

**ENGLISH HIGH COURT DECISIONS EMPHASISE NEED FOR CLARITY IN
CONTRACTUAL JURISDICTION CLAUSES**

Caresse Navigation Ltd v Office National De L'electricite & Ors [2013] EWHC 3081

British- American Insurance (Kenya) Ltd v Matelec Sal & Anor [2013] EWHC 3278

Introduction

Two recent decisions handed down by the English High Court – in *Caresse Navigation Ltd v Office National De L'electricite & Ors* [2013] EWHC 3081 (14 October 2013) and *British- American Insurance (Kenya) Ltd v Matelec Sal & Anor* [2013] EWHC 3278 (Comm) (29 October 2013) – have emphasised the need for clarity in contractual jurisdiction clauses.

Background

Caresse Navigation Ltd v Office National De L'electricite & Ors

The claimant in this case was a Marshall Islands company, which was the owner of the vessel "Channel Ranger" and the contractual carrier of the cargo under the relevant bill of lading. The first defendant, a Moroccan state electricity generating company, was the receiver of the cargo, while the second to sixth defendants were the insurers of the cargo.

The bill of lading stated that it incorporated the "Law and Arbitration Clause" in the underlying charterparty, which provided that the governing law would be English law and any dispute would be subject to the exclusive jurisdiction of the English courts. The incorporated clause did not contain any provision for arbitration.

The claimant commenced English proceedings for a declaration of non-liability and obtained permission to serve proceedings out of the jurisdiction. The first defendant commenced proceedings in Morocco and challenged the English court's jurisdiction. Two main questions arose in respect of this challenge - (i) should the clause be read as providing for the jurisdiction of the English courts and (ii) was there in any event an effective choice of English law as the law applicable to the bill of lading?

British-American Insurance (Kenya) Ltd v Matelec Sal & Anor

The claimant was British-American Insurance (Kenya) Limited, an insurance company carrying on business in Kenya. The defendants were Matelec SAL and Thika Power Limited, contractors in a project for the construction of a power plant in Kenya.

Both arbitration claims arose out of a policy document signed in February 2012 under which the claimant insured "project cargo" (that being cargo intended for the construction and erection of the power plant), giving cover against marine risks and against delay in start up. The policy of insurance originally included a term which stated that Kenyan law and jurisdiction was applicable. It also included a reinsurance contract with third party reinsurers, which required disputes to be settled by

arbitration in London in accordance with English law. The policy was subsequently amended by endorsement.

The present dispute was concerned with how any inconsistency between the jurisdiction and arbitration provisions should be addressed, and how disputes were to be resolved. The issues for the Court were (a) whether to declare that there was or was not a binding agreement to arbitrate; (b) whether to grant or refuse an injunction (interim or final) restraining proceedings other than by way of arbitration in London; and (c) whether to grant relief pursuant to s. 18 of the Arbitration Act 1996 (appointment of an arbitrator).

Decision

Caresse Navigation Ltd v Office National De L'electricite & Ors

The High Court dismissed the defendants' challenge to the jurisdiction of the English courts, holding that the bill of lading provides for exclusive English jurisdiction and there was (at least) a good arguable case that it is governed by English law and a serious issue to be tried on the merits. Even if the bill contained no English jurisdiction clause, the English court was clearly the appropriate forum and the proceedings served a practical purpose.

Giving his judgment, Mr Justice Males held that the question whether the bill of lading contains a term providing for English court jurisdiction is a question of law to be decided prior to trial. In this case, whatever the effect of the words "and arbitration" in the bill of lading clauses, the express references to the governing law of the charterparty amounted to an irrefutable case that the parties to the bill of lading intended their contract to be governed by the same law as was applicable to the charterparty.

General words of incorporation are not effective to incorporate an arbitration (or jurisdiction) clause because such clauses are "ancillary" to the main contract to which they relate. However, a specific reference to an arbitration (or jurisdiction) clause would be effective. In the present circumstances, the bill of lading purported to incorporate the charterparty "law and arbitration" clause although the charterparty provided for English law and jurisdiction (rather than for English law and arbitration). In the circumstances, Mr Justice Males held that the only clause in the charterparty to which the parties could have intended their words to refer is the law and jurisdiction clause, and it was a more natural construction of the bill of lading to read it as referring to that clause, rather than to read it as referring to an arbitration clause in the charterparty "if any".

Even if the jurisdiction clause did not apply, England was clearly the appropriate forum for this case, particularly taking into account the parties' choice of English law as the governing law and the risk of a less favourable legal regime in Morocco.

British-American Insurance (Kenya) Ltd v Matelec Sal & Anor

The High Court held that a binding agreement to arbitrate existed and the claimant was entitled to refer the dispute to arbitration in London, and accordingly was also entitled to relief by way of injunction (although an undertaking provided by the contractors could be an acceptable alternative). The Court granted the contractors seven days to appoint an arbitrator.

In his judgment, Mr Justice Walker identified the principles of construction to be adopted:

- in approaching the question of the interpretation of a commercial contract, the aim is to ascertain what a reasonable person would have understood the parties to have meant by the words they used, with such reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- the process of interpretation is an iterative process involving the checking of rival meanings against the other provisions of the document and investigating their commercial consequences in the context of the overall contractual scheme and purpose of the contract. Where the language of the parties can be construed in two different ways, the court should generally adopt the interpretation which will make more commercial sense.
- when confronted with two provisions in a contract that seem to be inconsistent with each other, the court must do its best to reconcile them if that can conscientiously and fairly be done.
- where the document sought to be construed has not been drafted "as a coherent whole", the likelihood of a need to reject parts of the document is greater.

Considering those principles, Mr Justice Walker concluded that the reasonable person must have understood the amended governing law provision to apply to both the reinsurance contract and the original contract. There was no good reason for wanting to have a different regime for deciding disputes as between insurer and insured on the one hand and reinsurers and reinsured on the other. A reasonable observer would conclude that the exclusive jurisdiction and arbitration provisions could be reconciled – the jurisdiction provision should not prevent the amended arbitration provision from being effective in either the insurance or the reinsurance contract. Further, as the arbitration provision identified London as the seat of arbitration, it carried with it jurisdiction for the English court to supervise the arbitration.

Observation

The decisions in both cases highlight the importance of ensuring that a jurisdiction clause is drafted clearly and reflects the intention of the parties. In particular, parties should ensure that there is no risk of conflicting jurisdiction clauses, especially where contracts are linked, or terms from one contract are incorporated by reference into another contract.

The full decision in *Caresse Navigation Ltd v Office National De L'electricite & Ors* [2013] EWHC 3081 can be found at: <http://www.bailii.org/ew/cases/EWHC/Comm/2013/3081.html>

The full decision in *British-American Insurance (Kenya) Ltd v Matelec Sal & Anor* [2013] EWHC 3278 can be found at: <http://www.bailii.org/ew/cases/EWHC/Comm/2013/3278.html>

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