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Arbitration

DON’T DELAY IF DOUBTING JURISDICTION OF ARBITRATION TRIBUNAL


This case is a salutary reminder of the need for a party to raise a jurisdictional challenge in arbitration quickly. The losing party in this application should have acted urgently – within “a day or two” – on discovering facts that could have given rise to a legitimate challenge. Its failure to do so meant that it lost its right to object.

The claim concerned a 2014 shipbuilding contract (the Contract) between the claimant, Exportadora de Sal SA (Exportadora) – a majority Mexican-state owned entity – as buyer, and Corretaje Maritimo Sud-Americano (CMSA), as designer, builder and seller of a salt barge. Exportadora was to pay CMSA in four instalments. The Contract contained a London seated arbitration clause and was governed by English law.

Exportadora failed to pay the second instalment, so in May 2015, CMSA gave notice to terminate the Contract. CMSA subsequently commenced arbitration proceedings against Exportadora in August 2015. A sole arbitrator, Mr Lionel Persey QC, declared in April 2017 (the Award) that such termination was lawful, leaving Exportadora liable to pay USD 6 million plus contractual interest.

A reluctance to engage with the arbitration

At first, following CMSA’s commencement of arbitration, Exportadora refused to engage and ignored the notice to arbitrate. Almost a year later, in July 2016, Exportadora’s solicitors finally came onto the record, declaring in correspondence that “both liability and quantum (and possibly jurisdiction)” would be contested. A Defence and Counterclaim was submitted in October 2016. No jurisdictional objections were raised.

A parallel regulatory investigation declares the contract to be void

At the same time, the Órgano Interno de Control (the OIC) in Mexico commenced a regulatory investigation into the tendering of the Contract. In England, Baker J remarked that the evidence suggested that this was no coincidence.

That investigation resulted, in November 2016, in a resolution declaring that under Mexican administrative law, the Contract tender process was null and void (and thus, so too was the Contract) (the OIC Resolution). As such, Exportadora was required to declare early termination of the Contract and it did so shortly thereafter.

But the arbitration still goes ahead

The arbitration proceeded, with a hearing on the merits in December 2016. Again, Exportadora did not raise an objection to the tribunal’s jurisdiction.

A very late jurisdiction challenge

It was only after this hearing that Exportadora finally raised a jurisdictional challenge. This was rejected by the arbitrator on the basis of delay, and that Exportadora had taken part, and continued to take part, in the arbitration when it should have been aware of the grounds upon which it had later sought to object to jurisdiction. The arbitrator delivered the Award in April 2017.
Shortly thereafter, Exportadora brought a claim under s67 Arbitration Act 1996 (the AA 1996), seeking a declaration that it did not have proper power to enter into the Contract, or the Arbitration Agreement, because of the OIC Resolution. As a consequence, Exportadora argued, the Award was of no effect.

Retroactive deprivation of authority to contract – a matter for substantive jurisdiction?

Exportadora’s position was somewhat unusual since it argued that the tribunal had jurisdiction at the start of the arbitration, but this was subsequently retroactively removed by the OIC Resolution on the basis this had removed its capacity to contract.

The court observed, however, that even if the Contract was invalid under Mexican law, this was only relevant to the discharge of the Contract, and not to the original capacity to contract. The retroactive deprivation of authority to contract could not, therefore, affect the tribunal’s substantive jurisdiction under the arbitration agreement.

Alternative basis for challenge too late

Secondly, while Baker J had already decided that the OIC Resolution did not affect jurisdiction, he nevertheless considered the parties’ arguments regarding s31 AA 1996 (Objection to substantive jurisdiction of tribunal).

In principle Baker J agreed with Exportadora’s view that the present circumstances fell within the scope of s31(2), which deals with objections raised during the course of the arbitral proceedings, where the tribunal is said to be exceeding its substantive jurisdiction. In the present circumstances, however, Exportadora had failed to raise its jurisdictional objection as soon as possible after the OIC Resolution.

Too late, and no excuse

The judge also ruled that there was no excuse for the lateness of the objection. Section 73(1) AA 1996 bars a late objection unless the party shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with “reasonable diligence” have discovered the grounds for the objection.

On the facts, it was clear that Exportadora knew about the OIC investigation from at least August 2016, and at the latest November 2016 when the OIC Resolution was issued. Despite this, Exportadora participated in the hearing on the merits in December 2016, raising no jurisdictional objections.

Baker J remarked that, following the OIC Resolution, Exportadora should have taken urgent advice and acted “within a working day or two”, regarding the investigation into a potential jurisdiction argument. This is because the context in which the question of reasonable diligence under s67 must be assessed is that, when faced with a legal claim asserted through arbitration, “logically and practically the first question any respondent can fairly be expected to consider and keep under review throughout is whether it accepts the validity of the process”.

COMMENT

This ruling perfectly demonstrates the importance of a party raising a jurisdictional objection as quickly as possible during proceedings. If a party becomes aware of such an objection, or facts that might give rise to an objection, it should act promptly – potentially within a matter of days. It also serves as a reminder, therefore, that parties should not hold such objections in reserve.

The judgment also underscores the sanctity of arbitral awards. The court will not entertain a party looking to circumvent the consequences of an otherwise enforceable contract by invoking s67, particularly where those circumstances arise through “understandable suspicion” and where the objecting party “may be guilty of gamesmanship or worse”.

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Conflict of laws

LIMITS OF NON-EXCLUSIVE JURISDICTION

UCP Plc v Nectrus Ltd [2018] EWHC 380 (Comm), 21 February 2018

A non-exclusive jurisdiction clause in favour of the English courts meant that the English court had no discretion to stay its proceedings or decline jurisdiction pending the outcome of related proceedings in a non-EU Member State court. This ruling shows the limits in the powers of EU Member State courts to stay proceedings under the *lis pendens* provisions in the Brussels Recast (Reg EU No. 1215/2012). Parties using non-exclusive jurisdiction clauses in favour of Member State courts with counterparties based outside the EU therefore still run the risk of parallel proceedings, which can increase costs and uncertainty.

The claimant, an Isle of Man company, and its subsidiary contracted the defendant, a Cypriot company, under an investment management agreement (the **Agreement**) to provide real estate investment advisory services. The Agreement was governed by English law and contained a non-exclusive jurisdiction clause in favour of the English courts. The claimant brought a claim before the English court against the defendant for breach of the Agreement. Related proceedings had already been commenced by the defendant in the Isle of Man.

The defendant sought an order that the English court should not exercise its jurisdiction over the claim or that it should stay the English proceedings pending resolution of proceedings in the Isle of Man.

**Brussels Recast – no discretion to stay**

The case raised issues concerning the interplay between the jurisdiction agreement and *lis pendens* (pending proceedings) provisions of the Brussels Recast in a situation where pending proceedings are on foot in a non-Member State.

Article 25 of the Brussels Recast provides that a Member State court has jurisdiction where it has been so selected in a jurisdiction agreement between the parties (regardless of where they are domiciled) – this includes non-exclusive jurisdiction agreements.

Cockerill J concluded in this case that the English court had jurisdiction under Article 25.

The next question was whether the English court had any discretion to stay its proceedings in favour of the Isle of Man proceedings. The answer was no. The *lis pendens* rules in Articles 33 and 34 of the Brussels Recast, which give a Member State court the power, in certain circumstances, to stay proceedings in favour of competing proceedings already on foot in a non-Member State court, do not apply where the EU Member State court has jurisdiction under Article 25 (ie under a jurisdiction agreement).

Articles 33 and 34 expressly list the circumstances when a Member State court has a discretion to stay proceedings in favour of a non-Member State court, which arise where, for example, the proceedings are brought in the Member State court on the basis of domicile or under special rules for persons domiciled in EU Member States in relation to eg contract and tort disputes. There is however no discretion to stay in cases (such as this one) where the Member State court (here, the English court) has jurisdiction under an Article 25 jurisdiction agreement.

Accordingly, the defendant’s application failed.
Non-exclusive jurisdiction clauses under common law

The judge made interesting *obiter* observations on the position at common law (the common law principles are only relevant when the Brussels Recast does not apply). Cockerill J found that the English court had jurisdiction because of the non-exclusive jurisdiction clause. The defendant had not shown very strong reasons for departing from the usual rule that the parties should be held to their contractual choice and it had failed to establish that the Isle of Man was an available alternative forum that was more appropriate than England for resolution of the dispute.

The judge said that, at common law, where there is a non-exclusive jurisdiction in favour of the English courts the “simple” *Spiliada* jurisdiction test, which requires the court to ask: (i) whether another forum is more appropriate to hear the dispute; and (ii) if so, whether there are any special circumstances requiring the claim to nevertheless be heard in England, was not appropriate. The judge said that although she “would hesitate to say” there is any formal exception to the *Spiliada* principles when considering non-exclusive jurisdiction clauses, she referred to authorities being “thick on the ground” which justified considering a non-exclusive jurisdiction clause as a strong personal connection on the part of both parties and being a strong factor weighing heavily against declining jurisdiction or staying the proceedings.

COMMENT

The *lis pendens* powers at Articles 33 and 34 of the Brussels Recast were added in response to uncertainty as to whether or not Member State courts had any discretion to stay proceedings brought before them where, for example, proceedings were already on-going in a non-Member State. Whilst the new powers have been welcomed for helping to clarify the position in certain cases, they have also been criticised for appearing to be too narrow in scope. This case suggests that the new powers are indeed narrow.

Cockerill J’s finding suggests that the rules do not apply where jurisdiction is based on the parties’ agreement (eg a jurisdiction clause in a contract), even if the parties have agreed non-exclusive jurisdiction, and that in this situation a Member State court does not have discretion to stay proceedings brought before it when proceedings are already on foot before a non-Member State court. Parties using non-exclusive jurisdiction clauses in favour of Member State courts with counterparties based outside the EU therefore still run the risk of parallel proceedings, which can increase costs and uncertainty.

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DUTY OF GOOD FAITH IMPLIED IN COMMERCIAL JOINT VENTURE


The High Court has implied a duty of good faith into an oral joint venture contract. While the generally accepted position is that there is no free-standing duty of good faith in English law, this decision is a reminder that the English courts may imply a duty of good faith into a “relational contract”, in this case a joint venture agreement. In practice, when seen through the lens of Leggatt LJ, a number of the features of joint ventures and long term co-investment could become the basis for one party to raise a defence or counterclaim based on good faith and a restriction on the ability of the other to pursue its own interests in a competitive market environment. This decision will be of interest to parties in long term contracts and joint ventures who are concerned about the scope of their obligations and the considerations which may apply to their performance of and exit from those arrangements.

In 2008, Ioannis Kent (IK), a Greek businessman, and Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan (ST), a member of the Abu Dhabi Royal Family, became equal shareholders in IK’s luxury Greek hotel business. Their joint venture later expanded to include an online travel business. They did not enter into a written agreement at this stage. By April 2012, the business was in considerable financial difficulty and ST had invested additional funds in exchange for equity, increasing his share to 70%. Shortly afterwards, representatives of ST resolved that he should separate his interest from that of IK. On 23 April 2012, IK and ST entered into two agreements: (i) a Framework Agreement to formalise the demerger of the business; and (ii) a promissory note by which IK agreed to pay ST the sum of EUR 5.4 million in annual instalments between 1 November 2013 and 1 November 2018 (the Agreements).

In 2013, ST began English court proceedings claiming payment of just over EUR 15 million under the Agreements. IK denied that he was obliged to make the payments, and also raised a counterclaim alleging, among other things, that ST owed him fiduciary and/or contractual duties, which he had breached. IK alleged that but for ST’s breaches of these duties, he would not have entered into the Agreements. Since the court held that the relationship between the parties did not give rise to fiduciary duties, we focus in this article on the approach to the contractual duty of good faith.

A duty of good faith under English law

There is no general doctrine of good faith in English contract law. A duty of good faith may be implied into certain limited categories of contract by law, for example, contracts of employment and between partners or others who have a fiduciary relationship. For Leggatt LJ, however, “there appears to be a growing recognition that such a duty may readily be implied in a relational contract”.

What is a “relational contract”?

Leggatt LJ used the term in his judgment in Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB) to describe a contract that “may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements”. He noted that this category might include certain joint venture agreements,
alongside franchise agreements and long-term distribution agreements (as was the case in *Yam Seng*).

Leggatt LJ used a similarly broad definition here to refer to contracts in which “the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract”.

**Joint ventures as relational contracts**

Leggatt LJ cites the following features of the dealings between the joint venturers in this case in support of his finding that it was a relational contract:

- the parties “naturally and legitimately expected of each other greater candour and cooperation and greater regard for each other’s interests than ordinary commercial parties dealing with each other at arm’s length”;

- the collaboration was formed and conducted on the basis of a personal friendship and involved “greater mutual trust than is inherent in an ordinary contractual bargain between shareholders in a company”; and

- they were content to proceed informally on the basis of their mutual trust and confidence that they would each pursue the common project in good faith.

Having found that the joint venture contract was a “relational contract”, he concluded that the implication of a duty of good faith in the contract was essential to give effect to the parties’ reasonable expectations and also satisfied the business necessity test. In doing so he does not deal expressly with the stringency of the implied terms test as set out in *Marks & Spencer v BNP Paribas* [http://www.allenovery.com/publications/en-gb/Pages/Test-for-implying-a-term-in-to-a-contract-is-stringent-and-has-not-been-diluted.aspx]).

**Breach of the implied duty of good faith**

In the event, the court limited itself in this case to identifying two forms of “furtive or opportunistic conduct” which were held to be in breach of the obligation. First, it was inconsistent with the duty of good faith for one party to enter into negotiations to sell his interest or part of his interest in the jointly-owned companies to a third party without informing the other party. Second, it would be contrary to the obligation to act in good faith for either party to use his position as a shareholder to obtain a financial benefit for himself at the expense of the other.

**COMMENT**

The opening lines of Leggatt LJ’s judgment appear to foresee its potential relevance, noting that the dispute between the parties in this case was an “all too familiar” story. While it remains to be seen how this first instance decision will be received by fellow judges and commentators (although note that Leggatt LJ is a Court of Appeal judge), it presents two immediate issues for parties involved in longer-term collaborations or joint ventures.

The first derives from the court’s approach to the implication of the duty. The approach in this judgment gives primacy to the concept of a “relational contract”, into which it is essential to imply a duty of good faith. In this case, Leggatt LJ held that the implication of the duty was essential to give effect to the parties’ reasonable expectations and also satisfied the business necessity test. In doing so he does not deal expressly with the stringency of the implied terms test as set out in *Marks & Spencer v BNP Paribas*. Is it really correct to say that without this duty being implied the contract would have lacked commercial or practical coherence? Moreover, Leggatt LJ notes (*obiter*) that failure to satisfy such tests need not be fatal to the implication of a duty of good faith, since such a term can also be implied into the contract as a matter of law “on the basis that the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith” (applying the test of Lord Wilberforce in *Liverpool City Council v Irwin* [1976] AC 239).

The second issue derives from the uncertainty surrounding the scope of the duty itself. While the “bad faith” conduct in this case was arguably a more overt example of concealment in the furtherance of one’s own interests at the expense of those of the joint venture partner, Leggatt LJ himself notes that it is “perhaps
impossible” to spell out an exhaustive description of what the obligation involves in any given case. This presents a challenge for parties engaged in long-term contracts in a competitive business environment where thoughts often need to turn to the exploitation of commercial opportunities and the execution of appropriate exit opportunities.

The decision will likely serve as a useful basis for parties wishing to raise defences and counterclaims based on good faith, though it is also likely that counterarguments will seek to tie the case tightly to its facts. For parties who wish to control the scope of their contractual obligations from the outset, what steps can be taken to limit the likelihood that a duty of good faith is implied? Unfortunately, a joint venture agreement, like a long-term distribution or franchise agreement, is likely to be presented as a paradigm “relational contract”.

However, the court was clearly influenced by the close relationship of trust between the parties and the fact that they had decided not to record the terms of their joint venture in writing. Parties should be sure to record the terms of their arrangement in writing, with thought given to appropriate eventualities in the case of financial difficulty and permissible exit mechanisms in order to preserve flexibility. Implication of terms is more difficult where the parties are legally advised commercial parties operating at arms’ length and where the express terms of the contract contradict the terms sought to be implied.

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Criminal

FAILURE TO PREVENT BRIBERY: GUILTY VERDICT IN FIRST CONTESTED CASE

*R v Skansen Interiors Ltd*, Southwark Crown Court [no citation as unreported]

The first contested case for failure to prevent bribery under s7 Bribery Act 2010 (the *Act*) has resulted in a conviction at trial. Skansen Interiors Ltd (*Skansen*) reported bribery by two employees to the police and was itself charged with the s7 offence. Skansen argued at trial that it had adequate procedures in place to prevent bribery, but a jury found this not to be the case. There are lessons to be learned from this case for all businesses.

Skansen was, until it ceased trading in 2014, a small refurbishment company operating mainly in London. In 2013, it won two tenders for office refurbishment from a company called DTZ, worth GBP 6 million in total. In January 2014, Skansen appointed a new CEO. Skansen’s Managing Director, Stephen Banks, informed the new CEO that following the award of the DTZ contracts to Skansen, GBP 10,000 had been paid to Graham Deakin, a project manager at DTZ. Mr Banks also said that a further GBP 29,000 was due to Mr Deakin on completion of the contracts.

The CEO was concerned that these payments were designed to give Skansen an improper advantage over its rivals in the DTZ tender. He therefore: (i) initiated an internal investigation; and (ii) established an anti-bribery and corruption policy, having identified that none appeared to be in place. When Mr Banks attempted to make the GBP 29,000 payment to Mr Deakin, it was blocked, and at the conclusion of the internal
investigation, both Mr Banks and Skansen’s Commercial Director were dismissed.

**Self-reporting**

Skansen then submitted a suspicious activity report to the National Crime Agency and reported the matter to the police. The company gave extensive assistance to the police during their investigation, including handing over legally privileged material.

At the conclusion of the investigation, Mr Banks and Mr Deakin were charged with and pleaded guilty to offences under s1 and 2 of the Act. Skansen was also charged under s7.

**The “failure to prevent” offence**

Section 7(1) of the Act provides that a company is guilty of an offence of failing to prevent bribery if a person associated with it bribes another person, intending to obtain or retain business or an advantage for the company. It is a defence under s7(2) of the Act, however, if the company had in place adequate procedures designed to prevent people associated with it from undertaking such conduct.

**The “adequate procedures” defence**

Skansen declined to plead guilty to the s7 offence on the grounds that it had adequate procedures in place to prevent bribery. Although its controls were limited, it argued that they were proportionate for a small company operating only in the United Kingdom. There were also clauses in the DTZ contracts prohibiting bribery and providing a termination right in the event that bribery occurred.

The jury did not accept Skansen’s defence and returned a guilty verdict. Given that the company had no assets by this time, the only penalty available was an immediate discharge.

**COMMENT**

The greatest lessons from this case are naturally for smaller companies, especially those reliant on “company values” to establish proper behaviour rather than having in place official anti-bribery and corruption policies and dedicated compliance departments. However, there are lessons too for larger companies, in particular that self-reporting and provision of assistance to investigating authorities may not – if the offence is serious – mean avoiding prosecution. Skansen had hoped to negotiate a deferred prosecution agreement (DPA), but the fact that it had no assets meant that this was not considered an option by the Crown Prosecution Service (CPS) and charges were brought.

A further point of interest is the decision of the CPS to pursue Skansen for the s7 “failure to prevent” offence rather than the direct bribery offence under s1 of the Act (which carries no defence). On the basis of Mr Banks’ guilty plea and his senior role at the company, it would have potentially been open to the CPS to charge Skansen on the basis that the ‘directing mind and will’ of the company had committed the offence. One possible conclusion is that the CPS felt it better to make an example of the company on the basis of its lack of procedures than to pursue it for the s1 offence, which is more fact-dependant and therefore carries fewer lessons for others.

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Disclosure

E-DISCOVERY – HOW TO USE PREDICTIVE CODING

Triumph Controls UK Ltd & anr v Primus International Holding Co & ors [2018] EWHC 176 (TCC), 7 February 2018

The court considered the use of Computer Assisted Review (CAR, also known as ‘predictive coding’) in the disclosure process. The judgment provides useful guidance on how CAR should be used in practice. A party should not act unilaterally to use CAR in the disclosure process as there is a risk that the decision will be carefully scrutinised by the court at a later date, and that a different course may be ordered. Also, if CAR is to be used, even where its use is consensual, a party should ensure that the technology is properly ‘taught’ and that the criteria for determining relevance are consistently applied at this ‘teaching’ stage.

In this USD 65 million share sale breach of warranty claim, involving around 450,000 potentially disclosable documents after keyword searches, the claimant did not mention any intention to use CAR in its Electronic Documents Questionnaire (EDQ) or agree with the defendants that it could be used. The claimant subsequently gave the defendants incomplete or vague information about how CAR had in fact been used. The defendants therefore applied to the court for an order that the claimant undertake a manual review of the documents which had been identified as potentially disclosable but, following the use of CAR and except as part of a very limited sampling exercise, had not been reviewed at all.

**The use of CAR in disclosure – discussion, cooperation and agreement between the parties from the outset is generally required**

The court held that a party should generally not act unilaterally to use CAR in the disclosure process. Discussion, cooperation and agreement between the parties is required from the outset unless there is a very good reason why this should not take place (as per Practice Direction 31B, which deals with the disclosure of electronic documents, and the TeCSA/TECBAR e-disclosure protocol, which is used as a guide in TCC cases involving electronic disclosure).

A failure to cooperate can lead to the court requiring that party to carry out further searches for documents or to repeat other steps which that party has already carried out (following Digicel (St Lucia) Ltd and ors v Cable & Wireless Plc & ors [2008] EWHC 2522 (Ch)).

A party intending to use CAR should therefore raise this with the other side as early as possible to avoid potential misunderstandings and limit the chances that the decision to use it will be carefully scrutinised by the court at a later date, and a different course ordered.

**Detailed information required about how CAR was used if party acts unilaterally**

When a party has acted unilaterally, that party should provide the other side with details about how the CAR was set up and how it was operated. That had not happened in this case, which the judge found to be “unsatisfactory”. He also found it unsatisfactory that the claimants had provided no information to the defendants about precisely how the sampling exercise, which was done following the CAR process to assess the relevance of any documents that the claimants no longer intended to review, had been conducted.
CAR technology must be ‘taught’ properly: best practice involves senior lawyer oversight

A party should ensure that CAR technology, which generally relies on supervised machine learning, has undergone a proper teaching process and that the criteria for relevance are consistently applied at this supervised ‘teaching’ stage. This point had previously been made in the case of Pyrrho Investments Ltd & anr v MWB Property Ltd & ors [2016] EWHC 256 (Ch), where the court had stated that “best practice would be for a single, senior lawyer who has mastered the issues in the case to consider the whole [teaching] sample”.

In this instance, the claimants’ lawyers had involved up to ten paralegals and four associates in the training process and it was not apparent that there had been any senior lawyer overseeing the work. The court noted on this basis that the CAR system may not have been ‘educated’ as well as it might have been, in particular as to the criteria for relevance.

Judge orders manual review

The court ordered the claimants to conduct a manual review of a 25% sample of the 220,000 disputed documents (55,000 in total) within three weeks, with a view to hearing further from the parties at the next scheduled hearing in the matter. The judge considered this to be proportionate in the circumstances, bearing in mind the size of the claim and the trial date being less than six months from the date of the hearing. There was no decision on costs at this stage, although it can be expected that the claimants will be penalised for embarking on a unilateral approach to disclosure.

COMMENT

This case provides litigants with a high-level guide to using CAR, or predictive coding, properly in the disclosure process. There is now more certainty around the use of these technologies and the potential consequences for a failure to follow best practice. This may in turn encourage more parties to make use of CAR in the disclosure process, which could substantially cut the costs involved with this aspect of litigation.

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Evidence

THE INVIOLABILITY OF DIPLOMATIC MISSION DOCUMENTS

R (on the application of Bancoult No. 3) v Secretary of State for Foreign and Commonwealth Affairs [2018] UKSC 3, 8 February 2018

A U.S. Embassy (in London) communication, purportedly recording discussions between the UK Foreign & Commonwealth Office and U.S. officials, was admissible in evidence in English court litigation against the UK government by residents of the Chagos islands. The decision is relevant to anyone involved with litigation in the English courts either against a state or where a third party state’s documents are in issue, as it provides important guidance on when a diplomatic mission’s documents may be admissible in evidence. Here the relevant circumstances justifying admissibility included that the document was already in the public domain (it had been leaked by Wikileaks) and that it was no longer part of the London U.S. Embassy’s archive.

A challenge of the UK government’s decision to create a Marine Protected Area

The underlying dispute in this case concerned the UK’s establishment of a Marine Protected Area (MPA) for the British Indian Overseas Territory (BIOT). The appellant was chair of a group representing the residents of the Chagos Islands in BIOT who had been removed and resettled elsewhere by the UK government between 1971 and 1973. The Secretary of State (SoS) established the MPA in 2010 following public consultation. This prevented fishing in BIOT and led to the end of commercial fishing by Chagossians in the waters around BIOT.

The appellant challenged the SoS’s decision to establish the MPA. The challenge had two limbs before the Supreme Court: (i) the decision to create the MPA had an improper ulterior motive (to make resettlement by the Chagossians impracticable); and (ii) the consultation process was flawed by a failure to disclose the arguable existence of inshore fishing rights held by Mauritius.

Can U.S. Embassy communication be relied on?

A sub-issue within limb (i) concerned the admissibility in evidence of a cable sent by the U.S. Embassy in London on 15 May 2009 to the departments of the U.S. Federal Government in Washington, elements in its military command structure and its Embassy in Port Louis, Mauritius (the Cable). The Cable was published by The Guardian in 2010 and The Telegraph in 2011, apparently having been passed on by Wikileaks. It was claimed that the Cable was a record of conversations between U.S. officials and employees of the UK Foreign and Commonwealth Office (FCO). The appellant claimed that the Cable demonstrated that the SoS had created the MPA with the improper motive of preventing resettlement by the Chagossians.

Invioability of a mission’s documents – a reminder

Certain articles of the Vienna Convention on Diplomatic Relations 1961 (the Convention) form part of English law by virtue of s2(1) Diplomatic Privileges Act 1964. These include articles 24 and 27(2), which provide, respectively, that “[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be”, and “[t]he official correspondence of the mission shall be inviolable”.

Conflicting views at first instance and Court of Appeal

The Administrative Court held that the inviolability of a mission’s documents under the Convention prevented their admission into evidence, and found that the SoS had no improper motive for creating the MPA.
The Court of Appeal held that the Cable should have been admissible but that it would not have made any difference to the Administrative Court’s conclusions on improper motive.

**Supreme Court rules that Cable is admissible**

The Supreme Court unanimously held that the Cable should have been admitted into evidence before the Administrative Court because it had lost its inviolability for all purposes, including its use in cross-examination or evidence in the proceedings.

**Inviolability subject to qualifications**

The Supreme Court held that “inviolability” under the Convention means, amongst other things, that such documents (or copies of them) cannot generally be admitted in evidence, at least in the court of the host state, unless there are extraordinary circumstances (such as state security) or an express waiver from the mission state. There are two important qualifications:

- the documents must constitute, or remain part of, the mission’s archive; and
- their contents must not have been so widely disseminated in the public domain that any confidentiality or inviolability that could sensibly attach to them has been destroyed.

**Cable was no longer part of a mission’s archive**

There was no suggestion that the Cable published by Wikileaks had been leaked from the U.S. Embassy in London. It had most likely come from the U.S. State Department or one of the other foreign locations to which it had been sent. The Supreme Court held by majority that, once the Cable reached the U.S. State Department (or any other location), it was then in the custody of the U.S. Federal Government (or other relevant authority) and was not part of the London U.S. Embassy archive. On that basis alone the Cable had lost its inviolability and was admissible.

Lord Sumption (concurring) emphasised that whether a document belonged to a mission’s archive depended on whether it was under the control of the mission’s personnel, rather than other agents of the sending state (ie the U.S.). Lady Hale (also concurring) considered that a diplomatic communication cannot always lose its inviolability once it leaves the mission. In her view, the concept of “control” emphasised by Lord Sumption should therefore include the restrictions placed by the mission on further transmission and use of the document (such as confidentiality markings). However, in the present case, whatever control had initially been exercised over the Cable was clearly lost (even before it was put into the public domain by Wikileaks).

**Cable was in public domain**

In the Supreme Court’s view, a document can, in principle, lose inviolability where it comes into the public domain, even in circumstances where it was wrongly extracted from the mission. The Cable had been put into the public domain by the Wikileaks publication and news articles, in circumstances where the applicant had no responsibility. As a result, the Cable had lost its inviolability and was also admissible on this basis.

**Improper motive**

The Supreme Court by majority (Lord Kerr and Lady Hale dissenting) upheld the conclusions on improper motive. The appropriate question for the Court of Appeal was whether the admission of the Cable “could” have made a difference to the Administrative Court’s conclusions on improper motive. It had not been shown that the Court of Appeal had erred in concluding that neither cross-examination on the Cable nor the Cable itself would have led to any different outcome.

**Non-disclosure of Mauritian fishing rights**

The Supreme Court also rejected the appeal on the issue of alleged non-disclosure of Mauritian fishing rights. The failure to mention Mauritian fishing rights (which had been established in a 2015 arbitral tribunal award) did not undermine the UK government’s consultation on the MPA so as to justify setting it aside.
COMMENT

There is an increasing amount of litigation involving states and their organs, and also where a third party state’s documents are in issue. This case falls into the latter category and is an example of principles of public international law and procedural aspects of domestic law (here the admissibility of documents into evidence) coming together. The judgment makes clear that the inviolability of a mission’s documents is not absolute: inviolability can be lost where documents no longer form part of a mission’s archive or as a result of dissemination in the public domain (even if extraction from the archive was unlawful). Where a mission wishes to preserve inviolability (including in respect of admission of documents into evidence in proceedings to which it is or is not a party), it should avoid onward transmission to multiple recipients and consider imposing restrictions on any further transmission and use. It goes without saying that dissemination in the public domain should also be avoided, although in practice this will likely be out of a mission’s control.

Privilege

LEGAL ADVICE PRIVILEGE DID NOT PROTECT FACTS ABOUT CLIENT’S ASSETS

Anthony David Kerman v Tatiana Akhmedova [2018] EWCA Civ 307 CA (Civ Div), 27 February 2018

A solicitor could not rely on legal advice privilege to avoid giving evidence about a client’s assets. The decision reinforces the well-established principles and limits of legal advice privilege – it only applies to “legal advice” given by a solicitor to the client, and does not apply to communications between a solicitor and third parties. The decision also refers to the distinction between a solicitor acting as a legal adviser, opposed to as a “man of business”; it is clear that the latter scenario will not attract legal advice privilege.

In this highly publicised divorce case, the husband’s long-term legal adviser, Mr Kerman, was asked about his role in arranging insurance for his client’s highly valuable art collection in order that its location could be ascertained (for financial settlement enforcement purposes). Mr Kerman attended court as requested but refused to answer the questions, on grounds of legal advice privilege. Haddon-Cave J rejected these objections and Mr Kerman appealed.
A reminder on the basic principles of privilege

The overarching principle is that confidential communications between client and solicitor for the purposes of obtaining legal advice are privileged from disclosure, and once the privilege is established it is absolute and permanent. The client is the person entitled to the privilege, and they have the right to decline or allow the disclosure of the communications in question: it is the duty of the solicitor to defend the client's privilege.

Legal advice is not confined to telling the client the law, but includes “advice as to what should prudently and sensibly be done in the relevant legal context”.

Where the lawyer is not wearing “legal spectacles” but, rather, is acting as the client's “[w]oman of business”, there will be no legal advice privilege.

No privilege over facts

The Court of Appeal dismissed the appeal.

The questioning of Mr Kerman had been confined to two topics of fact, namely, the insurance and business arrangements concerning the art collection. Mr Kerman was not being asked to reveal legal advice, dealings with clients or instructions from them or communications with them; accordingly there was no basis for a claim to privilege. It was re-affirmed that communications between a solicitor and a third party (here, a solicitor and insurers) are not covered by legal advice privilege, with the Court of Appeal citing with approval the recent high-profile decision in SFO v ENRC.

Sir James Munby also confirmed that a solicitor cannot refuse to answer questions on grounds of privilege where the client would not be able to do so – not least because privilege belongs to the client, not the lawyer.

COMMENT

Whilst set in a family law context, the issues raised in relation to legal advice privilege are useful reminders to all. The case provides a timely reminder that whilst legal advice privilege is a fundamental principle of justice that allows a solicitor to communicate openly with his/her client; it is clear from this decision that the Court will not entertain attempts to conceal “business” discussions behind the cloak of privilege.

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NO LITIGATION PRIVILEGE FOR CONTROLLER OF LITIGATION UNDER CONDUCT OF CLAIMS CLAUSE

(1) Minera Las Bambas SA (2) MMG Swiss Finance AG v (1) Glencore Queensland Ltd (2) Glencore South America Ltd (3) Glencore International AG, [2018] EWHC 286 (Comm), 21 February 2018

A non-party to proceedings cannot claim litigation privilege, even if it is exercising rights to control litigation under a ‘conduct of claims’ clause in a share purchase agreement. Sellers exercising a right to control a third party claim will need to be aware that any documents generated for that claim are unlikely to be protected by litigation privilege as against the buyer in any separate litigation between the buyer and seller (eg under an indemnity contained in the share purchase agreement).

The claimants (the Buyers) had bought a company (the target), which owned a mining project in Peru, from the defendants (the Sellers) under a share purchase agreement (the SPA).

The Peruvian tax authority (SUNAT) issued a tax assessment against the target, resulting in an increased tax liability. The target then issued proceedings against SUNAT to challenge the tax
assessment (the Peruvian Proceedings). The SPA contained a provision entitling the Sellers to control part of the proceedings against SUNAT (the conduct of claims clause).

The Buyers then sued the Sellers in England claiming under a tax indemnity in the SPA for the increased Peruvian tax liability. In the English proceedings, the Buyers sought disclosure from the Sellers of certain documents relating to the Peruvian tax litigation. The judgment does not give any detail about the documents.

Sellers try to claim litigation privilege

The Sellers asserted litigation privilege over the documents on the basis that they were produced for the dominant purpose of the Peruvian proceedings.

They relied on previous Court of Appeal authority in Guinness Peat Properties Ltd & anr v Fitzroy Robinson Partnership [1987] 1 WLR 1027. The Sellers contended that Guinness Peat was binding authority for the proposition that where a person is “in all but name” a party to proceedings, then that person may assert privilege over documents created for the dominant purpose of such proceedings.

In Guinness Peat, the Court of Appeal had allowed the defendants, a firm of architects to assert litigation privilege in a claim against them by their clients, over a notification of claim sent to the architects’ insurers. The notification expressed the architects’ views as to the merits of the claims against them. The claimants had argued that the dominant purpose test failed, as the firm’s prime purposes in making the notification was to comply with the terms of its insurance policy. However, in allowing the firm to assert litigation privilege, the Court of Appeal had considered the question of purpose from the perspective of the insurer (ie the non-party to the litigation), as the relationship between an insurer and the insured is such that “the insurers will in all but name be the effective defendants to any proceedings”.

The implication of the Sellers’ argument (although not expressly stated) was that, in exercising its rights under the conduct of claims clause, the Sellers were “in all but name” party to the Peruvian Proceedings and therefore entitled to assert litigation privilege over the documents in question.

The Buyers argued that any such privilege belonged to the target, not the Sellers.

Non-party cannot claim privilege

Moulder J rejected the Sellers’ submission. Guinness Peat was concerned with the application of the dominant purpose test; it was not authority for the proposition that a non-party to proceedings can claim litigation privilege arising out of those proceedings.

Moulder J held that the rationale for litigation privilege, namely that a party should be free to seek evidence without being obliged to disclose the results to the other side, did not extend to a non-party. Therefore as the Sellers were not parties to the Peruvian proceedings, they could not claim litigation privilege over the documents as against the Buyers. Moulder J noted that any right to assert litigation privilege over documents arising out of the Peruvian Proceedings belonged to the Buyers.

Joint or Common Interest Privilege

As a result of the above, Moulder J did not find it necessary to address the Buyers’ alternative argument that their joint or common interest in the documents relating to the Peruvian Proceedings meant that the Sellers could not Withhold inspection.

Had the point been discussed in the judgment, the Buyers would have been relying on the Court of Appeal decision in CIA Barca de Panama v George Wimpey & Co [1980] 1 Lloyd’s Rep 598. In that case, CIA Barca de Panama (Barca) and George Wimpey & Co (Wimpey) each owned 50% of a joint venture company (JV). When the JV became subject to claims against it, Barca and Wimpey agreed to provide assistance to each other and the JV. Barca subsequently brought an action against Wimpey for settling claims against the JV without authorisation. Barca subsequently pleaded for the disclosure of privileged material held by Wimpey. The Court of Appeal held that where two parties (A and B) have a common interest in litigation against a third party (C) and subsequently A and B litigate between themselves, neither A nor B can
claim legal professional privilege for documents which came into existence in relation to the earlier litigation against C.

The common interest between the Buyers and Sellers in the current case was not exactly the same as the equal JV partners in CIA Barca, but it was similar. Here, the common interest in the Peruvian Proceedings was a result of the tax indemnity; it was in the economic self-interest of both the Buyers and Sellers to obtain a positive result. This would also have been true of the JV partners in CIA Barca. As the court did not discuss the point, we do not know whether the judge would have accepted the Buyers’ submission.

**COMMENT**

It is common for the purchaser of a target company to receive indemnities from the seller. As a result, it is often in the interest of the seller to be able to influence proceedings against the target where an adverse finding would lead to a significant liability for the purchaser (and, via the indemnity, the seller). The frequent inclusion of conduct of claims clauses in SPAs acknowledges this commercial reality. They are often subject to negotiation over such features as whether the purchaser is in fact obligated to act in accordance with the seller’s views, or whether any indemnity claim is made conditional upon the purchaser acting in compliance with the conduct of claims clause.

The purchaser will seek to make its duties under the clause as flexible as possible, or even argue that the clause is unnecessary given the common law duty for the purchaser to mitigate its losses. The seller, on the other hand, will aim to maximise its control through eg preventing the purchaser from compromising a third party claim and obtaining veto rights over any proposed settlement of a third party claim. The degree of control which a seller has over third party claims can therefore vary widely.

Although a seller’s precise contractual position will vary, this ruling on litigation privilege means that a seller under an SPA will need to be aware that documents (e.g. advice or evidence from third parties) generated during litigation controlled under a conduct of claims clause may end up having to be disclosed to the purchaser in any subsequent, separate litigation under a sale and purchase agreement.

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Service

AN UNUSUAL ORDER FOR ALTERNATIVE SERVICE

*Koza Ltd & anr v Akcil & ors* [2018] EWHC 384 (Ch), 26 February 2018

Circumventing the more traditional methods of service, the English court permitted alternative service of English court proceedings on a Turkish state organ via the London office of a UK law firm which represented certain other co-defendants (but not the state organ itself) on the basis that the co-defendants were closely associated with the state organ. The decision potentially opens up another service option for litigants finding it difficult to serve proceedings on a state party.

The first claimant was an English subsidiary of a large Turkish company (the *Company*). Pending an investigation in Turkey into allegations against the Company group, an organ of the Turkish state (*SDIF*) appointed interim trustees (the *Appointees*) to replace the board of the Company. Disputes arose regarding the management and control of the first claimant, which commenced English proceedings against the Company, *SDIF* and the *Appointees*.

A key issue concerned service on *SDIF*, the state organ. A UK law firm represented the Appointees but not *SDIF*, the state organ.

The English claim form was couriered to *SDIF*’s office in Turkey by way of information. However, formal service had to be effected under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the *Hague Convention*). Turkey is a signatory to the convention, but had limited the means by which service could be effected on Turkish parties to official channels in Turkey, specifically the General Directorate of International Law and Foreign Relations at the Ministry of Justice.

The claimants alleged that the Turkish Ministry of Justice had co-operated with Turkish officials to confiscate the first claimant's funds and so could not be relied upon to effect regular service of English court proceedings on *SDIF* under the Hague Convention. The claimants therefore sought, in the alternative, an English court order that: (i) serving the proceedings on the Appointees via the law firm's London office also amounted to service on *SDIF*; (ii) the delivery of the proceedings to *SDIF*’s offices in Turkey amounted to good alternative service; and (iii) alternative service could be effected by courier or post to *SDIF*’s Turkish offices. This article deals only deals with (i), which is the more unusual form of alternative service requested.

**Test for alternative service in a Hague Service Convention case – “good reason”**

The court found, in the face of conflicting authority, that the test for alternative service under CPR r6.15 in a Hague Convention case is a “good reason”. This does not require exceptional or special circumstances. However, in a Hague Convention case, the more restrictive the relevant state had been in what it regarded as appropriate service, the more cogent the reason would have to be to be a “good reason” for service within r6.15.

In applying the good reason test to the facts, the court held that a delay of five months in service or a deterioration of the political situation in Turkey were insufficient to justify alternative service. However, the claimants’ allegation that the Turkish Ministry of Justice had co-operated with Turkish officials and therefore could not be relied upon to effect regular service under the Hague Convention was deemed significant. In this regard, the court stated that it was not in a position to make any finding as to the validity of the claimants’ allegations of collusion to confiscate property which formed the substance of the dispute in the proceedings.
However there was ample material before the court to show that there were real grounds for concern that regular service under the Hague Convention might never produce service at all or result in a long delay. In particular, the court found that there was obstruction by the Turkish state organs involving service of documents in other contexts and that it was reasonable to infer that the Ministry of Justice would be obstructive in this context as well.

**Alternative service on state organ through co-defendants’ solicitors**

As to the mode of service, the law firm argued that the application for an order that service on the Appointees via the law firm’s London office also amounted to service on SDIF:

- was an unprecedented attempt to serve a party to the proceedings via a law firm which did not act for them; and

- “there is a possibility, at least, of difficulty, to put it in low key and relatively neutral terms, for [the law firm] if they were confronted with that position.”

Whilst noting that there would or might be quite considerable issues for the law firm if they received material intended for service on a non-client, and sought to disregard it, the court made the order. The court acknowledged that SDIF and the Appointees were not the same. It also accepted that the law firm was not in fact in direct contact with SDIF. However the court observed that it was aware that the directors of the Company (ie the Appointees) were in fact appointees of SDIF. Further it was clear that the Appointees had to be able to make contact with SDIF and report back to SDIF.

The court went on to note that while “the firm [sic] could easily be acting on instructions from the individual directors [ie the Appointees] without contacting the SDIF, in the real world the SDIF and these directors are plainly very closely associated, in both legal and practical terms”.

**COMMENT**

The rather unusual order to permit service through solicitors who were not in fact instructed by the state organ raises questions as to whether, and in what circumstances, such orders may be made in future cases. The degree of nexus required to establish a “close connection” here related to the relationship between the appointed directors and the state organ (who had appointed them). It is not hard to imagine other scenarios where a state entity’s involvement with a commercial enterprise at board level could give rise to a similarly close connection.

There are questions as to what obligations, if any, solicitors owe non-clients in circumstances where the solicitors are deemed an alternative medium of service on such non-clients. As to this, in the last paragraph of the decision, the court emphasised that it was not making an order that service on the law firm amounted to service on SDIF. Rather, the order requested was that service on the Appointees (via the law firm) constituted service on SDIF. It is important to be mindful of this distinction.

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