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The arbitration agreement

EXERCISE 1 – THE ARBITRATION AGREEMENT I – SEMINAR

DISCUSSION QUESTIONS

Problem 1
Review and analyse the House of Lord's decision in the attached *Fiona Trust*. What is the 'fresh start' envisioned by the Lords?

Problem 2
Discuss pros and cons with the presumption established in *Fiona Trust*.

Problem 3
Review and analyse the Swedish Supreme Court decision in the *Bulbank* case, in particular the differences between the decisions of the Svea Court of Appeal and the Supreme Court.

Problem 4
Discuss pros and cons of including a confidentiality provision in the arbitration agreement.

CASE

Opinions of the Lords of Appeal for judgment in the cause

Premium Nafta Products Ltd (20th Defendant) and others (respondents)
v
Fili Shipping Co Ltd (14th Claimant) and others (appellants)

Wednesday 17 October 2007

Lord Hoffmann

My Lords,
1. This appeal concerns the scope and effect of arbitration clauses in eight charterparties in Shelltime 4 form made between eight companies forming part of the Sovcomflot group of companies (which is owned by the Russian state) and eight charterers. It is alleged by the owners that the charters were procured by the bribery of senior officers of the Sovcomflot group by a Mr

Nikitin, who controlled or was associated with the charterer companies. It is unnecessary to set out the details of these allegations because it is not disputed that the owners have an arguable case. They have purported to rescind the charters on this ground and the question is whether the issue of whether they were entitled to do so should be determined by arbitration or by a court. The owners have commenced court proceedings for a declaration that the charters have been validly rescinded and the charterers have applied for a stay under section 9 of the Arbitration Act 1996. Morison J [2007] 1 All ER (Comm) 81 refused a stay but the Court of Appeal (Tuckey, Arden and Longmore LJJ) [2007] Bus LR 686 allowed the appeal and granted it.

2. The case has been argued on the basis that there are two issues: first, whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and secondly, whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause. It seems to me, however, that for the reasons I shall explain, these questions are very closely connected.

3. I start by setting out the arbitration clause in the Shelltime 4 form:

> 41.
> (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.
> (b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.
> (c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred . . ..to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime Association of Arbitrators, in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re-enactment thereof for the time being in force.
>
> (i) A party shall lose its right to make such an election only if: (a) it receives from the other party a written notice of dispute which –
>
> (1) states expressly that a dispute has arisen out of this charter;
> (2) specifies the nature of the dispute; and
> (3) refers expressly to this clause 41(c) And

EXERCISE 2 – THE ARBITRATION AGREEMENT II – SEMINAR

DISCUSSION QUESTIONS

Problem 1

Is it possible for a bank to be bound by an arbitration agreement in the manner referred to by Plenty of Oil?

Problem 2

Is the arbitration clause sufficiently clear to constitute a valid agreement to arbitrate or could it be successfully challenged in court?

Problem 3

In case there is a valid arbitration agreement, is Emieux bound to accept to arbitrate with Plenty of Oil?

Problem 4

In case Emieux should be bound to arbitrate with Plenty of Oil, should the arbitration be conducted under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce?

Emieux International is a company incorporated under the laws of Finland. In early 1998, it enters into an agreement with Let's do Business AB, situated in Stockholm, by which Emieux purchases 100 per cent of the stock of Let's do Business AB's subsidiary Berghem Industries. The purchase price is divided into four partial payments of USD 57,000 and a final payment of USD 50,000. The partial payments are to be effected over a period of three years from the closing date. The first payment is to be effected the same year. According to the agreement, the partial payments and the final payments are both subject to adjustments for warranty claims.

For its liability to pay the first partial payment, Emieux provides an irrevocable guarantee issued by the Bank of North Pole in the amount of USD 57,000.

On 25 January 1999, the Norwegian company Plenty of Oil acquires Let's do Business' rights and obligations under the agreement. On 25 February 1999, Emieux raises warranty claims against Plenty of Oil in the amount of USD 50,000. Subsequently, it withholds a corresponding amount of its payments due under the agreement.

Plenty of Oil objects to the claims of Emieux and requests that the withheld payment should be effected. Negotiations between the parties are initiated but no agreement is reached. Emieux refuses to accept any settlement proposals from Plenty of Oil by which the total purchase price is not reduced by the withheld USD 50,000. Plenty of Oil on the other hand is convinced that

Emieux's position is a clear breach of contract but is willing to negotiate in order to save what they believed to be a fruitful business relationship for the future. However, as negotiations break down this scenario appears less and less likely and Plenty of Oil therefore decides to pursue the matter further to ensure they receive full payment under the agreement.

The agreement contains the following arbitration clause.

> 9. Dispute Resolution
> Arbitration Court in Stockholm, unless the parties have settled the dispute through friendly negotiations.

Plenty of Oil initiates arbitration under the Swedish Arbitration Act by filing a request for arbitration on 15 July 1999 against Emieux and the Bank of North Pole. The request arrives at the respective main offices of the two respondents on 17 July 1999. In its request Plenty of Oil claims that the arbitral tribunal shall establish Emieux's failure to fulfil the second payment. Through the irrevocable guarantee, Plenty of Oil argues, the Bank of North Pole has assumed Emieux's liabilities under the agreement and is therefore bound by the agreement, including the agreement to arbitrate.

The management of Emieux is very surprised when the request for arbitration arrives. The President turns to the General Counsel and asks him to 'make sure that those idiots at Plenty of Oil understand that this is nonsense.'

EXERCISE 3 – THE A
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> Article 33
> All disputes and
> friendly negotiati

EXERCISE 3 – THE ARBITRATION AGREEMENT III – MINI MOCK ARBITRATION

Lokomotiv International (Lokomotiv), a Russian corporation, has been contracted by the Russian Federation to develop the railway system in northern Siberia. In 2009 Lokomotiv entered into an agreement with the German company Eisenbahn GmbG (Eisenbahn), by which Lokomotiv bought 100 engines from Eisenbahn to be delivered over a period of ten years, starting with ten engines in 2010. The total purchase price was US$10 billion to be paid with US$1 billion in January each year of the ten-year period.

The first partial payment was provided in January 2010 and in March the same year the first five engines were delivered, the remaining five engines of the 2010 delivery to be effected in October.

When the first engines were put into service in Siberia it turned out that they did not function properly. There were problems both with starting the engines and reaching the guaranteed speed. Lokomotiv alleged that the engines were not able to endure the cold in Siberia, a matter that was particularly addressed and guaranteed in the contract, while Eisenbahn is of the view, after having examined the engines, that they are in perfect condition, fit for use in an even colder climate than in Siberia. Eisenbahn argues that the malfunction is due to Lokomotiv's inability to handle the engines properly.

Lokomotiv terminates the contract and requests that Eisenbahn pay back the US$1 billion already provided. It also requests damages, the amount of which is to be specified later. Eisenbahn rejects the termination, saying that Lokomotiv has not presented any grounds whatsoever which would give Lokomotiv the right to terminate the contract.

The President of Lokomotiv is, however, determined to release Lokomotiv from the contract with Eisenbahn and get the money back. He orders Lokomotiv's legal department to initiate arbitration against Eisenbahn.

A request for arbitration is filed with the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) under the following arbitration clause.

> Article 33
> All disputes and differences which may arise out of this contract shall be settled by friendly negotiations. If a settlement is not reached in such way the dispute shall

be settled by arbitration court in Stockholm. The award shall be final and binding upon the parties.

In its reply to the request for arbitration Eisenbahn objected to the jurisdiction of the SCC Institute, arguing that:

(a) Under the arbitration clause any dispute between the parties shall, in the first place, be settled by friendly negotiations. No such negotiations have taken place.
(b) The arbitration clause does not provide for arbitration under the SCC Institute Rules. It is clearly a clause contemplating ad hoc arbitration.

GROUP

Group 1
Present Lokomotiv's best counter-arguments to (a) and (b).

Group 2
How should the *SCC Institute* decide on the objections in (a) and (b)?

Group 3
How should the *Tribunal* decide (a) and (b) if the case is not dismissed by the SCC Institute and the objections to jurisdiction are renewed before the Tribunal where it becomes clear that:

(i) Eisenbahn has made several attempts to initiate friendly negotiations without Lokomotiv giving any reaction whatsoever to such attempts;
(ii) The Russian language version – which is equally applicable – of the arbitration clause instead of 'by arbitration court in Stockholm' says 'by arbitrators in Stockholm'?

Group 4
You are the observer group. Have the best arguments been presented? Are the decisions by the SCC Institute and the Tribunal correct?

EXERCISE 4: THE ARBITRATION AGREEMENT IV – SEMINAR

DISCUSSION QUESTIONS

Problem 1
Review and analyse the United States Supreme Court's decisions in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* and *Scherk v Alberto-Culver Co*. Argue that questions of antitrust/competition law should be arbitrable.

Problem 2
Review and analyse the United States Supreme Court's decisions in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* and *Scherk v Alberto-Culver Co*. Argue that questions of antitrust/competition law should not be arbitrable.

Problem 3
Review and analyse the ICC Interim Award in Case Nr. 6097 (1989). Argue that questions of patent law should be arbitrable. Use examples from different jurisdictions.

Problem 4
Review and analyse the ICC Interim Award in Case Nr. 6097 (1989). Argue that questions of patent law should not be arbitrable. Use examples from different jurisdictions.

CASE

Mitsubishi v Soler Chrysler-Plymouth 473 US 614 (1985)

US Supreme Court: *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc.* No. 83-1569

Certiorari to the United States Court of Appeals for the First Circuit

Syllabus

Petitioner-cross-respondent (hereafter petitioner), a Japanese corporation that manufactures automobiles, is the product of a joint venture between Chrysler International, SA (CISA), a Swiss corporation, and another Japanese corporation, aimed at distributing through Chrysler dealers outside the continental United States automobiles manufactured by petitioner. Respondent-cross-petitioner (hereafter respondent), a Puerto Rico corporation, entered into distribution and sales agreements with CISA. The sales agreement (to which petitioner was also a party) contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Thereafter, when attempts to work out disputes arising from a slackening of the sale of new automobiles failed, petitioner withheld shipment