Neutral Citation Number: **[2019] EWHC 1781 (comm)**

Case No: Claim No C-L 2018 000358

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: July 10 2019

Before:

Sir Jeremy Cooke
sitting as a Judge of the High Court
- -

Between:

Specialty Magnetics Limited	**Claimant**
- and -	
Agilent Technologies Lda UK Limited	**Defendant**

- -
- -

Lionel Nichols (instructed by **CANDEY**) for the **Claimant**
Jennifer Jones (instructed by **Hill Dickinson**) for the **Defendant**

Hearing date: 4 July 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39 A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this judgment as handed down may be treated as authentic

Sir Jeremy Cooke:

Introduction

1. The Defendant, by an application notice dated 14 February 2019, seeks a stay of these proceedings under section 9 of the Arbitration Act 1996 ("the Act") on the basis that clause 24 of terms and condition which form part, in its submission, of a contract between itself and the Claimant dated 20 May 2003 (and amended subsequently) constitutes a binding agreement to arbitrate.

2. The Claimant submits that clause 24, when read either in isolation, or in the context of clause 25 of the terms and conditions and of the contract as a whole does not amount to an arbitration agreement within the meaning of the Act.

3. The point is a short one and it is not necessary to delve into the background of the dispute between the parties save to say that the claim is made for breaches of warranty under a contract for the supply of a magnet which the Claimant wished to use in a prototype intra-operative MRI scanner which the Claimant hoped to develop or use in the detection and clinical management of cancer. Whilst there is no agreement between the parties as to the incorporation of the terms and conditions in full, for the purposes of argument today the Claimant accepts that clauses 24 and 25 are part of the contract, but contends that there is no effective agreement to arbitrate.

4. Under section 6 (1) of the Act, "an arbitration agreement means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)". Section 5 requires the agreement to be in writing. The sole issue is whether or not clause 24 constitutes such an agreement.

Clauses 24 and 25

5. The relevant clauses read as follows:

> "***24 Arbitration***
>
> 24.1 *In case of dispute of* [sic] *difference between the Parties arising out of or in connection with the Contract, the Parties shall first endeavour to settle it amicably through arbitration prior to recourse to law.*
>
> 25 ***Applicable Law***
>
> *25.1 This Contract shall be governed by and construed in all respects in accordance with the laws of England, and the Parties agree to submit to the non-exclusive jurisdiction of the English Courts."*

The Parties' positions

6. There was no real difference between the parties as to the principles of construction which bear on the question at issue. I was inevitably referred to the decisions of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 at paragraphs 15 to 20 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at paragraphs 10 to 13, as well as to *Chopra v Bindra* [2009] EWCA Civ 203 at paragraph 8 (the last- named as authority for the principle that all parts of a contractual document must be given effect, if possible).

7. Of greater direct relevance to what does and does not constitute a binding arbitration clause, I was also referred *to AIG Europe SA v QBE International Insurance Ltd* [2001] 2 Lloyd's Rep 268, *Kruppa v Benedetti* [2014] EWHC 1887 (Comm), *Walkinshaw v Diniz* [2000] 2 All ER (Comm) 237, as well as authorities where the Court reconciled inconsistent jurisdiction and arbitration clauses along the lines of that effected in *Axa Re v Ace Global Markets*

Limited [2006] EWHC 216 (Comm) and *Exmek Pharmaceuticals SAC v Akem Laboratories Ltd* [2015] EWHC 3158 (Comm).

8. In *Kruppa,* which contained a form of words in the dispute resolution clause which bore some similarity to that in the present case, I set out a number of propositions which were common ground between counsel there and which were not the subject of dissent before me in the present case. At paragraphs 4 and 5 appeared the following;

   i) A clause of this kind should be construed in the same way as any other clause in a contract, the aim being to ascertain the intention of the parties and what a reasonable person would have understood the parties to have meant, with all the relevant background knowledge that they had the time.

   ii) Dispute resolution clauses can be arbitration agreements when the word "arbitration" is not used and need not be arbitration agreements even where the word is used.

   iii) Where a contract contains an exclusive jurisdiction clause and a mandatory arbitration clause, there is an assumption that the parties intend any dispute be heard by the same tribunal and the court's policy in favour of arbitration means that the usual way of reconciling the clauses is by holding that substantive issues go to arbitration and that the court's jurisdiction only extends to ancillary matters relating to supervision or enforcement of the arbitration and awards.

iv) The court should seek to give effect to all parts of the clause in the same way as it has to give effect to all clauses in a contract, insofar as it is possible to do so, in order to arrive at an harmonious result.

9. The Defendant's submission is that the word "arbitration", which appears both in the title of clause 24 and in the body of the clause, should be given its ordinary and natural meaning which involves the process of arbitration envisaged under the Act. "Mediation" and "conciliation" are different processes, which are not readily encompassed by the word "arbitration" and proper weight should be given to the use of the word, with the surrounding wording read in the light of it. It was said that the choice of the word "shall" makes the choice of arbitration mandatory and the non-exclusive jurisdiction given to the English courts by clause 25 does not affect this conclusion because this court should seek to give effect to all parts of the clause and can do so in the manner set out in paragraph 8 (iii) above, as has been done in a number of reported authorities, to which I was referred. The Defendant points to the limited requirement in the Act in sections 5 and section 6 (1) which merely require that there should be an agreement in writing to submit present or future disputes to arbitration. The Defendant also stresses that informality is unobjectionable and arbitration clauses in summary form have been accepted by the courts on many occasions, as, for example, in many charter-party cases.

10. The Defendant placed particular reliance on the decision of Thomas J (as he then was) in *Walkinshaw v Diniz* (ibid) and to the citation at page 254 of the report of the decision of a passage from *The Law and Practice of Commercial Arbitration in England* by Lord Mustill and Stuart Boyd QC, where the

attributes of arbitration were set out. One of the features to which attention was drawn is that the agreement to arbitrate must contemplate that the tribunal which carries on the process will make a decision which is binding on the parties, whilst another feature was that the agreement must be intended to be enforceable in law.

11. The Defendant also relied on that decision for the following propositions*:*

i) terminology is a pointer, but is not determinative;

ii) arbitration determines the legal rights and obligations of the parties judicially, with binding effect;

iii) there must be a fair and a quasi-judicial process for there to be an arbitration;

iv) the process of the nominating arbitrators may be relevant.

12. The Defendant relied in particular on the *Axa* and *Exmek* cases (ibid) for similarities in the wording which in the former case read, "the parties agree that prior to recourse to courts of law any dispute between them shall first be the subject of arbitration"; and in the latter case read, "all disputes …shall be referred to arbitration before any legal proceedings are initiated". It was submitted that as the arbitration agreement was found to be fully effective in those decisions, the same must follow in the present case.

13. The Claimant submitted, in essence, that, although the wording of clause 24 was not identical to that found in the dispute resolution clause in *Kruppa*, the effect was the same and that the essential rationale for the *Kruppa* decision

applied with equal force here. The Defendant sought to distinguish that decision on the grounds that the clause there was, on its proper construction, a tiered resolution clause providing for a first and then a second stage in the process where there were particular difficulties in implementing an arbitration in Switzerland without further specificity or agreement in the arbitration agreement. It was argued that there was no such difficulty in the present case because the Act in itself, or the court, was able to make good practical shortcomings or deficiencies in the arbitration agreement by specifying the number of arbitrators where there was no agreement and appointing arbitrators and the like by virtue of sections 15 – 19 of the Act.

Analysis

14. It is common ground that arbitration results, unless something has gone wrong, in an award binding on the parties so that an agreement to arbitrate must involve an agreement to refer the disputes to a "quasi-judicial" process which leads to a result binding upon the parties. If the wording of a dispute resolution clause is inconsistent with such a final and binding result as a consequence of following the "arbitration" process, the parties cannot truly have concluded an agreement to arbitrate- see the propositions at paragraph 11(ii) and (iii) above.

15. Section 58(1) of the Act states that "unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding on both the parties and any person claiming through or under them". This clearly envisages a process which gives rise to a final and binding result, even if the parties are free to agree otherwise, which must, I take it, refer to an

ex post facto agreement, subsequent to an agreement to arbitrate, since the essence of arbitration as opposed to conciliation or mediation is a final and binding result. This latter proposition appears from a number of authorities, as well as Mustill and Boyd's text book (ibid) and, as far as I know, has never been doubted. In *Walkinshaw* (ibid), *England and Wales Cricket Board Ltd v Kaneira* [2013] EWHC 1074 (Comm), and *Exmek* (ibid), the dictum of Hirst J (as he then was) in *O' Callaghan v Coral Racing Ltd* [1998] Times 26 November was cited with approval:

> "To my mind the hallmark of the arbitration process is that it is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law"

16. Leaving aside the particular complications posed by the words "Swiss arbitration" in *Kruppa,* because any deficiencies in the arbitration agreement could not be made good in the absence of a chosen canton as the seat of the arbitration, the essential problems which faced the Defendant there, when seeking a stay, are identical in the present case.

17. Clause 24.1, standing on its own, does not require the Parties to submit the dispute to arbitration but provides that they "shall first endeavour to settle it amicably through arbitration prior to recourse to law". There cannot be any doubt that the reference to "recourse to law" means recourse to the courts, as opposed to arbitration. Thus, the wording envisages an "endeavour" on the part of the parties to "settle" the dispute "amicably" through arbitration and, in the event of that failing, the matter proceeding to court. There is, therefore, no obligation imposed on a party to refer a dispute to arbitration and the language used is inconsistent with such an obligation. Moreover, the clause

contemplates the failure of such endeavours to settle the matter amicably by the process and contemplates a second stage in the process (a two-tiered process) which cannot arise in the ordinary way if the parties have agreed to refer the disputes to a final and binding arbitration.

18. Thus, as pointed out at paragraph 10 in *Kruppa*, the parties have agreed, not to refer a dispute to arbitration as such, but to a lesser action, namely, here, to endeavour to resolve the matter through arbitration, with an express fall-back provision, should they fail to do so in this way. Within the confines of the one clause, the parties have envisaged the possibility of two stages, the first being resolution through arbitration and the second being litigation in the courts.

19. For the reasons given in paragraph 11 – 14 of my decision in *Kruppa*, even without reference to clause 25 in the present case, it is logically impossible to have an effective multi-tier clause consisting of one binding tier (i.e. arbitration) followed by another binding tier (i.e. litigation). Yet that is exactly what clause 24.1 would envisage, if it was a binding agreement to arbitrate. *Exmek* (ibid) and *Axa* (ibid) do not assist the Defendant because in each of those cases, there was clearly an unequivocal agreement to refer disputes to arbitration with a binding result and not a fall- back position in the event of the failure of the arbitration. The Court could only reconcile the conflicting clauses there by holding, as the language allowed, for the reference to the Court's jurisdiction to take effect as relating to enforcement of an Award or exercise of the Court's supervisory jurisdiction, as the court of the seat.

20. This is not a case, like many, where there are provisions requiring the parties to refer disputes to different Tribunals or fora, where the two provisions have

to be reconciled to the extent that it is possible to do so. Here the issue arises out of the form of the clause itself which provides for attempts to settle the dispute amicably in arbitration and in the event of such failure to have recourse to law. The clause envisages two stages and the failure in the first to resolve the substantive dispute would lead to the second. It is no answer to say that an arbitration might, for various reasons, prove inoperable, since clause 24 does not envisage that as the basis for proceeding to the courts. The envisaged circumstance in which resolution does not take place at the first stage is where the parties have "endeavoured" to resolve the dispute through arbitration but have failed in that endeavour. The clause contemplates an attempt (hence "endeavour") - to reach agreement (hence "amicably") - through "arbitration", although whether that means either that the word "arbitration" is to be read as "mediation" or "conciliation", or that the clause envisages the parties attempting to agree amicably to an arbitration (where the details have not been spelt out) is an open point which does not require determination. The critical points are:

a) First that there is no obligation to refer the dispute to an arbitration which will produce a binding decision and,

b) Second, the clause itself provides that if that process fails, then the substantive dispute falls to be resolved by recourse to law.

21. The nature of the obligation incumbent upon the Claimant with reference to arbitration appears from the form in which any order for specific performance would be made, if it were possible for the Defendant to seek such an order. It would be for an order that the Claimant "endeavour to settle the dispute

amicably through arbitration", not that the Claimant refer the matter to arbitration. The nature of the obligation shows that there is not a binding agreement to arbitrate but an agreement to attempt to resolve the matter amicably by a process of "arbitration", the details of which have not been set out in the clause. Although some of those deficiencies of detail could be made good by the supervisory court if there was found to be a binding agreement to arbitrate, it strains the words too much to interpret them as an obligation to arbitrate.

22. Even if the word " arbitration" is given its proper meaning, in the context of clause 24, an "endeavour to settle the dispute amicably through arbitration" must involve the party seeking, amicably to agree with the other, on the particular process of arbitration which could include the number of arbitrators, the means of their appointment, the rules applicable to the arbitration, the form which it would take and possibly the venue/seat, regardless of the fact that the court could determine some of those issues in accordance with the provisions of the Act. Whilst the particular problems which arose in the context of "Swiss arbitration" in *Kruppa* do not arise here, the form of words adopted give rise to the same result.

23. It is more probable, however, in my judgment, that, when the parties used the word "arbitration", like many laymen who use the word, they had in mind a process of conciliation or mediation of some kind, as in the *AIG Europe* case (ibid). That notion fits better with the overall wording of clause 24

24. When reference is then made to clause 25, this construction of clause 24 is reinforced. The words "prior to recourse to law" in clause 24 herald the

Parties' agreement to submit to the non-exclusive jurisdiction of the English courts, in the event of the failure of the process set out in clause 24. The two clauses are best read together in this way rather than in the strained way that is often the result seeking to uphold and give effect to an arbitration clause which is clear on its terms but which appears to be contradicted by the jurisdiction clause, when both appear to provide for a substantive dispute to be determined in different fora.

Conclusion

25. In these circumstances and for these reasons I hold that clause 24 does not require the parties to refer any dispute to arbitration in the sense required by the Arbitration Act. Whether the word "arbitration" is to be read as "mediation" or " conciliation" on the one hand, or that the process envisaged by Clause 24 is of seeking to agree to arbitrate, on the other, matters not, because no obligation to arbitrate is imposed and the clause itself provides that the process will not give rise to a final and binding result, with a fall-back provision in the event of failure of the process (whatever that may be) as "recourse to law". The terms of clause 25 confirm this construction.

26. The application for a stay must therefore fail and the Defendant must bear the costs.