Resolving Ambiguities in the Arbitration Agreement

Judge Abraham J. Gafni (Ret.)
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It is well-recognized that arbitration is a matter of contract, and that courts will rigorously enforce arbitration agreements in accordance with their terms. Yet, often, ambiguities require that courts apply basic principles of contract interpretation to ascertain the intent of the parties as to matters unclear in the agreement itself. Such a situation presented itself recently in the U.S. Court of Appeals for the Eleventh Circuit, where the appellate court overturned a lower court determination that an arbitration should be conducted in Florida rather than in London. *Internaves De Mexico s.a. DE C.V. v. Andromeda Steamship*, No. 17-12164, 8/1/18.,2018 U.S. App.Lexis 21280*)*

The dispute between the parties involved a shipping transaction. It was clearly understood that such disputes would be submitted to arbitration. The arbitration agreement, however, was confusing as to where the matter was to be arbitrated. When the parties turned to the federal district court in Florida to resolve this issue, the judge decided that he was unable to ascertain the appropriate venue for the arbitration from the agreement. Accordingly, he resorted to the default arbitration forum under the Federal Arbitration Act (FAA), 9 USC Section 4, as it related to international arbitration agreements under Chapter 2, which provides that “if the parties agreed to arbitrate but failed to ‘provide for’ a forum, then the court must compel arbitration, but only within its own district …” On this basis it ordered arbitration in Florida, a venue neither mentioned in the agreement nor sought by either party.

The court's difficulty arose by reason of a seeming conflict between written markings contained in Part I, which contained terms specific to this particular transaction and Part II, which contained general boilerplate provisions typically incorporated in shipping transactions of this nature.

Part I included a Box 25 labeled "Law and Arbitration." Box 25 instructed that the parties' choice of forum would be made by inserting in Box 25 one of four possible options provided under four sub-clauses of Clause 19 of Part II of the Agreement. These four options were:

- 19(a). Arbitration in London under English Law
- 19(b). Arbitration in New York under US law
- 19(c) Arbitration in a place indicated in Box 25 in Part 1
- 19(d) If Box 25 is not filled in, the place indicated in 19(a) [i.e., London] would be deemed the place selected.

Inside Box 25 in Part I the parties had not selected any of the four options by sub-clause number but had clearly written the words: "London arbitration, English Law" which might initially appear to have resolved the matter. In Clause 19 of Part II itself, however, which contained the four possible options, the parties had crossed out 19(a) (which designated London), 19(c) (which allowed designation in Box 25 of another location) and 19(d) (which would have referred the venue back to London under 19(a)). Only 19(b), which referred to New York, was not crossed out.

Thus, as the appellate court noted, a conflict was created. The parties had apparently demonstrated their preference by writing "London arbitration, English Law" in Box 25 of Part 1. However, in Clause 19 of Part II they had stricken all but one of the possible options including the reference to London. The only choice not stricken from Clause 19 was the one assigning venue to New York, which would seem to reflect that the parties intended New York as the proper venue for the arbitration.

The appellate court recognized the strong presumption in favor of compelling arbitration in the forum provided in the international arbitration agreement. If the parties fail to clearly provide for such forum, however, the reviewing court is required by the FAA, as noted above, to compel arbitration within its own district.

The appellate court then explained that for the purpose of determining intent in an ambiguous international arbitration agreement, a court is required to look to the federal common law principles of contract interpretation. In particular, five principles were here applicable:

- "The actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls;"

- The court must “work to interpret the contract harmoniously to avoid conflict and give meaning to all of its provisions;”
- If there are intra-contractual conflicts, but the contract itself provides means for reconciling the conflict, the court is obliged to apply such contractual clauses;
- Specific terms are favored over more general language; and
- Recognizing that parties occasionally err or misprint in preparing contracts, courts “will strive to give the contract coherent meaning, if we can, rather than capitulate in the face of apparent ambiguity.”

Based upon these principles, the court determined that the agreement reflected the parties’ intent that the arbitration be conducted in London.

In support of this conclusion, it noted that the contract provided that, “In the event of a conflict of conditions, the provisions of Part 1 shall prevail over the Provisions of those in Part II to the extent of such conflict.” Here, the reference to “London Arbitration, English Law” in Part I overcame “Part II’s manifestation of the parties’ preference for a New York forum.” While it was true that all of the venue selection options in Part II except for the one that designated a New York forum had been stricken, such striking could not rise to the same level of expressing intent as did the insertion of the actual words selecting London.

Moreover, an asterisk appearing alongside the four sub-clauses stated “(a) (b) and (c) are alternatives; indicate alternative agreed in Box 25”. Thus, Box 25 was the authoritative space within which the forum selection was to be placed. In fact, the parties had written their preference “London arbitration, English Law” in Box 25 which superseded their suggested preference of New York resulting from their striking of 19(a) (c) and (d).

As no portion of the provision that established Box 25’s supremacy was crossed out, the striking of 19(c) “did not undermine either Part I’s predominance over Part II or Box 25’s status as the contract’s authoritative forum-selection clause.”

The appellate court noted other principles of contract interpretation that supported this conclusion.

For example, principle 4 noted above requires that specific terms are to be elevated over more general ones. Thus, as the court concluded, “the specific written insertion of ‘London’ entailed far greater specificity and particularity—and constitutes a far more powerful expression of intent—than the simple striking of 19(a) 19 (c) and 19 (d) from boilerplate script.”

Finally, that the parties failed to insert into Box 25 one of the specific alternatives listed in sub-clause 19 represented only a “small error that cannot undermine their manifest intent as they wrote it, to arbitrate in London under English Law.”

The opinion reflects how important it may be to include provisions which direct how conflicts in the agreement are to be resolved, and that a court will generally be more persuaded by actual written insertions rather than the mere striking of words.

What should also not be overlooked is the recognition that “contracts must be interpreted with sensitivity to the reality that parties occasionally err or misprint in the course of contract drafting,” and that even in such cases, courts will seek to “discover and give effect to the intent of the parties if possible,” so long as the apparent contractual error does not, in fact, render the contract ambiguous.

Too often, however, parties negotiating a contract focus so intently on the principal substantive issues of a transaction that they fail to give the same close attention to ancillary but critical provisions, such as those relating to dispute resolution, and end up with an “unskillfully prepared instrument.”

Such an apparent failure here almost resulted in an arbitration in Florida (rather than New York or London), a venue sought by neither party. •

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