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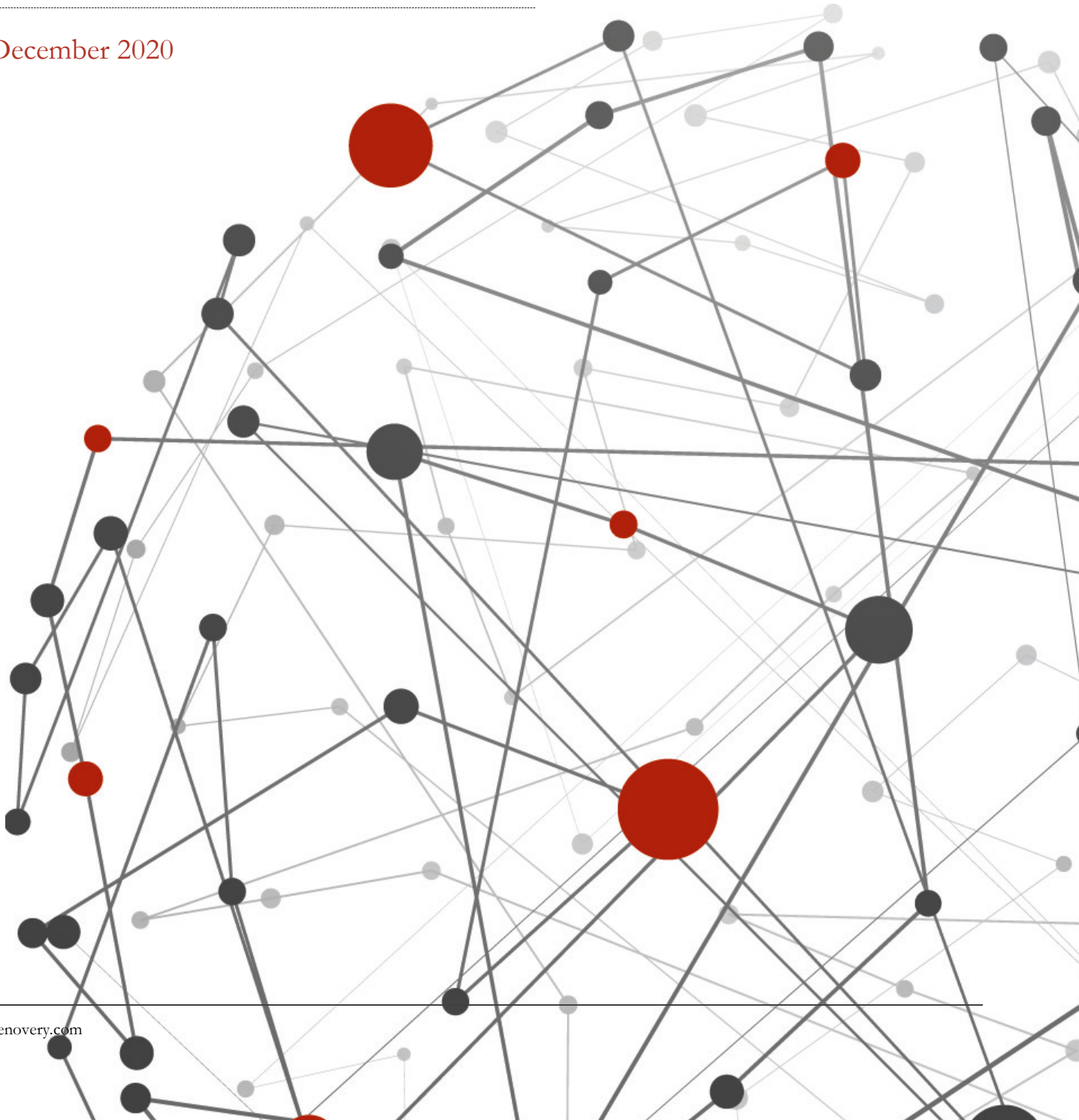

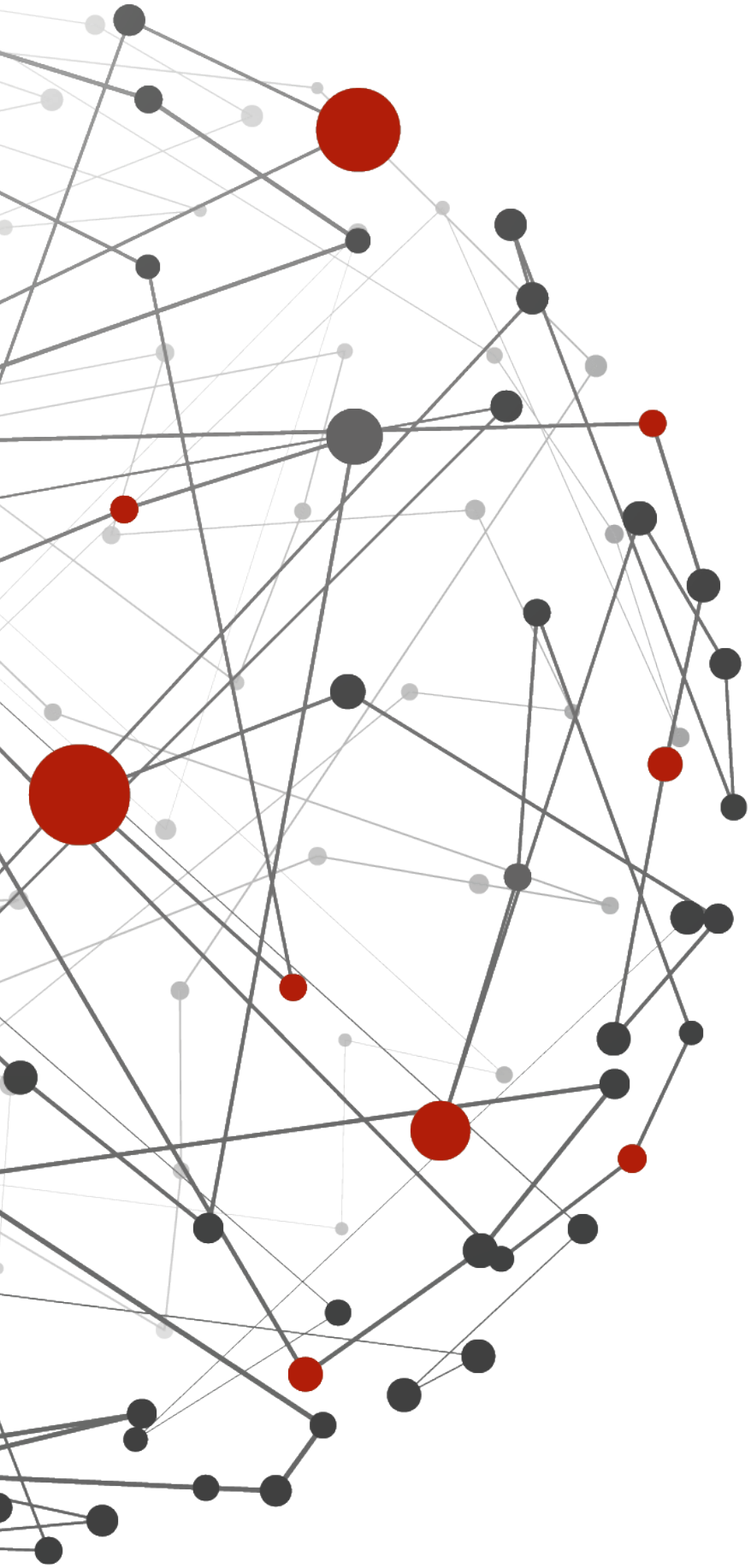

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Arbitration

Governing law of an arbitration agreement: UK Supreme Court ruling brings clarity

Enka Insaat ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, 9 October 2020

The Supreme Court unanimously held that, if the parties have chosen a governing law for a contract containing an arbitration clause, this would usually amount to an express or implied choice of governing law for the arbitration clause too. The majority held that, where there is no express or implied choice of governing law of the contract, the arbitration clause would be governed by the law with which it has the closest and most real connection – usually the law of the seat.

This was an appeal by OOO "Insurance Company Chubb" (**Chubb Russia**) against a decision of the Court of Appeal granting an anti-suit injunction restraining Chubb Russia from pursuing litigation in the Russian courts against Enka Insaat ve Sanayi SA (**Enka**). Enka sought an anti-suit injunction on the basis that Chubb's claim should have been brought in arbitration pursuant to an arbitration agreement in the relevant contract, which provided for London-seated arbitration under the ICC Rules. The High Court refused; however, the Court of Appeal disagreed and granted an anti-suit injunction.

The relevance of the governing law of the arbitration agreement was that, if it was governed by English law, it was common ground that the Russian claims fell within the arbitration agreement. However, if the arbitration clause was governed by Russian law, it was arguable that the Russian claims fell outside it. The Court of Appeal had held that, by choosing the law of the seat, the parties would usually also be making an implied choice of a law to govern the arbitration agreement, even if the law of the main contract was different.

The governing law of the arbitration agreement

The Supreme Court confirmed that the law applicable to an arbitration agreement is the law expressly or impliedly selected by the parties or – in the absence of such a choice – the law most closely connected with the arbitration agreement. This test has not been controversial. However, there has been ongoing uncertainty under English law about how to apply it where there is no express choice of law for an arbitration agreement. In particular, it has been unclear whether, in the absence of such an express choice, the law of the seat or the law of the contract would apply to the arbitration agreement. This judgment settles that uncertainty.

The Court unanimously held that, where the parties have chosen a governing law for their contract, this would generally be construed as a choice of law for the arbitration agreement too, unless there was good reason to conclude otherwise. This means that a governing law clause for the contract would usually be interpreted as applying to the arbitration clause as well. The Supreme Court rejected the Court of Appeal's conclusion that there would be a strong presumption that the parties had impliedly chosen the law of the seat to govern the arbitration clause.

However, the Court was split on what the approach should be if there was no express or implied choice of law to govern the arbitration agreement, ie if there was no governing law clause in the main contract. The majority (Lords Hamblen, Leggatt and Kerr) held that the law with the closest connection to the arbitration agreement was the law of the seat. The minority considered that there was an implied choice of law for the arbitration agreement which matched whatever law was held to apply to the main contract following English law rules for determining the applicable law (Lord Burrows), or that the law with the closest connection to the arbitration agreement was the law of the main contract (Lord Sales).

The decision on the case itself really turned on the applicable law analysis for the main contract. The majority found that the parties had made no express choice of law for the main contract. They held that the arbitration agreement was governed by English law, as the law of the seat, on the basis that this was the law which was most closely connected to the arbitration

clause. The minority considered that the parties had made a choice of Russian law for the main contract and, therefore, for the arbitration agreement.

English seat brings with it the jurisdiction to issue an anti-suit injunction

The Supreme Court confirmed the Court of Appeal's decision to issue an anti-suit injunction. The Court held that, even had the arbitration agreement been governed by Russian law, comity would not prevent the English courts from issuing an anti-suit injunction. It found that deference to a foreign court would give way to the importance of upholding the parties' agreement to specify London as the seat, and preventing a party to an arbitration agreement from litigating in breach of that agreement.

Comment

The Supreme Court's judgment provides clarity in what was an unsettled area of law. It lays down a clear process to follow when identifying the governing law of an arbitration agreement. Nevertheless, the process can be easier to describe than to apply: whether there has been a choice of governing law for the arbitration agreement (express or implied) can be difficult to determine in practice, as the divergence of opinions in this case demonstrates. Yet the outcome of this test can lead to different outcomes, with the arbitration agreement either governed by the law of the main contract or the law of the seat. Thus, while the test is clear, its outcome is not necessarily easy to predict.

The law applicable to an arbitration agreement may sound like a somewhat esoteric issue but, as the law which determines its interpretation and scope, it can have significant practical consequences. Different governing laws may, for example, result in claims falling within or outside the scope of the arbitration agreement, or lead to the arbitration agreement being held valid or invalid. In these circumstances, the practical advice remains the same. Parties should therefore ensure that, where the law of the main contract differs from the choice of seat, the governing law of the arbitration agreement should be expressly defined. Often, the seat is chosen for being a safe and predictable place for resolving international disputes, while the governing law may be a less-predictable local law. In these circumstances, it would be sensible to specify the law of the seat to govern the arbitration agreement.

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Company

Reflective loss rule does not apply to claim by indirect shareholder

BIG, Burgess & ors v Smith & ors [2020] EWHC 2501 (Ch), 21 September 2020

The rule against reflective loss does not apply to a claim by an "indirect" shareholder in a company. Applying the rule, as restated by the majority of the Supreme Court in *Marex*, to a joint venture dispute, the High Court ruled that claims by a direct shareholder were barred, but not those by a claimant whose interest in the company was via two intermediary shareholding companies.

The rule against reflective loss means that a shareholder cannot bring a claim for a loss suffered by the company, for example damages based on a diminution in the market value of shares or a likely diminution in dividend, where the company itself has its own cause of action. A shareholder's loss is said to be merely a "reflection" of the loss suffered by the company, and the company (or its liquidator) is the proper claimant.

In *Marex*, the majority of the Supreme Court reaffirmed the rule, but limited its application to a claim by a shareholder qua shareholder only. It does not apply, the Court said, to a claim by anyone else, including a creditor.

In this more recent decision, the Court had to decide whether the rule applied to an "indirect" shareholder, ie an individual who is a shareholder of a company (A), which itself is a shareholder in another company (B), which holds shares in a third company (C). Does the rule prohibit a claim by the individual against B or C?

An oral joint venture agreement

Mr Smith and two claimants, a company (**BIG Ltd**) and Mr Burgess (an indirect shareholder in BIG Ltd, via his shareholding in another company) entered into an oral joint venture agreement agreeing to set up a holding company (**holdco**) with BIG Ltd as one of the shareholders. Mr Smith was then meant (but failed) to procure the transfer to holdco of two further companies, which were to become holdco's operating subsidiaries. Holdco went into creditors' voluntary liquidation.

BIG Ltd and Mr Burgess claimed for losses resulting from the breach of the oral agreement by Mr Smith. BIG Ltd claimed for its losses in the form of a diminution in the value of its shares in holdco, and a diminution in dividends received. Mr Burgess claimed for the same losses, but only as an indirect (rather than a direct) shareholder, via BIG Ltd, in holdco.

Mr Smith claimed that the claims by both BIG Ltd and Mr Burgess were barred by the reflective loss rule.

Company has a cause of action, so reflective loss rule applies to shareholder's claim

The claimants argued that the rule could not apply to their claims as holdco was not party to the oral agreement that was breached and therefore did not have a concurrent cause of action against Mr Smith.

The Court disagreed. The agreement envisaged the transfer to holdco of the two operating companies. This was a benefit that holdco could enforce under the Contracts (Rights of Third Parties) Act 1999. BIG Ltd's claims (as a shareholder) were therefore barred by the reflective loss rule as holdco had its own concurrent cause of action. The Court also found that the rule barred BIG Ltd's claims for specific performance of the joint venture agreement.

The reflective loss rule does not apply to indirect shareholders

As to the claim by Mr Burgess, the claimants argued that the reflective loss rule does not apply to the loss suffered by him, as he was only an indirect shareholder in holdco.

The C agreed, relying on *Marex*, and noting that the rule originates from the legal relationship between a shareholder and a company; it does not apply in any other circumstances, including to "quasi-shareholder" claims: "*To blur that distinction is to ignore the separate legal personality of the companies which form the intervening links in the chain between the claimant and the loss-suffering company*".

COMMENT

This decision is welcome confirmation that the reflective loss rule does not apply to indirect shareholders. This may interest an investor seeking to acquire sizeable equity in a company. An intermediate holding structure may help to ensure that any future claim by the investor linked to the fall in value of its indirect shareholding is not barred by the rule, albeit of course the investor would still need to have a cause of action against the defendant.

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Contract

Material Adverse Effect clauses and Covid-19

Travelport Ltd & ors v WEX Inc [2020] EWHC 2670 (Comm), 12 October 2020

A Material Adverse Effect clause in a share purchase agreement excluded conditions resulting from a pandemic except where those conditions would have a disproportionate effect on the target companies as compared to companies in the "industries" in which those companies operated. The court agreed with the purchaser that the correct comparator for the target (which provided virtual credit and payment services to the travel payments market) was the broader B2B payments industry and not, as the seller contended, the narrower "travel payments industry". The seller had failed to provide sufficient evidence that the "travel payments industry" was a distinct, externally-recognised industry.

WEX (the **purchaser**), a corporate payment services provider, entered into an SPA with the sellers whereby it agreed to purchase 100% of the shares in two companies (the **Target Companies**), which provide virtual credit and payment services in the travel payments market. Thesellers are the shareholders in the Target Companies.

A condition to closing was that no Material Adverse Effect (**MAE**) had occurred. The definition of MAE in the SPA excluded conditions resulting from pandemics, except if the event, change, development, state of facts or effect in question had a disproportionate effect on the Target Companies or their subsidiaries "as compared to other participants in the industries in which [the Target Companies] or their respective Subsidiaries operate". This wording is central to the dispute since, if the comparison was with a small group of other equivalent participants, those participants would be more likely to have experienced similar changes, so that those of the Target Companies would not be disproportionate.

The Covid-19 pandemic and resulting global decrease in travel meant that the trade volumes of the Target Companies decreased. The purchaser notified the sellers by letter of the occurrence of an MAE within the meaning of the SPA due to "conditions resulting from the SARS-CoV-2 pandemic" and stated that it was not obliged to close the transaction.

The sellers sought: (i) a declaration that there had been no MAE; and (ii) specific performance under the SPA.

The relevant "industries"

To assess whether the pandemic had resulted in conditions disproportionately affecting the Target Companies a key preliminary issue was the meaning of "the industries" in which the Target Companies operate.

The sellers argued for a narrow interpretation – that the relevant industry was the "travel payments industry".

The purchaser countered that there was no "travel payments industry" and the appropriate comparator was either the "business to business" (**B2B**) payments industry or the payments industry. The judge agreed, finding that there was no "travel payments industry" as defined by the sellers, nor was there any other "travel

payments industry" which might exist distinct from that defined by the sellers. The judge found that the relevant industry for the purpose of assessing any disproportionate impact on the Target Companies was the "B2B payments industry".

Industry – broad pool of participants

The judge found as a matter of interpretation that the word "industry", used in the MAE clause, connoted a broad pool of participants. The parties could have chosen "markets", "sectors" or "competitors" (or an identified pool of participants), but instead "chose to peg disproportionality to a comparison with 'industries'". The contract was a heavily negotiated document and therefore it should be assumed that the words used had been deliberately chosen.

No "travel payments industry"

Whilst noting that the existence of a "travel payments industry" would not in any case be determinative, the judge found that the sellers had failed to demonstrate the existence of such an industry (either using the sellers' definition or otherwise). In addition to witness evidence, the sellers had relied on the use of the term "travel payments industry" in statements by the parties (including in investor presentations) and in third-party materials such as news or company websites, references by analysts, statements by other market participants and industry publications and events.

Whilst the judge accepted witness evidence that the term "travel payments industry" was a well-understood phrase, it was noted that none of the witnesses gave evidence that "travel payments industry" was a standard term and the sellers' witness accepted it was uncertain that the relevant regulator would understand the term. Moreover, the references to the term identified by the sellers were insufficient to support the conclusion that the "travel payments industry" was a distinct, externally-recognised industry. The judge noted the "*relative paucity*" of references to the "travel payments industry" (in contrast to the thousands of references to the terms "B2B payments industry" or "payments industry" adduced by the purchaser) and that on examination many of the references submitted by the sellers were of little assistance in any case. A common theme was that publications or events focussed on issues from either a payments or travel perspective rather than concerning a "travel payments industry"; for example, it was found that news relating to travel payments would most likely be found in a payments industry newsletter (whereas there were no travel payments industry newsletters) and similarly the awards ceremonies which might feature the Target Companies were travel industry awards. The judge concluded that "travel payments industry" was not a term in established use, but was rather used informally and with contextually varying meaning.

The judge also considered the purpose of the transaction, which the sellers argued supported their interpretation. However, the judge found that the purpose did not ultimately help the sellers. While it was accepted that the Target Companies operated in the travel payments market, the judge considered that it would be an "*oversimplification*" to describe the purpose of the transaction as merely a purchase of a travel payments business.

The law on MAE clauses

The judge noted the "*dearth*" of English case law on MAE clauses and referred to U.S. case-law and academic literature.

The U.S. authorities largely view MAE clauses (and any carve-outs and exceptions) as functioning to allocate firm-specific internal risks to the seller and industry-wide external risks to the purchaser. However, there was no clear authority to say that the comparison was inevitably one of company versus market as opposed to company versus industry.

Comment

The approach of the judge emphasises the significance of a textual analysis of the contractual language in ascertaining the meaning and effect of an MAE clause. In this instance, the wording favoured the purchaser. With the benefit of hindsight, the sellers would have benefited from defining the comparator group more precisely; but that will not always be the case and a certain amount of ambiguity or flexibility may work better in other instances.

Permission to appeal has been sought.

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Performance relief clauses and waiver by election

Delta Petroleum v BVI Electricity Corp [2020] UKPC 23, 12 October 2020

A fuel supplier did not waive its right to rely on a "performance relief" provision by temporarily continuing to perform by alternative means after the refinery, which it used to source fuel, closed. There was no inconsistency between the supplier choosing to supply from an alternative source for a limited period whist trying to negotiate a price increase, and its exercise of rights under the performance relief clause.

BVI Electricity Corp (**BVI Electricity**) contracted to buy fuel from Delta Petroleum (**Delta**). The agreement contained a "performance relief" provision, allowing Delta to claim relief from further performance should the refinery from which it sourced the fuel close. When the refinery closed, Delta continued to supply BVI Electricity with fuel from a different source, but tried to negotiate a price increase to reflect the costs of the new supplier.

Negotiations failed, and Delta sought to exercise its rights under the performance relief clause to cease supply of fuel. BVI Electricity claimed that Delta had waived this right when it continued to provide fuel from a different source, and obtained an interim injunction, followed by an order for specific performance, requiring Delta to continue to deliver fuel.

The Privy Council held that the principle of waiver by election did not apply to the performance relief clause. It was not equivalent to, say, a right to terminate. It did not present Delta with a binary, all-or-nothing choice between ending all obligations and treating those obligations as still binding. There were a range of options: it could withhold, reduce or suspend deliveries. Additionally the clause required Delta to prove it had taken all reasonable steps to minimise delay or damages. So there was no inconsistency in Delta continuing to supply for an interim period.

Further, the Privy Council found that BVI Electricity was liable for any damages that Delta had suffered by reason of the interim injunction granted at first instance, and exercised its inherent jurisdiction to make a restitutionary award requiring BVI Electricity to pay Delta the difference between the contract price of the fuel, and the value of the fuel transferred to Delta to BVI Electricity under the lower court's order for specific performance.

The decision is a reminder that not all provisions are susceptible to being waived by election.

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Equity

Horse betting company not liable for breach of confidence, but is liable for unlawful means conspiracy

The Racing Partnership Ltd, Arena Leisure Ltd, Arena Racing Corporation Ltd v Sports Information Services Ltd [2020] EWCA Civ 1300, 9 October 2020

Sports Information Services Ltd (SIS) was not liable for breach of confidence as it lacked notice that the information it received from a third party (Tote) was communicated in circumstances importing an obligation of confidence on SIS. SIS was assisted by a warranty in the contract with Tote that Tote had all necessary rights to provide the information and that SIS's use of the information would not breach any third party rights. SIS was however liable for unlawful means conspiracy. Knowledge of the unlawfulness of the means in question was not required.

The defendant (**SIS**) once had the exclusive right to collect and distribute live horseracing information from Arena's racecourses to off-course bookies. The information had a high commercial value and was protected by Arena by imposing restrictions on racecourse visitors.

After the expiry of the Arena/SIS agreement, the collection and distribution right was passed to The Racing Partnership (**TRP**), under a new agreement between Arena and TRP. TRP claimed that notwithstanding that SIS had lost its rights, SIS continued to supply live horseracing information, for an additional six months, to Betfred and Ladbrokes.

SIS collected the information through (i) betting exchange websites (and SIS admitted it was in breach of the exchanges' T&Cs by using information in the way it did), and (ii) SIS's contract with Tote (Successor Company) Ltd (**Tote**) whereby Tote provided data to SIS for fixed-odds betting. Tote was contractually permitted by Arena to collect and distribute certain information only for pool betting.

Arena and TRP sued SIS for breach of confidence, unlawful means conspiracy, copyright and database right infringement and breach of contract. At first instance, the claimants lost on all fronts except for breach of confidence. SIS appealed against its liability for breach of confidence, and TRP cross-appealed against the dismissal of unlawful means conspiracy.

Notice of obligation of confidence required for breach of confidence

Lewison and Phillips LJJ disagreed with the trial judge (and Arnold LJ) by holding that SIS was not in breach of confidence.

The requisite elements for breach of confidence are:

- information with the necessary quality of confidence;
- information was communicated in circumstances importing an obligation of confidence; and
- an unauthorised use of the information to the detriment of the party communicating it, without lawful excuse.

The court's discussion predominantly revolved around the second limb, specifically whether a reasonable person in SIS's position knew or should have appreciated that the information provided by Tote was confidential to Arena/TRP (for purposes other than pool betting), so as to import an obligation of confidence on SIS.

On the facts, Tote supplied the information to SIS under a contract which included an express warranty that Tote had all necessary rights from third parties to provide the information and that SIS's use of the information would not breach any third party rights (ie Arena's/TRP's rights). Based on that warranty in the Tote/SIS contract, the majority held that a reasonable person would not be on notice that the information was supplied in breach of confidence unless there were clear countervailing factors. Such factors did not exist: SIS had made

enquiries and believed Tote was lawfully entitled to provide the information, so was not liable for breach of confidence. Even though the information provided by Tote to SIS went beyond what was covered by the Tote/SIS contract, TRP had not asserted that this additional information as confidential, and therefore SIS was protected by the warranty in the Tote/SIS contract.

Knowledge of unlawfulness not required for unlawful means conspiracy

Arnold and Phillips LJJ held that SIS had unlawfully conspired with Ladbrokes, Betfred and Tote to injure Arena/TRP.

Unlawful means conspiracy requires:

- an agreement between two or more people;
- an intention to effect an unlawful purpose;
- an intention to injure the claimant (which need not be the predominant intention, it being sufficient that the conspirators seek a benefit at the claimant's expense); and
- damage to the claimant.

The issue for the court was whether knowledge that the means in question are unlawful is a necessary ingredient of the tort. A different majority held that it was not. Reading Arnold and Phillips LJJ's judgments together, the unlawful means appear to be: (i) Tote's (not SIS's) breach of confidence; and; (ii) SIS's breach of the exchanges' T&Cs. (The court's finding that these unlawful means were the "instrumentality" which caused harm to TRP warrants further discussion, but is beyond the scope of this article.)

Having reviewed the authorities, there were two irreconcilable Court of Appeal decisions on civil conspiracy, being *British Industrial Plastics v Ferguson*[1] (which held that C's honest – but incorrect – belief that his receiving confidential patent information from B would not breach B's employment contract with A, meant C **was not** liable to A for unlawful means conspiracy) and *Belmont Finance Corporation v Williams Furniture Ltd (No 2)*[2] (which held that shareholders in certain companies **were** liable for unlawful means conspiracy following a breach of a statutory prohibition on unlawful financial assistance, even though one defendant received erroneous legal advice that the transaction in question did not breach the prohibition).

The majority favoured *Belmont Finance* (ie knowledge of the unlawfulness is not required). Arnold LJ was persuaded by a case on criminal conspiracy, which held that knowledge of the unlawfulness was not required, on the basis that ignorance of the law is generally no excuse.[3] As unlawful means conspiracy is a tort of primary liability, Arnold LJ was convinced that the authorities cited in support of his conclusion – which involved underlying unlawfulness of criminal, regulatory and strict liability – could apply to an infringement of private law rights, like on the facts. Therefore, the conspirators only need knowledge of the means (which in this case was the facts underpinning the breach of the exchanges' T&Cs and possibly Tote's breach of confidence), not knowledge of the unlawfulness of the means.

Comment

The majority's decision on the breach of confidence claim can be welcomed for its commercial practicality. Tote had expressly warranted to SIS that it had the right to provide the data, and use of the data would not breach third party rights. It would have cut across the parties' risk allocation to hold SIS liable for breach of confidence in this scenario.

The debate on unlawful means conspiracy raises numerous value judgements, such as the extent to which criminal and civil conspiracy should be aligned. The court also considered at length whether its finding was correct, considering that knowledge of unlawfulness is required for a very similar economic tort to unlawful means conspiracy, namely of procuring breach of contract.[4] Further consideration of the knowledge and intent requirements may be warranted for scenarios where the underlying unlawfulness is the infringement of a private law right, rather than a strict liability offence.

With strong dissents on both issues, this is not the last we'll hear on the scope of breach of confidence or unlawful means conspiracy. Which way will the law go? All bets are off.

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1 [1938] 4 All ER 504.
2 [1980] 1 All ER 393.
3 *Churchill v Walton* [1967] 1 All ER 497.
4 *OBG Ltd v Allan* [2007] UKHL 21.

Privilege

Tax structuring advice not protected by litigation privilege despite enquiry from French tax authority

FRC v Frasers Group plc (formerly Sports Direct) [2020] EWHC 2607 (Ch), 5 October 2020

Litigation privilege did not apply to tax restructuring advice prepared for a company by accountants following enquiries received from the French tax authority. Even where litigation can be said to be in prospect, a claim to litigation privilege will only be successful where the dominant or sole purpose of a document is the conduct of that litigation.

In its investigation into Grant Thornton, the FRC (the UK's regulatory body for accountants, auditors and actuaries) has been seeking various categories of documents from Sports Direct (now Frasers Group) for several years. These have been the subject of a series of contested applications, see our coverage here and here. This latest privilege ruling concerns three reports prepared for Sports Direct by Deloitte in 2015 about a proposed new tax structure (the **Reports**).

French tax authorities enquire about VAT

In 2010, Sports Direct implemented arrangements aimed at ensuring it paid VAT in the UK on its online retail services to EU customers. It received a short communication from the French tax authorities in June 2014, enquiring whether the Sports Direct entity involved in invoicing customers from its French website paid English or French VAT.

The communication did not threaten litigation nor assert that any VAT on its French sales was properly payable in France. Nonetheless, Sports Direct interpreted this initial communication as being likely to lead to a full enquiry and subsequent challenge, from French and possibly other EU tax authorities, to Sports Direct's VAT position in Europe.

Deloitte advises on tax structure

The enquiry from the French tax authorities prompted Sports Direct to engage Deloitte to prepare the Reports. The Reports recommended altering part of Sports Direct's online sales arrangements, with the hope that this new structure would put those arrangements outside the scope of relevant tax legislation such that any VAT would continue to be payable only in the UK.

According to Sports Direct, the Reports summarised the changes to the previous structure and how the new structure would affect the mechanics of the VAT, and associated legal and commercial considerations. Notably, the Reports also included details on the steps that were being taken to mitigate the risk of challenges from EU tax authorities.

Sports Direct resisted the production of the Reports to the FRC on the grounds that they were protected by litigation privilege.

"Impossible" that the Reports were prepared for the purpose of litigation

For litigation privilege to apply, there must be a confidential communication between a client and their lawyer, or between either of them and a third party (such as Deloitte), for the sole or dominant purpose of obtaining information or advice for litigation that is in progress or reasonably in contemplation.

The court rejected Sports Direct's claim to litigation privilege, holding that the Reports were not prepared for the sole or dominant purpose of litigation.

In reaching this conclusion, the court worked on the hypothesis that litigation by an EU tax authority was contemplated by Sports Direct at the time the Reports were prepared. However, any such litigation would be over the tax structure as it was implemented in 2010 – as opposed to the new structure that was recommended in the Reports. Although the Reports were prepared in the context of responding to a contemplated challenge to Sports Direct's tax position, they did not advise on the merits of, or how to conduct a defence to, such a challenge. Instead, their primary purpose was to recommend implementing new tax arrangements.

Moreover, the court considered that the Reports were unlikely to even be admissible as evidence in such litigation; or if admissible, were unlikely to be helpful, given they recommended adopting a new structure.

The court was also not persuaded by Sports Direct's attempt to argue that the litigation would extend to the new structure that was the subject of the Reports, as tax authorities would be likely to encompass this aspect in any challenge. Even if that were so, fundamentally, "*a taxpayer who takes advice as to how to structure his affairs does not do so for litigation purposes. He does so because he wants to achieve a particular result for tax purposes*".

Litigation in reasonable contemplation?

In light of the above findings, the court was not required to decide, as a matter of fact, on whether Sports Direct believed that litigation was reasonably in contemplation.

However, the judgment contains helpful *obiter* comments that the threshold for when litigation was anticipated was likely met in these circumstances. In particular, although the "*bland*" enquiry from the French tax authority did not threaten litigation or make any challenge or assertion – Nugee J remarked that there would have been no reason for the court to look behind the witness statements, of the then Sports Direct Head of Finance and an external lawyer, that Sports Direct suspected a challenge from EU tax authorities to be likely. The judge also said that even if all that was contemplated was an investigation by the French tax authority, there was nothing to doubt the evidence that it was anticipated by Sports Direct that this would in due course be followed by a claim that would be defended by Sports Direct in litigation. This evidence included an awareness that similar tax structures adopted by other retailers were under scrutiny and challenge from tax authorities, and that it was inevitable that a full enquiry from the French tax authority (which would be defended) would therefore follow.

Comment

Companies hoping to assert litigation privilege over reports from professional advisors, including tax advice, will need to be confident that such reports are prepared squarely with litigation in mind. The judgment demonstrates that simply taking advice on a particular structure or position, even in the context of or prompted by anticipated litigation, will not suffice for a claim to litigation privilege.

Rather, the purpose for which the advice is commissioned, and the substance of the advice, will need to be the conduct of actual or contemplated litigation or the use as evidence in that litigation. This will need to be the sole or dominant purpose of the advice, meaning it is not enough for the advice to state that implementing a recommended structure would mitigate a risk of litigation. The Reports contained references to the risk of challenges from EU tax authorities, and steps taken to mitigate those. This however did not mean the Reports satisfied the dominant purpose test, as the Reports were not "*primarily advice as to the conduct of the future possible litigation*".

Although *obiter*, the judge's comments point to a relatively early starting point, on these facts, for when litigation can be said to be anticipated in a pre-investigation context. Nugee J saw no reason to doubt evidence that Sports Direct contemplated litigation on receipt of a relatively neutrally worded enquiry from the French tax authority. The recognition of the company's awareness of similar challenges on foot faced by other companies could factor into the likelihood of proceedings being started. However, determining this point in practice is a complicated and fact-specific enquiry. Companies need to take care when seeking to assert litigation privilege over documents created even before an investigation has commenced.

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Top finance litigation and contract law developments in 2019 (Jan/Feb)

Arbitration

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Which law governs an arbitration agreement where the governing law of the main contract and the seat of arbitration do not match?: *Kabab-Ji S.A.L. v Kout Food Group* (Mar/Apr)

English seat does not guarantee English governing law and anti-suit injunction: *Enka Insaat ve Sanayi SA v OOO "Insurance Co Chubb" & ors* (Jan/Feb)

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Oh no, not another case on good faith and rationality: *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* (Aug/Sept)

On notice – spa tax claim unenforceable as inadequate notice given: *Dodika v United Luck* (Aug/Sept)

Failure to notify "as soon as possible" precludes indemnity claim: *Towergate Financial (Group) Ltd (2) Towergate Financial (East) Ltd (3) Towergate Financial (East) Holdings Ltd (4) Towergate Financial (East) Intermediate Ltd v Mitchel Hopkinson & 17 ors* (May/June)

Bank ordered to disclose internal compliance review files in mis-selling claim: *Fine Care Homes Ltd v Natwest Markets Plc (formerly Royal Bank of Scotland Plc)* (May/June)

Clauses under scrutiny: force majeure and excluding liability for consequential loss: *2 Entertain Video Ltd & ors v Sony* (May/June)

English law aircraft lease valid despite alleged breaches of foreign procurement laws: *Wallis Trading Inc v (1) Air Tanzania Co Ltd and (2) The Government of the United Republic of Tanzania* (Mar/Apr)

Oil and gas joint venture parties not bound by good faith or rationality when discharging operator: *(1) Taqa Bratani Ltd; (2) Taqa Bratani LNS Ltd; (3) JX Nippon Exploration and Production (UK) Ltd; and (4) Spirit Energy Resources Ltd v Rockrose UKCS8 LLC* (Jan/Feb)

No oral modification clause and good faith: *Kabab-ji Sal (Lebanon) v Kout Food Group (Kuwait)*: (Jan/Feb)

"Please go ahead with the below…." A binding contract?: *Athena Brands Ltd v Superdrug Stores Plc*: (Jan/Feb)

Costs

No guaranteed "cap" on a third party litigation funder's liability for adverse costs: *ChapelGate Credit Opportunity Master Fund Ltd v (1) James Money (2) Jim Stewart-Koster (Joint Administrators of Angel House Developments Ltd) (3) Dunbar Assets Plc* (Mar/Apr)

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CJEU invalidates EU-US Privacy Shield framework and upholds EC Standard Contractual Clauses: *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Aug/Sept)

Company not vicariously liable for data breach but Supreme Court does not rule out the possibility in future cases: *Wm Morrison Supermarkets plc v Various Claimants* (Mar/Apr)

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Horse betting company not liable for breach of confidence, but is liable for unlawful means conspiracy: *The Racing Partnership Ltd, Arena Leisure Ltd, Arena Racing Corporation Ltd v Sports Information Services Ltd* (Dec)

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Legal advice privilege: does a lawyer get you home and dry?; *A v B*: (Aug/Sept)

Privilege in regulatory investigation context: *Sports Direct International Plc v FRC* (Mar/Apr)

Legal advice privilege subject to "dominant purpose" test – how to deal with multi-party email communications: *The Civil Aviation Authority v Jet2.Com Ltd, R. (on the Application of)*: (Jan/Feb)

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The long arm of OFAC: English law contracts and U.S. secondary sanctions: *Lamesa Investments Ltd v Cynergy Bank Ltd* (Aug/Sept)

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The limits of without prejudice protection: (*1) Motorola Solutions Inc (2) Motorola Solutions Malaysia SDN BHD v (1) Hytera Communications Corp Ltd (2) Hytera America Inc (3) Hytera Communications America (West) Inc: (1) Motorola Solutions Inc (2) Motorola Solutions Malaysia SDN BHD v (1) Hytera Communications Corp Ltd (2) Hytera America Inc (3) Hytera Communications America (West) Inc (4) Project Shortway Ltd (5) Sepura Ltd* and *Berkeley Square Holdings & ors v Lancer Property Asset Management Ltd & 5 ors* (May/June)

A misprediction is not a mistake: settlement not set aside despite change in law: *Jeremy Philip Elston v (1) Lawrence King (2) Sue Roscoe (trustees in bankruptcy of Jeremy Philip Elston)*: (Jan/Feb)

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Mining company not liable for unlawful acts of Sierra Leonean police: *Kadie Kalma & ors v (1) African Minerals Ltd (2) African Minerals (SL) Ltd (3) Tonkolili Iron Ore (SL) Ltd* (Mar/Apr)

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 Karen Birch.

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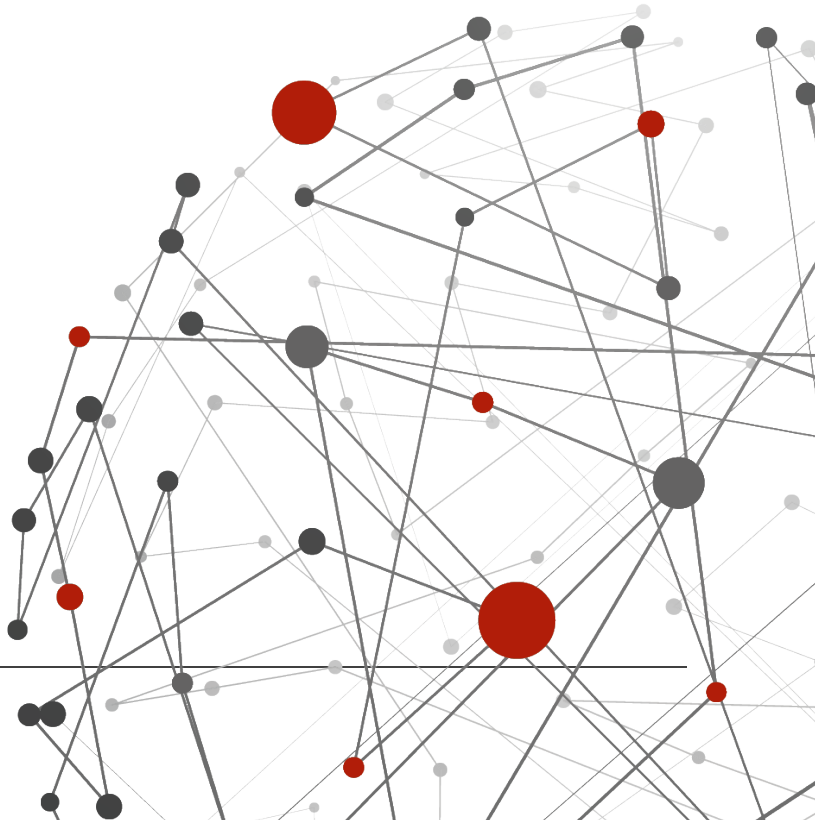

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