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UPDATE

Exclusion agreements in arbitration clauses – a recent decision of the Jersey Court of Appeal

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In *Public of the Island of Jersey v The Jersey Electricity PLC* [2016] JCA 169) the Jersey Court of Appeal considered an attempt by a party to an arbitration to challenge the arbitration decision through Royal Court proceedings, despite an agreement that the arbitration was to be 'final and without appeal'.

The case concerned a site which is leased by the Public of the Island of Jersey (the **Lessor**) to the Jersey Electricity Company Limited (the **Lessee**). The lease between the parties of 26 June 1964 (the **Lease**) set the annual rent of the site at £1,000 per annum for the initial period of 42 years, with a right to renew the lease and to 'increase the rental payable' thereafter.

The Lease was, however, silent as to how any new rental was to be arrived at. The parties attempted to negotiate a revised rental, but without success and so, in accordance with the provisions of the Lease, they referred the matter to arbitration. An arbitration process followed, which was in two stages: the first setting the legal basis of the rental review and the second determining what rental should actually be applied. That process had been agreed between the parties and it resulted in a final determination that the rental should remain at £1,000 per annum.

The Lessor sought to appeal the decision of the second arbitrator (ie the one making the final determination of the rental to be paid) to the Royal Court under Article 21 of the Arbitration (Jersey) Law 1998 (the **Law**). Under Article 23 of the Law, however, the Court may not grant leave to pursue an appeal in cases where the parties have entered into an 'exclusion agreement', which is an agreement whereby the parties exclude the right of appeal to the Court.

The terms of the arbitration provisions in the Lease stated that the decision in arbitration shall be 'final and without appeal'. However, the Lessor argued that:

- the wording itself was not sufficient to be an exclusion agreement; and
- the parties had amended the provisions of the Lease as regards arbitration. The Lease originally provided for the appointment of an arbitrator for each side, with a third to be appointed in the case of disagreement between the two arbitrators, so that a majority decision could be arrived at. The parties had, however, agreed to amend that provision in 2011 (the **2011 Agreement**) and instead opted for two jointly-instructed arbitrators in a two-stage process.

In the Royal Court, the Deputy Bailiff granted leave to the Lessor to challenge the decision by way of Court proceedings. The Deputy Bailiff, in particular, considered that by way of the 2011 Agreement, the parties had effectively entered into a new arbitration agreement that did not include an exclusion clause. The Lessee appealed to the Court of Appeal.

The Court of Appeal first considered issue (a), ie whether the wording of the clause was sufficient to amount to an exclusion agreement at all. The Court of Appeal determined that it clearly did. Certain authorities in England were considered, from which it was clear that simply including a provision that a decision was 'binding' was not sufficient, and the Court concluded that the wording used in the Lease made it entirely clear that the intention was to exclude any possibility of appeal.

The Court of Appeal also considered that leave could not be granted on the basis there was a strong possibility (as the Learned Deputy Bailiff appeared to believe there was, as he ultimately granted leave) that the arbitral award would be reversed, holding that the Court could not dilute the effect of a clear provision simply because it suspects on particular facts that the award may be set aside.

The next question was whether the 2011 Agreement had removed the exclusion provisions from the Lease. The Court of Appeal carefully considered the correspondence between the parties in 2011 by which the arbitration process had been agreed (the parties agreeing matters by correspondence rather than a variation to the Lease). By that correspondence, the parties had agreed to amend the arbitration process by appointing jointly-instructed arbitrators rather than each party appointing their own, and then a third breaking any deadlock. The Court of Appeal considered that it must ascertain whether the relevant words of the Lease had been disapplied in relation to the arbitration process to which the parties agreed. The Court of Appeal held that the learned Deputy Bailiff had erred in determining the point on the basis of whether the words 'final and without appeal' could be imputed into the 2011 Agreement. The correct question was, in fact, the reverse, namely whether under the 2011 Agreement the 'final and without appeal' words in the Lease had been severed and so were not included in the agreement between the parties.

The Court of Appeal was satisfied that the 2011 Agreement focused on the regime for the appointment of arbitrators, not the effect of the arbitration. The correspondence was clearly focused on the mechanism for appointment of arbitrators. The parties, in that correspondence, did not at any stage refer to the exclusion provisions. The correspondence appeared to contemplate that other than changing the number of arbitrators, the relevant provisions of the Lease would be unaltered. 'As such, the 'final and without appeal' wording remained in place and the Lessor was prevented from bringing any challenge to the Court.

Comment

This case provides helpful reassurance that where parties agree to exclude any right of appeal after engaging in an arbitration process, the Court will uphold that agreement. If the Lessor had been allowed to continue with its challenge, arguably all the work and time that had been spent on arbitration would have been wasted. That was against the clear intention of the parties.

It is worth noting, however, that prior to commencing an arbitration process parties should check the arbitration provisions of the governing agreement and re-affirm whether they want to maintain the binding and without appeal nature of any agreement. This is particularly necessary where any provision of the arbitration clause is being amended. Whilst the Court in this case distinguished between mechanism and effect, it is clearly preferable for all parties to be clear whether they are entering into a process from which there is no recourse to the Courts.

Mourant Ozannes acted for the successful Lessee in these proceedings.

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