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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Arbitration: was there a binding agreement to arbitrate?

Kruppa v Benedetti & Anr

[2014] EWHC 1887 (Comm)

Benedetti made an application to stay proceedings brought by Kruppa pursuant to section 9 of the Arbitration Act 1996. The main question for Mr Justice Cooke to decide was whether or not the clause in question constituted an arbitration agreement within the meaning of the Act. The relevant clause reads as follows:

"Laws of England and Wales. In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction."

Benedetti said that this clause required the parties to arbitrate their dispute. Further, the word "arbitration", on its own, was sufficient for an English court to find a binding arbitration agreement. The clause here had been drafted by professionals and the words "Swiss arbitration" referred only to arbitration and not to mediation or some other form of ADR. Parties would be expected to know the difference between "arbitration" and "mediation". When the word "arbitration" is used, it should be given its ordinary and natural meaning.

However, the Judge considered that there were a number of difficulties with that approach. First, the parties had not specifically agreed to refer any dispute to arbitration. They had agreed to "endeavour" to resolve the matter through Swiss arbitration. Secondly, the clause plainly envisaged the possibility of two stages in the dispute resolution process. The parties had agreed to attempt to resolve the matter first by arbitration and if that did not result in a solution then there would be a need for litigation in the courts.

The clause was a two-tier dispute resolution clause which provided for a process referred to as "Swiss arbitration" with a right to the parties to refer the matter to the jurisdiction of the English court, "should a resolution not be forthcoming" through the Swiss procedure envisaged. It was logically not possible to have an effective multi-tier clause consisting of one binding tier (i.e. arbitration) followed by another binding tier (i.e. litigation).

In the Judge's view, what the parties had in mind was that there should be an attempt to agree a form of arbitration between them in Switzerland. If they failed to do so, the English court was to have non-exclusive jurisdiction.

The nature of that obligation showed that there was not a binding agreement to arbitrate but merely an agreement to attempt to resolve the matter by a process of arbitration which itself had not been set out in the clause or elsewhere in the contract. The absence of provisions relating to the number of arbitrators, the identity of the arbitrators, the qualifications of candidates for arbitration or the means by which they should be chosen further demonstrated the need for the parties to reach further agreement on the subject because the reference to "Swiss arbitration" did not specify the seat of the arbitration nor the court that could make any appointment in lieu of the parties' agreement. The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two stage process envisaged.

Benedetti's application was dismissed.

Consequences of failing to follow the pre-action protocol

Sainsbury's Supermarkets Ltd v Condek Holdings Ltd & Others

[2014] EWHC 2016 (TCC)

The dispute here related to the design and construction of a car park in North Cheam. Two of the Defendants successfully brought applications to strike out the claims against them. They then applied for their costs on an indemnity basis because , they said, Sainsbury's had failed to follow the pre-action protocol process.

Mr Justice Stuart-Smith allowed the first application, noting that no good reason had been shown for the failure to implement the Protocol before issuing the Claim. Had Sainsbury's done so, the Judge was of the view that it would have obtained all the relevant information it needed to reassess whether proceedings should have been brought against that party.

The second application was allowed in part. Here the Judge felt that the party seeking indemnity costs had himself not engaged in the pre-action correspondence "as constructively" as he might have done and had further given inaccurate information during that process. However, the position changed once a Defence had been served. Sainsbury's ought to have reassessed its position. Had it done so, it should have realised that its claim was liable to be struck out or be the subject of an adverse summary judgment application. The Judge made it clear he was not saying that a party automatically has to accept assertions made in a defence, but it must consider them in terms. Accordingly, the second party was allowed its costs on an indemnity basis but only from the date of the first Case Management Conference.

Does the late payment legislation apply to international contracts?

Martrade Shipping v United Enterprises

[2014] EWHC 1884 (Comm)

To what extent does the Late Payment of Commercial Debts (Interest) Act 1998 apply to international contracts? The legislation is afterall based on European Union legislation. Here, Mr Justice Popplewell explained that section 12 of the Late Payments Act provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to ensure that the Act applies. The Act will only apply if there is a significant connection between the contract and England or if the contract would be governed by English law leaving aside the choice of law clause.

The Judge also reminded everyone of the twin purposes of the Act: namely to protect commercial suppliers whose financial position makes them particularly vulnerable if their debts are paid late and the general deterrence of late payment of commercial debts. This does not explain why section 12 provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the Act.

The Judge explained. First it reflected domestic policy considerations which are not necessarily the same as for contracts with an international dimension. Second, it is of considerable economic value that international parties regularly choose English law and jurisdiction to govern their contracts. Section 12 recognises that subjecting parties to a penal rate of interest on debts might be a discouragement to those who would otherwise choose English law to govern contracts arising in the course of international trade, and accordingly does not make such consequences automatic.

The Judge identified the following factors which might justify the application of a domestic policy of imposing penal rates of interest on a party to an international commercial contract. They must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the UK:

(i) Where the place of performance of obligations under the contract is in England;

(ii) Where the nationality of the parties or one of them is English; here, if the paying party was a UK national then the Act may well be engaged.

(iii) Where the parties are carrying on some relevant part of their business in England.

(iv) Where the economic consequences of a delay in payment of debts may be felt in the UK, something which may engage consideration of related contracts, related parties, insurance arrangements or the tax consequences of transactions.

Finally, the Judge was of the view, that when it came to the performance of the contract, what mattered, at least for a contract for the supply of services, was the performance of the supplier, not that of the person who pays for the services.

Expert evidence: meeting with witnesses

Stagecoach South Western Trains v Hind & Anr

[2014] EWHC 1891 (TCC)

Stagecoach sought damages following a collision between a train and the stem of an Ash tree which had fallen onto the railway line from the garden of a property. As is usual with this type of case, much turned on the expert evidence. Here, a few weeks after Stagecoach sent out a letter of claim and before Ms Hind's solicitors had written advising of their instruction, an expert arboriculturalist instructed on behalf of Stagecoach attended the property and interviewed Ms Hind.

Mr Justice Coulson had to consider the nature of the expert evidence. Here the Judge felt that although there was a useful Joint Statement, the experts spent far too much time dealing with matters of law and contentious matters of fact. He was more critical of the interview. Whilst the expert was speaking with Ms Hind he made rough notes. He then went back to his car and expanded on these, principally by inserting questions into the original notes. There was a dispute about the accuracy of the notes. Further, although the expert had told Ms Hind that he would send her a copy of the notes for her to agree, he failed to do so. There was no explanation for this. During the hearing it became apparent that there were significant inaccuracies in the notes. The Judge was clear that save:

"in exceptional circumstances, experts should not embark on this kind of fact-finding exercise … Matters of fact are for witnesses of fact, not for experts. Because a formal claim had already been made against Ms Hind by this time, she should at the very least have been interviewed by a solicitor and been given the opportunity of checking the resulting notes of that interview."

Further, the Judge referred to the expert making a significant deletion of an issue (which was detrimental to the claimant's case) between his first and second reports, noting that this was after the issue had been discussed with the claimant's solicitors.

This inevitably led to the suggestion that the expert in question could not be regarded as acting independently in accordance with CPR Part 35 and which led to the Judge to conclude that the expert's evidence was unreliable.

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