ALLEN & OVERY

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Litigation and Dispute Resolution

Review

EDITORIAL

In this edition of the Litigation Review we cover a decision of the Privy Council about the interpretation of a disputes clause which may impact the approach taken by commercial parties to the drafting of such clauses and even their strategy when any subsequent dispute arises (*Anzen Ltd & ors v Hermes One Ltd* – see **Arbitration**). The clause in question provided that "any party may submit a dispute to arbitration". The Privy Council concluded that this was not a binding agreement to arbitrate.

We also cover cases that look at core aspects of contract law – *Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U.* where the Court of Appeal considered who should take the benefit of favourable mitigation and *C&S Associates UK Ltd v Enterprise Insurance Co plc* where the court considered informal variations to a contract (as well as the interplay between contractual termination provisions and common law termination rights).

The first substantive judgment has been given in the new Financial List, which was established in October 2015 as a joint initiative involving the Chancery Division and the Commercial Court in order to allow claims related to financial markets to be heard by judges with suitable expertise and experience. Mr Justice Knowles handed down the judgment in *GSO Credit – A Partners LP v Barclays Bank plc* [2016] EWHC 146 (Comm), which will be covered in the next edition.

Finally, we have published a series of specialist papers on the legal consequences of Brexit for commercial parties. There are papers on whether English governing law clauses should be amended, whether English jurisdiction clauses should still be included in commercial contracts as well as the impact of Brexit on the Unitary Patents Court. These papers are available on our website.[1] We have specialist teams looking at the many issues that arise in relation to the UK Referendum on EU membership. If you are a client and have any questions in this regard, please do not hesitate to contact us.

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[1] http://www.allenovery.com/news/en-gb/articles/Pages/Brexit.aspx.

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Arbitration

"*MAY*" OR "*SHALL*": WHAT SHOULD BE USED IN AN ARBITRATION CLAUSE?

Anzen Ltd & ors v Hermes One Ltd (BVI) [2016] UKPC 1, 18 January 2016

This Privy Council decision has important implications for the drafting of arbitration clauses. The Privy Council held that an arbitration clause providing that "any party may submit a dispute to arbitration" was not a binding agreement to arbitrate. Instead, (i) in the first instance, either party could commence litigation, but (ii) this was subject to an option, exercisable by either party, to submit the dispute to arbitration, whereupon a binding agreement would come into existence and any litigation would have to be stayed.

The arbitration clause appeared in a shareholders agreement between Anzen Ltd (**Anzen**) and Hermes One Ltd (**Hermes**). It provided that "if a dispute arises out of or relates to this Agreement or its breach… and the dispute cannot be settled within twenty (**20**) business days through negotiation, any party may submit the dispute to binding arbitration" in London by a sole arbitrator under the ICC Rules. The clause contained various other provisions about the conduct of the arbitration. There was no express suggestion in the shareholders agreement that either party was entitled to submit disputes to litigation.

The shareholders agreement was governed by English law, while the case concerned an application for a stay under the Arbitration Ordinance in the British Virgin Islands (**BVI**). It therefore raised issues of both English and BVI law. Nevertheless, even on the BVI law issues, the Privy Council's reasoning is likely to be adopted in future English law cases. Consistent with this, the judgment draws on English and other common law authorities on points of both English and BVI law.

Hermes initiated court proceedings in the BVI. Where there is a binding arbitration agreement, a respondent party is entitled to a stay of court proceedings on the ground that disputes must be submitted to arbitration. The UK Supreme Court has made clear that a party does not have to commence arbitration proceedings in order to obtain a stay in these circumstances, because a binding arbitration agreement is as much an agreement not to submit disputes to the courts as it is a positive agreement to submit them to arbitration (*AES UST-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35).

Anzen duly applied for a stay. It did not commence arbitration proceedings. Hermes argued that Anzen was not entitled to a stay because there was no binding arbitration agreement. Instead, Hermes argued, the arbitration clause contained permissive language (in particular, the word "may"), which only gave Anzen an option to arbitrate, and which did not prevent Hermes from commencing court proceedings. Hermes accepted that Anzen would have exercised that option, and would be entitled to a stay, if it had commenced arbitration proceedings but asserted that, since it had not commenced an arbitration, it was not entitled to a stay. Hermes' argument was successful before the BVI courts.

Potential interpretations

Lord Mance and Lord Clarke jointly gave the Privy Council's decision. The Privy Council considered three possible interpretations of the arbitration clause:

- Analysis I: if either party wishes to have a dispute resolved, it must do so through arbitration.
- Analysis II: either party may submit a dispute to litigation, but the other party has an option of submitting the dispute to arbitration, with the option exercisable by commencing an ICC arbitration (the analysis preferred by the BVI courts).

- Analysis III: either party may submit a dispute to litigation, but the other party has an option of submitting the dispute to arbitration, which is exercisable either by making "an unequivocal request to that effect" and/or by applying for a stay.

"May" v "Shall"

The Privy Council rejected Analysis I. It accepted that a clause providing that disputes "shall" or "should" be submitted to arbitration created a binding agreement to arbitrate disputes and, equally, not to litigate them. It held, by contrast, that "clauses depriving a party of the right to litigate should be expected to be clearly worded", and that "there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision… that 'any party may submit the dispute to binding arbitration'". Accordingly, the clause in this case was not a binding agreement to arbitrate disputes (and not to litigate them). Instead, it allowed either party to commence court proceedings, save that the other party had an option to submit the dispute to arbitration which, once exercised, created a binding arbitration agreement.

The remaining question was how the option to "submit the dispute to binding arbitration" could be exercised (ie whether Analysis II or Analysis III should be preferred). The Privy Council preferred Analysis III, ie that it could be exercised by applying for a stay. The Privy Council's view appears to have been driven by its discomfort with Analysis II, which would have required a party to go to the effort and expense of commencing an arbitration (after engaging in 20 business days of negotiations) even if its sole aim was to prevent the other party from having the dispute heard before the courts.

COMMENT

The short point to be derived from this case is that, in order to have a binding arbitration agreement, mandatory language "shall" or "must" should be used. According to the Privy Council, permissive language "may" creates an option to arbitrate, exercisable by either party. It is only once the option is exercised that a binding arbitration agreement comes into existence.

In a sense, the practical effect of the distinction drawn by the Privy Council between "may" and "shall" could be regarded as slight. Where there is a binding arbitration agreement, and one party commences court proceedings in breach of that agreement, the other party can obtain a stay of those proceedings, even if it has no intention of commencing an arbitration. See the *AES UST-Kamenogorsk* case. Similarly, if the arbitration clause is drafted like the clause in *Anzen v Hermes* with permissive language, and one party commences court proceedings, the other party should still be able to obtain a stay of those proceedings by exercising its 'option' to arbitrate.

However, although most cases with equivalent language in the dispute resolution clause should ultimately end up in arbitration, there could well be practical implications if an "option" to arbitrate has to be exercised. On a general level, the decision creates a risk of unnecessary court proceedings as a prelude to arbitration. Those proceedings could potentially be before any court with competent jurisdiction if, as was the case here, there is no court jurisdiction clause. This generates uncertainty and risk, along with unnecessary expense and delay.

More specifically, the decision has an impact on the rights of the party which does not commence litigation. Where there is a binding arbitration agreement, court proceedings would amount to a breach of the arbitration agreement. This would give rise to a claim for damages for breach of the arbitration agreement relating to (for example) any costs incurred by the innocent party in the court proceedings. Moreover, an anti-suit injunction might be available to restrain the litigating party from continuing court proceedings. By contrast, where there is only an "option" to arbitrate, litigation is permitted until the "option" has been exercised and, therefore, there is no breach of the arbitration agreement until then, and no claim for damages. Since litigation is permitted, an anti-suit injunction may not be available. Instead, the relevant party may be forced to apply for a stay in whichever jurisdiction court proceedings have been commenced.

In view of the potential impact of the drafting distinction drawn by the Privy Council, it is worth reconsidering the merits of the decision. There is some room for debate on this point.

First, the Privy Council did not consider the possibility that the word "may" was used to provide that, after the 20-day negotiation period had expired in relation to a dispute, either party could submit that dispute to a binding process of dispute resolution – which, in this case, had to be arbitration – but was not obliged to do so (if, for example, it wished to continue negotiations). In other words, the Privy Council did not consider that the discretionary language arguably applied to the timing of the submission to arbitration, rather than a choice between arbitration and litigation. The Privy Council apparently considered that the word "must" should have been used if the parties wished to enter into a binding arbitration agreement. However, arguably that would instead have had the effect of requiring the parties to submit the dispute to arbitration immediately after 20 days had expired, even if they wished to continue negotiations.

Secondly, it is not clear that the parties in this case had any intention of allowing each other to submit disputes to the courts. One would expect a commercial agreement like the shareholders agreement to have made provision for court litigation if it were permitted, probably through a jurisdiction clause (just as they included a detailed arbitration clause). Yet the shareholders agreement made no reference at all to court proceedings.

Thirdly, the "option" to arbitrate propounded by the Privy Council is, at best, an imprecise one, with no clear provision as to the timing or manner of its exercise. In particular, it is not clear how long the party, which does not commence litigation, has to exercise the option. Potentially it could require a dispute to be submitted to arbitration even after litigation was well advanced – unless some term were implied into the clause to prevent this. It is uncertain how this issue should be addressed.

How should parties draft their arbitration clauses in light of this decision? It is important to ensure that arbitration clauses contain language making clear that disputes "must" or "shall" be submitted to arbitration, if that is the parties' intention. That may be a matter of checking that "may" does not appear in your model arbitration clauses. However, the drafting may not be that simple. For example (and as suggested above), in cases where parties want to provide for an initial period of negotiations in the event of a dispute, failing which either party may submit the dispute to arbitration, it may be necessary to make clear separately that, where a dispute is submitted to binding dispute resolution, it must be submitted to arbitration as set out in the contract in question.

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Bribery

HISTORIC BRIBERY OF AGENTS OF FOREIGN PRINCIPALS WILL NOT GO UNPUNISHED

R v Ail, GH & RH [2016] EWCA Crim 2, 15 January 2016

Bribery of an agent or official of a foreign body has been a crime in the UK since 1906. Previous uncertainty had led to amendments in 2002 to clarify the foreign scope of bribery offences. However, this decision, in the context of bribes allegedly paid in the transport/power sector, confirms that even prior to 2002 the offence was not restricted to bribing officials of UK public and private bodies. The decision is likely to impact several other pending prosecutions and investigations which the Serious Fraud Office (**SFO**) is currently pursuing.

The question before the Court of Appeal was whether, prior to 2002, it had been an offence in the UK to bribe the agent of a foreign principal or body.

Transport, power and bribes

The underlying criminal case is on-going and therefore subject to reporting restrictions, however it is understood that the SFO is prosecuting an English subsidiary (the **Company**) of a multinational conglomerate that operates in the power generation and transport sector. It is alleged that the Company paid bribes, disguised as "consultancy payments", to agents of foreign organisations in India, Poland and Tunisia. The Chairman and Chief Executive of the Company and the Managing Director of the group's Indian subsidiary stand accused of arranging the payments.

The territorial jurisdiction to try these offences was not in question as the allegedly corrupt payments had come from UK bank accounts, and hence the *actus reus* had occurred in the UK. However, in a preparatory hearing under s7 Criminal Justice Act 1987, His Honour Judge Pegden QC, sitting at the Southwark Crown Court, had ruled that (prior to amendments contained in the Anti-Terrorism, Crime and Security Act 2001 (the **2001 Act**)) the corruption offences under s1 Prevention of Corruption Act 1906 (the **1906 Act**), were limited to the bribing of agents of UK public or private bodies.

This had the effect that those of the allegedly corrupt payments that occurred before 14 February 2002 (when the amendment in the 2001 Act took effect) could not have constituted offences. The SFO appealed this ruling.

The Court of Appeal reversed the first instance ruling as they were satisfied that even prior to the amendments in the 2001 Act it was an offence under s1 1906 Act to corrupt the agent of a foreign principal or body.

Section 1 of the 1906 Act made it an offence to corrupt any "agent" in respect of the affairs of his "principal". It was common ground that there was no direct authority on the point, nor did the Parliamentary proceedings provide any assistance. Hence the court approached the question as a matter of interpreting whether the plain, ordinary and natural meaning of "agent" and "principal" included foreign persons or bodies. The court acknowledged the particular need for legal certainty in criminal matters, albeit a need for "sufficient rather than absolute certainty".

The definition of "agent" and "principal" in the 1906 Act were wide and non-exhaustive: for example an agent "includes any person employed by or acting for another". The court held that the intention of the definitions was to evoke the ordinary meaning of "agent" rather than the narrower technical meaning under the law of agency.

The court noted that, in the context of the expansion of global trade, early 20th century legislators would not have had difficulty in using "agent" and "principal" to include foreign bodies. The terms agent and principal

were neutral as to nationality and location. There was nothing in the 1906 Act to limit or to restrict the offences to UK agents and principals and if Parliament had intended to make such a restriction it would have done so. The court agreed with the view of the Law Commission's 1998 report that the law had covered corruption of foreign agents and principals even before 2002. The 2002 amendments had been made to clarify the legislation.

COMMENT

This is the second time that the Court of Appeal has assessed the scope of the 1906 Act in recent years and broadly found in favour of the SFO. In the first case (*R v J & ors* [2013] EWCA Crim 2287), the court found that the prosecution did not have to prove that the principal did not consent to the bribe (albeit it found that often an offence would not have been committed where the defendant could prove that the principal had in fact so consented).

Here, the Court of Appeal showed again that it is not afraid to take an expansive approach to interpreting the scope of historical offences. This is despite the accepted principles that criminal statutes should be construed narrowly and that the need for certainty in criminal law is paramount. That said, in the context of the extra-territorial reaches of modern anti-corruption regimes it is unsurprising that the court rejected the public policy argument that criminalising the bribery of foreign bodies amounted to illegitimate interference with activity that may be lawful in the affected country.

This decision will give the SFO more teeth in a number of cases currently going through the courts and under investigation. While not nearly as far-reaching as the Bribery Act 2010, the extra-territorial impact of this offence may provide further trouble for suspects and defendants that had previously believed that historic conduct in relation to foreign bodies could not constitute an offence.

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Conflict of laws

"THERE CAN SOMETIMES BE GOOD FORUM SHOPPING"

Re Codere Finance (UK) Ltd [2015] EWHC 3778 (Ch), 17 December 2015

The English High Court sanctioned a scheme of arrangement involving an English company deliberately acquired by a foreign parent to attract the court's jurisdiction, and in doing so considered the application of the Recast Brussels Regulation.

Codere SA (a Spanish company) was the ultimate parent of a group of gaming companies in Latin America, Italy and Spain. The group was materially financed by two series of notes (the **Notes**) issued by a Luxembourg incorporated subsidiary of Codere SA.

The group had approximately EUR 1.5 billion of debt, of which the Notes accounted for the vast majority, and was no longer in a position to meet all of its debts. However, insolvency proceedings may have jeopardised the gaming licences on which the group depended for its underlying business, and so the best restructuring option was an English scheme of arrangement.

Codere SA therefore specifically acquired an English company, Codere Finance (UK) Ltd (the **Company**), to

assume a primary, joint and several obligation in respect of the Notes. The Company then applied to the English court for approval of the scheme of arrangement under Part 26 of the Companies Act 2006.

The proposed restructuring was complex. It included provision for cancellation of the Notes in exchange for shares and other notes; injection of EUR 400 million of new money; reallocation of assets; and interposition of additional companies. Implementation of the scheme was conditional on the grant of an order recognising the scheme and its effects under Chapter 15 of the U.S. Bankruptcy Code.

Ultimately, the scheme was expected to result in noteholders recovering at least 47% of liabilities, as opposed to a potential nil recovery, and the loss of EUR 600 million to scheme creditors. Naturally, the scheme was very well supported by noteholders: over 98% of creditors voted in favour, with the residual 2% reflecting unidentifiable noteholders.

Newey J considered the three usual precursors required to sanction a scheme to be satisfied in the circumstances: the relevant provisions of the Companies Act had been complied with, the voting creditors fairly represented those to be bound by the scheme and acted without coercion of a minority, and the scheme was one that an intelligent and honest person could reasonably approve.

The main issue was the relevance of the measures taken to attract the court's jurisdiction: the group had only recently acquired the Company (around 14 months before judgment, when the consideration of the company's restructuring had commenced some two years prior), and deliberately encumbered it with large liabilities, with a view to obtaining approval of such a scheme in England.

Newey J held that these factors should not stop him from exercising his discretion to sanction the scheme, which otherwise related to an English company with its centre of main interest in England. Rather, he found that "the authorities show that over recent years the English courts have become comfortable with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with this jurisdiction".

Newey J found that neither the Insolvency Regulation or Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Recast Brussels Regulation**) presented an obstacle to making an order in England.

However, interestingly, he did consider, as a matter relevant to the exercise of his discretion from the perspective of the Judgements Regulation, both (a) the connection between the scheme and the English jurisdiction and (b) the likelihood that the scheme would achieve its purpose. He noted that 22% (by value) of scheme creditors were domiciled in England; the scheme was likely to be effective in other relevant jurisdictions (given the Chapter 15 proceedings in the U.S.); and the other connections with England on the part of the group (such as a 2005 intercreditor agreement and other agreements governed by English law and the location of the note trustee and security trustee in London).

As such, the court was satisfied that it was appropriate in the circumstances to exercise its discretion in favour of sanctioning the scheme.

COMMENT

Newey J knew that the Spanish company was clearly forum shopping: the debtors were deliberately seeking to take advantage of the English court's scheme jurisdiction. However, while recognising that forum shopping could be undesirable (such as where a debtor sought to move its centre of main interests to take advantage of a more favourable bankruptcy scheme), in the present case, the purpose of the forum shopping was to achieve the best possible outcome for creditors: Newey J observed that "there can sometimes be good forum shopping".

From a practice perspective, it demonstrates that even where the applicant company is incorporated in England, the court may under the Recast Brussels Regulation consider matters usually only relevant in schemes for foreign companies: that is, the connection between the scheme and the English jurisdiction and the likelihood that the scheme would achieve its purpose. It will be important to bear this in mind in the context of scheme documents and applications for approval of such

schemes, particularly in circumstances such as the present which the court appeared to consider amounting to a foreign restructuring.

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WHEN IN ROME: ESCAPING THE DEFAULT RULES ON GOVERNING LAW

Molton Street Capital LLP v Shooters Hill Capital Partners LLP & Odeon Capital Group LLC [2015] EWHC 3419 (Comm), 26 November 2014

Entering into an agreement without specifying its governing law is rarely a good idea. This case confirms that, where no governing law clause is included, escaping the default governing law provisions of the Rome I Regulation will be harder than under the old Rome Convention and contains useful analysis on how to apply the new test. It also highlights the continuing uncertainty surrounding the doctrine of *ex turpi causa* under English law.

The claimant, Molton Street Capital LLP (**Molton**), was a London-based broker-dealer specialising in structured credit products. The second defendant, Odeon Capital LLC (**Odeon**), was a New York-based broker-dealer. Molton sued Odeon and Shooters Hill Capital Partners LLP[1] (**Shooters Hill**) in England for the wrongful cancellation of a contract for sale of junk bonds. Molton claimed the cancellation had affected a chain of transactions and had caused it to fail on a trade to Morgan Stanley. Molton sought damages for loss of profit and an indemnity for any liability owed to Morgan Stanley.

A contract – with no governing law clause

Although Shooters Hill had negotiated the trade, for regulatory capital reasons, it could not conclude the trade and so Odeon had acted as principal. The court examined the relevant correspondence and concluded that a contract had been formed when Molton confirmed the essentials of the trade to Odeon via Bloomberg message. This, combined with the late substitution of Odeon and the absence of an overarching agreement between the parties, meant no choice of governing law had been expressed.

Article 4(1)(a) of the Rome I Regulation (EC No 593/2008) (the **Rome Regulation**) states that, in the absence of the parties expressing a choice, "*a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence*". On this basis, the governing law of the trade would be New York law (which Odeon argued was the case).

Molton sought to rely on Article 4(3) of the Rome Regulation. This so-called '**escape clause**' provides that *"[w]here it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in [Articles 4(1) or (2)], the law of that other country shall apply."*

Clear and decisive connection required to displace default rule

Popplewell J stated that the revised wording of the escape clause under the Rome Regulation had created a more stringent threshold to be satisfied than under the Rome Convention.

The insertion of the word "manifestly" (which did not appear in the Rome Convention) indicated a stricter test. Popplewell J emphasised that, in deciding whether this test was met, the combined weight of the factors connecting a contract to another country "must clearly

and decisively outweigh" the desirable certainty of the default provisions under Article 4(1).

England not a manifestly more connected country

Popplewell J rejected a number of Molton's arguments in favour of English law, namely:

- Odeon had played a relatively insignificant role (only stepping in at the last minute because Shooters Hill could not act as principal);
- the upstream and downstream contracts in the chain of transactions were governed by English law (although Odeon was not aware of this);
- the place of delivery was London; and
- Molton was based in London and regulated by the FCA.

Popplewell J stated that by acting as principal, Odeon had assumed counterparty risk and became subject to regulatory capital requirements – this was not an insignificant role. The proper law of the contracts above and below the disputed contract would not normally be a strong connecting factor (though he noted the case may be different where other contracts in the chain contained express choice of law provisions of which the parties were aware). Finally, that Molton was subject to UK criminal and regulatory regimes did not prevent it also being subject to New York civil law obligations.

Place of delivery of junk bonds

Popplewell J noted that, the question of the place of delivery of the junk bonds was more complex as no paper or electronic certificates changed hands between the parties. Rights in the junk bonds would be transferred by means of the creation and deletion of book entries which reflected beneficial interests in the instruments. These beneficial interests could be held through the Depositary Trust Company (**DTC**) in New York and/or Euroclear in Belgium. The disputed transaction involved the transfer of a beneficial interest from Odeon's DTC participant to Molton's Euroclear participant. "Delivery" was therefore effected by deleting the book entry of Odeon's DTC participant and creating a new entry with Molton's Euroclear participant. Molton argued that because its Euroclear participant was London-based, the final stage of delivery took place in England.

Popplewell J found that it was necessary to examine the substantive rights attaching to the junk bonds, not simply local arrangements. There were considerable factors which indicated New York to be more closely connected. First, the junk bonds were complex residential sub-prime mortgage backed securities which granted rights exercisable against special purpose vehicles incorporated in New York. Contractual performance was to take place in New York (through monthly coupon payments made by DTC on behalf of the issuer). Finally, the purchase price was in USD and was to be paid through New York-based settlement agents.

Taking these factors together, Popplewell J concluded that the applicable law was New York law under Article 4(1) (place of seller's habitual residence). Molton had failed to satisfy the escape clause in Article 4(3).

Claimant's wrongful act prevents recovery?

On a separate note, Odeon raised the defence of *ex turpi causa*. Molton's broker had knowingly given inaccurate information as to the value of the junk bonds. Accordingly, Odeon argued, the doctrine of *ex turpi causa* applied to prevent Molton claiming relief as a result of its wrongful act.

As highlighted in *Jetivia SA v Bilta (UK) Ltd* [2015] 2 WLR 1168, the law relating to the doctrine is in a state of uncertainty. One line of case law suggests that the doctrine may only be raised as a defence where a claimant's pleading relies on facts which disclose the wrongful conduct in question (see *Tinsley v Milligan* [1994] 1 AC 340). A second line of case law suggests that an 'inextricable link' between the wrongful conduct and the claim is sufficient (see *Hounga v Allen* [2014] 4 All ER 595).

In this case, Molton's claim relied simply on pleading the existence (and subsequent breach) of a contract. Molton's claim did not depend on facts arising from its wrongful conduct and therefore would not be precluded by the doctrine of *ex turpi causa* as interpreted under *Tinsley v Milligan*. Contrastingly, were the *Hounga v Allen* line of case law to be applied, the court stated it

would have held that the necessary inextricable link existed so as to preclude Molton's claim.

Ultimately, a disclaimer included on Odeon's communications to the effect that only principals of Odeon could bind the firm meant that Odeon was able to cancel the purported junk bond sale and provided it with a full defence to Molton's claim (applying New York law). As a result, the court did not have to determine which test applied. Nonetheless, the case provides yet another example of the impact the current uncertainty surrounding the doctrine may have on contractual disputes (and highlights the importance of precisely drafting pleadings where wrongful conduct may be at issue).

COMMENT

The judgment offers a useful indication of factors a court will take into account in assessing whether a contract is manifestly more closely connected to a particular country when determining the proper law of that contract. In particular, Popplewell J's detailed analysis of place of delivery provides a helpful focus on how classic choice of law concepts will apply in complex financial markets.

In an earlier case[2], Males J (also sitting in the Commercial Court) had very briefly considered issues relating to applicable law, noting that Article 4(3) created a "high hurdle" for parties to overcome. *Molton Street* confirms this. The ECJ had previously stated that the old Rome Convention's escape clause was intended to provide a certain degree of flexibility in deciding the proper law of a contract.[3] This flexibility has been reduced by the Rome Regulation. However, many parties may view the increased certainty provided by the curtailed escape clause as desirable.

The court, applying New York law, was clear in this case that parties should be bound "from the moment unequivocal acceptance of a firm bid or offer is made". The completion of a trade ticket – while an important step in evidencing and processing a trade – should not be mistaken for the point of agreement where the essential terms have already been concluded. A disclaimer on a trade ticket alone may therefore come too late where traders can (in theory) have formed the basis of a contract by Bloomberg message, email, phone or "any other oral or written form".

Parties concerned by the choice of law that the default rules under Article 4(1) would otherwise impose would do well to expressly document their preferred choice of law. The facts of the case serve as a caution to parties that, in the absence of agreed terms of business or framework agreements, the fundamentals of a contract for sale can be agreed without expressing which law is to govern. If this occurs, escaping from the application of the Rome Regulation's default rules will be no easy matter.

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1 Shooters Hill played no part in the litigation and the claim in relation to them was compromised.

2 *BNP Paribas SA v Anchorage Capital Europe LLP & ors* [2013] EWHC 3073 (Comm) (11 October 2013).

3 *Intercontainer Interfrigo v Balkeende* [2009] C-133/08.

ENFORCEMENT OF EU MEMBER STATE JUDGMENT

Dr Richard Barry Smith v Xavier Huertas (as administrateur judiciaire et commissaire a l'execution du plan mandataire ad hoc a la procedure to redressement judiciare of Valorum SA) [2015] EWHC 3745 (Comm), 21 December 2015

Enforcement proceedings are not the appropriate avenue for appealing a foreign court judgment on the merits, and recognition and enforcement of an EU Member State judgment can only be refused in exceptional circumstances. The Commercial Court dismissed an application for a declaration that a French court judgment should not be recognised and enforced under Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels Regulation**) on the basis that the judgment was manifestly contrary to public policy. The Court rejected arguments based on actual or apparent bias of the French court and on the basis of alleged lack of procedural fairness. The Court also noted that the matters could and should have been pursued in France and/or before the European Court of Human Rights rather than at the enforcement stage before the English courts.

The applicant (**Dr Smith**) was sentenced by a French court (the Cour d'Appel D'Aix-en-Provence, the **APCA**) for an offence of fraudulent bankruptcy (committed while he was a director of a company subject to court-ordered liquidation receivership) and ordered him to pay a compensatory award to the judgment creditor. The judgment creditor in the French proceedings sought to enforce the APCA's decision against Dr Smith in England. Dr Smith argued that recognition and/or enforcement of the APCA judgment should be denied because it would be manifestly contrary to public policy.

Dr Smith alleged that: (i) the criminal proceedings against him were contrary to the right to a fair trial under Article 6 of the European Convention on Human Rights (**ECHR**) and/or amounted to a breach of natural justice under English law; and/or (ii) the French criminal courts were guilty of actual or apparent bias against him.

Should have raised arguments in appeal court

The court decided that, where the circumstances invoked as being contrary to public policy in England are factors which the court had already considered in the foreign jurisdiction or which could have been raised in that jurisdiction (eg, in an appeal), it was "self-evident that the foreign jurisdiction must be treated as the best place for those arguments to be raised and determined." To do otherwise would be contrary to the spirit of the Brussels Regulation regime for recognition and enforcement of judgments of EU Member States. Thus, the court essentially decided that enforcement proceedings under the Brussels Regulation were not the appropriate forum for making such arguments where Dr Smith could have raised these arguments elsewhere (eg, before the French Cour de Cassation and/or the European Court of Human Rights).

Very high threshold

The court also restated the high threshold for showing that recognition and/or enforcement of an EU Member State judgment would be "manifestly contrary to public policy" under the Brussels Regulation. In order to succeed in resisting enforcement of the APCA judgment on grounds of English public policy, Dr Smith would be required to overcome the strong presumption that the procedures in French courts, another EU Member State, are compliant with Article 6 of the ECHR. To meet this high threshold, Dr Smith would not only have to show "an exceptional case of an infringement of a fundamental principle constituting a manifest breach of a rule of law regarded as essential" in English law or of a right recognised in England as being "fundamental", but also prove that "the system of legal remedies in France did not afford a sufficient guarantee of his rights." The Court concluded that there was no manifest violation of public policy because the French legal system provided

enough protections for Dr Smith's right to defend himself, and that matters raised by Dr Smith could and properly should have been pursued in France and/or before the ECtHR rather than raising the point at the enforcement stage only.

The Court ruled that judgment would be entered for the judgment creditor against Dr Smith, and a declaration would be made that the APCA judgment was recognised and enforceable in the English courts.

COMMENT

This judgment confirms the approach taken by English courts in recognition and enforcement proceedings relating to foreign judgments from other Member State courts.

Specifically, this judgment confirms the very high threshold that must be met for enforcement of an EU Member State judgment to be refused by the English courts under the Brussels Regulation. This Regulation has recently been updated (recast) by the new Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Recast Brussels Regulation**) which applies to proceedings instituted on or after 10 January 2015. Thus, judgments rendered by courts of other EU Member States may be enforced in the UK under the 2001 Brussels Regulation or under the Recast Brussels Regulation, depending on the date on which the enforcement proceedings are commenced. The new regime introduced a simplified procedure for enforcement and recognition of judgments, but the exceptional grounds for refusing enforcement and recognition (Article 45 of the Recast Regulation) remain very similar to those under the Brussels Regulation (Article 34). In practice, therefore, the English courts will continue to apply the same high threshold for finding violations of public policy as restated in *Smith v Huertas*.)

The judgment also reminds us that parties should carefully consider any domestic remedies available for challenging a decision of a court in that country. If these avenues are not exercised, enforcement proceedings cannot provide a substitute for a review on the merits in the original jurisdiction.

As to judgments rendered by courts of a non-EU Member State, the relevant enforcement regime for those judgments will differ. For example:

- enforcement of judgments rendered by courts in (broadly) other Commonwealth jurisdictions is subject to a specific statutory regime pursuant to various bilateral arrangements; and
- there are several bilateral and multilateral conventions providing for mutual recognition and enforcement of judgments from certain jurisdictions (eg, the 2007 Lugano Convention would apply to the enforcement of judgments rendered by Icelandic, Norwegian or Swiss courts in England; the Hague Convention on Choice of Court Agreements (which came into force on 1 October 2015) may apply, eg, to enforcement of Mexican judgments by the English courts). It is anticipated that the Hague Convention will be ratified in further jurisdictions in due course.

Absent a special enforcement regime, English common law rules will apply. In fact, the decision is in line with another judgment rendered on the same day, *Superior Composite Structures LLC v Parrish* [2015] EWHC 3688 (QB, Admin), which rejected common law defences raised against enforcement of a U.S. judgment where appeal against the damages award could have been brought in the U.S. courts.

An understanding of the enforcement prospects of any resulting judgment or award is often a fundamental part of any analysis of which dispute resolution clause to include in a contract. Of course arbitral awards are subject to a specialised set of rules for their recognition and enforcement under the New York Convention.

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Contract

INDEMNITY IN SHARE PURCHASE AGREEMENT ONLY COVERED HALF THE LOSS

Capita (Banstead 2011) Ltd v RFIB Group Ltd [2015] EWCA Civ 1310, 21 December 2015

A seller of a company was only partially liable under an indemnity for losses incurred by the purchaser (on behalf of the company) as a result of negligently performed services provided by the company to a client before the transfer date of the shares, the results of which only came to light post-sale. A new negligent (or fraudulent) act by the company, post-sale, was a concurrent cause of the loss suffered from that point. The purchaser was thus unable to claim for losses incurred after the new act. This case is important for its analysis of what is (and what is not) covered by an indemnity in a share purchase agreement. It also highlights how a target's negligent acts, post-sale, can limit or preclude recovery under such an indemnity.

The company was sold by the defendant to the claimant in April 2004. The company (by one of its employees, Mr Le Cras) negligently provided pension services and advice to the Trustees (**Trustees**) of a pension scheme between 2000 and 2007. It had failed to inform the Trustees that their requested amendments to the pension scheme required the Trustees' execution of a formal document. The failures occurred before the sale in April 2004 but their effects continued afterwards. In December 2004 Mr Le Cras represented to the members and Trustees, in a new scheme guidance booklet that the appropriate amendments were in place. The negligence was discovered in December 2007, and the scheme rules were finally amended in July 2008. The Trustees had additional liability to the members of over GBP 4 million owing to the changes not having been made, and sued the company, which settled for just under GBP 4 million.

This appeal relates to the purchaser's claim under the indemnity clause contained in the share purchase agreement.

A continuing breach, reoccurring daily, or one unremedied breach?

In Popplewell J's opinion (and Gloster LJ, dissenting in the Court of Appeal), the failures by the company were a continuing breach of contract because the company had an on-going general retainer and duty to assist in ensuring that the Trustees' instructions were implemented. This continuing breach gave rise to a fresh breach daily both before and after the sale. As the indemnity only covered liabilities arising from services supplied by the Company before the sale, Popplewell J concluded that some of the loss, and thus some of the liability arose after the sale and apportioned the claim 50/50.

The majority of the Court of Appeal (Longmore LJ and Henderson LJ) disagreed with the continuing breach analysis. They regarded the company's failure as a single unremedied breach which occurred before sale. Longmore LJ stated that an unremedied breach of contract is not a continuing contractual obligation (ie one which gives rise to a fresh breach on a daily basis). The features of the continuing retainer were "factually incidental". The provision of advice after a mistake has been made does not mean that an obligation to correct continues to accrue and gives a fresh cause of action every day.

The Court of Appeal concluded that losses occurring both before and after the sale were potentially covered by the indemnity as they stemmed from one, pre-sale, breach.

Concurrent cause of loss precludes recovery

However the employee's alleged negligence or deceit when making new representations in December 2004 (the new scheme booklet which stated that the changes had been made) gave rise to a new cause of action (based on misrepresentation/deceit) which was a concurrent cause of the loss from that point.

Where there are concurrent causes of loss to which an indemnity apparently applies, one of which involves the claimant's negligence and the other which is non-negligent, there can be no recovery because it is not intended that the clause should apply to losses caused by the claimant's negligence (applying *EE Caledonia Ltd v Orbit Value Co Europe* [1994] 1 WLR 221).

The claimant's negligence in this case was that of the company employee (by this stage, the company was owned by the claimant). The indemnity was not intended to protect the claimant against the consequences of its own negligence. Although the court recognised that the claimant was not the employee's employer, there was a "common interest" between the company and the claimant.

In conclusion the indemnity covered the claimant's loss from 2000 until when the guidance booklets were published (December 2004) – apportioned at about 50%.

COMMENT

Understanding the scope of an indemnity in a business or share sale agreement helps with risk assessment, both at the pre-deal stage (by making sure the indemnity covers what it is intended to cover) and during a dispute.

Each case will depend on the drafting of the indemnity in question, but this case shows that any arguments concerning "continuing" breaches as a way of limiting liability under an indemnity are unlikely to be successful.

This case highlights how actions taken by the target post-transfer may affect a purchaser's ability to recover 100% of its loss under an indemnity. Those advising a claimant or defendant will want to look out for any post-sale new act by the target which may constitute what the courts have termed a "concurrent cause of loss". If this new breach is an additional cause of loss, then the indemnity will no longer apply.

The Court of Appeal recently considered another indemnity in *Andrew Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd* [2015] EWCA Civ 839, 30 July 2015, in which an indemnity in a share purchase agreement for the purchase of shares in an insurance broker did not allow the buyer to recover loss due to customer compensation, caused by misselling insurance, in the absence of claims or complaints by customers to the Financial Services Authority (**FSA**). This case also showed how understanding the scope of a proposed indemnity or warranty at the negotiation stage is important for managing risk.

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WHEN MITIGATION LEADS TO A PROFIT, WHO SHOULD BENEFIT?

Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U.) of Spain ("The New Flamenco") [2015] EWCA Civ 1299, 21 December 2015

If, following a breach of contract, the innocent party benefits from its mitigation, then, ordinarily, that benefit will reduce the loss that can be claimed for breach. Shipowners who were forced to sell a vessel early, due to the charterer's breach, received more for the sale than if they had sold when the charter party had ended in the normal course. This unexpected windfall should reduce the loss claimed, the Court of Appeal held. The owners had made a considerable profit from the action they took by way of mitigating what would otherwise have been an undoubted loss. That profit arose from the consequences of the breach and should therefore be brought into account when assessing loss.

Globalia Business Travel S.A.U. (**Globalia**) had chartered a vessel from Fulton Shipping Inc of Panama (**Fulton**), the owners. The term of the original charter was extended by oral agreement. Globalia, disputing that there was an oral agreement, claimed that it was entitled to redeliver the vessel on the original (pre-extension) date. Fulton treated Globalia as being in anticipatory repudiatory breach, accepted the breach as terminating the charter party and sold the vessel since there was no available market to re-charter it. The time of sale corresponded with a market peak which occurred immediately prior to the global financial crisis. The difference between the price that the vessel actually realised and the price which it would have achieved if sold at the end of the contract term (the **benefit**) was greater than the loss of profits claimed by the owners.

Globalia argued that the benefit the owners, Fulton, gained by selling the vessel two years earlier should be taken into account, with the result that it, Globalia, should pay no damages. An arbitral tribunal agreed, and the owners appealed to the High Court. Popplewell J, after undertaking an extensive review of the case law, overturned the tribunal's decision. This was a further appeal to the Court of Appeal.

Mitigation (per McGregor on Damages)

The key principles of mitigation are:

- The claimant must take all reasonable steps to mitigate its loss, or, put another way, the claimant cannot recover for avoidable loss.
- Consequently, the claimant can recover for loss incurred in its reasonable attempts to avoid loss.
- However, the claimant cannot recover for avoided loss.

It was the third principle that was the focus of the debate before the Court of Appeal.

Avoided loss will normally be taken into account

The Court of Appeal held that "if a claimant adopts by way of mitigation a measure which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant."

The court believed that, on a fair reading of the arbitral award, the arbitrator considered that the breach by Globalia was the (or at least an) effective cause of the benefit. As Leggatt J put it in *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), "When the defendant's breach of contract combines with another effective cause to result in loss to the claimant, the loss is recoverable … the same principle must apply to gains."

At first instance, Popplewell J had felt that the benefit should not be taken into account since to do so would be contrary to fairness and justice, as the benefit was the fruit of something the owners, as the innocent party, had done or acquired for their own benefit (and at their own

risk). The Court of Appeal turned this on its head by noting that the owners had made a considerable profit from the action they took by way of mitigating what would otherwise have been an undoubted loss. That profit arose from the consequences of the breach and should therefore, it held, be brought into account.

COMMENT

The decision how to mitigate a loss is very important for an individual or business. This decision makes it clear that extra benefits obtained during mitigation will favour the defaulting party, because they serve to reduce the innocent party's loss. In this case, those benefits were in excess of the loss, so wiped out the innocent party's claim. Of course, to the extent that the benefit exceeds the loss, the "extra" is retained by the innocent party.

This decision should not impact an innocent party's decision about how best to mitigate. When faced with a breach it is always going to be advisable to mitigate loss in the best, and most profitable way, even if it means letting the defaulting party off the hook. Why? Because doing so reduces the risk of an unsuccessful claim for damages (against a possibly insolvent counterparty) and the innocent party may still realise a gain over and above its loss.

This decision will encourage a defaulting party to carefully examine the mitigating steps that have been taken in order to assess whether they were reasonable, and more importantly, what benefits have been obtained.

The test set out by the Court of Appeal is easier to apply than Popplewell J's multifactorial analysis. It also represents a more broad brush approach to the tricky question of whether a benefit that arises in the context of mitigation should be taken into account.

Separately, the Court of Appeal stressed the importance, in appeals from an arbitrator's award, of being particularly respectful of the boundaries between fact and law which the parties, by their choice of tribunal, have created. The Court noted that Fulton, when seeking leave to appeal from the award on a point of law pursuant to s69 of the Arbitration Act 1996 was correctly astute to formulate the question of law that fell to be decided.

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"MANY THANKS MYLES, MUCH APPRECIATED" – LESSONS IN AUDIT RIGHTS, REPUDIATORY BREACH AND INFORMAL VARIATION

C&S Associates UK Ltd v Enterprise Insurance Co plc [2015] EWHC 3757 (Comm), 21 December 2015

In a dispute between an insurer and its claims handler, issues concerning the right to access files and data arose which are common to many outsourcing or data-processing arrangements. It was held that an insurer was not entitled to demand the files, especially as they were being used for the claims handler's business. The court also ruled on termination provisions (the effect of a commonly used "cure" period for breaches on rights to terminate) and whether informal email correspondence could satisfy a contractual requirement that any variation be in writing and signed by or on behalf of the parties (it could).

In July 2012 C&S Associates (**C&S**), a motor insurance claims handler, began providing claims handling services to Enterprise Insurance, a Gibraltar-registered insurer. Initially, all seemed to go well. By January 2014, however, the relationship between the parties had broken down, and Enterprise purportedly terminated the

Claims Management Delegated Authority Agreement (the **Agreement**) governing the provision of services by C&S. C&S started a breach of contract claim in the High Court.

Mr Justice Males was asked to determine a number of preliminary issues prior to full trial, including the following:

Whether C&S was obliged to deliver case files at Enterprise's instruction

It was common ground between the parties that in the competitive environment of motor insurance, effective claims handling is important. Claims handlers negotiate insurance claims to obtain the best result possible for an insurer and, crucially, determine, monitor, and adjust if necessary, the reserving of funds required to cover each claim, in line with any bespoke guidelines issued by the insurer.

Unsurprisingly, therefore, Enterprise had the right under the Agreement to audit the claims handling work of C&S. Such audits were undertaken in 2012, and twice in 2013, and were generally satisfactory. In October 2013, however, the CEO and principal shareholder of Enterprise informed C&S that external solicitors instructed by Enterprise would be conducting a full audit of all active case files held by C&S. C&S held a single copy of each Enterprise case file in physical paper form, which was permissible under the Agreement. C&S was requested to send the files in batches to Enterprise's solicitors, for review and return. C&S was initially compliant, but became concerned as batches of files went unreturned, which caused significant disruption to its processing of claims. At this point, the motive behind Enterprise's request (apparent dissatisfaction with the C&S's service levels) was finally made clear. C&S took the view that the premise of Enterprise's audit was erroneous and, after review of the files that were returned, disagreed with Enterprises' solicitors' analysis that generally claims had been over-reserved. C&S stated that it would not provide any more files, pending a relationship discussion with Enterprise.

Enterprise terminated the Agreement via its solicitors a few days later. Enterprise argued that C&S's refusal to send further files was a repudiatory breach of the Agreement. Males J disagreed. He held that, although the data contained within the files was Enterprise's, the Agreement could not be construed as giving Enterprise the right to demand delivery up of the files. The right of audit was clearly drafted as a right of access only. Further, once files were passed to C&S, C&S had the right to work those files to earn its fee; Enterprise should not be permitted to demand delivery of files if it interfered with this, as it would be contrary to the commercial reality of the arrangement.

Whether pleaded allegations of negligence by C&S were capable of amounting to a repudiatory breach

Males J did not doubt that a number of less material breaches, taken cumulatively, are in theory capable of being repudiatory. In this case, however, the parties had provided contractually for a right to terminate for material breach, subject to a 30-day cure period following written notice of such breach. Males J noted that this provision would aid the interpretation of the sorts of breaches that might be considered by the parties to be repudiatory (or otherwise). This provision would not, however, exclude either party's right to terminate for repudiatory breach by the other, provided that such breach was incapable of remedy. As the Court of Appeal made clear in *Stocznia Gydnia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 95, only express wording demonstrating the parties' clear intention will be sufficient to exclude the common law right to terminate for repudiatory breach. As such, C&S's alleged breaches, if proven at trial, were capable of amounting to repudiatory breach.

Whether the Agreement had been varied by exchange of emails

In September 2013 C&S sought to renegotiate the fees under the Agreement, and to introduce a minimum two-year term to what had previously been a rolling agreement. During September and October 2013, the Finance Director and COO of C&S and the Head of Claims UK of Enterprise exchanged emails negotiating the terms of the proposed new arrangement. This discussion concluded with an email from Enterprise's Head of Claims UK stating "I am pleased to confirm that…we are happy to agree the fees outlined…with a 2 year agreement to take effect from 1 October 2013…

We will in due course submit to a you a revised Claims Administration Service Agreement to include the agreed terms" to which C&S responded "many thanks Myles, much appreciated."

The Agreement required that any variation to the contract be in writing and signed by or on behalf of each party. Despite the relatively informal language and medium, this exchange was nevertheless a binding variation of the Agreement. Males J noted that: (i) from this point Enterprise paid the increased fees without protest; (ii) an electronic message such as an email is still "in writing"; (iii) the relevant emails were signed on behalf of each party, and there was no reason to assume the relevant individuals did not have authority to do so; (iv) the intention to execute subsequently a formal document to confirm this variation did not prevent these emails from varying the contract, given especially that the parties used the language of contract; offer ("we are pleased to confirm") and acceptance ("many thanks Myles"); and (v) any uncertainty arising out of the variation (in particular what was meant by a "2 year agreement") was insufficient to prevent the new agreement from being given effect.

COMMENT

This decision is highly relevant to the day-to-day management of commercial contracts.

In relation to outsourcing and data processing contracts, the data owner should not assume that it will have an unfettered right to demand access to its own information and/or data. If a purported right to access data files were to conflict with the commercial practicalities of the contract as drafted, an English court is likely to also consider the impact on the processor's ability to perform its duties under the contract. Of course, this potential difficulty falls away if the data is in an easily reproducible (eg electronic) form.

Courts will still start from the assumption that neither party intends to abandon any common law remedies for breach. It takes clear wording to exclude any common law remedy and, the more valuable the right in question (eg the right to terminate for a breach that goes to the heart of the contract), the clearer and more express this wording must be. But it appears likely that English courts are likely to closely scrutinise any termination provisions for guidance as to which types of breach the parties considered insufficiently serious to give rise to a right of termination. It is not yet clear whether in some cases this may erode the common law right to terminate.

Finally, parties should be extremely careful in any contractual renegotiation. Informal email correspondence may still be sufficient to vary a contract. Arguing that the informality of the exchange led to too much uncertainty to create a valid contractual state of affairs may fail: provided the purported variation appears objectively to have been intended by the parties and does not lead to a commercially absurd result, it is likely to be held effective by the courts.

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Regulatory

WAS AN INDIVIDUAL "IDENTIFIED" IN A DECISION NOTICE?

Christian Bittar v The Financial Conduct Authority [2015] UKUT 602 (TCC), 10 November 2015

The Upper Tribunal considered a claim by a former employee of a large bank (the **Bank**), Mr Bittar, who argued that he had been prejudicially identified in a decision notice issued by the Financial Conduct Authority (the **FCA**) to the Bank. The Upper Tribunal considered and applied the Court of Appeal's judgment in *FCA v Macris*, finding that Mr Bittar had indeed been identified (even though he was not specifically named). In coming to its conclusion, the Upper Tribunal provided guidance on the Court of Appeal's two-stage test in *Macris*.

Decision Notice against Bank for benchmark manipulation

The FCA gave a decision notice to the Bank on 23 April 2015 (the **Decision Notice**) concerning its attempted manipulation of two benchmark interest rates, namely LIBOR and EURIBOR, and its exercise of improper influence over the submission of those rates. Mr Bittar, who was previously the manager of the Money Markets Derivatives desk at the Bank in London, alleged that the text of the Decision Notice included reasons which identified him (although he was not specifically named), prejudiced him, and which he had no opportunity to contest. Mr Bittar is one of a number of former bank employees who filed challenges in the Upper Tribunal following investigations by the FCA which resulted in notices being issued against the former bank employers.

Protection for third parties

Under s393 Financial Services and Markets Act 2000 (**FSMA**), third parties have certain rights in relation to warning and decision notices. In particular, where a decision notice: (i) identifies a person other than the person to whom the decision notice is given; and (ii) in the opinion of the regulator, is prejudicial to the third party, a copy of the notice must be given to the third party (s393(4) of FSMA).

A copy of the Decision Notice was not given to Mr Bittar as the FCA took the view that the notice did not identify him. Mr Bittar challenged the FCA's conclusion. The Upper Tribunal was left to decide whether the Decision Notice did indeed "identify" Mr Bittar.

Earlier *Macris* decision on identification

In May 2015, the Upper Tribunal found that certain notices issued by the FCA (relating to the "London Whale" trades) "identified" an individual, Mr Macris (the International Chief Investment Officer), under s393 FSMA. Although the notice did not specifically name Mr Macris, it was critical of the management of the Chief Investment Office. The penalty was imposed on JP Morgan by the FCA and related to trading by JP Morgan's Chief Investment Office.

The FCA appealed. The Court of Appeal set out a two stage test (the ***Macris* test**) to assess whether the reasons contained in a decision notice relate to matters which identify a person who is not named in the notice:

- First, whether the relevant statements in a notice said to "identify" the third party, construed in the context of the notice alone (without recourse to external material), refer to someone other than the person to whom the notice was given; and
- Secondly, whether the words used in the notice would lead persons "acquainted" with the third party or who operate in the relevant industry (and therefore have the requisite specialist knowledge of the circumstances) to believe, at the date of the notice, that the third party is prejudicially affected by the matters in the notice.

Against the background of the decision in *Macris*, Mr Bittar argued that market participants who read the Decision Notice and who were familiar with the Bank's foreign exchange or money market derivatives operations would know that the person referred to as "Manager B" was in fact Mr Bittar.

Interpreting the Macris test

For the purposes of the first stage of the test, it was clear that a "person" other than the person to whom the notice was given had been identified – the Decision Notice had referred to a "Manager B".

Information available in the public domain

In interpreting the second stage of the test, the Upper Tribunal decided that it should refer only to information that was in the public domain at the time the notice was published. Importantly, the Upper Tribunal noted that such knowledge did not include knowledge that would be obtained by an extensive investigation of available sources, such as that conducted by an investigative journalist. The test focused on "the knowledge that could reasonably have been expected to have been obtained by well-informed market participants in the relevant area by the time of the publication of the notice". The Upper Tribunal clarified that "market participants" were those working directly in the relevant sector, rather than those commenting upon it from a different perspective. Persons from the relevant sector were deemed to be "relevant readers" by the Upper Tribunal; it was what these "relevant readers" would reasonably know and conclude that was key to the question of whether a third party was "identified", rather than whether it was logically possible to deduce the third party's identity from publicly available material.

Meaning of "acquainted"

The Upper Tribunal decided that persons "acquainted" with the third party or those who work in the same area should not include: (i) those with intimate knowledge of the relevant events (for example, those who participated in the particular transactions); or (ii) those with special personal knowledge (for example, a close friend or someone who sat next to the person at work). However, Mr Bittar's counterparties in other leading banks operating in the same area as well as customers and counterparties of his business unit could be considered "relevant readers".

Each case highly fact dependent

The Upper Tribunal confirmed that the application of the test would be wholly dependent upon the circumstances of each individual case. Having considered the information available in the Decision Notice, the media coverage which had focused on Mr Bittar at the time, and information in other regulatory notices which readers could cross-reference with the media coverage, the Upper Tribunal considered that Mr Bittar had indeed been identified in the Decision Notice.

COMMENT

The guidance provided by the Upper Tribunal will be welcomed by those individuals who continue to pursue claims against the FCA. However, for all practical purposes, the industry awaits the decision of the Supreme Court on the matter in 2016, with permission to appeal the *Macris* decision having been granted to the FCA in November 2015. Indeed, a number of claims brought by former bank employees before the Upper Tribunal have been stayed pending the appeal.

Despite the pause for the Supreme Court, the FCA has needed to be particularly careful when drafting notices, especially those that have received significant public interest. The very same extracts from traders' chatroom messages that provide the FCA with publicity could end up leading to numerous sets of proceedings from individuals who contend that they have been identified. In addition, the FCA will now need to consider whether notices drafted by other global regulatory authorities interact with their own notices in such a manner as to help identify individuals.

The wording of the final notice issued to a different bank on 25 November 2015 in respect of a structured finance transaction is a prime example of the cautious approach now being utilised by the FCA in drafting its notices. The final notice contains only very generic references to senior managers and may form a template for the FCA, at least until the Supreme Court makes its decision.

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Forthcoming client seminars

Client seminars can be viewed online at www.aoseminars.com

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

If you missed "Forum selection – should recent developments change your approach" by Sarah Garvey on 9 September 2015 and/or would like a copy of the slides, please email sarah.garvey@allenovery.com.

RECENT DEVELOPMENTS IN BANKING AND FINANCE LAW SEMINAR

Thursday 17 March 2016 – 12:30pm – 1:30pm

Presented by: Richard Hooley, Consultant

An update on developments in banking and finance law and practice in the last six months

Registration and buffet lunch will take place from midday; the seminar commences at 12:30pm.

We also offer a full range of bespoke seminars in our General Client Seminar Menu, Corporate Client Seminar Menu and Financial Services Client Seminar Menu from which clients can choose a seminar topic of interest which will be delivered by Allen & Overy LLP specialists at a client's premises. If you are a client and have a query in relation to this, please contact Sarah Garvey on +44 20 3088 3710 or sarah.garvey@allenovery.com.

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"A case based on hindsight" – misselling claim rejected: *Thornbridge Ltd v Barclays Bank plc* (Jan/Feb)

Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Sarah Garvey.

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