

GAFTA: EFFECTIVE NOTICE OF ARBITRATION

A recent challenge¹ to a GAFTA arbitration award under section 67 of the Arbitration Act 1996, on grounds of lack of jurisdiction, offers a useful reminder of the importance of serving an effective notice of arbitration.

Background

The Seller had entered into two separate contracts to sell to the Buyer two consignments of Russian Milling Wheat, each containing an arbitration clause referring any disputes arising out of or under the contract to arbitration in London in accordance with GAFTA Arbitration Rules No. 125.

Disputes arose under both contracts and the Buyer sent to the Seller a single notice of arbitration (the "Notice"). The Notice referred in the title to both sale contracts but referred in the text to a single arbitration and nominated one arbitrator *"for the disputes related to the two Contracts"*. In the final paragraph, it proposed that the two contracts be adjudicated in a single arbitration *"for efficiency and economy"*. The Seller did not respond.

The parties then negotiated a 'Washout Agreement' in an attempt to settle the disputes. The Washout Agreement referred to both contracts but referred to the "Claim" and "Arbitration" in the singular. Under the terms of the Washout Agreement, in the event the Seller failed to make payment, the Buyer would be entitled to terminate the Washout Agreement and continue the claim in arbitration for the full value of its loss.

The Seller failed to make payment due under the Washout Agreement and so, in accordance with its terms, the Buyer terminated it and continued the arbitration. At this point, the Seller disputed the jurisdiction of the Tribunal on the grounds that the Buyer had failed to commence arbitration properly under each of the contracts and had instead wrongfully purported to commence a single consolidated arbitration.

GAFTA Arbitration

The GAFTA Tribunal rejected the Seller's objection on grounds of jurisdiction, deciding that it had waived its right to object by its silence in response to the Buyer's suggestion that the two contracts be consolidated into one arbitration. The Seller appealed but the Board of Appeal upheld the first decision, although on different grounds: it held that by entering into the Washout Agreement, the Seller had accepted that there would be a consolidated arbitration and had waived its right to object. The Seller appealed to the English Commercial Court.

Commercial Court

In the Commercial Court, the Seller challenged the GAFTA tribunal's jurisdiction on a number of grounds. It argued that the Notice was ineffective because it wrongly purported to commence a single arbitration in respect of two separate claims. In the alternative, it argued that there should be rectification of the Notice. Each party argued the other was estopped from contesting its case.

The Court found as follows:

1. Under Section 14(4) of the Arbitration Act 1996, an arbitration commences when a notice is served on the other party. The Court noted that "other than writing, there are no statutory prescribed formalities in respect of a notice, and the courts have taken a commercial approach to their interpretation." It also referred to a

¹ *LLC Agronefteprodukt v. Ameropa AG* [2021] EWHC 3474 (Comm).

previous judgment, in which the Court had set out guidance for use when assessing whether the requirements of section 14 had been met:

- one should interpret section 14 'broadly and flexibly,' avoiding a strict or technical approach, especially when the notice has been drafted by non-lawyers.
- the requirements will generally be satisfied if the notice sufficiently identifies the dispute to which it relates and makes clear that the person giving notice is intending to refer the dispute to arbitration.
- one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood the notice given its terms and the context in which it was written.

Based on that guidance, the Court found that the Notice served on the Seller did properly commence two separate arbitrations, in particular given that the final paragraph requested that the Seller accept that the two contracts 'be adjudicated under a single arbitration'. This request would not have been made if the Buyer were not proposing to commence two separate arbitrations.

2. The request for rectification was refused. Rectification is available on the basis of common or unilateral mistake and neither existed here. Further, it is an equitable remedy and in this case, it would be inequitable to rectify the Notice because it would mean the Tribunal did not have jurisdiction when the parties had signed the Washout Agreement under which the Seller agreed that the Buyer would continue with the arbitration if the settlement payment was not made.
3. The Court found it difficult to see how there could be estoppel against the Buyer in circumstances where an appeal under section 67 amounts to a full rehearing, in which there is no restriction on the arguments that can be raised. Furthermore, the Seller had not relied on any representations to its detriment, for example by incurring wasted costs. Conversely, there would have been an estoppel by convention against the Seller. There was an implied understanding between the parties when the Washout Agreement was signed that the Notice was valid and that the arbitration had been properly commenced. If the Seller had challenged this at the time, the Buyer would never have signed the Washout Agreement.

Conclusion

This case is a reminder that even where there are relatively few requirements as to validity, notices should be drafted and served correctly and in accordance with the terms of the contract to which they relate. Although the Notice in this case was ultimately held to be effective, the time and cost involved in dealing with the jurisdictional challenge could have been avoided.

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