Client Alert

August 2018

Eleventh Circuit Compels Parties to Arbitrate in London Despite Contract's Conflicting Arbitration Forum Selection Clauses

What Happened

The Eleventh Circuit overturned a lower court ruling requiring arbitration in Florida under US law, finding, instead, that the greater specificity in a written insertion of London and English law as the applicable seat and law provided greater clarity of the parties' intent.

The Bottom Line

Where a contract contains conflicting terms, courts will give more weight to the specific written insertion of terms over those that appear from the striking of boilerplate script.

The Full Story

On August 1, 2018, the Eleventh Circuit issued its opinion in *Internaves de Mexico S.A. v. Andromeda Steamship Corp.*, a case involving a maritime contract that unambiguously obligated the parties to arbitrate their dispute but contained conflicting arbitration forum selection clauses. The decision reversed the Southern District of Florida, which had found that the conflicting clauses made the parties' selection of an arbitration forum ambiguous and compelled the parties to arbitrate in the Southern District of Florida, the default forum under the Federal Arbitration Act. Instead, the appellate panel found that the parties intended to arbitrate their dispute in London under English law because they specifically wrote that forum into the contract. By contrast, the parties' willingness to arbitrate in New York under US law appeared only in the portion of the contract containing boilerplate provisions. Importantly, the parties had also specified that the part of the contract containing the New York selection was subordinate to the part containing the London selection wherever the two conflicted.

The contract at issue in *Internaves* consisted of two parts. Part I contained terms specific to the underlying transaction, while Part II contained general boilerplate terms used for shipping contracts of its kind. Part I included a box labeled "Law and Arbitration." The box instructed the parties to state their choice of forum from among the options enumerated in subclauses in Part II under a clause also labeled "Law and Arbitration." If the parties selected the choice that allowed for a forum not enumerated, the box instructed the parties to state the place of arbitration chosen. Here, the parties did not indicate which of the enumerated choices they selected but instead only wrote "London arbitration, English Law" in the box. In Part II, the three subclauses provided the parties with the option of selecting: (a) arbitration in London under English law; (b) arbitration in New York under US law; or (c) any forum of the parties' choice, to be indicated in the box in Part I. A fourth subclause, (d), provided that if the box in Part I was left completely blank, then subclause (a) was to govern forum selection. Here, the parties struck through subclauses (a), (c) and (d), leaving only (b), the option of arbitrating in New York under US law, unstruck. This, as the Eleventh Circuit noted, created a conflict because "while the parties wrote in the words 'London arbitration, English Law' in . . . Part I, the parties

signaled some desire to arbitrate in New York under U.S. law in Part II." But it did not find that this inter-part conflict obscured the parties' intent to arbitrate in London.

Instead, the court relied upon the parties' inclusion of a clause providing that "[i]n the event of a conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict." The court noted that "[w]hen parties author conflicting contractual provisions, but expressly provide for a contractual mechanism to resolve any conflict, we are bound by the mechanism they have chosen." The court found that under this conflict clause, the parties' choice of London as the arbitration forum in Part I necessarily must prevail over any conflicting selection in Part II.

Further, the court found the conclusion that the parties had intended to select London was supported by the canon of contract interpretation that elevates specific terms over general ones. The court flatly stated that "[t]he parties' particular insertion of 'London arbitration, English Law' prevails over crossed-out boilerplate terms." The court then rejected the argument that "specifically" crossing out all of the subclauses other than the New York forum selection elevated that boilerplate language to a specific rather than a general condition. In rejecting the contention that the two acts were equal indications of the parties' intent, the court reasoned that "the specific written insertion of 'London' entailed far greater specificity and particularity—and constitutes a far more powerful expression of intent—than striking [the three other subclauses] from boilerplate script."

While the Eleventh Circuit's holding in *Internaves* rests primarily on the contract's conflicts clause, the court's deference to the parties' insertion of particular terms is an important takeaway from the case. As the court noted, it found the parties' written terms "a far more powerful expression of intent" than marking through or selecting from options in general boilerplate. It is unclear whether that deference alone, without the presence of a conflicts clause, would have carried the day in *Internaves* and rendered the parties' intent unambiguous. But parties and potential parties to similar agreements should take heed that courts are likely to give greater weight to what the parties write into the contract over other ways in which they aim to indicate their intent.

The international arbitration and transnational litigation group at Hunton Andrews Kurth will continue closely monitoring related jurisprudence. Please contact us if you have any questions or would like further information regarding this decision.

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