UT RES MAGIS VALEAT QUAM PEREAT AND RECONCILING LITIGATION AND ARBITRATION CLAUSES IN CONTRACTS

In-house counsel are often faced with the difficult question of how to prioritise dispute resolution clauses which appear to contain conflicting terms and are asked to advise which should have precedent over the other. The problem is not an uncommon one and often arises where contracts have been put together quickly and possibly without overview by a member of the legal team.

The Commercial Court recently considered this issue when it was asked to look at the construction of two dispute resolution clauses contained in a distribution agreement (the 'Agreement') which on their face appeared to be contradictory: Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd [2015] EWHC 3158 (Comm).

The first clause, Article 13 of the Agreement stated that "the proper law of this Agreement is the law of the UK, and the Parties submit to the exclusive jurisdiction of the Court of the UK...".

However Article 14 of the Agreement stated that "All disputes and differences.....in relation to this Agreement.....shall be referred to arbitration before any legal proceedings are initiated. The arbitration shall be conducted in the UK in accordance with the provisions of the law in the UK in effect at the time of the arbitration..."

One of the questions the court had to decide was whether Articles 13 and 14 resulted in there not being a valid agreement to arbitrate. The Defendant had given notice of arbitration in London and sought to appoint an arbitrator, to which the Claimant had objected. The Defendant subsequently appointed a sole arbitrator, who issued an award confirming his jurisdiction. The Claimant sought to challenge his award under s.67 Arbitration Act 1996. The Claimant argued that there was no valid arbitration provision as the two Articles were inconsistent and irreconcilable, and Article 14 was not expressed to be final and binding.

Burton J held that where there were similar inconsistent or apparently contradictory provisions regarding exclusive jurisdiction and the existence of arbitration, the clauses should be construed together so as to read both sets of provisions consistently. In order to do this the court should:

- Construe a contractual provision or set of provisions in favour of validity rather than invalidity (for which Burton J. cited the legal maxim ut res magis valeat quam pereat);
- Apply commercial common sense in resolving the question as to what a reasonable person would have understood the parties to have meant; and
- That the court should not be discouraged from adopting a 'belt and braces' approach to constructing commercial contracts.

As a result Burton J concluded that Article 13 meant that 'UK' law was the law of the contract and that the dispute resolution process should be arbitration (Article 14). Therefore, reading both Articles together the procedural law of the arbitration will be 'UK law', the UK courts will "supervise" the conduct of the arbitration, and will have exclusive jurisdiction if the arbitration becomes ineffective in some way.

The court also had to consider what was meant by 'UK law', which of course for these purposes does not exist. Again the court took a sensible commercial approach when interpreting what the parties meant by 'UK law'. Although neither party had a connection with England or London, the court agreed with the Defendant's submission that, as a contract relating to international trade, the courts and laws of England & Wales are regularly resorted to for resolving disputes of this nature. This must be what the parties had meant in this case (rather than the law of Scotland or Northern Ireland).

This case serves as a useful reminder that the courts of England & Wales will take a sensible and pragmatic approach to the construction of dispute resolution clauses which are, on their face, contradictory or inconsistent, or which make reference to jurisdictions that are technically incorrect. The best approach is to seek advice on these clauses when agreements are being negotiated, but there is some comfort in knowing that common sense will prevail in the commercial court if the construction of these clauses becomes an issue at a later date.

www.twobirds.com

Bird & Bird

International Commercial Arbitration
International Arb-Med
International Mediation

The New Zealand International Arbitration Centre (NZIAC) provides an effective forum for the settlement of international trade, commerce, investment and cross-border disputes in the Australasian/Pan Pacific region.

www.nziac.com