Unilateral arbitration clauses

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The High Court in England has taken another look at unilateral arbitration clauses in Aiteo v Shell [2022] EWHC 2912 (Comm).

A unilateral (also known as 'asymmetric') arbitration clause gives one contractual party only the right to elect to pursue a given dispute in arbitration. The other party will usually be bound contractually to litigate or arbitration in a specified forum. As a result, asymmetric arbitration clauses are controversial because they cut across the inherently bilateral nature of arbitration agreements. It is this asymmetry which is why such agreements are ordinarily unenforceable in several jurisdictions, including mainland China.

However, unilateral arbitration clauses are enforceable as a matter of English law, with the principle of free bargaining power taking precedence. In NB Shipping v Harebell Shipping [2004] EWHC 2001, the High Court upheld a unilateral arbitration clause, despite the fact that litigation proceedings had already commenced. In Hong Kong, the position is the same, by analogy with the Court of First Instance decision in Suen Kawi Kam v China Dragon Select [2020] HKCFI 69.

In Aiteo Eastern E&P v Shell Western Supply [2022] EWHC 2912 the relevant agreement provided that:

"any Party (other than an Obligor) […] may elect to refer for final resolution any dispute […] by arbitration…"

As Obligor, Aiteo was therefore not entitled to refer disputes to arbitration. Instead, Aiteo commenced litigation proceedings in Nigeria, obtaining various injunctive relief there. Shell in turn commenced (London) arbitration, with the Tribunal finding in a partial Award that they had jurisdiction. It was the appeal from this Award that came before the High Court.

The Judge held that the arbitration option could be exercised by an insistence on arbitration by Shell, without formally requesting arbitration or applying to stay the Nigerian court proceedings. In doing so, the Judge applied the decision of the Privy Council in Anzen v Hermes One [2016] UKPC 1, which dealt with the following 'optional arbitration' clause (emphasis added).

*"any party **may** submit the dispute to binding arbitration"*

The Privy Council found that this permissive language did not require either party to arbitrate – or put another way, it did not forbid either party from submitting a dispute to litigation. However, the clause did require any party which commenced litigation to submit to arbitration if required to by the other party – making that a risky (and expensive) step for a party to take unilaterally.

In Aiteo the High Court applied those same principles from (symmetric) optional arbitration clauses to (asymmetric) unilateral arbitration clauses, and found that Shell had referred the dispute to arbitration per the requirements of the specific arbitration clause. On the facts, *"it*

is the message which matters, not the medium" (per paragraph 31(vi) of the Judgment).

This resulted in Aiteo being in the difficult position of being unable to arbitrate unilaterally, but being exposed to the risk of any proceedings it commenced being 'trumped' by the exercise by Shell of its unilateral right to arbitrate. That however, was found to be the deal between the parties and the nature of unilateral arbitration clauses.

Comment

The decision of the High Court in Aiteo is a useful reminder of the enforceability of unilateral arbitration clauses, and the dangers of proceeding unilaterally where optional arbitration clauses are involved. When considering (and ideally when drafting or negotiating) such clauses, it is key to keep in mind:

1. Who can exercise the option to arbitrate?

2. Is there a set time or method to exercise the option?

In addition, it bears highlighting that the Court rejected an argument by Aiteo that there was an implied requirement for Shell to exercise their unilateral arbitration option within a reasonable time, noting that there was sufficient protection already given by the equitable doctrines of waiver and estoppel (per paragraph 41 of the Judgment).

The decision in Aiteo comes at a time when the Law Commission of England & Wales is undertaking a review of the Arbitration Act, including in particular s67 of the Act (which deals with challenges to the Tribunal's jurisdiction). This currently includes a proposal (at Chapter 3 of the Second Consultation Paper) that any challenge under s67 be made by way of an appeal – and not (as is currently the case, as in Aiteo) a full rehearing. The Paper currently proposes in practical terms that the Court would not entertain new grounds of objection or new evidence unless these could have been submitted to the Tribunal with 'reasonable due diligence'.

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