Neutral Citation Number: [2018] EWHC 1370 (Comm)

Case No: CL-2018-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 13th April 2018

Before:

MR. JUSTICE PHILLIPS

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Between:

A	**Claimant**
- and -	
B	**Defendant**

- -

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MR. JAMES WATTHEY (instructed by **Sach Solicitors**) for the **Claimant**
MR. ADAM WOOLNOUGH (instructed by **Tatham Macinnes**) for the **Defendant**

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JUDGMENT APPROVED

MR. JUSTICE PHILLIPS:

1. This is an arbitration claim under section 67 of the Arbitration Act 1996 ("the Act") challenging an Award issued on 15 December 2017 by which the Tribunal ruled that it lacked jurisdiction over the underlying dispute.

2. The dispute arose in relation to a charterparty entered on 16 June 2015 between the parties by which the claimant, as owners, chartered a vessel to the defendant for a voyage ("the Charterparty"). The Charterparty was essentially on the Asbatankvoy form, with amendments, and was in the Russian language, notwithstanding that the governing law was that of England.

3. The Charterparty was in two parts, with an express provision that if there was a conflict between Part I and Part II, then Part I would take precedence. Part I Clause J contained a provision, the Russian version of which is as follows:

> "J. Распределение общей аварии и арбитражное разбирательство: "
>
> распределение общей аварии в соответствии с йорк-
>
> антверпенскими правилами 1994 г. арбитражное разбирательство –
>
> Лондонский международный арбитражный суд, в соответствии с
>
> законодательством Великобритании"

4. The appropriate translation of that clause is hotly disputed between the parties, but it is agreed that the literal wording is, in English, as follows: "Arbitration proceedings – London international arbitration court, in accordance with the laws of Great Britain …"

5. Clause 24, which was in Part II of the Charterparty, provided as follows, the parties having agreed the translation in the following terms:

> "Arbitration. Any disagreements and disputes … arising out of the C/P are to be resolved by arbitration in ~~New York or~~ London, according to which of these places is provided for in Part I … by a tribunal of three people, one appointed by the owners, one by the charterers, and one appointed by the two arbitrators elected in such a way."

6. A dispute arose under the Charterparty, the details of which are not relevant for present purposes. The claimant purported to commence arbitration proceedings in London by appointing Alan Oakley as their nominated arbitrator. Mr Oakley accepted the appointment on the basis of LMAA Terms 2012. The defendants appointed Mr. Bruce

Harris. Mr. Harris also accepted his appointment on LMAA Terms 2012. At that time the defendant made no reservation as to either jurisdiction or as to the terms on which either arbitrator was appointed.

7. Thereafter, the defendant made an application challenging the jurisdiction of the arbitrators under section 31 of the Act. The defendant's initial contention was that the reference in Clause J to "London international arbitration court" was effectively meaningless and ineffective. The specific term they used was "pathological", submitting that there was no such body. The response from the claimant was that the clause simply provided for arbitration in London before an arbitral body and that, therefore, the arbitrators did have jurisdiction. Further, the arbitrators had accepted on LMAA Terms and the parties had not demurred.

8. In their careful, detailed and fully reasoned Award the arbitrators referred to the fact that they themselves had obtained comments from Russian speaking solicitors in London upon the translation of Clause J and had further asked for the parties' comments on what they had been informed. The Arbitrators were impressed by the fact that if the term "London Court of International Arbitration" (i.e. the LCIA, the well-known body that does exist) was to be translated into Russian, the word order would be different in that language and that only the first word would be capitalised; in other words, the result would be the formulation which was used in Clause J, or something very similar.

9. In view of that approach, the arbitrators had no hesitation in finding, leaving aside Clause 24, that the intention of Clause J was to refer disputes to the LCIA. They then went on to hold that Clause 24 did not affect that conclusion. Clause 24 was in direct conflict because it provided for the appointment of arbitrators by the parties, whereas the LCIA Rules provide that the LCIA will appoint arbitrators, albeit taking into account any agreement or nomination by the parties. Accordingly, the conflict provision came into play such that Clause J must prevail and, in those circumstances, the arbitrators held that they did not have jurisdiction over the dispute. The arbitrators so awarded and declared and directed that the claimant pay the defendant's costs of the reference with interest.

10. This application was made by arbitration claim form issued on 12 January 2018. The claimant submits that the arbitrators were wrong to determine the construction of Clause J in isolation and by effectively reverse engineering the translation of the English term "London Court of International Arbitration", submitting that they should have looked at the proper purposive construction of the clause in the light of the contract as a whole. The defendant submits that the arbitrators' analysis was entirely right; that the words used in Clause J, to be given their full effect, can only be referring to the London Court of International Arbitration; that if the intention was simply to refer to ad hoc arbitration in London the words "international arbitration court" are surplusage; and further, that the whole of Clause J would effectively be surplusage as all that the claimant relies upon could be found in Clause 24. It is also submitted that Clause 24 is not inconsistent with that interpretation because the LCIA will give effect to any agreement between the parties when it comes to appointing the appropriate tribunal. The defendant therefore submits that the arbitrators were entirely right in their conclusion albeit possibly for slightly different reasons.

11. In my judgment the proper approach, at least in the first instance, is to look at the provisions of the contract as a whole in construing their meaning. Although the conflict

provision cannot be ignored, it only comes into effect if there is indeed a conflict between the relevant provisions. In determining whether there is a conflict, one must first construe the clauses. That requires taking them together. Particularly where, as it seems to me is plainly the case here, there is an ambiguity in Clause J, it is not right to ignore Clause 24 in determining the proper meaning of Clause J. It is only if those two clauses cannot be read together that the conflict provision, which provides that Clause J take priority, comes into effect.

12. Further, in my judgment, construing a clause in a foreign language where there is doubt as to the proper translation requires the court to reach its final determination as to the meaning of the clause by way of combined process of assessing the evidence as to the translation together with the usual tools of construction. The end purpose of a process of construction is to reach a proper interpretation of the meaning and effect of the contract as agreed by the parties.

13. I do not consider that the use of the words in this case clearly indicates a choice of the LCIA, using that term as shorthand for the well-known arbitral body. If the phrase used had been exactly that which was used by the LCIA in its own Russian version, that is, with each relevant word starting with a capital letter and using a different Russian word for "Arbitration", then I consider that it might have been clear that the intention was to refer to the LCIA. Instead, the words used are capable of referring either to the LCIA or, more generally, to an international arbitral body in London appointed ad hoc by the parties. That ambiguity falls to be resolved.

14. The parties have presented alternative translations. At the end of the day neither of them can be conclusive as to what was the intention of the parties. Looking at the matter more broadly, I take into account the following factors. First, that the parties have agreed in Clause 24 a mechanism for appointment of arbitrators which would not be necessary or indeed appropriate if the simple agreement was to proceed by LCIA arbitration. Clause 24 is more applicable to an ad hoc arbitration, particularly as (in its printed form prior to the striking out of the reference to New York) it anticipates that there may be an arbitration in either New York or London. I consider that Clause 24 is inconsistent with an LCIA arbitration, as did the arbitrators. Reading Clause J together with Clause 24 would suggest that LCIA arbitration was not intended.

15. Secondly, it seems to be at least common ground that LCIA arbitration for maritime disputes arising out of a voyage charterparty would be unusual, although the defendant's evidence is that it is not highly unusual and it is certainly known. Nevertheless, I consider it is at least doubtful that the parties would have intended to limit themselves to an LCIA arbitration in a case such as this.

16. Thirdly, I consider that if it had been the intention to specify LCIA arbitration then more care would have been taken to ensure that the wording used did so specifically identify that body. As I have already indicated, the words used do not mirror the Russian version used by LCIA itself, nor do they take any simple step which could have been used, for example, by putting the words "LCIA" in brackets or making reference to English words so as to put the matter beyond doubt.

17. In summary, although the matter is by no means beyond doubt, I have concluded on the balance of probabilities that that parties' intention was not to refer specifically to LCIA arbitration but to an ad hoc arbitration in London by way of international arbitration

before a tribunal appointed pursuant to the mechanism set out in clause 24. The parties are agreed that the word used in Russian translated as "court" is capable of referring to a range of bodies, including tribunals. I am satisfied that that is the intention here. I therefore disagree with the conclusion of the arbitrators that they do not have jurisdiction because it was an LCIA arbitration clause.

18. Mr. Woolnough, for the defendant, mounts an alternative argument to support the decision on a different ground. He submits that, even if this was an ad hoc arbitration clause, it does not permit or require the defendants to agree to arbitration on LMAA Terms and therefore these arbitrators, he submits, do not have jurisdiction, having only accepted their appointment on terms which were not agreed.

19. I accept Mr. Watthey's submission for the claimant that jurisdiction and procedural terms are different issues. There is no doubt that London arbitrators appointed pursuant to Clause 24 do have jurisdiction. The question about whether or not there is agreement to the arbitrators proceeding on LMAA Terms therefore must be looked at ignoring the question of jurisdiction which I have found the arbitrators would otherwise have.

20. The question is addressed in the decision of Saville J (as he then was) in *Fal Bunkering of Sharjah v. Grecale Inc. of Panama* [1990] 1 Lloyds LR 369. In that case Saville J found that the appointment of LMAA arbitrators did not per se mean that the parties had agreed to LMAA Terms in itself, although he recognised that that might one day become the case. But he went on to say this at the bottom of the right-hand column of page 373:

> "If a proposed arbitrator makes clear that his acceptance of appointment is on the basis that the LMAA Terms are to apply to the reference, then the party seeking the appointment must either accept this condition or look elsewhere. If nothing more is said or done but the appointer treats the appointment as duly made, he will doubtless be taken to have accepted the condition, at least as between him and his arbitrator. If the other party has, by this or other means, also agreed the same with his arbitrator, then it would be but a short step to conclude that the reference was governed by the terms, either on principles akin to those applied in *Clarke v. Dunraven* [1897] AC 59, or on the basis that each arbitrator was respectively vested with authority to agree with the other on behalf of his respective appointer that the arbitration was to be conducted in accordance with the LMAA Terms."

21. That reasoning, in my judgment, is conclusive that both parties have agreed with their arbitrator and therefore with each other through the respective arbitrators to LMAA Terms applying. Given that I have ruled that there is no merit in the jurisdiction dispute, that is exactly the position which applies in this case. Mr. Woolnough submitted that Saville J's reasoning in that case was obiter, which indeed it was. However, it seems to me that it is, nevertheless, reasoning which is entirely unobjectionable which I would adopt in this case and apply.

22. For those reasons the claimant's application succeeds. The arbitrators' Award is to be set aside and I determine that the arbitrators do have jurisdiction and that this arbitration is to proceed on LMAA Terms 2012.

(For continuation of proceedings: please see separate transcript)