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Review

EDITORIAL

In this edition of the Litigation and Dispute Resolution Review we cover two decisions on important jurisdictional issues for commercial parties operating globally.

First, we cover Mrs Justice Proudman's decision in *Plaza BV v Law Debenture Trust Corp plc* in which the English court considered whether to stay English proceedings on the basis that there was a "third state" (Australian) jurisdiction clause. Central to the analysis was whether the decision of the Court of Justice of the European Union (**CJEU**) in *Owusu* meant that there was no discretion to stay English proceedings commenced against a defendant domiciled in England.

Secondly, we consider the decision of the CJEU concerning a prospectus liability claim brought by an Austrian consumer against an international bank. The CJEU ruled that the courts of the place of domicile of the investor should have jurisdiction, provided that the loss is suffered in a bank account also in that jurisdiction (see **Conflict of laws**).

Finally, a warning for solicitors. A defendant solicitor's late night email stating "*Noted with thanks*" was sufficient for the High Court to find that it had indicated that a binding settlement of complex litigation had been reached between the parties by email. The defendant failed to persuade the court that this email exchange was subject to a long form agreement. As a result, the defendant was bound to a very basic settlement which failed to include an important indemnity against third party claims (see **Settlement**).

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RESOLVING POTENTIALLY INCONSISTENT JURISDICTION AND ARBITRATION PROVISIONS IN COMMERCIAL CONTRACTS

Amtrust Europe Ltd v Trust Risk Group SPA [2014] EWHC 4169 (Comm), 10 December 2014

An alleged conflict between jurisdiction and arbitration clauses was resolved by reference to the purpose and construction of the underlying agreements. This case demonstrates that the presumption that parties intend disputes to be determined in the same forum may be displaced where the competing agreements deal with different subject matters.

Background

The defendant Italian broker placed medical malpractice insurance with the claimant UK insurer. The claimant alleged that the defendant had misappropriated premiums received from insured persons which were to be paid into a trust account for the benefit of the claimant. The claimant sought an injunction requiring the defendant to pay the sums into the trust account.

The parties' relationship was governed in part by a 2010 Terms of Business Agreement (**TOBA**), which was subject to English law and jurisdiction, and a 2011 Framework Agreement, which was governed by Italian law and provided for disputes to be determined by arbitration in Milan.

One matter to be decided was whether the High Court had jurisdiction to grant the injunction, as it was unclear whether the dispute should be settled by arbitration in Milan pursuant to the Framework Agreement, or in the English courts under the TOBA.

The claimant argued that the English court had jurisdiction to grant the injunction sought, because the dispute arose under the TOBA. The TOBA and Framework Agreement dealt with different aspects of the relationship between the parties, and the dispute in question was governed by the TOBA.

The defendant argued that, upon its inception, the Framework Agreement supplanted the TOBA and the parties intended, from then on, for their relationship to be subject to Italian law and arbitration.

Principles for resolving conflicting dispute resolution provisions

The parties agreed on the principles for determining jurisdiction when there is an alleged conflict between jurisdiction and arbitration clauses in different agreements, namely:

- the party seeking to invoke the English court's jurisdiction must show that it has a good arguable case that the English court has jurisdiction (*Canada Trust & ors v Stolzenburg and ors (No 2)* [1997] EWCA Civ 2592);
- a "good arguable case" does not require proof on the balance of probabilities that the court has jurisdiction, because that would require a trial. However, it is a higher test than "whether there is a serious issue to be tried";
- construction of an arbitration clause should start from the assumption that the parties are likely to have intended that any dispute arising out of the relationship into which they have entered be decided by the same tribunal. This is known as the *Fiona Trust* presumption (per *Fiona Trust & Holding Corp & ors v Privalov & ors* [2007] EWCA Civ 20); and
- parties may agree to resolution by different tribunals where, for example, different agreements deal with distinct aspects of their relationship, or where it is convenient to apply a particular dispute resolution regime to some aspect of their relationship.

English court has jurisdiction

Blair J accepted that the *Fiona Trust* presumption carries considerable weight, but can be displaced by a "rational reason" for there being different dispute resolution clauses.

The claimant had shown, to the "good arguable case" standard, that the TOBA continued in force after the Framework Agreement. The Framework Agreement said that, upon termination "The Agreements including the TOBA shall be modified…", suggesting that the TOBA continued in existence, contrary to the defendant's claims that the TOBA had been supplanted by the Framework Agreement.

Blair J held that the TOBA and Framework Agreement dealt with different aspects of the parties' relationship. The TOBA dealt with, for example, the payment of premiums, whereas the Framework Agreement dealt with the parties' exclusive placing arrangement. Different dispute resolution clauses were a "rational" choice in this situation because each agreement dealt with different aspects of the parties' relationship. As a result, the English court had jurisdiction under TOBA to grant the injunction in respect of the trust account as this was a matter that was specifically covered by the TOBA.

COMMENT

This case demonstrates that there are circumstances where parties may rationally enter into a number of agreements with different dispute resolution provisions and that the courts will recognise this when construing the relevant clauses.

When disputes arise in a multi-contract relationship, it is seldom the case that the claims made fall neatly under just one contract. Including a multiplicity of different dispute resolution mechanisms in relevant contracts therefore gives rise to the risk of a multiplicity of proceedings and, potentially, inconsistent outcomes. In most situations, it is advisable to have consistent dispute resolution provisions in suites of contracts between the same parties in order to minimise this risk. It is therefore prudent to check the dispute resolution provisions in related contracts at the drafting stage, to determine whether they are consistent. If they are not, then it is generally sensible to conform them unless there is a cogent, rational and objectively discernible reason why it is appropriate for different mechanisms to apply. If separate mechanisms are included, it is important that they are drafted as clearly as possible to avoid disputes as to which mechanism applies.

The judge in this case did not rely on identifying the "commercial centre" of the relationship in order to determine whether the English courts had jurisdiction, which was the approach applied in *UBS AG v HSH NordBank AG* [2009] 2 Lloyd's Rep 272. However, the judge did cite *UBS* with approval, confirming that the question of which mechanism applies is a matter of construction.

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THIRD STATE JURISDICTION CLAUSE RESPECTED – *OWUSU* CONSIDERED

Plaza BV v Law Debenture Trust Corp plc [2015] EWHC 43 (Ch), 16 January 2015

To what extent, if at all, does the English court have discretion to decline jurisdiction over proceedings commenced on the basis of domicile of the defendant, if the appropriate forum is a third state court? In particular, what if the dispute should be resolved before that third state court pursuant to a jurisdiction clause? The decision of Mrs Justice Proudman in the Chancery Division in this case grapples with these tricky questions, which remain unresolved, ten years after the controversial 2005 decision of the Court of Justice of the European Union (**CJEU**) in *Owusu v Jackson* (C-281/02). Mrs Justice Proudman's decision was given under the old Brussels Regulation and no mention appears to have been made of the new Brussels (Recast) Regulation (applicable to proceedings commenced on or after 10 January 2015).

The defendant (**LDTC**) was a trustee of five subordinated bond issues issued by an Australian group of companies, the Bell Group. All the trust deeds were governed by English law and had non-exclusive English jurisdiction clauses. The claimant (**Plaza**) was a substantial holder and beneficiary of certain bonds.

The backdrop to this action was the collapse of the Bell Group in the early 1990s, when certain companies within the group went into liquidation. There followed almost a decade of litigation in Australia, with the liquidators of the principal companies in the Bell Group commencing proceedings in Western Australia challenging security taken prior to the collapse by groups of banks. In 2013 the main Australian action was settled by a Deed of Settlement (**Deed**). The parties to the Deed included LDTC (as trustee) and, importantly, Plaza. The Deed's principal purpose was to resolve the issues between the Bell group of companies and the defendant banks by disposal of all the proceedings. The banks dropped their claims as creditors in the liquidation and under this Deed the liquidators of certain Bell companies received 1.7 billion Australian dollars. The Deed was governed by the laws of Western Australia and the parties submitted to the exclusive jurisdiction of the courts of Western Australia.

In the English action Plaza sought to restrain LDTC from acting contrary to Plaza's interests in alleged breach of trust and in alleged conflict of interest. Plaza sought injunctive relief restraining LDTC from implementing certain supplemental deeds claiming that all such deeds should be delivered up and LDTC's execution of a previous deed should be annulled.

The question the court first had to address was whether the exclusive Australian jurisdiction clause in the Deed of Settlement was engaged. Secondly, it had to consider what the effect of Article 2[1] of the Brussels Regulation was in the light of *Owusu*. In this matter, the defendant was an English domiciled company.

Scope of jurisdiction clause

The jurisdiction clause in the Deed included a submission to the Australian courts and reference to "any proceedings in connection with the Deed" being resolved by the "courts of Western Australia". The court noted these words should be given a broad and purposive construction (as per *Sebastian Holdings Inc v Deutsche Bank* AG [2010] EWCA Civ 998). Mrs Justice Proudman noted that in reaching a decision the court must consider a wide range of material including all the pleadings and the circumstances directly or indirectly referred to in the pleadings, and that wider assessment exposed the connection between issues in the English proceedings and the Deed.

Although Plaza's claim did not directly reference the Deed, Mrs Justice Proudman concluded that the substance of its claim was that it would be a breach of trust for LDTC to comply with its obligations under the Deed of Settlement. Such a claim was squarely "in connection with this Deed".

Article 2 vs third state jurisdiction clause: *Owusu* considered

On the second issue, Plaza argued that the mandatory effect of Article 2 of the Brussels Regulation meant that, as LDTC was domiciled in England, it must be sued in England. It was submitted by Mr Moss QC for Plaza that *Owusu* has ousted the jurisdiction of the court of any Member State to stay its proceedings on *forum non conveniens* grounds and that, moreover, exclusive jurisdiction clauses and the principle of *lis abibi pendens* are no more than constituent factors in the wider principle of *forum non conveniens*. Plaza argued that, notwithstanding the exclusive Australian jurisdiction clause and the fact that there were other proceedings on foot in Australia, the Brussels Regulation positively required Plaza to bring proceedings in England to obtain a remedy for alleged breaches of trust by an English domiciled trustee.

Mrs Justice Proudman rejected these submissions. Her Ladyship held that Article 23(1) should be given "reflexive" effect[2] and the English proceedings stayed on the basis that there was an exclusive Australian jurisdiction clause.

In the course of the judgment, Mrs Justice Proudman analysed various English authorities that had considered *Owusu* and whether the English court was excluded from enforcing exclusive jurisdiction clauses in favour of third state courts (*Konkola Copper Mines plc v Coramin Ltd* [2005] EWHC 898 (Comm), *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3146 (Ch) and *Ferrexpo v Gilson Investments*) [2012] EWHC 721 Comm). Mrs Justice Proudman referred in particular to the comments of Lawrence Collins LJ (as he then was) in *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 303; [2008] 2 Lloyd's Rep 128, who referenced the rules concerning Member State jurisdiction clauses in the Brussels Regulation, and noted that it would be "odd" if this regime did not permit the English court to stay its proceedings where there was a jurisdiction clause in favour of the courts of a non Member State (eg a New York jurisdiction clause) and proceedings had been brought in England in breach of that contract.

Mrs Justice Proudman concluded that she agreed with Norris J in *Winnetka* and Lawrence Collins LJ's observations in *Masri*. Her Ladyship stated that "the parties' autonomy to choose the forum in which to settle their disputes is an important one which exists in European law, as well as national law, as can be seen from Article 23(1) itself. The court should not lightly override that principle".

Mrs Justice Proudman rejected the suggestion that to respect the Australian jurisdiction clause was contrary to the ECJ's decision in *Owusu*, noting that "Article 23(1) is a mandatory exception to Article 2, unlike *forum non conveniens*. In my judgment, *Owusu* does not bar a reflexive application of Article 23(1). A mandatory exception to a rule does not have the same potential to undermine legal certainty as a discretionary exception".

Related actions pending in a third state

The court also considered whether Article 28 of the Brussels Regulation should be given "reflexive" effect. In other words, does the English court have discretion to stay proceedings on grounds that another court is already seised of a dispute which is so closely connected to the proceedings that there is a risk of irreconcilable judgments. The court considered various decisions touching on this issue: *Catalyst Investments Group Ltd v Lewinsohn* [2009] EWHC 1964 (Ch); [2010] Ch 218 and *Skype Technologies SA & anr v Joltid and Kasesalu & ors* [2009] EWHC 2783 (Ch), (*Mittal v Mittal* [2003] EWCA Civ 1255). The court also considered case law on Article 28, itself, including the Supreme Court's decision in *The Alexandros T* [2013] UKSC 70.

Adopting a "broad and common sense" approach, the court concluded that the Australian court was seised of related issues. The court noted that the Brussels Regulation did not say that Member State courts had lost their discretionary powers to stay proceedings where a non-Member (third) State court has been first seised of as issue. Indeed, not only did the CJEU in *Owusu* not rule out a stay of proceedings on the basis of *lis alibi pendens*, at 47-52 the court noted it expressly declined to answer that question.

Ultimately Mrs Justice Proudman left the issue open, concluding that "it may be open to apply Article 28 reflexively". The court observed that the question of the nature of *lis alibi pendens* (whether it is merely a constituent factor of *forum non conveniens* and, if so, the effect of *Owusu*) is one that merited full argument. As a result, the court rested it decision on the exclusive Australian jurisdiction clause.

Finally, the court considered whether it was open to it under its inherent power or under CPR rule 3.1(2)(f) to stay proceedings. The court considered *Reichhold Norward ASA v Goldman Sachs International* [1999] 1 All ER (Comm) 40 where the Court of Appeal (confirming Moore Bick J's first instance decision) held that a case management stay may be granted in "rare and compelling circumstances" where there were concurrent proceedings on foot. The court concluded that if it had not ordered a stay by virtue of the reflexive application of Article 23, it would have ordered a case management stay.

The trust documents contained a non-exclusive jurisdiction clause but the court concluded that Article 23(4) (concerning jurisdiction clauses in trust documents) was not applicable in the present case. The court also rejected Plaza's argument that Article 5(6) might be relevant to the application.

COMMENT

This decision addresses an issue that has troubled many in the private international law field, namely, the extent to which the Brussels Regulation (as applied, specifically, by the CJEU in its ruling in *Owusu*) allows a Member State court where it has jurisdiction under the Regulation, to exercise a discretion to stay its proceedings in favour of a third state court, on the basis that the parties have agreed that disputes should be referred to the courts of that third state.
Mrs Justice Proudman very clearly concludes the court does retain such a discretion and that Article 23(1) should be given "reflexive" effect. This decision provides some welcome clarification to this area (although a decision of the CJEU would be needed to provide certainty of the position under European law).

There is however a further potential complication. It has been argued by some that the new international *lis pendens rules* introduced by the Recast Regulation (new Article 33 and 34) may restrict the basis upon which a Member State court might stay proceedings brought before it. By way of reminder, while sweeping away the requirement regarding the domicile of the parties, Article 25 (jurisdiction clauses) remains confined to jurisdiction clauses that designate a Member State court. The new international *lis pendens* rules provide Member State courts with a statutory discretion to stay proceedings before them (on the basis of domicile and certain other grounds), where there are already related proceedings pending before a third state court (and provided other requirements are satisfied). It has been suggested that this new international *lis pendens* rule might constitute a comprehensive or exhaustive regime under which Member State courts might stay proceedings in favour of third state courts. In other words, even if parties have agreed to have their disputes resolved before, say, the New York courts, if the test in Article 33/34 is not satisfied (for example, because proceedings had not been first commenced in New York) then Member State courts would have no discretion to stay proceedings brought before them, albeit in breach of contract. Interestingly, although this decision was handed down on 16 January 2015, there is apparently no discussion of the position under the Recast Regulation (applicable to proceedings issued on or after 15 January 2015).

Although based on the old Brussels Regulation, Mrs Justice Proudman's decision does provide some comfort that a third state jurisdiction clause would be respected by the English courts (at least). Going forward it is thought that the EU's ratification of the Hague Convention[3] may also provide greater certainty in this area: signatory states agree to respect exclusive jurisdiction agreements in favour of the courts of other signatory dates. However, to date, only Mexico has ratified this Convention.

For all these reasons, the *Owusu* debate looks likely to rumble on.

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[1] Article 2 (now Article 4 of the Recast) is the default rule to sue in the courts of the place of the defendant's domicile.

[2] Although the subject of some debate broadly "reflexive" effect is where Member State courts give effect to provisions of the Brussels regime by analogy, as though non Member States were Member States.

[3] Hague Convention on Choice of Court Agreements of 30 June 2015.

CJEU RULES ON JURISDICTION IN PROSPECTUS LIABILITY CLAIM

Request for Preliminary Ruling: *Kolassa v Barclays Bank plc* [2015] EUECJ C-375/13, 28 January 2015

The Court of Justice of the European Union (Fourth Chamber) has ruled on jurisdiction in a prospectus liability claim, concerning index certificates issued by a UK bank, and purchased by an Austrian investor (consumer) via a professional intermediary. The court ruled that under Article 5(3) Brussels Regulation[1] (now Article 7(2) Brussels Recast) the "place where the harmful event occurred" includes where an investor suffers loss. The CJEU held that the court at the place where the investor is domiciled has jurisdiction, on the basis of where the loss occurred, particularly when the loss occurred in the investor's bank account in that jurisdiction.

A UK bank (**Bank**) issued index certificates and sold them to institutional investors, including DAB Bank AG, which has its seat in Munich. The institutional investors sold them on to consumers.

DAB Bank AG transferred the index certificates to its subsidiary in Austria, direktanlage.at AG, which sold them on to private individuals, including the claimant, Mr Kolassa, domiciled in Austria, who invested EUR 69,000.

In accordance with its General Terms and Conditions of Business, direktanlage.at AG fulfilled Mr Kolassa's order "in securities account", meaning that it held, as covering assets, all its customers' certificates in its own name at Munich, on behalf of the client in question.

The certificates were in bearer form. The amount repayable and, therefore, the value of the certificates are governed by an index made up of a portfolio of several target funds, so that the value of the certificates is directly indexed on this portfolio. The investment failed and the value of the certificates is currently estimated to be EUR 0.

At the time of the issue of the certificates Barclays distributed a base prospectus dated 22 September 2005, which was distributed in Austria too. The certificates were issued in 2006. Repayment is due in 2016. The transacting clearing house for this purchase was a company with its seat in Frankfurt-am-Main. This is also where the "global note" was deposited.

Mr Kolassa sought to recover damages from the Bank before the Austrian court (Handelsgericht Wien) in which he asserted contractual rights and claims in tort or delict (alleging irregularities in the prospectus and failures of control, in breach in particular of the Austrian Law on Capital markets and the Law on Investment Funds). The Bank refuted all the allegations and also challenged jurisdiction. It is the Bank's challenge to the jurisdiction of the Austrian courts that formed the basis of this CJEU ruling.

Article 5(3) – place where harmful event occurred or may occur

The CJEU ruled that the Austrian court has jurisdiction in this dispute, as Austria was the place that Mr Kolassa had suffered his loss. Under Article 5(3) of the then Brussels Regulation (now Article 7(2) of the Recast Brussels Regulation), in tortious or delictual claims, the courts of the place where the harmful event occurred or may occur, have jurisdiction. This is intended to cover both the place where the damage occurred and the place of the event giving rise to it.

Where had the damage/loss occurred?

The CJEU ruled that the damage occurred where Mr Kolassa suffered it. "*The courts of the place where an applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts*".

According to the CJEU, this interpretation of Article 5(3) enabled an applicant to identify easily the court in which he may sue and the defendant to foresee in which court he may be sued. An issuer, when deciding to distribute a prospectus in other Member States, must "*anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss*".

The court stated that it would not have been sufficient for Mr Kolassa to have simply shown that he suffered financial consequences in Austria (as his place of domicile) if both the events causing loss and the loss itself occurred in another Member State.

Where was the place giving rise to the damage?

The CJEU commented that the "place giving rise to the damage" was not Austria, as the alleged breach by the Bank of its legal obligations had not taken place there – there was no evidence to show that any decisions concerning the content of the prospectus, or arrangements for the investments, or drafting of the prospectus, had taken place in Austria.

Article 5(1) – matters relating to contract

The CJEU found that the Austrian court did not have jurisdiction under Article 5(1) (matters relating to a contract). While Article 5(1) did not require the conclusion of a contract directly between Mr Kolassa and the Bank, it did require that as a matter of EU law (not national law) there was a legal obligation freely consented to by the Bank towards Mr Kolassa. This is because the jurisdiction of the national court under Article 5(1) depends upon the "place of performance of the obligation in question". No such obligation existed in this case, even if, as the court recognised, under the national law applicable, the Bank has certain obligations towards Mr Kolassa.

Article 15 – consumer claims

The fact that Mr Kolassa had purchased the investment via a professional intermediary precluded the operation of Article 15, which applies to consumer claims. Article 15 must be interpreted strictly and it requires the consumer to have concluded a contract directly with the defendant – this requirement is not satisfied when there is a chain of contracts through which the rights and obligations of the defendant in question are transferred to the consumer. An applicant who, as a consumer, has acquired certain rights which relate to a bearer bond from a third party professional (here, the Austrian bank), without a contract having been concluded between that consumer and the issuer of the bond (which it is for the national court to verify), may not invoke jurisdiction under Article 15 against the issuer in an action based on the bond conditions, prospectus liability and breach of information and control obligations.

Finally the CJEU ruled that, for the purpose of determining jurisdiction under the 2001 Brussels Regulation, it is not necessary to conduct a comprehensive taking of evidence in relation to disputed facts that are relevant both to the question of jurisdiction and to the existence of the claim. It is, however, possible for the court seised to examine its jurisdiction in the light of all the information available to it, including the allegations made by the defendant.

COMMENT

A CJEU ruling concerning a document which is so commonly used by finance parties will always attract attention. The CJEU has concluded that a bank having its seat in the United Kingdom may be sued in respect of liability in tort/delict in Austria as the place of domicile of an investor who acquired certificates, in particular when that loss itself occurred directly in the applicant's bank account in Austria.

Interestingly, the CJEU disagreed with the Advocate General's Opinion[2] (albeit reaching the same end result), which found that the "place where the harmful event occurred" must be interpreted as encompassing the place where the bond holder is domiciled, if the publication of the prospectus in the Member State in which the holder is domiciled gives rise to financial damage. The CJEU judgment is unclear on the issue of prospectus distribution – it definitely states that the prospectus was distributed in Austria, but then later states that the harmful event did not happen there as the prospectus was not originally distributed there. The Advocate General, however, found that it was the publication of the prospectus in Austria that would be determinative.

The AG's opinion is more in line with English case law. For example, *McGraw Hill International (UK) Ltd v Deutsche Apotheker Und Arztebank EG* [2014] EWHC 2436 was a mis-selling claim by investors who bought Constant Proportion Debt Obligations (**CPDOs**) arranged by the then ABN Amro Bank NV, and rated by Standard & Poor's (**S&P**). Cooke J ruled that the English court could not take jurisdiction in a claim against S&P under Article 5.3. In this case there was no contention that the damage occurred in England, so the focus was on the place of the event giving rise to the damage. S&P argued, unsuccessfully, that this was England because the origin of the alleged defective credit rating lay in London and in the creation of the marketing material there and that, therefore, this was where the mis-statements originated. Cooke J rejected this argument, finding instead that, in relation to the allegedly misleading written materials, the place where the harmful event occurred for the purposes of Article 5.3 was the place where the materials were delivered and received, not the place where they originated. This was in each investor's country of domicile, not England.

Jurisdiction clauses in a prospectus and bonds terms and conditions are of course not going to help in this type of situation, where there is no contractual nexus between the claimant and the bank.

The case highlights the risk of issuers facing a legal challenge by an investor in a court other than that which has been selected in the contractual documentation. Where a prospectus liability claim is brought can affect its outcome. Despite the harmonisation of content requirements, the Prospectus Directive[3] provides for only limited harmonisation of liability for information included in a prospectus. Responsibility for the contents must be taken at least by the issuer or its board, the offeror, the person requesting admission to trading or the guarantor (Article 6), however, the standard of liability is left to individual Member States to determine. Article 4(1) Rome II Regulation uses the same test of the "place where the damage occurred" in order to determine the applicable law in tortious claims. Recital 7 of the Rome II Regulation provides that the scope and provisions of Rome II should be consistent with, *inter alia*, the old 2001 Brussels Regulation. It seems therefore that the *Kolassa* ruling could also impact on the applicable law applied in non-contractual disputes such as prospectus liability claims, allowing a Member State court where an investor is domiciled (and where the loss was suffered) to apply its own law to a prospectus liability claim.

The European Securities and Markets Association (**ESMA**), at the request of the European Commission, published a report in 2013 comparing liability regimes applied by Member States in relation to the Prospectus Directive.[4] It compares the civil, administrative and government liability, criminal liability and sanctions applied in each regime. ESMA concluded that the diversity of different regimes could, particularly on cross-border transactions, make it difficult for market participants to assess their respective risks and rights in relation to prospectus liability.

It is not surprising that the CJEU ruled that the applicant could not invoke jurisdiction on the basis of Article 15 (consumer claims) or Article 5(1) (matters relating to

contract) given the lack of any contractual nexus between Mr Kolassa and the Bank. It is more noteworthy, however, that the CJEU placed emphasis on the location of the applicant's bank account, rather than focussing solely on domicile. This may be regarded as unwelcome to the extent that it creates further uncertainty over the question of where an issuer may be sued – not only will domicile be relevant but what bearing does the location of any account have, if in a different place? The ruling does not appear to deal with the situation where the investor uses monies from a bank account located in another Member State – would the other Member State's court have jurisdiction in such a scenario? If the answer is yes, this would be problematic from a risk assessment point of view for banks. While it is possible to predict that investors from a Member State where a prospectus is distributed may purchase, it is completely impossible to predict with any certainty from where the investment proceeds will be paid.

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[1] This has been superseded by Regulation (EC) 1215/2012 ("Recast Regulation") which replaced the Brussels Regulation from 10 January 2015. See: http://www.allenovery.com/publications/en-gb/Pages/Brussels-Regulation-recast-an-update.aspx.

[2] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62013CC0375.

[3] Directive 2010/73/EU, amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

[4] http://www.esma.europa.eu/system/files/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf.

Contract

EFFECT OF AGENT'S SURREPTITIOUS DEALING

Tigris International NV v China Southern Airlines Co Ltd & anr [2014] EWCA Civ 1649, 17 December 2014

The Court of Appeal has confirmed, *obiter*, that when a contract is terminated because of a party's surreptitious dealing with the terminating party's agent, it is not void *ab initio* in circumstances where the misconduct occurs during the performance of the contract, rather than at the time that the contract was entered into.

Background – a joint venture to sell aircraft to Iran

The claimant, Tigris International NV (**Tigris**), was a joint venture vehicle set up by Mr Koolhaas and Mr Pakdaman to purchase six aircraft from the defendant, China Southern Airlines (**CSA**), and subsequently sell those aircraft in Iran. Mr Koolhaas was a director of Tigris; Mr Pakdaman was not. Simon J at first instance described the set up as a "delicate commercial transaction": Tigris had no commercial or financial substance, and given that Iran was subject to UN sanctions, Tigris knew that CSA would not be willing to sell aircraft whose ultimate destination was Iran.

Tigris itself had no way of fulfilling its obligations under the aircraft purchase agreements, and so the success of the venture depended on Tigris securing – through Mr Pakdaman's contacts – back-to-back contracts that would fund the deposits and the balance of the purchase price paid for the aircraft by Tigris to CSA. Broadly, it was agreed that Mr Koolhaas would be responsible for the purchase of the aircraft, and Mr Pakdaman would be responsible for sales in Iran. Tigris was represented by Mr Ventner in relation to all technical aspects, in exchange for a percentage of the net profits.

Four days after the parties formally entered into the aircraft sale agreement, Tigris failed to meet certain of its contractual obligations. Mr Koolhaas and Mr Pakdaman fell out "spectacularly". Tigris alleged that Mr Pakdaman, without the knowledge of Tigris or Mr Koolhaas, had entered into a secret agreement with CSA to divert the sale contracts, so that five out of the six aircraft would be sold to another company that was linked to him and Mr Ventner.

Tigris asserted that Mr Pakdaman's surreptitious dealing with CSA amounted to a repudiatory breach of contract, which it purported to accept as termination of the contract. Two weeks later, CSA terminated the aircraft sale agreement on the basis of breaches by Tigris.

Tigris brought proceedings in the High Court claiming return of the deposit it paid under the aircraft sale agreement and damages against CSA. CSA counterclaimed. At first instance, Simon J held that there had not been a repudiatory breach that would entitle Tigris to terminate the contract, and that instead the contract had been rightfully terminated by CSA, whose counterclaim was largely successful. Tigris appealed.

Was there surreptitious dealing?

The Court of Appeal considered whether there had been surreptitious dealing between Mr Pakdaman and CSA. Clarke LJ considered *Panama and South Pacific Telegraph Co v India Gutta Percha Telephone Works Co* [1875] 10 Ch App 515, the leading authority on the situation where a party whose agent has been bribed to enter into a contract may rescind that contract when the bribery is discovered. "Surreptitious dealing" was not defined in *Panama*, but Clarke LJ considered it to mean behaviour which amounted to bribery (not alleged against CSA in this case) and that was regarded as fraudulent and dishonest.

Having reviewed the evidence, Clarke LJ upheld the first instance decision that there was no surreptitious dealing and no secret agreement between Mr Pakdaman and CSA. CSA had not acted in bad faith, rather it had dealt with Mr Pakdaman on the basis that the agreement was with Tigris and that if it was to be transferred from Tigris, Mr Koolhaas would be involved. Therefore, Clarke LJ held that CSA had not acted in a way that amounted to surreptitious dealing and as such there had been no repudiatory breach of contract.

Consequences of surreptitious dealing during the performance of a contract

Clarke LJ considered, obiter, whether, if CSA had repudiated the contract by its conduct, it would nevertheless have been entitled to damages for Tigris' breaches [142–144]. The principle established by *Panama* is that, if the agent is bribed to enter into the contact, the principal may rescind *ab initio*. Clarke LJ summarised the position as follows: "*This line of authorities* […] *establishes* [...] *that the remedies available to the principal of an agent bribed or offered a secret commission by his counterparty include the following. If the agent is bribed to enter into the contract the principal may rescind it ie avoid it ab initio, provided that counter restitution can be made and the right has not been lost eg by delay. This is rescission properly so called – an equitable remedy. If, after the contract has been entered into, the agent is bribed in the course of its performance, the principal may bring it to an end as from the moment of discovery ie for the future. The same applies if the bribery was effected at the time of the contract but for some reason (delay, impossibility of counter restitution, rights of bona fide third parties etc) rescission ab initio is impossible* […] *At law bribery, whether at or after contract, amounts to a repudiatory breach by the bribing party which, on discovery, his counterparty may accept as bringing the contract to an end. Whether that is because bribery is a stand-alone ground for termination, or the obligation to restrain from it an incident or an implied term of every contract is debatable and, for present purposes, does not matter*."

Applying this principle, if Tigris were to have validly accepted a repudiation, it would only be entitled to rescind the contract for the future. As such, Tigris would have had to give credit to CSA for any right to damages that it had accrued before the contract was terminated.

COMMENT

When an agent defrauds its principal in conjunction with the contractual counterparty, both legal and equitable remedies may be available. *Panama* and the cases that have followed have established the principle that if the agent defrauds its principal to enter into a contract, that contract can be rescinded *ab initio*. This decision by Clarke LJ complements this line of authorities by clarifying that, if a contract is terminated by a party because of surreptitious dealing between its agent and the counterparty and during the course of performing the contract, that contract can only be rescinded for the future, meaning that the principal will remain liable to the counterparty for any obligations, for example a right to damages, which have already accrued.

The principles set out in this case in respect of agents' fiduciary duties are likely to be persuasive authority for cases that involve allegations of bribery. In circumstances where a party discovers that a contract has been infected by bribery during the course of its performance, a court may now be more inclined to grant termination for repudiatory breach than to award rescission. However, where restoration is possible (for example, because it is for a straightforward recovery of payments made), the victim of a bribe may be able to rescind and be restored to its pre-contractual position. In such circumstances, the victim of the bribe should take care not to act in a way that would bar rescission, for example by affirming the contract.

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Injunctions

FULL AND FRANK DISCLOSURE OBLIGATION BREACHED BUT INJUNCTION UPHELD

JSC Mezhdunarodniy Promyshlenniy Bank & anr v Sergei Viktorovich Pugachev [2014] EWHC 4336 (Ch), 19 December 2014

Mann J refused to discharge a GBP 1.2 billion worldwide freezing injunction despite finding, *inter alia*, that misrepresentation and non-disclosure had occurred during the original without notice application. Whilst there had been material non-disclosure by the claimants it was not sufficiently serious to warrant the discharge of the freezing order. The inadequacies had to be placed in context. The relevant documents were not deliberately excluded, and even if they had been disclosed the injunction would still have been granted due to the weight of other evidence.

The context of this claim is the collapse of a Russian bank (the first claimant), previously controlled by the defendant. The now-insolvent claimant bank aims to recover its losses from the defendant in Russian insolvency litigation under Article 14 of the Federal Law on Insolvency of Credit Institutions. This article holds liable the person who controlled the now-insolvent institution and caused its insolvency. The defendant argues in the Russian proceedings that the collapse of the bank was politically motivated, and exacerbated by security being sold at an undervalue, aided by the second claimant, which is a state-owned Russian company. The defendant relies, *inter alia*, on independent valuations from BDO of certain shares that it had held. The matter came before the English court because of the claimant bank's application for a worldwide freezing order against the defendant.

The worldwide freezing order was obtained in support of these proceedings by way of a without notice application, supported by a lengthy witness statement from the claimants' English solicitor.

Application for discharge of the Worldwide Freezing Order

The defendant brought an application seeking an order that the freezing injunction be discharged for, *inter alia*, misrepresentation and non-disclosure during the original without notice application. Other grounds were also pursued, which are not covered in this article.

The complaints raised by the defendant in this respect were that: (i) the lengthy witness statement submitted by the claimants' solicitor contained a lot of hearsay evidence and did not identify the sources of this hearsay evidence; and (ii) the claimants had failed to draw the judge's attention to key documents, such as the BDO Valuation.

Hearsay evidence

The defendant argued that given the draconian nature of a freezing order, particularly one with a high ceiling of GBP 1.2 billion as in this case, its grant should not be based on evidence which relies on hearsay evidence and does not identify the source(s) of that hearsay evidence. The defendant complained that the requirement to identify sources was an important protection as otherwise there is the danger of a generalised impression being given that may smear the defendant. After considering the examples put forward by the defendant, Mann J held that whilst there were indeed technical failings in the witness statement in this respect, the level of research and detail that had gone into the witness statement did not invalidate its contents. Further, Mann J held that deficiencies in the written evidence could be taken into account by the weight placed on that evidence.

Non-disclosure

The defendant alleged the claimants had failed at the *ex parte* hearing to disclose, amongst other issues, the BDO

Valuation and/or to draw the judge's attention to the merits of the Russian proceedings. The defendant alleged that these were material-non disclosures on their own but that the non-disclosure also meant that the political motivations (as alleged by the defendant) were also not bought to the court's attention.

Mann J held that the claimants should have disclosed these documents and issues at the *ex parte* hearing. The claimants should have acknowledged that Russian state bodies have a reputation and that, whilst the allegations of political motivation were denied by the claimants, they had to recognise that this reputation exists and could infect these proceedings. The claimants were under an obligation to approach their disclosure obligations with this in mind. Mann J also found that the BDO Valuation ought to have been disclosed as it had a significant relevance to one of the key issues in dispute (an alleged sale at an undervalue of pledged shares).

Mann J emphasised an applicant's obligation to anticipate defences that may be raised and to make full and frank disclosure of those anticipated defences is very important, and "*a fundamental requirement, and safeguard*". Whilst the disclosure obligation did not require every possible defence to be raised, those which were obvious or arguable had to be.

Having found that there had been material non-disclosure on the part of the claimants, Mann J noted that some were more serious than others and so have to be placed in context. The relevant documents were not deliberately excluded. Even if the documents and information in question had been disclosed, the injunction would still have been granted due to the weight of other evidence. The omission of the documents in question did not leave the court with a false impression. Mann J therefore refused to discharge the freezing order on the grounds of non-disclosure.

COMMENT

This case clearly shows that the obligation to give full and frank disclosure of all relevant documents and information at a without notice application is a fundamental obligation that the courts take seriously. Parties must take a pragmatic approach to the issue of full and frank disclosure, as the courts will not look favourably on purely technical points being raised. The non-disclosure has to be of a material nature such that it would call into question whether the order would have been granted had the obligation been properly adhered to. Further, it is clear that the obligation of full and frank disclosure is not limited to disclosure of documents, but that the applicants must also draw the judge's attention to the anticipated defences that might be raised.

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Service

COMMERCIAL COURT CLARIFIES TEST FOR RETROSPECTIVE ALTERNATIVE SERVICE OF CLAIM FORM

Michael Norcross v Chrislos Georgallides [2014] EWHC 4530 (Comm), 4 July 2014

The Commercial Court has clarified the test that will be applied by a court when determining whether to grant retrospective alternative service of a claim form under CPR 6.15(2). This judgment emphasises that the key question for a court to ask when considering whether to grant such an order is whether there is a good reason for treating the delivery of the claim form by an alternative method or to an alternative place as good service.

CPR 6.15(2): Order for retrospective alternative service

Under CPR 6.15(2) a court may order that "*steps already taken to bring the claim form to the attention of the defendant*" by an alternative method or at an alternative place constitutes good service. In *Abela & ors v Baadarani* [2013] UKSC 44, the Supreme Court held that when deciding whether to grant an order under CPR 6.15(2), a court "*should simply ask itself whether in all the circumstances of the particular case there is a good reason to make the order sought*" given that the purpose of serving proceedings is to bring the proceedings to the attention of the defendant.

Facts

The claimant had served the claim form at an address that it believed, in good faith, was the defendant's address for service. However, this turned out not to be the case. The defendant nonetheless became aware of the proceedings and successfully applied to set aside service of the claim form.

The claimant applied to the court for an order for retrospective alternative service under CPR 6.15(2).

Order for retrospective alternative service granted

The court made an order for retrospective alternative service under CPR 6.15(2). Although the claim form had been served at the wrong address, the Commercial Court took into account the fact that:

- it had come to the attention of the defendant and its advisers that the claimant had attempted to serve a claim form on it well before the time limit for service had expired; and
- the proceedings were not time-barred when the claimant made its application for an order for retrospective alternative service.

As a result, the Commercial Court concluded that granting the order would not cause any prejudice to the defendant.

In coming to its decision, the Commercial Court applied the reasoning set out in *Abela* (see above) where it was held by the Supreme Court that the defendant's awareness of the proceedings was a critical (but not decisive) factor in determining whether to grant an order for retrospective alternative service. In addition, in this case the Commercial Court held that the claimant had acted in good faith in serving the claim form (as it reasonably believed (albeit mistakenly) that it had served the claim form on the defendant's address for service) and that it would not be in the overall interests of justice to require the claimant to institute fresh proceedings.

What if an application for an order for retrospective alternative service is made out of time?

The Court of Appeal has recently granted permission to appeal in a separate case, *Kaki v National Private Air Transport Co & anr* [2014] EWHC 1947 (Comm), which also concerns the availability of an order for retrospective

alternative service under CPR 6.15(2). In this case, the claimant had applied to the court for an order for retrospective alternative service nine months after the deadline for service of the claim form had expired.

The Court of Appeal gave permission for the defendant to appeal an order for retrospective alternative service that had been granted at first instance. In particular, Briggs LJ was persuaded that the test applied in *Abela* could be distinguished given that the claimant in this case had applied for an order for retrospective alternative service after the time limit for service had expired.

In addition, the defendant argued that it would be prejudiced if an order for retrospective alternative service was granted as it would appear to validate an otherwise easily challengeable order for summary judgment which the claimant had obtained in the meantime. In granting permission to appeal, Briggs J stated that it would be helpful for the Court of Appeal to consider whether the consequences of an order for retrospective alternative service are effective on the date that the order is made, or the date when the relevant steps were taken by the claimant to try and effect service of the claim form.

COMMENT

The Commercial Court's decision in *Norcross* emphasises that the key question for a court to ask when considering whether to grant an order for retrospective alternative service under CPR 6.15(2) is whether there is a good reason for treating the delivery of the claim by an alternative method, or to an alternative place, as good service. In this case, the Commercial Court's decision appears to have turned on the fact that the claimant took reasonable steps in good faith to bring the claim form to the attention of the defendant and that the claimant made its application for an order under CPR 6.15(2) before the time limit for service of the claim form had expired.

However, the permission to appeal that has been granted in Kaki raises an interesting question as to the impact that applying for an order under CPR 6.15(2) after the time limit for service of the claim for had expired will have on a court's willingness to grant such an order. In addition, the comments made by Briggs LJ also mean that it is likely that the Court of Appeal will opine on when the consequences of an order for retrospective alternative service take effect.

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Settlement

INTER-SOLICITOR EMAIL EXCHANGE HELD TO AMOUNT TO A BINDING SETTLEMENT OF A COMPLEX LITIGATION

Raymond Bieber & ors v Teathers Ltd (in liquidation) [2014] EWHC 4205 (Ch), 11 December 2014

"*Noted with thanks*" was sufficient for the High Court to find that the defendant's solicitor had indicated that a binding settlement had been reached between the parties by email. Upon an application by the claimants for a declaration that the parties had reached a binding settlement of their dispute by way of an exchange of emails between their solicitors, the defendant failed to persuade the court that the agreement was subject to a long form agreement being agreed. As a result, the defendant was bound to a settlement which omitted certain key features which it had hoped to include in a formal agreement, including an indemnity by the claimants against third party claims.

The claimants were 220 high net worth individuals who had invested in a series of production partnerships formed by the defendant. The aim of the partnerships was to invest in film and television productions thereby enabling investors to achieve an attractive rate of tax relief on their investment, as well as a commercial return. However, the schemes were failures as a result, in the claimants' view, of the defendant's failure to invest in productions that met the criteria set out in the investment memoranda used to promote the investments, and the claimants commenced proceedings against the defendant in September 2009.

Following the failure of a mediation on 21 May 2014, the parties made a series of offers and counter offers to one another in order to settle the proceedings (the trial of which was due to start on 21 July 2014). On 26 June 2014 (the day the trial bundle should have been lodged, but was not, at court), a further settlement offer was made by the defendant's solicitor (**W**) to the claimants' solicitor (**P**) (the **Final Offer**). The following day, the claimants turned down the Final Offer and P requested that W take instructions from his client. W did not respond with a further offer, noting that his client would incur its next tranche of brief fees in two days and that he did not expect the Final Offer to last beyond that time. The next day (on 29 June 2014), P communicated his clients' acceptance of the Final Offer and stated that he would send round a draft consent order the next morning. The court held that it was at this point that an agreement was concluded unless the discussions had been expressly or impliedly conducted on a subject to formal contract basis. W replied a number of hours later "*Noted, with thanks*" (the **29 June** Exchange). Two days after the claimants sent it the draft consent order, the defendant rejected the draft order and sent a long form settlement agreement to P for the claimants' agreement. Although a number of issues arose from this agreement, what proved irresolvable was the defendant's requirement that the claimants indemnify it in respect of any contribution claims that might be made against it following any of the claimants bringing any claims against third parties in relation to the subject matter of the proceedings being settled. The defendant's concern was not unfounded as one claimant refused to forgo his reserved claim against the independent financial advisor that had promoted the investment to him.

Later the same month, P informed W that the claimants would not agree to the indemnity and that he had instructions to issue an application for a declaration that the parties had reached a binding settlement by way of the 29 June Exchange. In opposing this application, the defendant denied that the 29 June Exchange constituted a binding settlement of the parties' dispute rather, it argued, the exchange was the first stage of a two stage process. At this first stage, no more was agreed than the sum that

the claimants would accept subject to contract or in principle to settle the proceedings. However, this agreement was subject to the parties agreeing the terms of, and entering into, a detailed settlement agreement, the terms of which would be negotiated by the parties during the second stage of the two stage process.

Principles for determining whether a binding agreement has been made

Judge Pelling QC summarised the legal principles applicable to the determination of whether parties have reached a concluded agreement:[1]

- Such a determination is to be made objectively by considering the whole course of the parties' negotiations. Generally, any subjective concerns which a party has regarding the agreement that have not been communicated to the other party are irrelevant to whether an agreement has been reached.
- That the parties intend to enter into a formal agreement which records or even adds to the terms they have agreed is not a barrier to a contract being formed. All that is required is for the parties to have agreed all the terms necessary for there to be an enforceable contract.
- If parties wish to ensure that their contract is concluded only by a formal document, they should expressly stipulate that their negotiations are being conducted "subject to contract". A mutual understanding that negotiations are proceeding "subject to contract" will also suffice, although whether such an understanding exists is a question of fact.

Objective appraisal of parties' conduct

The judge undertook a detailed analysis of the objective material available, consisting of *inter partes* correspondence and an attendance note made by W, regarding the parties' negotiations leading up to, and including, the 29 June Exchange. On the basis of these facts, he concluded that it was plain that the parties had intended by their communications to reach a final and binding agreement. The judge also rejected the alternative argument that, notwithstanding that the parties appeared to have entered into a binding agreement, this agreement was nonetheless subject to contract.

The judge noted that there was no objective material to substantiate the defendant's case that the agreement of the settlement figure in the 29 June Exchange was the first stage of a two stage process. By way of example, the judge considered that W's final response in the 29 June Exchange ("*Noted, with thanks*") was inconsistent with the alleged two stage process: If such a process had been contemplated, W would have stated that, now that the parties had agreed on the settlement sum, it was necessary for the parties to consider other issues before concluding their agreement. W had given no indication to P that any substantive issues remained to be agreed. Regarding the defendant's concerns in relation to third party claims in particular, the judge found that there had never been an attempt by the defendant to reserve its position in relation to such claims. That the defendant had this unexpressed reservation to the parties' agreement was irrelevant to the judge's determination. The defendant's argument that the litigation was too complex to be settled other than on the basis of a careful analysis of all the relevant implications of the settlement, in particular the third party claims issue, also failed to compel the judge.

COMMENT

This case serves as a caution to those engaged in settlement, or indeed any, negotiations to proceed with care, particularly when working under the pressure of a rapidly approaching trial or another immovable deadline. It also highlights a number of practice points that should be kept in mind when conducting settlement discussions with an opposing party.

Of upmost importance in any negotiation is to make express, and keep a careful record, that the negotiation with the other party is being conducted subject to contract, in order to remove the real risk of inadvertently binding yourself, or your client, to an agreement that does not best serve its interests. It is also worthwhile identifying the key points that will "make or break" a settlement at an early stage, in order that these can be flagged to the other side or, at least, your party's position reserved in respect of these points.

Finally, the example in this case of the judge undertaking a thorough factual analysis of the parties' conduct on the basis of both contemporaneous documents and oral

evidence in order to establish whether an agreement had been reached by the parties, provides a useful reminder to litigators of the importance of recording the details of inter-solicitor discussions. For, if the parties' negotiations break down or the terms of the settlement agreement are later disputed, it will be important to have a contemporaneous record of the positions set out by both parties prior to the alleged agreement being reached.

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[1] At paragraph 14 of the judgment.

Global Litigation Survey 2015

The Allen & Overy Global Law Intelligence Unit has produced a new and expanded edition of our Global Litigation Survey. It includes contributions from an additional 25 jurisdictions, including Bahrain, Bangladesh, Cayman Islands, Cuba, Jamaica, Lebanon, Macau, Malawi, Paraguay, Rwanda and Senegal. Existing entries and analysis have also been extensively updated.

The result is an evaluation of the essentials of litigation in 161 jurisdictions. The survey will be of interest to all in house legal teams involved in cross-border transactions. If you would like a copy please contact sarah.garvey@allenovery.com.

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(All events are held in A&O's office at Bishops Square unless otherwise stated)

WHAT'S THE DAMAGE?

Thursday 30 April 2015, 12.30 – 1.30pm

Presented by: Jason Rix, Senior PSL and Rainer Evers, Senior Associate – Litigation

In the first of two seminars we look at the question of contractual damages – the purpose of damages, the types of award the court makes, how the court quantifies the loss, when the assessment is to take place and the rules for recovery.

Registration and buffet lunch will take place from midday; the seminar commences at 12.30pm.

DAMAGES ARE NOT THE ONLY FRUIT

Thursday 21 May 2015, 12.30 – 1.30pm

Presented by: Jason Rix, Senior PSL and Rainer Evers, Senior Associate – Litigation

In the second of two seminars we look at remedies other than damages for contractual disputes such as specific performance, declaratory relief, injunctions and rectification.

Registration and buffet lunch will take place from midday; the seminar commences at 12.30pm.

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