‘Russian’ to Judgment: the English Court grapples with an arbitration clause in Russian

James Hatt comments on how the recent case of A Limited v B Limited [2018] EWHC 1370 (Comm) illustrates the complications that can arise when a contract is not expressed in clear English – or in clear Russian.

The case was a s.67 application in which James Watthey of 4 Pump Court acted for the successful claimant owners. The owners had chartered a vessel to the defendant charterers on the terms of an amended Asbatankvoy charterparty written in the Russian language.

The Charterparty contained two potentially conflicting arbitration clauses.

First, Part I (which was expressed to take precedence over Part II in case of any conflict) contained Clause J, which stated: “J. …□□□□□□□□□□□□ □□□□□□□□□□□□□□□□ – □□□□□□□□□□□ □□□□□□□□□□□□□□ □□□□□□□□□□□□ □□□□, □ □□□□□□□□□□□□□□ □ □□□□□□□□□□□□□□□□□□□ □□□□□□□□□□□□□□□□”. The literal translation of this was: “J. Arbitration proceedings – London international arbitration court, in accordance with the laws of Great Britain…”

Second, Part II of the Charterparty contained Clause 24, which stated, according to the agreed translation: “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.” A dispute arose under the Charterparty. The owners commenced arbitration in London and appointed an arbitrator. The charterers did likewise. The charterers then made an application to the tribunal challenging their jurisdiction on the basis that the “London international arbitration court” referred to in Part I Clause J was effectively meaningless.

The tribunal obtained comments from Russian speaking solicitors. It was impressed by the fact that if the term “London Court of International Arbitration” (i.e. the LCIA) were to be translated into Russian then the word order would be different and 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.

The tribunal therefore found that Part I Clause J was a reference to arbitration under the LCIA Rules. Under the LCIA Rules, however, the LCIA rather than the parties appoints the arbitrators. The tribunal found that Part II Clause 24, which permitted party-appointed arbitrators, was in conflict with Part I Clause J and must therefore yield to it under the rules of precedence established by the Charterparty. The overall outcome was that the tribunal found that it did not have jurisdiction over the dispute because it was not a tribunal appointed under the LCIA Rules.

The owners issued an application under s.67 of the Arbitration Act 1996 challenging that decision before the Commercial Court. In his judgment, Phillips J started from the premise that the Charterparty had to be construed as a whole: the two arbitration provisions had to be read together to resolve any ambiguity, and it was only if they could not be read together that the conflict provisions came into play.

The Court concluded that Part I Clause J was ambiguous. It could refer to the LCIA but equally it could refer to an ad hoc international arbitral body in London.

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The Court noted that the phrase used in the Charterparty was not the same as the LCIA's own Russian name for itself, which has each relevant word starting with a capital letter and which uses a different Russian word for "Arbitration". If the LCIA's 'official' terminology had been used, or if the letters "LCIA" had been included in brackets, then the intention would have been clear – but it was not. Moreover, the Court noted that the use of the LCIA to resolve maritime disputes under voyage charterparties was rare, although apparently not wholly unknown.

On that basis, the ambiguity in Part I Clause J was to be resolved by recourse to Part II Clause 24. That clause made it clear that the parties were entitled to appoint arbitrators and so the Charterparty permitted ad hoc arbitration in London. Phillips J therefore concluded that the tribunal did have jurisdiction and that the arbitration was to proceed.

This case is therefore another example of the difficulties that parties can create for themselves if they do not clearly express themselves in their contract. The relatively unusual feature of this case, from the point of view of London arbitration clauses, is that the parties expressed themselves in Russian rather than in English, but in essence nothing turns on this: if the parties had wanted to provide for LCIA arbitration of disputes arising under their voyage charterparty then they could easily have done so by making a clear and unambiguous reference to the LCIA, using its official Russian title; and very similar difficulties could have arisen by use of an ambiguous English phrase.

Once again, the moral is that expensive and time-consuming jurisdictional disputes can be avoided by clear thinking and clear drafting in the negotiation of contracts.

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