CASE IN BRIEF

DISPUTE RESOLUTION CLAUSES: A SONG OF (DIS)HARMONY

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Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GMBH [2018] EWHC 909 (Comm)

Overview

The English High Court has dismissed challenges to the jurisdiction of two arbitral tribunals in a case which – notwithstanding the outcome – highlights the importance of parties ensuring their network of contracts have clear, express and aligned dispute resolution clauses.

The claimant, Dreymoor Fertilisers Overseas PTE Ltd (**Dreymoor**), had sought to challenge under the English Arbitration Act 1996 (the **Act**) the jurisdiction of two tribunals in separate LCIA and ICC arbitrations initiated by the defendant Eurochem Trading GMBH (**ECTG**). The case involved multiple contracts and complex relationships – including some alleged bribery. Dreymoor argued that:

1. the LCIA arbitration clause only covered breaches of the relevant sales contracts, and did not extend to bribery allegations (whether framed in contract or tort) which were the foundation of ECTG's claims – a challenge under s67(1)(a) of the Act; and

2. the ICC arbitration agreements did not cover claims in relation to Dreymoor at all, and accordingly there was no agreement to arbitrate – a challenge under s32 of the Act.

Both arguments were rejected by the High Court. The Court took a "liberal or generous interpretation, avoiding narrow distinctions" when construing the LCIA arbitration clause, with the wording "any dispute or claim arising out of this contract" held to be wide enough to cover non-contractual claims such as bribery inducing entry into a contract. The Court also found that the very wide wording of the ICC arbitration clause meant that Dreymoor was a party, as this was the "governing intention" of the contract, notwithstanding that under the contract there was no provision for Dreymoor itself to appoint an arbitrator.

Background

The relationship between Dreymoor, an international trading company, and ECTG, a Swiss company selling fertiliser products, was based on numerous contracts.

Broadly, Dreymoor was to act as ECTG's agent in India for sales of two kinds of fertilisers, Di-Ammonium Phosphate and Mono-Ammonium Phosphate (**DAP/MAP**), and Urea. Under some contracts, Dreymoor was ECTG's sales agent undertaking direct sales from ECTG to Indian end-users, for others Dreymoor bought ECTG's products and re-sold them to third parties (acting as ECTG's agent and receiving commission).

In both arbitrations, ECTG claimed Dreymoor had bribed two former senior ECTG employees in order to be appointed as ECTG's agent in India on much more favourable terms than Dreymoor could have otherwise obtained, and to ensure Dreymoor received guaranteed volumes of high margin products.

Dreymoor and ECTG's relationship involved five sets of contracts, each with different dispute resolution clauses as summarised in the table below:

Contract	Dispute Resolution clause
(1) DAP/MAP Agency Agreement (the "umbrella" agreement), pursuant to which ECTG appointed Dreymoor as its sales agent for the sale of DAP/MAP in India	No dispute resolution clause
(2) DAP Third Party Sales Contracts, by which ECTG sold DAP to Indian companies	ICC arbitration clause
(3) DAP/MAP Sales Contracts, by which ECTG sold DAP/MAP to Dreymoor for re-sale to third parties	"Long-form" LCIA clause
(4) Urea Agency Agreements (further umbrella agreements), pursuant to which ECTG appointed Dreymoor as its sales agent for the sale of Urea in India	"Short-form" LCIA clause
(5) Urea Sales Contracts, by which ECTG sold Urea to Dreymoor for re-sale to third parties	"Long-form" LCIA clause

The LCIA Arbitration Clause

The Long-form LCIA clause, in the DAP/MAP and Urea Sales Contracts (items (3) and (5) in the table above), provided that "*any dispute or claim arising out of the contract*" was first to be negotiated and (if unsuccessful) "*such dispute, controversy or claim shall be referred to arbitration*" under the LCIA Rules, seated in London, and determined by a sole arbitrator agreed by the parties, applying English law. The Short-form LCIA clause, in the Urea Agency Agreements (item (4)), provided that the agreement was governed by English law and that "*disputes on this agreements [sic] shall be settled by LCIA*".

The ICC Arbitration Clause

In contrast, the ICC clause in the DAP Third Party Sales Contracts (item (2)), provided that "*any dispute, controversy or claim arising out of or relating to*" the contract was to be referred to arbitration under the ICC Rules, by a three-member arbitral tribunal seated in London (again, applying English law). The buyer (the Indian companies) and the seller (ECTG) would each appoint one arbitrator, with the two chosen arbitrators to appoint the third chairperson arbitrator. There was no provision for Dreymoor to appoint an arbitrator.

When Dreymoor would not agree to have the DAP Third Sales Contracts disputes heard before the extant LCIA tribunal, ECTG filed a request for arbitration with the ICC, with the same causes of action as in the LCIA Arbitration.

ECTG contended that the Indian companies as the buyers, ECTG as the seller, and Dreymoor as the agent, were all parties to the DAP Third Party Sales Contracts (item (2)) which contained the ICC arbitration clause. Dreymoor argued it was not a party to those Contracts, or at least not to the arbitration clauses.

The Challenges

Dreymoor challenged the jurisdiction of both the LCIA and ICC tribunals under the Act on two different bases.

Challenge to LCIA Arbitration

Dreymoor's challenge to the LCIA Arbitration under s67(1)(a) of the Act centred on whether matters had been submitted to arbitration in accordance with the LCIA clauses in the relevant agreements. Dreymoor contended that the DAP/MAP Agency Agreement (item (1) – which had no dispute resolution clause) governed the dispute. Specifically, Dreymoor argued that:

- the DAP/MAP and Urea Sales Contracts (items (3) and (5)) only covered breaches of the sales contracts, rather than the alleged corruption and bribery. The "centre of gravity" of ECTG's claims was for an alleged breach of the DAP/MAP Agency Agreement (item (1)) and associated non-contractual duties. Similarly, Dreymoor argued that any alleged bribery to procure the Urea Agency Agreement (item (4)) must have happened *before* entry into the Urea Agency Agreement, therefore such claims could not be covered by the short-form LCIA clause;

- the absence of an arbitration clause in the DAP/MAP Agency Agreement (item (1)) was a deliberate choice, "*consistent with a presumption that the parties would have wished for the resolution of all disputes between them in one forum*". All disputes should be litigated in court, instead of fragmenting the dispute between different arbitral tribunals (as would occur under ECTG's approach). Dreymoor argued that the Russian courts were the appropriate forum to hear all of the bribery allegations.

Challenge to ICC Arbitration

Dreymoor challenged the ICC Arbitration under s32 of the Act, arguing that there was no agreement to arbitrate between ECTG and Dreymoor. Alternatively, if there was an agreement to arbitrate, then ECTG's claims did not fall within it. Dreymoor claimed:

- that the dispute arose from the DAP/MAP Agency Agreement (item (1)) and not from the DAP Third Party Sales Contracts (item (2)), which contained the ICC arbitration clause; Agreement, therefore such claims could not be covered by the short-form LCIA clause;

• those DAP Third Party Sales Contracts were between ECTG and the Indian purchasers, and Dreymoor was not a party. It was therefore never intended that any claims against Dreymoor should be subject to the ICC arbitration clause.

The English High Court's conclusions

The English High Court did not accept Dreymoor's arguments, and dismissed its challenges to both arbitrations. The overall approach of the Court was commercially focussed, with the intentions of "reasonable business people" emphasised in His Honour Justice Butcher's reasoning when faced with such a complex – and inconsistent – web of contracts:[1]

> *"The issue is one of construction of the relevant agreements, and... in considering that issue it is relevant to consider what the parties, as reasonable business people, must be taken to have intended as to how and where disputes which might arise between them should be resolved."*

LCIA arbitration

The Court first considered the ambit of the dispute resolution clauses in the DAP/MAP and Urea Sales Contracts (items (3) and (5)), looking at those Contracts in isolation. Applying a liberal interpretation approach, avoiding narrow distinctions, as per the House of Lords in *Fiona Trust*,[2] the Judge concluded that the bribery disputes were covered by the Sales Contracts and their LCIA arbitration clauses. The clause which referred "*any dispute or claim arising out of this contract*" to LCIA arbitration, was wide enough to cover disputes which relate to non-contractual claims, including pre-contractual misrepresentation and antecedent bribery inducing the contract.[3]

The Court did accept that there could be circumstances in which an arbitration clause will not extend to tortious or other non-contractual claims if the parties would, at the time of conclusion of their contract, have considered that any possible contractual claim in the relevant area would have been "*outlandish or unarguable*".

Butcher J went on to consider the effect of the umbrella Agency Agreements (items (1) and (4)), ultimately deciding that they did not alter the conclusion that the disputes were covered by the DAP/MAP and Urea Sales Contracts.

The Court noted that the absence of a jurisdiction or arbitration clause in the DAP/MAP Agency

Agreement (item (1)) created uncertainty. Reasonable business people would not have intended that such an uncertain jurisdictional position should apply to a dispute, as opposed to the specified dispute resolution mechanism in the individual Sales Contracts. The Court similarly rejected Dreymoor's argument that the dispute fell neither under the Urea Sales Contracts arbitration clauses (item 5) – because the "centre of gravity" was the two sets of Agency Agreements (items (1) and (4)) – nor under the arbitration clause in the Urea Agency Agreements (item (4)) – because it was too narrow – but instead was to be resolved in an unspecified court. This was "*lacking in common sense or commercial reality.*" Since the parties had included arbitration clauses in both the individual Sales Contracts and the Urea Agency Agreement, the Court found it unlikely, in the absence of clear indications to the contrary, that they intended that disputes such as the present should be resolved under neither.

Accordingly, applying the "*commercially-rational construction*" approach of the English Court of Appeal in *Sebastian Holdings*[4] to give effect to the clear terms of the relevant agreements, Butcher J considered the current disputes could and should be arbitrated under the LCIA Arbitration clauses in the DAP/MAP and Urea Sales Contracts.

ICC Arbitration

The Court did not accept Dreymoor's argument that it was not a party to the DAP Third Party Sales Contracts (item (2)), and that the arbitration clauses in those contracts did not apply to disputes between Dreymoor and ECTG. These contracts named ECTG as the Seller, the Indian companies as the Buyer, and Dreymoor as the Agent. Each agreement was signed by all three "Parties", including Dreymoor. Dreymoor's role in the contract was specified in express terms. Dreymoor was accordingly held to be a party to the DAP Third Party Sales Contracts.

The arbitration clause in the DAP Third Party Sales Contracts covered "*any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof*". The Court held that if a dispute falling within one of these categories was one which involved Dreymoor, as Agent, then the arbitration clause applied to it. The bribery allegation fell within this wide clause.

Equally, the Court rejected Dreymoor's arguments regarding the mechanism for the appointment of arbitrators in the DAP Third Party Sales Contracts, whereby Dreymoor was not expressly given a power to appoint. Looking to the governing intention of the Contract, notwithstanding the appointment mechanism, the Court found that Dreymoor should be a party to the arbitration clause and all disputes arising out of or relating to the Contract should be subject to arbitration.

Our comments

The Court's reluctance to accept Dreymoor's arguments, which were considered to be "*lacking in common sense or commercial reality*", and the Court's striving to give effect to the parties' intentions for dispute resolution via arbitration even when faced with a complex network of contracts, offers some reassurance to commercial parties.

Nevertheless, the case is a useful reminder of the need for careful drafting where there are multiple potentially applicable contracts to ensure that dispute resolution clauses operate harmoniously – and to ensure that no contract is left without a dispute resolution clause. This is particularly pertinent for commercial relationships which touch multiple jurisdictions, like the Dreymoor-ECTG arrangement in this case, leaving open the prospect of litigation in an unspecified and possibly undesirable country.

Additionally, a number of institutions permit consolidation of arbitrations initiated under the institution's rules. Consistency in the dispute resolution clauses can enable parties to consolidate disputes if they arise in connection to related contracts, creating efficiencies and cost-savings.

Finally, the case is worth noting for the finding that the various arbitration clauses were wide enough to encompass non-contractual claims of bribery by Dreymoor – even if the Court recognised that such a conclusion may not be reached in all cases.

End Notes

1 *Dreymoor Fertilisers Overseas Ltd v Eurochem Trading GMBH* [2018] EWHC 909 (Comm) at [56]

2 Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40

3 At [53]

4 Sebastian Holdings v Deutsche Bank [2011] 1 Lloyd's Rep 106 (CA)

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