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Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd [2022] EWHC 2912 (Comm) (17 November 2022)

The Commercial Court dismissed Aiteo's challenges, brought under s.67 Arbitration Act 1996, of two partial awards, in respect of jurisdiction and consolidation, which arose out of asymmetrical jurisdiction clauses in two linked facility agreements¹.

Facts

A dispute arose between Aiteo Eastern E&P Company Ltd ("**Aiteo**") and Shell Western Supply and Trading Ltd ("**Shell**") under a USD\$512 million facility agreement concluded in connection with Aiteo's acquisition of an interest in certain Nigerian oilfields and associated facilities (the "**Offshore Facility**"). Aiteo had also entered into a separate facility under which it borrowed USD\$1.488 billion from another group of lenders (the "**Onshore Facility**").

Both the Offshore Facility and the Onshore facility provided for disputes to be settled by way of arbitration or, at the financing parties' exclusive option, in the courts of England or Nigeria, respectively². In addition, the Offshore Facility required the parties to "elect to refer" any disputes to arbitration.

On 19 August 2019, Shell and the other lenders notified Aiteo that it had breached the Offshore Facility and the Onshore Facility. Correspondence continued and culminated in a formal demand for repayment on 23 October 2019.

On 31 October 2019, Aiteo commenced proceedings in the High Court of Nigeria against Shell and the other lenders and sought and obtained an interim injunction, preventing the Finance Parties from taking any steps relating to Aiteo's alleged indebtedness (the "**Nigerian Proceedings**").

Shell and the other lenders (bar one) entered a conditional appearance before the High Court of Nigeria, filing a notice of appeal and an application to stay the Nigerian Proceedings (the "**NOA**").

On 11 December 2020, Shell served a Request for Arbitration on Aiteo and sought an anti-suit injunction from the High Court, which was granted on a "without notice" basis on 14 December 2020. Similar steps were taken by the lenders under the Onshore Facility.

Aiteo objected to the jurisdiction of the tribunal, constituted in relation to the Offshore Facility, and on 15 March 2022 the tribunal issued an award rejecting the jurisdictional challenge (the "**Jurisdiction Award**").

On 1 April 2022, final anti-suit relief was granted against Aiteo on the basis that the commencement and continuation of the Nigerian Proceedings constituted a breach of both the Offshore and Onshore Facilities.

Aiteo applied for permission to appeal, which was granted on one ground – that the judge should either have determined the issue of arbitral jurisdiction himself or adjourned the hearing until the time for bringing a s.67 challenge had expired, or any jurisdictional challenge had been rejected, rather than relying on the Jurisdiction Award to establish the existence of an obligation to arbitrate.

¹ <https://www.bailii.org/ew/cases/EWHC/Comm/2022/2912.html>

² See full text of clauses set out in the appendix

On 22 July 2022, an award was issued consolidating the arbitrations under the Offshore and Onshore Facilities (the "**Consolidation Award**").

Aiteo challenged both the Jurisdiction Award and the Consolidation Award under s.67 AA 1996 (challenge on the basis of substantive jurisdiction).

Relevant legal principles

The asymmetrical arbitration agreements contained an option to refer a dispute to arbitration, rather than an obligation. The arbitration agreement only comes into existence, and therefore the obligation to arbitrate, once that option has been exercised³.

In Anzen Ltd v Hermes One Ltd [2016] 1 WLR 4098, concerning a similar inchoate clause, the Privy Council held that exercising an option to arbitrate did not require arbitration to be commenced, but by "*making an unequivocal request to that effect and/or by applying for a corresponding stay*", rejecting the argument that it could only be exercised by commencing arbitration.

The Privy Council was explicit that it was reaching a conclusion "*as a matter of general principle*", rather than on the basis of specific facts incapable of wider application.

Decision

Foxton J was "*not persuaded that anything more than an unequivocal statement by [Shell] requiring Aiteo to arbitrate an identified dispute [was] required...whether that took the form of serving a Request for Arbitration, seeking a stay or some other communication. This is a context in which it is the message which matters, not the medium.*" [25, 31(vi)]. In addition, he found that the NOA was sufficient to exercise the option and therefore constituted the inchoate arbitration agreement.

The court did not find that there was a time limit for the exercise of the option to arbitrate (in contrast to the strict provisions in relation to the financing parties exercising their option to litigate), supported by the waiver provisions of the Offshore Facility, but that the doctrines of waiver and estoppel would "*provide sufficient protection against unfairness*"⁴.

Accordingly, both challenges under s.67 AA 1996 were dismissed.

Comment

This case gives welcome guidance on the steps a party must take in order to exercise its election in an inchoate arbitration agreement.

The Court has confirmed that a party is not required to commence arbitration (with the associated costs and other obligations involved), which will be of particular comfort to a party in the position of a defendant who is facing proceedings and wishes to exercise its election without incurring significant costs or being forced to issue a request for arbitration with a notional cause of action.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

³ Russell on Arbitration 924th edition) [2-018], Union Marine v The Government of the Comoros [2013] EWHC 5854 (Comm).

⁴ cf Lord Sumption in Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC, [16]

Appendix – contractual clauses

Offshore Facility

Clause 41.1 ("Referral to arbitration"):

41.1.1 Subject to Clause 41.2 (Finance Parties' option), any Party to this Agreement (other than an Obligor) may elect to refer for final resolution any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a 'Dispute') by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC') in force at that time (the 'ICC Rules'), which ICC Rules are deemed to be incorporated by reference into this Clause 41.1.

41.1.2 There shall be three (3) arbitrators, one nominated by the claimant(s) in the request for arbitration, the second nominated by the respondent(s) within thirty (30) days of receipt of the request for arbitration, and the third, who shall act as presiding arbitrator, nominated by agreement of the parties to the Dispute within thirty (30) days of the appointment of the second arbitrator. If any arbitrators are not nominated within these time periods, the International Court of Arbitration of the ICC shall make the appointment(s).

41.1.3 The place and seat of arbitration shall be London, England

...

41.1.7 Where Disputes arise under this Agreement and under any of the Onshore Facility Agreement and Intercreditor Agreement which, in the absolute discretion of the first arbitrator to be appointed in any of the disputes, are so closely connected that it is expedient for them to be resolved in the same proceedings, that arbitrator shall have the power to order that the proceedings to resolve that dispute shall be consolidated with those to resolve any of the other disputes (whether or not proceedings to resolve those other disputes have yet been instituted)

Clause 41.2 ("Finance Parties' option"):

41.2.1 Before a Finance Party has submitted a Request for Arbitration or Answer as defined in the Arbitration Rules of the ICC (as the case may be), the Finance Party may by notice in writing to the Borrower require that all Disputes or a specific Dispute be heard by a court of law. If the Finance

Party gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 41.3 (Jurisdiction).

...

Clause 41.3 ("Jurisdiction"):

41.3.1 If the Finance Party issues a notice pursuant to Clause 41.2 (Finance Parties' option), the provisions of this Clause 41.3 shall apply. (a) The courts of England have exclusive jurisdiction to settle any Dispute. (b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle any Dispute and accordingly no Party will argue to the contrary. (c) This Clause 41.3 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions...

Onshore Facility

41.1.1 Subject to Clause 41.2 (Finance Parties' option), any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, or termination or any non-contractual obligations arising out of or in connection with this Agreement (a 'Dispute') shall be referred to and finally resolved by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the 'ICC') in force at that time (the 'ICC Rules') ...

...

41.2.1 Before a Finance Party has submitted a Request for Arbitration or Answer as defined in the Arbitration Rules of the ICC (as the case may be), the Finance Party may by notice in writing to the Borrower require that all Disputes or a specific Dispute be heard by a court of law. If the Finance Party gives such notice, the Dispute to which such notice refers shall be determined in accordance with Clause 41.3 (Jurisdiction).

...

41.3.1 If the Finance Party issues a notice pursuant to Clause 41.2 (Finance Parties' option), the provisions of this Clause 41.3 shall apply. (a) The courts of the Federal Republic of Nigeria have exclusive jurisdiction to settle any Dispute. (b) The Parties agree that the courts of the Federal Republic of Nigeria are the most appropriate and convenient courts to settle any Dispute and accordingly no Party will argue to the contrary