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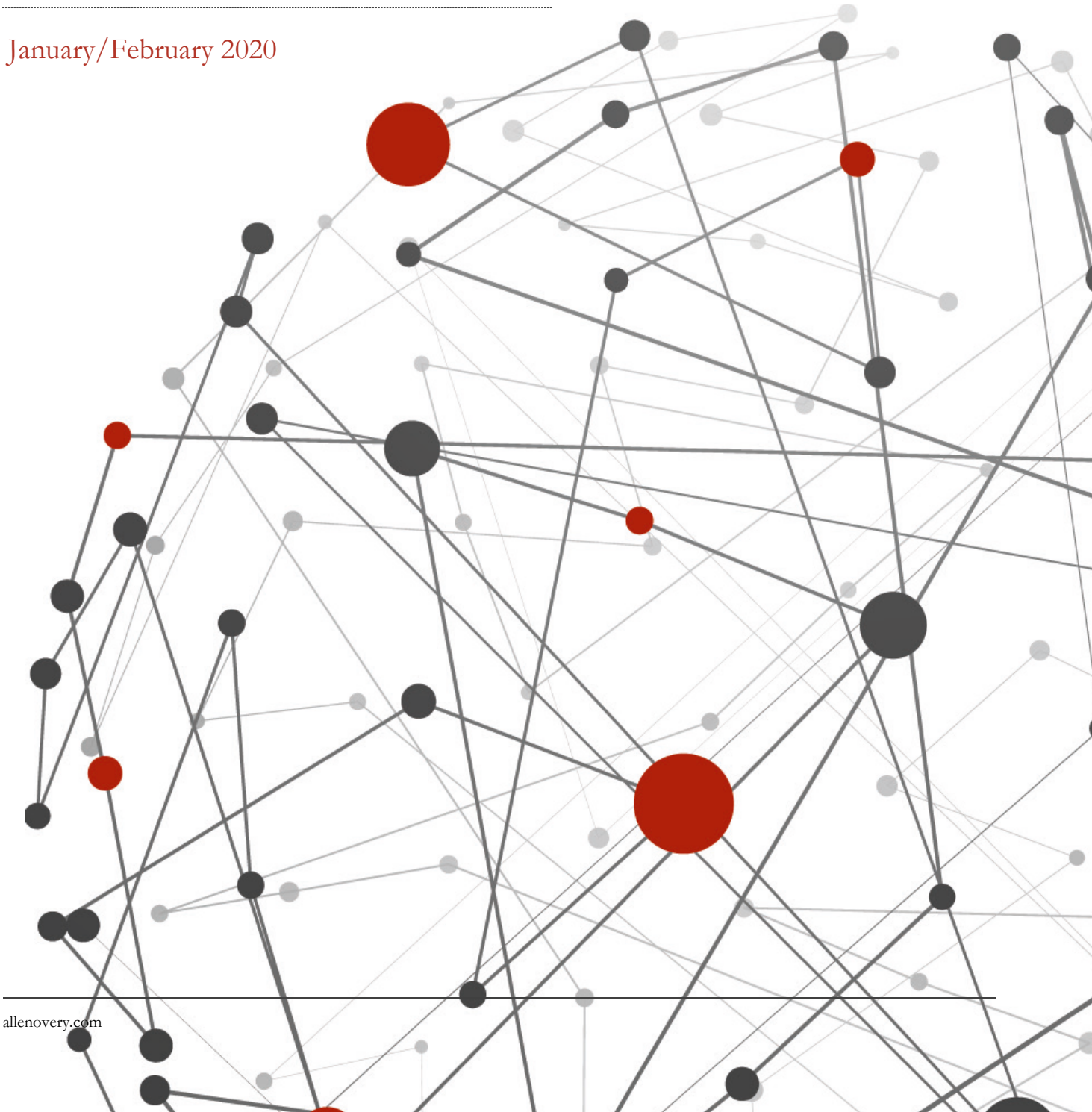

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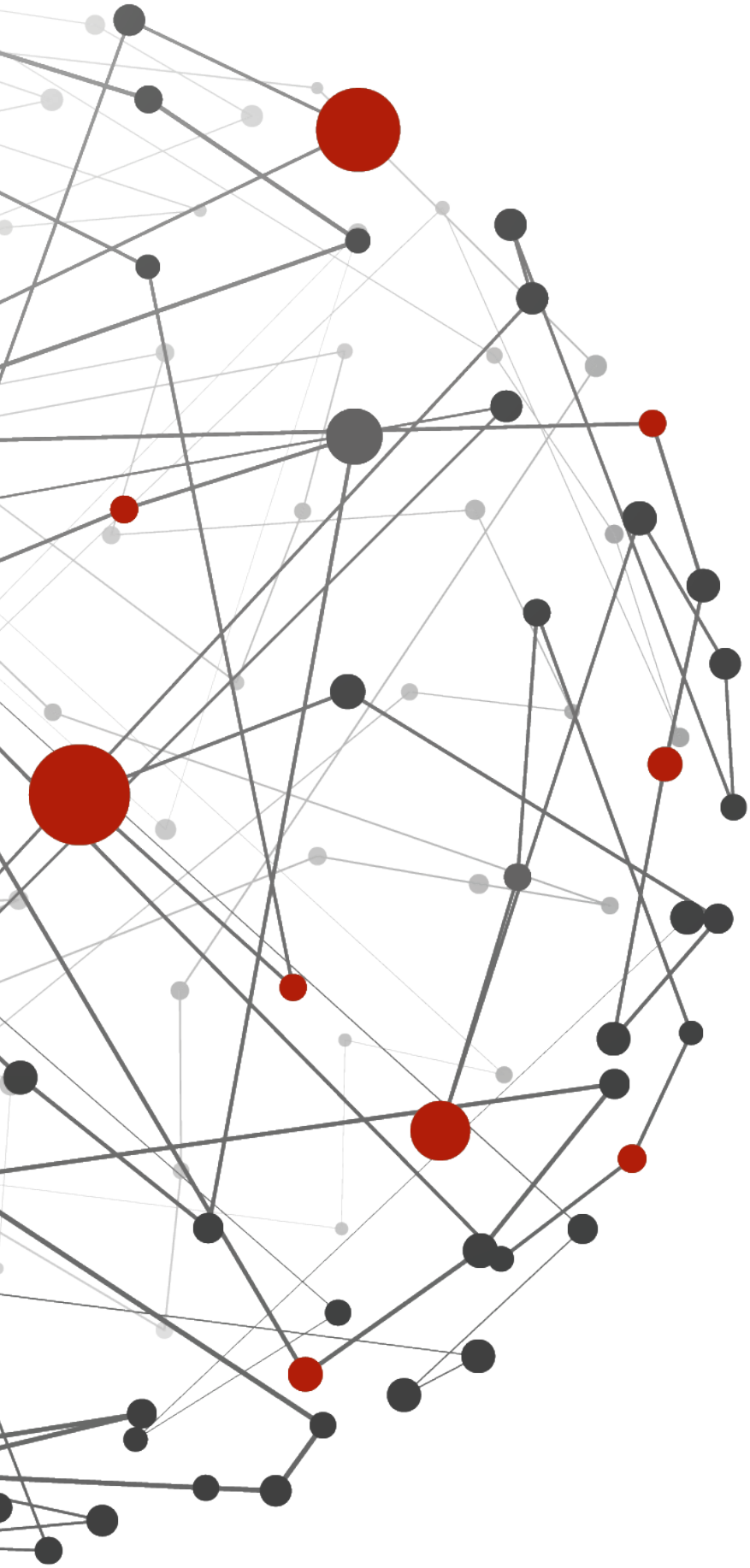

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Arbitration

English seat does not guarantee English governing law and anti-suit injunction

Enka Insaat ve Sanayi SA v OOO "Insurance Co Chubb" & ors [2019] EWHC 3568 (Comm), 20 December 2019

The English High Court (Andrew Baker J) has refused to hear an application for an anti-suit injunction to restrain proceedings in Russia allegedly in breach of an arbitration agreement. The court concluded that it was not an appropriate forum to rule on the scope of the arbitration agreement, even though London was the seat of arbitration. It was no more appropriate than the Russian court, or an arbitral tribunal (if the claimant Enka had started an arbitration – which it had not). One factor against the English court ruling on this issue was that it was not clear that the arbitration agreement was governed by English law, notwithstanding a choice of London seat. The court would not have granted an anti-suit injunction even if it were the appropriate forum, partly on the basis that the applicant had been guilty of delay.

OOO "Insurance Company Chubb" (**Chubb Russia**) filed a tort claim in the Russian courts against *Enka Insaat ve Sanayi SA* (**Enka**), a subcontractor on a power plant construction project in Russia, claiming damages for insurance losses arising out of a fire at the plant (the **Russian proceedings**).

It was common ground that there was a valid and binding arbitration agreement between Enka and Chubb Russia (as subrogated insurer of Enka's original contractual counterparty), which provided for ICC arbitration in London. However, no arbitration was commenced. Nevertheless, 18 months after first being on notice of a dispute, Enka applied to the English court for an anti-suit injunction restraining Chubb Russia from pursuing the Russian proceedings against Enka on the basis that the Russian proceedings had been brought in breach of the arbitration agreement. Chubb Russia claimed that there was no breach as the arbitration agreement did not extend to claims in tort.

The English court's decision ultimately focused on whether the English court was the appropriate forum to rule on the scope of the arbitration agreement. In doing so, the court considered the relevance of the law governing the arbitration agreement. The court also considered whether an anti-suit injunction should be granted, even if (contrary to its view) the English court were the appropriate forum.

English court not the correct forum

The primary question, in the judge's analysis, was whether the English court was the appropriate forum to issue the anti-suit relief requested by Enka.

The court considered that the London seat in the arbitration agreement did not give the English courts exclusive or even primary jurisdiction over enforcing the parties' obligation to arbitrate (and the corresponding obligation not to litigate). An English court, when issuing an anti-suit injunction, would not be exercising supervisory powers in relation to the arbitration, but instead would be exercising independent primary jurisdiction. Ordinary jurisdictional principles therefore applied, and so it was necessary to demonstrate that the English courts had personal jurisdiction over all of the injunction defendants and that the English courts were the most appropriate forum.

On the facts, the judge held that the English court was not the appropriate forum. Among other things, the judge seems to have taken into account: (i) that it seemed more likely that the arbitration agreement was governed by Russian law (see below); (ii) that proceedings were on foot in Russia, where the issue could more conveniently be determined; and (iii) that a further, more appropriate forum (in addition to Russia) was ICC arbitration, which Enka could have commenced but had not done so.

Choice of seat not determinative of governing law of the arbitration agreement

An interesting aspect of the decision is its analysis of the law governing the arbitration agreement, even though this is not a central factor in the court's decision. Enka argued that a key reason why anti-suit relief should be granted was that, in its submission, the arbitration agreement was governed by English law. If this was right, the tort claim in the Russian proceedings would be within the scope of the arbitration agreement. In contrast, Chubb Russia claimed that the arbitration agreement was governed by Russian law, and that its tort claim in the Russian proceedings was outside the scope of the arbitration agreement if it was governed by Russian law.

Neither the contract itself nor the arbitration agreement had an express governing law provision. Recent English decisions (eg *Sulamerica CIA Nacional de Seguros SA & ors v Enesa Engenharia SA & ors* [2012] EWCA Civ 638, and *Arsanovia Ltd & ors v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm)) are arguably split on the relevance of the choice of seat to determining the governing law of an arbitration agreement. Enka argued that the seat of the arbitration provided an implied choice as to the governing law of the arbitration agreement and that, as a result, it was governed by English law. That argument was rejected. Instead, the court held that the governing law of the arbitration agreement should be determined by an ordinary process of construction of the whole contract, including any express governing law clauses in that contract (and not just the arbitration agreement, even though it is a separate contract as a matter of law under s7 Arbitration Act 1996).

The court did not accept that the choice of governing law for the arbitration agreement was as critical as Enka submitted. The true question was whether England was the appropriate forum to rule on the scope of the arbitration agreement. In any event, while not making a final determination, the court found that it was at least well arguable that the arbitration agreement was not governed by English law. Among other things, the court (perhaps oddly) found it significant that the arbitration clause provided for ICC arbitration, which was said to be a "supranational" choice. The lack of clarity on the governing law of the arbitration agreement was at most a factor against the English court being the most appropriate forum to rule on the scope of the arbitration agreement.

Don't delay

The judge went on to consider whether he would have granted an injunction even if the English court had been the appropriate forum. He held that he would not have done so. He considered that there was not a strong arguable case that the Russian proceedings were in breach of the arbitration agreement because it was likely that Russian law governed the arbitration agreement. The judge also considered that Enka's participation in the Russian proceedings and its delay in seeking anti-suit relief would have militated against its application.

Comment

The jurisdiction of the English courts to issue an anti-suit injunction for breach of an arbitration agreement is well established. However, as this case demonstrates, an anti-suit claimant must first demonstrate that the English courts are the correct forum to determine whether there has been a breach of the arbitration agreement. On this issue, the decision makes some notable points. First, the English courts will not accept jurisdiction simply because there is an English seat. Secondly, the decision seems to imply that anti-suit claimants will have to explain why they have not started an arbitration so as to seek anti-suit relief through the arbitration. This proposition seems to qualify the Supreme Court's decision, in the *AES Ust-Kamenogorsk case* ([2013] UKSC 35), that the English court has power to issue anti-suit relief to restrain foreign proceedings even if no arbitration is commenced. Thirdly, the law governing the arbitration agreement may be relevant to whether England is the appropriate forum.

This case also illustrates the importance of including an express provision stating the governing law of an arbitration agreement. A London seat may not be sufficient to ensure that the arbitration agreement is governed by English law. The case shows that the governing law can have important consequences, including on interpretation of the scope of the arbitration agreement.

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Wide interpretation of "investment" and "investor" in bilateral investment treaty

The Republic of Korea v Mohammad Reza Dayyani & 5 ors [2019] EWHC 3580 (Comm), 20 December 2019

The High Court rejected an application by the Republic of Korea to set aside an investment arbitration award under s67 Arbitration Act 1996. In deciding that the arbitrators had substantive jurisdiction, Butcher J scrutinised the language in the relevant investment treaty and interpreted the terms "investment" and "investor" widely, in line with prevailing international investment law jurisprudence. Questions of admissibility (in this case, issues of attribution) will not be reopened in a s67 application.

The case concerned the failed sale of Daewoo Electronics, a Korean company, to D&A Holding, a special-purpose vehicle set up by a group of Iranian investors (the **Dayyanis**).

In preparation for the sale, D&A Holding entered into a Share and Claim Purchase Agreement (**SPA**) with the sellers, a consortium of financial institutions in which the Republic of Korea (**Korea**) held a significant stake. In accordance with the SPA, D&A Holding paid a deposit of USD50 million. The acquisition subsequently fell through and the sellers refused to return the deposit. The Dayyanis commenced arbitration against Korea under the 1998 Korea-Iran bilateral investment treaty (**Korea-Iran BIT**) to seek, among other claims, the return of the USD50m. The London-seated arbitral tribunal found that Korea failed to provide fair and equitable treatment to the Dayyanis and ordered the return of the deposit.

Korea applied to the High Court to set aside the award under s67 Arbitration Act 1996. The English courts had jurisdiction to hear the challenge because the place of arbitration (or the tribunal's "seat") was London. Korea argued that the tribunal lacked "substantive jurisdiction" for a number of reasons, including that under the Korea-Iran BIT: (i) the SPA and deposit were not "investments"; and (ii) the Dayyanis were not "investors". Korea also argued that the tribunal had no jurisdiction because the acts of the sellers could not be attributed to Korea.

The SPA and deposit were "investments"

The court disagreed with Korea's argument that the SPA and the deposit were not "investments" under the BIT. The Korea-Iran BIT defines "investments" as "every kind of property or assets" and includes a non-exhaustive list of examples. Butcher J described this definition as "very wide" and explained that "asset" refers to something that is owned and has "some economic value", while "property" refers to a right or interest in something, identifiable by others, capable of assumption and having some permanence and stability. The SPA and the deposit each fulfilled this definition.

The court rejected Korea's argument that an "investment", in this context, must have additional "objective characteristics" (a certain duration, a contribution to the host state and an element of investment risk for the investor). According to Butcher J, given the clear wording of the BIT, there was no reason to import characteristics not expressly set out in the treaty.

The Dayyanis were "investors"

Korea argued that the Dayyanis were not "investors" as they did not enter into the SPA or pay the deposit. This was done by D&A Holding, a company in which the Dayyanis were shareholders. In this sense, they held the investments "indirectly".

To determine whether the definition of "investor" encompassed an "indirect" investor, the court turned to the language of the Korea-Iran BIT and noted the absence of any express requirement that the investor must have a "direct" legal interest in the investment. The treaty was held to confer "wide enough protection such that a shareholder may be protected in relation to damage to the assets of the company in which the shares are held", so long as that shareholder exercised some control over the company.

State attribution issues were not jurisdictional questions

A further argument before the court was that the sellers' acts were not attributable to Korea and, for that reason, there was no dispute between an "investor" and a "Contracting Party" as required under the Korea-Iran BIT.

The court disagreed. The relevant question for the purposes of the tribunal's jurisdiction was whether Korea was the "Contracting Party" and it plainly was. Korea's argument was not one of jurisdiction but of admissibility. The attribution dispute between it and the Dayyanis was a matter for the tribunal to determine pursuant to the arbitration provision in the Korea-Iran BIT, which encompassed "any legal dispute".

Comment

A jurisdictional challenge under s67 involves a *de novo* rehearing of the jurisdictional issue(s) by the English courts. This means that the arbitrators' decision on those issues has "no automatic legal or evidential weight" but may be "persuasive". This high standard of review, which applies equally to commercial and to investor-state arbitration, might be unexpected by parties with experience of similar proceedings in other jurisdictions, in which national courts (or an ICSID Annulment Panel) may perform a more limited review on a jurisdictional challenge. This may be one factor to consider for investors who are contemplating bringing a claim and have a choice of different fora under the relevant treaty.

The definitions of "investment" and "investor" under various treaties vary widely, but have tended to be interpreted expansively in international jurisprudence. In interpreting the provisions of a treaty, the English courts will be guided by English law principles of construction, as well as the applicable public international law rules of interpretation (as enshrined in the Vienna Convention on the Law of Treaties 1969). While English courts will have regard to international jurisprudence, it is clear that the starting point of the court's interpretative task will always be the specific wording chosen by the contracting states. This highlights the need for investors and their advisers carefully to consider the jurisdictional basis of a claim before commencing proceedings.

It should also be noted that while English courts will engage in a detailed review of the jurisdictional aspects of an award challenged under s67, they will defer to the findings of the tribunal on issues that are not jurisdictional, so as not to engage in reassessing the merits of the case. This limits the uncertainty that a s67 challenge presents for investors.

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Conflict of laws

Asymmetric jurisdiction clauses and multiple related agreements

Etihad Airways PJSC v Flother [2019] EWHC 3107 (Comm), 18 November 2019

Disputes arising under a side letter fell within the scope of the jurisdiction clause in a separate but related loan agreement. The asymmetric clause in the loan agreement was exclusive for the purposes of the anti-torpedo rule of the Recast Brussels Regulation (the **Brussels Recast**),[1] so the court refused to stay the English proceedings despite the fact that they post-dated earlier proceedings in Germany. This decision will be of interest to lenders and other parties who enter into multiple related agreements and rely on asymmetric clauses to maximise their enforcement rights.

The proceedings arose out of a dispute between Etihad Airways PJSC (**Etihad**) and the insolvency administrator of Air Berlin (the **Insolvency Administrator**). In 2016, following years of financial difficulties, Air Berlin began working with Etihad (as shareholder) on a restructuring package. In April 2017, Etihad agreed to lend EUR350 million to Air Berlin under a Facility Agreement containing an asymmetric jurisdiction clause which provided that the English courts had exclusive jurisdiction to settle any disputes arising out of or in connection with it, but that Etihad was not "prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction" (the **Jurisdiction Clause**). On the same day, the parties also signed a Comfort Letter which did not contain a jurisdiction clause.

Air Berlin ceased trading six months later and the Insolvency Administrator began proceedings in Germany (the **German Proceedings**) against Etihad under the Comfort Letter. Etihad later issued a claim in the English court (the **English Proceedings**) for declarations that, among other things, the claims made in the German Proceedings were subject to the exclusive jurisdiction of the English court because they were within the scope of the jurisdiction clause in the Facility Agreement.

Scope of a jurisdiction clause – application beyond Facility Agreement

The question for the court was whether Etihad had a good arguable case that the parties' intention (as revealed by the agreements reached between them) was that a dispute under the Comfort Letter fell within the Jurisdiction Clause. In ascertaining the parties' intention, the court considered the closeness of connection between the Comfort Letter and the Facility Agreement. The judge confirmed that the starting assumption in *Fiona Trust*[2] (that the parties, as rational businessmen, are likely to have intended any disputes arising out of their relationship to be decided by the same tribunal) is potentially applicable to multiple contract scenarios where there is an "overall agreement package" and the related contracts contain no competing jurisdiction clause.

On the facts, Jacobs J found that the parties intended disputes arising in relation to the Comfort Letter to fall within the scope of the Jurisdiction Clause:

- The Jurisdiction Clause was very wide, covering contractual and non-contractual disputes arising out of or in connection with the Facility Agreement.
- Both the Comfort Letter and the Facility Agreement were part of an overall "support package" provided by Etihad to Air Berlin.
- The two agreements were very closely connected.
- Etihad had a good arguable case that the Comfort Letter did not create legally binding obligations and was not therefore the basis for a separate contractual relationship between the parties, as contended by Air Berlin. The Comfort Letter was properly viewed as an ancillary document, linked to the Facility Agreement.

1 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
2 *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

- The other agreements in the support package did not contain "competing jurisdiction clauses"; they also contained English law and jurisdiction clauses.
- It was reasonably foreseeable that the resolution of a dispute under the Facility Agreement might require the court to determine the effect of the Comfort Letter and vice versa (echoing the comments of Hope LJ in *Fiona Trust* that "one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings").[3]

A "particular legal relationship"

Etihad also needed to satisfy the court that the disputes in the German Proceedings arose "in connection with a particular legal relationship" in accordance with Article 25 of the Brussels Recast. Air Berlin contended that the claims in Germany fell under the "Comfort Letter relationship", rather than the lender/borrower relationship covered by the Jurisdiction Clause in the Facility Agreement. Applying *Powell Duffryn*,[4] Jacobs J clarified that it was necessary for the Court to adopt a two-stage process:

1) first, to identify, "by reference to the facts of the case as a whole, […] the legal relationship between the parties in connection with which the jurisdiction agreement was concluded"; and

2) secondly, to consider "whether the dispute originates from that legal relationship or a different one".

Jacobs J found that the dispute originated in the lender/borrower relationship; it was "unrealistic for Air Berlin to contend that the dispute relating to the Comfort Letter originated in a relationship other than" the lender/borrower relationship.

Asymmetric jurisdiction clauses – ability to continue to hear proceedings as second seised court

Article 31(2) Brussels Recast permits a second seised court (the English court in this case) to continue with proceedings where it has been chosen in an "exclusive" jurisdiction clause (in other circumstances the court second seised is required to stay its proceedings while the first seised court determines whether it has jurisdiction). The key question in dispute, therefore, was whether the Jurisdiction Clause conferred exclusive jurisdiction on the English court.

Air Berlin contended that the Jurisdiction Clause, when read as a whole, did not give the English courts complete exclusivity. Jacobs J concluded that the Jurisdiction Clause conferred exclusive jurisdiction on the English courts for the purposes of Article 31. In particular, Jacobs J:

- stated that there could be "no doubt" that Air Berlin had agreed "upon the exclusive jurisdiction of the English courts in respect of any proceedings which they commence against Etihad". Air Berlin therefore had an "obligation" not to sue in other jurisdictions;
- relied on ECJ case law in support of the view that not all disputes from a particular legal relationship need to be submitted to the same court for a jurisdiction agreement to be exclusive, nor does the exclusivity need to be reciprocal; and
- noted that allowing Etihad to rely on an asymmetric clause as conferring exclusive jurisdiction for these purposes was consistent with academic writing and case law which confirms that this approach reflects the aims of the Brussels Recast and in particular the need expressed in Recital 22 to "enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics".

Comment

At a practical level, including jurisdiction provisions in all agreements will mitigate the risk of counterparties seeking to rely on the absence of express wording to muddy the waters as to what has been agreed. This decision is a salutary reminder of the jurisdiction complications which can and do arise between parties who have entered into a number of related contracts, often against a background of time pressure and financial distress. The lengthy judgment demonstrates that disputes about the scope of jurisdiction clauses still provide fertile ground for argument.

The approach of the English court should provide comfort to parties that commonly rely on "asymmetric" jurisdiction clauses in order to maximise their enforcement options against counterparties. An asymmetric jurisdiction agreement allows one party (normally a lender) to litigate anywhere, whilst the other party (normally a borrower) is restricted to

[3] [2007] UKHL 40 at [28].
[4] *Powell Duffryn v Petereit* [1992] ECR I-1745.

bringing proceedings in one jurisdiction only (in this case Air Berlin was restricted to suing in England). Jacobs J was emphatic in his classification of an asymmetric jurisdiction clause as exclusive (for the lender's benefit) for the purposes of Article 31(2) of the Brussels Recast. This means that the tactic, commonly used by borrowers, of commencing proceedings in a slow moving Member State court in breach of an asymmetric jurisdiction agreement, is unlikely to be so attractive as it will not delay proceedings in the English court if it has been chosen by the parties in an asymmetric jurisdiction agreement. The decision is consistent with previous case law. Air Berlin has been granted permission to appeal the decision, with a hearing expected in November 2020.

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Contract

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 [2020] EWHC 58 (Comm), 17 January 2020

Parties to an unincorporated oil and gas joint venture were free to act in their individual best interests in deciding whether to discharge another party from its operator role. No duty of good faith or rationality applied.

The parties owned oil and gas field blocks through an unincorporated joint venture governed by joint operating agreements. The defendant acted as operator of the field blocks. The claimants invoked a change of operator clause in the agreements, which stated that the "Operator may be discharged… by the Operating Committee giving not less than ninety (90) days notice to it" provided that the non-operating parties approved the discharge by unanimous vote. The claimants' intention was to substitute the first and second claimants as operator; and the first and second claimants had agreed to indemnify the third and fourth claimants for any transition costs exceeding a certain cap.

A dispute arose as to the validity and effect of the notices of discharge. The defendant alleged that the right to discharge was qualified by duties of good faith and rationality, either through interpretation of the agreements (the **interpretation issue**) or implication of terms based on: (i) a *Socimer/Braganza* contractual discretion (the ***Braganza* issue**); or (ii) the agreements being Yam Seng relational contracts (the ***Yam Seng* issue**).

No qualification as a matter of interpretation

On its proper interpretation, the court found that the right to discharge the operator was unqualified. Relevant factors included:

- the use of clear and unambiguous language: the right to discharge was a binary decision involving no evaluatory or adjudicatory exercise;
- the parties' drafting convention evidenced through other clauses in the agreements: where a right was intended to be unqualified, it was simply described as a right, without stating that it was unqualified. Conversely, as seen in other clauses, the parties could and would have expressly included a qualification if that was their intention; and
- the parties' common understanding of the nature of the relationship: there was no partnership or quasi-partnership. Where interests ceased to be aligned, the parties were free to act in their individual best interests.

Braganza issue: reluctance to imply a duty of rationality in commercial context

The court reiterated prior case law on the basic test for implication of terms. It noted that particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties (such as in this case). Where an issue had been left unresolved, it was much more likely to be the result of choice rather than error. Where detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (following *UTB LLC v Sheffield United Ltd* [2019] 2322 (Ch)).

In *Braganza v BP Shipping* [2015] 1 WLR 1661, the Supreme Court approved the Court of Appeal's statement in *Socimer International Bank Ltd (In liquidation) v Standard Bank London Ltd* [2008] EWCA Civ that "…a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality".

However, on the present facts, it was not necessary to imply any duty of rationality or good faith either in order to give business efficacy to the joint operating agreements or in order to give effect to what was so obvious that it went without saying. Prior case law established that *Braganza* duties had no application to unqualified termination provisions in expertly drafted, complex commercial agreements between sophisticated commercial parties. Here, the right to discharge the joint venture operator was assimilated to the right to terminate a contract.

Braganza and commercial contracts

More generally, the court expressed doubt over the application of *Braganza* to absolute rights in commercial contracts. Absolute rights conferred by professionally drawn or standard form contracts – including but not limited to absolute rights to terminate relationships and roles within relationships – were an everyday feature of contracts that govern commercial relationships. Extending *Braganza* to such provisions would be an unwarranted interference in the freedom of parties to contract on the terms they choose, at any rate where there was no fiduciary relationship.

Yam Seng issue: not all relational contracts include implied duty of good faith

In *Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB), a duty of good faith was implied into a "relational contract", the definition of which included "a contract governing a long term relationship to which the parties make a substantial commitment". Examples included some joint venture agreements, franchise agreements and long-term distributorship agreements.

Here, the court treated the joint operating agreements as being, at least arguably, relational contracts within the meaning of *Yam Seng*. However, not all relational contracts would attract an implied duty to act in good faith, as the basic test for implication of terms still applied.

The court held that it was not necessary to imply a duty to act in good faith obligation in relation to the exercise of the right to discharge the operator. On its true interpretation, the right in question was absolute and unqualified. As the parties had legislated on the terms of the relationship, it was not necessary to imply such a term in this case.

Braganza duty would have involved a review both of process and outcome

Despite the fact that the court had rejected the proposed implied duties, it considered the content of a hypothetical implied *Braganza* duty and applied it to the facts, on the parties' request.

The court commented that where a *Braganza* duty is implied, both the decision-making process and the substantive decision itself would come under review:

- First, did the decision-maker take into account something that it should not have, or fail to take into account something that it should have?
- Second, was the decision that was reached so unreasonable that no reasonable decision-maker, occupying the position of the maker of the decision under challenge, could have reached it?

The court added that each claimant would be considered separately; that the weight given to any particular factor was a matter for the decision-maker; and that where a mixture of material and immaterial factors had been taken into consideration, the court should ask whether the party concerned would still have made the same decision by reference to the material factors.

After considering evidence as to each claimant's motivations, the court concluded that, even assuming that its decision on the implication of terms was incorrect, the claimants did not breach any implied qualification. Even aside from the first and second claimants' wider commercial best interests in taking over operation of the fields, each claimant had considered the discharge to be in their best interests based on genuine concerns about the risks of the defendant continuing as operator. The fact that the first and second claimants had agreed to indemnify the third and fourth claimants for any transition costs over a costs cap did not invalidate the decision. The claimants' decision to discharge the defendant as operator was therefore upheld.

Comment

Good faith-type arguments have been raised in a number of first instance cases, based on the *Yam Seng* and *Socimer/Braganza* decisions on good faith in relational contracts and implied duties of rationality.

The developing case law in this area and the fact-specific nature of disputes provide multiple angles for challenging a contractual counterparty's actions, although ultimately such challenges have tended to fail in the context of detailed commercial contracts. As Professor Ed Peel has said, the good faith cat is now out of the bag.

On a practical level, this case shows the value of having contemporaneous evidence of the reasons for exercising contractual rights. Decision-makers should be aware that their beliefs and motivations may come under close scrutiny.

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No oral modification clause and good faith

Kabab-ji Sal (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6, 20 January 2020

The Court of Appeal considered the "estoppel test" from the Supreme Court's decision in *MWB v Rock*: a party can be estopped from relying on a "no oral modification" clause if that party's words or conduct unequivocally represented that the modification was valid. The court held that clearly worded "no oral modification" clauses can only be overridden if the estoppel test set out in *MWB v Rock* is satisfied and that principles of good faith cannot be used to set aside such clauses on broader grounds.

The dispute related to whether, following a corporate reorganisation, Kout was now a party to a franchise agreement originally entered into between Kabab-ji and an entity that had subsequently become a subsidiary of Kout. No formal agreement to amend the terms of the franchise agreement to make Kout a party was ever entered into, despite the franchise agreement containing a no oral modification clause.

Kabab-ji argued that Kout was a party to the franchise agreement, because it contained an express provision that the parties act in good faith (and was supported by similar provisions within the UNIDROIT principles, which also applied to the franchise agreement) which, when considered alongside Kout's conduct in appearing to act as a party to the franchise agreement, overrode the no oral modification clause.

The court held that clearly worded no oral modification clauses can only be overridden if the estoppel test set out in *MWB v Rock* is satisfied and that principles of good faith cannot be used to set aside such clauses on broader grounds. Further, the court held that the UNIDROIT principles do not specify any principles which are broader than the estoppel test set out in *MWB v Rock*.

This summary was first published on Allen & Overy's contract law blog: aocompactcontract.com

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"Please go ahead with the below…." A binding contract?

Athena Brands Ltd v Superdrug Stores Plc [2019] EWHC 3503, 18 December 2019

A two-email exchange – culminating with "Please go ahead with the below…" – amounted to a binding contract. Large corporations must ensure that employees are sufficiently trained to avoid inadvertently entering commercial contracts (and potentially acting outside purchasing procedures) through the exchange of relatively informal emails.

In an email exchange, Athena asked Superdrug to confirm that a stated minimum number of orders was being placed. Superdrug responded saying "Please go ahead with the below…".

Superdrug argued there was no contract because:

- the email chain did not amount to a contractual agreement as the Superdrug employee in question had not followed the usual Superdrug purchasing procedure (issuing a specific purchase order) when contracting with Athena;
- there was no intention to create legal relations; and
- the Superdrug employee lacked ostensible authority to enter into a contractual agreement for the purchase of goods.

The court agreed with Athena, granting summary judgment on the basis Superdrug's arguments did not have a real prospect of success.

Specifically, the court decided that the Superdrug employee held themselves out as a buyer authorised to negotiate terms and that Athena lacked any knowledge of restrictions existing on the buyer's authority to negotiate. Objectively there was no doubt that Athena, in the course of the email exchange, had relied on the Superdrug employee's confirmation as binding legal intent to form a commercial contract. The court also noted that there was no evidence to show that Athena has acted unreasonably in thinking so.

Large corporations would do well to ensure that employees are sufficiently trained to avoid inadvertently entering commercial contracts (and potentially acting outside purchasing procedures) through the exchange of relatively informal emails. Clear communication, robust training and systems and controls should help reduce the chances of employees with ostensible authority falling into this trap.

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Limitation

Time limits for damages claims based on public law breaches during rail franchise procurement

Secretary of State for Transport v Arriva Rail East Ltd & ors [2019] EWCA Civ 2259, 18 December 2019

This case highlights the very different, and often very strict, time limits that apply in different private law and public law claims. Rejecting the Secretary of State's attempt to strike out part of the claims against it, the Court of Appeal confirmed that the six-year time limit for damages claims applies to a procurement conducted outside the Public Contracts (and similar) Regulations. However, the three-month judicial review time limit may apply to other private law claims in this context.

The decision highlights the importance of considering time limits when challenging, or defending, public body decision-making. Where the public law act engages private law rights, damages and other remedies may still be available where the time limits for judicial review have passed – provided that judicial review is not being sought by the back door.

These claims arose out of the Secretary of State for Transport's decisions to disqualify four claimant train operating companies from the competitions for the East Midlands, South Eastern and West Coast rail franchises.

Alleging that the design and conduct of the procurements as well as the decisions to disqualify them were unlawful, the four claimants commenced Part 7 proceedings seeking various private law remedies, including damages, injunctions and declarations and also judicial review to challenge the disqualification decisions.

The Secretary of State unsuccessfully attempted at first instance to strike out those parts of the Part 7 claims which related to the design and conduct of the procurement on the basis that the claims were brought outside the three-month time limit to judicially review the acts. Arguing that the underlying claim was a public law challenge, the Secretary of State argued that the claimants could not seek private law remedies, which were dependent on establishing the public law illegality of those acts and decisions. The principal issue on appeal of the strike-out application was therefore the applicable time in which the claimants' Part 7 claims should have been brought.

Time limits – usually very short in the context of procurements or public body challenges

This case highlights the very different, and often very strict, time limits that apply in different private law and public law claims.

- Damages – A claim for breach of statutory duty is a tort claim with a six-year limitation period (s2 Limitation Act 1972). In this case, the claim arose under s2(1) European Communities Act 1972 for an alleged breach of EU law duties, subject to the *Francovich* principles (ie that damages are available where the rule of law infringed was intended to confer rights on individuals, the breach was sufficiently serious, and there was a direct causal link between the breach of obligations and the damage sustained by the injured party).
- Judicial review – A very short time period applies as proceedings must be started promptly and in any event within three months of the decision or action being challenged.

For procurement challenges, the comprehensive procedural rules in the Public Contracts Regulations, Utilities Contracts Regulations and Concession Contracts Regulations emphasise the need for rapidity and generally proceedings must be started within 30 days from when the claimant first knew or ought to have known that the grounds for starting proceedings had commenced. Although these claims did involve a government tender exercise, the procurement rules expressly exclude rail franchise procurements so the Court of Appeal had to consider which time rules were applicable in the absence of express statutory guidance.

Time limit for Part 7 claims which inextricably raise public law issues

At first instance, Stuart-Smith J held that the applicable time limit for the Part 7 claims was (subject to potential exceptions) six years, rejecting the Secretary of State's argument that he should have imposed a three-month time limit by analogy with the judicial review procedure.

Coulson LJ for the Court of Appeal broadly upheld this decision but was more willing to differentiate between the different Part 7 remedies sought by the claimants.

- *Francovich* damages claims – the six-year time limit applied. There was no reported authority confining a *Francovich* damages case to the three-month time limit for judicial review, and there was no compelling principle why that would now be appropriate. The damages claims were not an attempt to undo the public law event which gave rise to the claim and so urgency was not so key.
- Declaratory relief and/or injunctions – the "cross over" relief which procedurally could be sought in private or public law claims. The question here was whether it was an abuse of process to bring a private law claim to get around the short three-month time limit for judicial review. The Court of Appeal found no difficulty or prejudice in the first instance judge's decision to determine this at the trial rather than on the strike-out application. However, Coulson LJ gave a strong signal by stating it was "likely" that claims for declarations were also subject to the six-year time limit but that injunctions "may well fall on the other side of the line" – as seeking to set aside the underlying public law decision is "a very different thing" to a *Francovich* damages claim. Coulson LJ also called upon the trial judge to ensure that such claims for injunctions were not used to circumvent the judicial review time limit in procurements falling outside the Public Contracts (and similar) Regulations.

Judicial review time limits in a "fluid process"

The Court of Appeal also rejected the Secretary of State's second ground of appeal regarding the precise starting point for the three-month judicial review time limit (potentially only relevant to injunctions). In a fluid decision-making process such as the rail franchise procurements, the Court of Appeal did not accept that there was a clear demarcation between the Secretary of State's decisions to issue the tender documents, seek re-bids and then disqualify the claimants. While it was not accepted that the time limit necessarily ran from the first of these decisions, as claimed by the Secretary of State, the Court of Appeal held that precisely when the period started to run was a matter to be decided by the judge at trial.

COMMENT

Although an orthodox application of established principles, this outcome may come as a surprise to potential claimants in a public procurement competition, who have long been required to proceed with speed, even when seeking damages.

However, this decision is not only relevant to procurements conducted outside the specific procedural rules in the Public Contracts (and similar) Regulations, it also applies more generally to any private law claim which inextricably raises public law issues and highlights when they may benefit from a six-year time limit.

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Privilege

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) [2020] EWCA Civ 35, 28 January 2020

The dominant purpose of a communication must be to obtain, or give, legal advice for legal advice privilege to apply. The Court of Appeal considers how, in the light of this, to analyse privilege and internal multi-party email communications between in-house lawyers and non-lawyer employees. *Three Rivers No. 5* is criticised but acknowledged to be binding.

Jet2 brought judicial review proceedings challenging the CAA's decision to publish a press release critical of Jet2 and some related correspondence. The basis of the challenge was that the CAA had no power to publish the materials or, if it had a power, it had exercised it for an improper purpose. As part of these proceedings Jet2 made an application for specific disclosure of all drafts of, and discussions concerning, a key letter from the CAA to Jet2 in which the CAA responded to Jet2's complaints about the press release. The CAA claimed these documents were privileged on the basis that its in-house lawyers were "involved in those discussions and gave advice in relation to the various drafts, the content of which was privileged". The documents were CAA internal multi-party emails which included in-house lawyers and non-lawyer employees as addressees. Jet2 challenged the privilege claim on the basis that the communications were not for the dominant purpose of legal advice in a relevant legal context.

Legal advice privilege – the basics

Legal advice privilege attaches to communications made in confidence between lawyers and their clients for the purpose of giving or obtaining legal advice in a relevant legal context.

The court summarised the starting point as follows:

- Legal advice privilege has to be considered on a document-by-document basis and not by reference to the general retainer of the lawyer.
- Where the lawyer is acting as a lawyer (as opposed to as a commercial adviser) most communications to and from the client are likely to be sent in a legal context and are likely to be privileged.
- Where the lawyer's role is to act as a commercial adviser, it is still possible for a particular document to fall within the scope of legal advice privilege.
- When thinking about whether a document is covered by legal advice privilege, it is important to remember that legal advice is a wide concept in its own right and, separately, extends to the so-called continuum of communications (ie the back and forth between lawyer and client).
- Although context is important, the court is unlikely to be persuaded by fine arguments as to whether a particular communication falls outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two is for practical purposes impossible.
- Where there is no intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by legal advice privilege will not be disclosable (and so can be redacted), and the rest will be disclosable.
- A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep its lawyer up to date with a matter on the basis that the lawyer will provide legal advice as and when appropriate.
- Legal advice, privileged when given, can be disseminated internally and (in certain circumstances) externally for the purposes of being considered and applied without the loss of privilege: here, English law has taken a flexible and realistic approach, reflecting the realities of modern corporate and commercial arrangements.

But there is a dominant purpose test

Following some dense analysis of the authorities going back to the 19th century and of the leading textbooks, while accepting that the jurisprudence was not straightforward, the court held that for legal advice privilege to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice. It did so despite the Court of Appeal's non-binding criticism of this proposition in *ENRC v SFO*, where it said that the additional qualification of looking at the dominant purpose was tautologous.

English law is now in line with the law in Australia, Hong Kong and Singapore on this point.

How to analyse multi-party email communications

With all the above in mind, the court proposed the following approach to multi-party email communications between, in this case, in-house lawyers (acting as lawyers) and non-lawyer employees about the key draft letter:

- Although the general role of the lawyer may be a useful starting point, the test focuses on the individual communication.
- If the dominant purpose of a communication from a client is, in substance, to agree instructions to the lawyer then that communication will be covered by legal advice privilege. That will be so even if that communication is sent to the lawyer, by way of information or if it is part of a rolling series of communications with the dominant purpose of instructing the lawyer. However, if the dominant purpose is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee.
- The response from the lawyer, if it contains legal advice, will almost certainly be privileged, even if it is copied to more than one addressee.
- On balance, multi-addressee communications should be considered as separate bilateral communications between the sender and each recipient rather than as a whole. That said, who is an addressee of an email may reveal its dominant purpose.
- It helps to consider first, whether, if the email were sent to the lawyer alone, it would have been privileged. If not, then the question of whether any of the other emails are privileged hardly arises. If so, the question then arises as to whether any of the emails to the non-lawyers are privileged, because, for example, their dominant purpose is to obtain instructions or disseminate legal advice.
- Where a communication might realistically disclose the nature and content of the legal advice, then that communication will be privileged.
- The above approach applies to meetings. Legal advice requested and given at a meeting will be privileged; but the mere presence of a lawyer, perhaps only on the off-chance that legal input might be required, is insufficient to render the whole meeting the subject of legal advice privilege.

Emails and attachments separate

The CAA tried to argue that an attachment to an email cannot be regarded separately to the email. This received short shrift: while the email and attachment may be regarded as a single communication, the attachment will have a separate, standalone, existence and so will also have to be considered on that basis.

Modest disclosure not a waiver

An email was voluntarily disclosed by the CAA as an exhibit to a witness statement in order to show that not all of the executives of the CAA shared the approach suggested by one executive in an earlier email. Jet2 said this amounted to a collateral waiver of all the documents sought. The court did not accept, obiter and on the facts, that such a "modest voluntary disclosure" could amount to a collateral waiver in the way that Jet2 claimed.

Three Rivers concept of client criticised (again) but binding

Like the Court of Appeal in *ENRC v SFO*, this court doubted the analysis and conclusion in *Three Rivers No. 5* that communications between an employee of a company and the company's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving that advice on behalf of the client. The court added that, for no obvious reason, the law in relation to legal advice privilege, set out in *Three Rivers No. 5*, for the collection of information to instruct lawyers is out of line with the law about the dissemination of advice from lawyers, once received. Nonetheless, this court accepted it was bound by that decision.

Comment

Whether there is or is not a dominant purpose test for legal advice privilege under English law has long been debated. Now we know the answer: there is. It remains to be seen how much difference in practice this will make (merely copying a lawyer, or having them attend a meeting, has never, without more, been enough to make something privileged). We do now have a detailed approach for dealing with multi-party lawyer/non-lawyer communications.

The essence of the court's test is this:

- is a particular communication for the dominant purpose of obtaining or giving legal advice in a relevant legal context; or, if not,
- does the communication realistically disclose the nature and content of the legal advice?

In the court's mind legal advice privilege is what it says: a privilege. You need to "take proper care" of it. In practice, especially where in-house lawyers are concerned, this can be really difficult when everyone communicates both instantly and electronically. In an ideal world people will think about, and maybe stress, the dominant purpose of their communications and consider whether, alternatively, separate communications to and from in-house lawyers are more appropriate (with the email subsequently being forwarded on a confidential basis as necessary).

As an aside, this dispute was primarily about 11 documents concerning a single letter. It has taken two first instance decisions and one of the Court of Appeal to resolve the matter. Quite how privilege reviews are supposed to be carried out economically if the analysis is this granular and may be subject to this level of scrutiny is unclear.

Finally, *Three Rivers No. 5* is ripe for being overturned if only the subject matter would get to the Supreme Court.

Post script: In a decision which shows how far legal advice privilege can extend, the Court of Appeal held that a client's instructions to its solicitors about monies to be held in escrow were privileged even though the solicitors had confirmed to a counterparty the nature of these instructions. The instructions were given in the legal context of the solicitors acting on the underlying deal and were part of the "continuum of communications" between lawyer and client. The solicitors had no express or implied authority to waive privilege and had not done so: *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd & Ashurst LLP* [2020] EWCA Civ 11, 21 January 2020.

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Settlement

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) [2020] EWHC 55 (Ch), 24 January 2020

A change in the law made shortly after a compromise agreement was entered into did not give rise to a common mistake of law capable of setting aside the agreement. The High Court held that while the doctrine of mistake operates in the context of compromise agreements, there was no "common assumption" between the parties as to the relevant law in this case and therefore no mistake. The court observed that "*a mistake will more likely arise where a well-established and unquestioned rule of law is dramatically overturned than where a single decision on a new and difficult point is overruled*". The decision highlights the reluctance of the English courts to disturb already concluded settlements on the basis of a future revision of the law.

Elston and his trustees in bankruptcy were parties to an Income Payments Agreement (**IPA**) under which sums were paid out from Elston's pension funds to his trustees as contributions to his bankruptcy debts. The IPA was made under s310A Insolvency Act 1986, so that its provisions were capable of enforcement by the court as if they were provisions of an income payments order (**IPO**) under s310. The IPA was entered into in light of *Raithatha v Williamson*,[1] a 2012 decision in which the High Court held that undrawn pension rights were income for the purposes of s310 and could therefore be the subject of an IPO.

A month after the IPA was entered into, the High Court in *Horton v Henry*[2] declined to follow *Raithatha* and instead held that undrawn pension rights did not fall to be assessed as part of a bankrupt person's income for the purposes of s310. In light of this change in law, Elston brought a claim of unjust enrichment against the trustees, seeking restitution of the sums paid out from his pension funds. He argued that the IPA had been concluded under a mistake of law and should be set aside and the payments made under the Agreement repaid.

A change in law may give rise to a mistake

The law can be changed retrospectively by a later judicial declaration (*Kleinwort Benson v Lincoln County Council*).[3] In light of this ruling, the court commented that "[i]*t is a peculiarity of subsequent changes in the law that what is, on any sensible view, not a mistake at all but a future revision of the law, has the potential of rendering past decisions taking a contrary view (or persons' understanding of such decisions) in effect mistakes capable of having private law consequences*".

Against this backdrop, the court reiterated that, absent misrepresentation or fraud, a contract can only be set aside for common mistake of the parties to the contract. As set out in *Great Peace Shipping*, there are five elements to be satisfied in order to set aside on grounds of common mistake:[4]

1) there must be a common assumption as to the existence of a state of affairs;

2) there must be no warranty by either party that such state of affairs exists;

3) the non-existence of the state of affairs must not be attributable to the fault of either party;

4) the non-existence of the state of affairs must render performance of the contract impossible; and

5) the state of affairs may be: (a) the existence (or a vital attribute) of the consideration to be provided; or (b) circumstances which must subsist if performance is to be possible.

1 [2012] 1 WLR 3559.
2 [2016] EWCA Civ 989.
3 [1999] 2 AC 349.
4 *Great Peace Shipping* [2002] EWCA Civ 1407 at [76].

The doctrine of mistake applies to compromise agreements

The IPA was found to be a compromise agreement: it settled a pre-existing dispute in that it headed off an application for an IPO that would otherwise have been made by the trustees. The court observed that the rules of mistake apply to compromise agreements as they do to other contracts.[5] However, compromise agreements are different from other contracts in that the parties reach a compromise *not* from a common perspective, but from a divergent one. Compromise agreements involve each party reaching a view *not* on what the facts are or what the law is, but on how the court will determine the factual and/or legal questions.

Ultimately, the court concluded that where it is asserted that a compromise agreement should be set aside for mistake of law, the following two-stage process must be undertaken:

- The true meaning and effect of the agreement must be examined. This may include considering the status of any judicial decision relied on by the parties. If this results in a construction of the contract whereby one of the parties is found to have assumed the risk of the law changing in the future, then that is the end of the inquiry, as "[t]*he answer to the effect of a mistake will be found in the risk allocation adopted by the parties to the compromise agreement*".
- If, on the other hand, the risk is not allocated in the contract, the court must go on to ask whether the retrospective change in law gives rise to a common mistake of law (as defined in *Great Peace Shipping*) or whether one or both of the parties simply made a misprediction about the course of future legal events.

A misprediction is not a mistake

The court observed that "*a mistake will more likely arise where a well-established and unquestioned rule of law is dramatically overturned than where a single decision on a new and difficult point is overruled*". The latter will be a case of misprediction. In drawing this distinction, the court endorsed the view that parties to a compromise should not be treated as ignorant of the fact that the common law develops.[6]

The court found that there was no "common assumption" between the parties as to the court's jurisdiction to make an IPO in respect of Elston's undrawn pension rights. Both parties were aware that *Raithatha* was a first instance decision on a novel point of law. It was open to Elston to contend that the court had no such jurisdiction and to refuse to enter into the IPA as a result. Instead, he and the trustees each made their own "prediction" of the likely outcome were an application to court to be made and entered into the IPA on this basis. Therefore, the primary requirement for setting aside a contract on grounds of mistake did not exist in this case.[7]

Comment

In grappling with the consequences of *Kleinwort Benson*, the court in this case made clear that developments in the common law will only give rise to a mistake in contract – with all the private law consequences that follow – in very limited circumstances. "Closed transactions" are protected by the court and will likely only be reopened on the basis of a mistake of law where the parties have expressly provided for this. Without such a provision, the parties are taken to have understood that the common law evolves over time, and their agreement will stand regardless of any future changes in law.

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5 *Brennan v Bolt Burden* [2004] EWCA Civ 1017.
6 *Brennan v Bolt Burden* [2004] EWCA Civ 1017 at [31] (Bodey J).
7 While the first instance decision was affirmed on this ground alone, the court also found that the IPA was not "impossible to perform" by reason of the misprediction.

Top cases 2019

Top finance litigation and contract law developments in 2019

This is a round-up of the most interesting finance litigation and contractual developments in 2019. The selection is necessarily subjective and draws from a wide range of cases and developments that are of direct relevance to finance parties. Full coverage can be found in our monthly Litigation and Dispute Resolution Review.

Contract

Economic duress curtailed

In *Times Travel (UK) Ltd v Pakistan Airlines Corporation* [2019] EWCA Civ 828, an extended concept of lawful-act duress, which had been given wings by the High Court, was ultimately grounded by the Court of Appeal. Economic duress recognises that a contract may be voidable where illegitimate pressure (which may include threats of lawful acts ie lawful-act duress) has been applied to induce a party to enter into that contract. The Court of Appeal held that an agreement will only be voidable for lawful-act duress where the defendant induces the claimant to concede a demand to which the defendant, does not believe in good faith it is entitled. Reasonableness of the defendant's belief is irrelevant.

In this case Pakistan Airlines Corporation (**PAC**) gave notice of termination of its existing contract with Times Travel. It then offered a new contract on the condition that Times Travel waived its existing claims for commission. Times Travel successfully challenged the validity of the new contract on economic duress grounds in the High Court. The Court of Appeal allowed PAC's appeal and declined to broaden the scope of lawful-act duress beyond cases of bad faith. This reining-in of lawful-act duress is reassuring given that economic pressure is ubiquitous in commercial situations and the introduction of a reasonableness standard would have given rise to considerable uncertainty.

Good faith in relational contracts

Alan Bates & ors v Post Office Ltd [2019] EWHC 606 (QB) brought certainty in some respects and uncertainty in others to the implication of a contractual duty of good faith. In clarifying the scope of the duty of good faith, the High Court said that it went beyond mere honesty: the question is whether the conduct would be regarded as commercially unacceptable by reasonable and honest people and it relates to every power and discretion in the contract.

However, the question of when a duty of good faith will be implied into a contract remains unclear. The High Court appeared to indicate that once you have a relational contract (various relevant characteristics were listed), then a duty of good faith is automatically implied as a matter of law. However, there is a competing view that a duty of good faith will in fact only be implied if the context requires it. Subsequent High Court decisions such as *UTB LLC v Sheffield United Ltd & ors* [2019] EWHC 2322 (Ch) have approached implication as a matter of fact rather than law. Furthermore, in refusing the Post Office permission to appeal, the Court of Appeal's view was that the High Court in *Bates* had not implied the duty automatically after finding that the contract was relational.

The practical effect of finding an implied duty of good faith in *Bates* was that 17 terms were implied into the contracts between the Post Office and sub-postmasters. The key takeaway: is if you don't want to risk this broad duty of good faith being implied into your contract, you should expressly provide otherwise.

Contracts are the only thing not frustrated by Brexit

Could Brexit result in frustration of a commercial agreement? In *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), an English court considered this question for the first time, and held that Brexit did not frustrate the 25 year lease of the headquarters of the European Medicines Agency (**EMA**) in London. EMA argued that the lease had been frustrated because Brexit had: (i) triggered legal changes which undermined EMA's capacity to continue with the

lease (ie EU legislation required EMA to relocate to Amsterdam); and (ii) frustrated the common purpose of the lease. The court rejected both arguments finding, among other things, that EMA did have capacity and that the lease was a product of a negotiation between commercial parties with different purposes. That an EU institution failed to make out this argument shows that it will be very difficult for parties to argue that Brexit has frustrated their contracts. It is also clear that arguments based on frustration of a common purpose (which takes into account subjective factors such as the parties' knowledge and expectations in determining that common purpose) will very rarely succeed. Another win for certainty although those left with a bad bargain as a result of Brexit might view the court's approach as frustratingly narrow.

Fintech: decrypting crypto

Until recently, clarity over the legal treatment of cryptoassets appeared to be as elusive as the "Missing Cryptoqueen" herself, Dr Ruja Ignatova. Questions such as whether they constitute property will take on even more real-world significance as cases concerning stolen cryptocurrency and bust crypto-exchanges start to appear in the courts.

Two recent English cases, *Robertson v Persons Unknown*, unreported, CL-2019-000444 and *Elena Vorotyntseva v Money-4 Ltd t/a Nebeus.Com, Sergey Romanovskiy, Konstantin Zaripov* [2018] EWHC 2596 (Ch) made headlines for their treatment of cryptocurrencies as property for the purposes of an asset preservation order and freezing order respectively. A promising start but both are interlocutory decisions and neither elaborated on the specific proprietary category these cryptocurrencies fell into (choses in possession or choses in action). Enter the UK Jurisdiction Taskforce with its legal statement on cryptoassets and smart contracts (released in November) suggesting that cryptoassets should be treated as a third category of property. The legal statement is not binding but its analysis of the proprietary status of cryptoassets received High Court endorsement in *AA v Persons Unknown* [2019] EWHC 3556 (Comm). The legal statement has therefore brought some welcome clarification to this area although some significant uncertainties remain (eg governing law concerns).

Smart contracts are often mentioned in the same breath as cryptoassets and the Singapore International Commercial Court dealt with both *in B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03. Traders on Quoine's platform bitcoined off more than they could chew when, as a result of a bug in Quoine's software, they purchased cryptocurrency for values that were 250 times off-market. The court had to consider: (i) whether Bitcoin was property (it held that it was); and (ii) whether contracts entered into by software on both sides and without human intervention were void for unilateral mistake. For unilateral mistake to apply (under both Singaporean and English law), the counterparty must be aware of the innocent party's mistake. As the contracts had been concluded by software, the court held that the knowledge/intention of the programmer at the time of programming (by including values that were 250 times off-market) was relevant. The relevant values had been inserted in B2C2's trading algorithm to protect B2C2's position rather than to take advantage of the traders' mistake, so unilateral mistake was not made out and the contracts were valid. This is a good example of some of the perverse outcomes that may occur when the common law collides with automated smart contracts that have little or no direct human involvement.

Class actions

UK class action regime

Merricks v Mastercard Inc [2019] EWCA Civ 674 concerned a GBP14 billion class action claim brought against Mastercard on behalf of 46 million UK consumers. They relied on the European Commission's finding that interchange fees had been set at an unlawfully high level and therefore artificially raised prices for British consumers. Under the UK consumer rights class action regime, a collective proceedings order (**CPO**) must be obtained from the Competition Appeals Tribunal (**CAT**). The CAT had dismissed the application on the basis of its finding that there was no credible methodology for determining the loss suffered by each individual consumer. The Court of Appeal overturned the CAT's decision, holding that it should not have conducted a mini-trial (the question is simply whether the claims are suitable to proceed on a collective basis, not whether they are certain to succeed) and that the method of distribution could be addressed after the actual trial. Mastercard was subsequently granted

permission to appeal to the Supreme Court. All similar CPO applications at the CAT have been paused pending the Supreme Court's decision which is expected in late 2020 or early 2021.

Representative class action: damages for loss of control of data

2018 saw the success of the 5500-strong class action in *WM Morrison Supermarkets PLC v Various Claimants* [2018] EWCA Civ 2339 (judgment is currently awaited from the Supreme Court in this case). Arguably even more concerning for institutions is the 2019 four million-strong class action in *Lloyd v Google LLC* [2019] EWCA Civ 1599 (this also relates to a pre-GDPR cause of action under the Data Protection Act 1998) in which the Court of Appeal held that damages could be claimed for loss of control of data without having to prove any financial loss or distress: mere breach was sufficient. The claim alleged that Google had installed cookies on iPhones without the users' knowledge and consent, which enabled it to track their internet activity. Lloyd sought permission to serve the claim out of jurisdiction on Google and he was required to show that damage was sustained in the jurisdiction. In granting him permission, the Court of Appeal held that the damage was the users' loss of control of data; that he had a good arguable case that the damage was sustained within the jurisdiction; and that there was no requirement for the class to authorise the claim. The size of this claim shows that managing data risks should be at the forefront of firms' minds (especially with GDPR now in the picture).

Corporate criminal liability and financial crime

Bank breaches Quincecare duty

The Quincecare duty is implied into bank/customer relationships and requires a bank to refrain from executing an order to transfer funds where there are reasonable grounds for believing that the order is part of a scheme to defraud a customer. Despite the duty having been established over 30 years ago, *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 marks the first time a bank has been held to have breached it.

Singularis' liquidators claimed that Daiwa had made payments from Singularis' account in breach of its Quincecare duty. The payments had been made on the instructions of a fraudulent Singularis director. On appeal to the Supreme Court, Daiwa argued that the director's fraudulent conduct should be attributed to Singularis which would engage, amongst other things, the illegality defence in favour of the bank. The Supreme Court dismissed the appeal, holding that the question of attribution required consideration of the context and that the fraud was not to be attributed because the very purpose of the duty was to protect customers where trusted agents, such as the director, misappropriated funds. To allow for attribution would "denude the duty of any value".

Breach will be rare (eg in *Singularis*, the judge had found at first instance that there were "many obvious, even glaring, signs" of fraud) but this case confirms that the duty is not inert. The duty can in principle be excluded. However the courts have suggested that clear express words are required and standard entire agreement or exclusion clauses are unlikely to be sufficient.

Terminating customer relationship on suspicion of financial crime/money laundering

Banks concerned about their obligations in respect of preventing financial crime and mitigating money laundering risk will welcome the decision in *N v The Royal Bank of Scotland* [2019] EWHC 1770 Comm (although permission to appeal this decision has been granted). The Royal Bank of Scotland (**RBS**), had a contractual right to terminate a customer relationship without notice if it considered there to be exceptional circumstances. The court held that RBS was entitled to exercise this right where RBS suspected that the customer accounts were vulnerable to fraud and money laundering. While each case will need to be decided on its facts, banks should ensure that they take appropriate advice before making decisions to terminate and should document their decision-making processes. Measures which are less extreme than termination should be taken into account in a bank's decision-making process.

Breaching confidentiality to report suspected criminality?

Saab & anr v Dangate Consulting Ltd & ors [2019] EWHC 1558 (Comm) provided clarity on when, and how, it is appropriate to breach confidence to report suspected criminality. Private investigators were engaged to conduct an independent internal investigation into alleged money laundering at FBME Bank (**FBME**). The retainer contained strict confidentiality provisions

including a duty to notify FBME's lawyers before disclosing confidential information to third parties and to deliver up confidential documents if requested by FBME's lawyers/owners. Having fallen out with FBME, the investigators gave all the documents and information obtained from FBME to a U.S. regulator and other law enforcement agencies. When they were sued by the owners of FBME for breach of confidence, the investigators relied on the public interest defence. The court held that the investigators were in breach and made the following findings: the public interest defence was available in respect of regulators but not law enforcement agencies; the defence was not available in respect of the notification and deliver up confidentiality provisions; and a wholesale document dump of all the information they had gathered (as opposed to focused disclosure) was not justified on public interest grounds.

Key takeaways are that targeted disclosure is more readily justifiable on public interest grounds and that, for parties seeking to protect confidential information when disclosing to third parties, express confidentiality agreements which include notification and deliver up provisions are advisable.

English law disclosure obligation clashes with foreign criminal law

Bank Mellat found itself between a rock and a hard place in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 where compliance with a disclosure order of the English court would have placed it in breach of Iranian criminal law. In holding that disclosure should be given, the Court of Appeal undertook a balancing act between, on the one hand the risk of prosecution in Iran (it concluded that there was an actual risk but that it was less serious than Bank Mellat suggested because no relevant examples of past prosecutions had been given), and on the other, fair disposal of the trial. The court observed that where a court order might entail a breach of foreign law, it would not make such an order lightly but also emphasised that "foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law". This is consistent with previous cases which, for instance, have ruled that the French Blocking Statute does not trump orders for disclosure in the English courts.

Jurisdiction in cross-border disputes

A summary of litigation developments would be incomplete without discussing the tactics around jurisdiction that are a common feature of cross-border disputes. Note that certain decisions below relate to the application of the Brussels Recast Regulation in the English courts and are likely therefore to be of limited applicability once the transition period has come to an end and the UK ceases to be an EU Member State.

Different jurisdiction clauses in two contracts between the same parties

In *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA (Rev 1)* [2019] EWCA Civ 768, the parties' financing agreement contained a jurisdiction clause in favour of the Court of Turin whereas their swap agreement contained a jurisdiction clause in favour of the English courts. Proceedings were issued in both courts under Article 25 of the Brussels Recast Regulation. Trattamento Rifiuti Metropolitani SpA (**TRM**) challenged the jurisdiction of the English courts over BNP Paribas's claims under the swap agreement. The Court of Appeal held that there were two legal relationships for the purposes of Article 25: the financing agreement relationship and the swap relationship. Disputes relating to the swap therefore fell within the English jurisdiction clause.

This case brings welcome certainty, as it appears to accord with the intention of the parties in choosing different jurisdictions for different agreements. Importantly however, the Court of Appeal recognised that the starting presumption that competing jurisdiction clauses are to be interpreted on the basis that each clause deals exclusively with its own subject matter may be displaced by the language and surrounding circumstances.

Bringing foreign-domiciled defendants within the jurisdiction of an anchor defendant

Will jurisdiction be refused where a claimant commences an action in an "anchor defendant's" jurisdiction with the sole object of joining a foreign defendant to the same proceedings? The Court of Appeal in *JSC Commercial Bank Privatbank v Kolomoisky and Bogolyubov & ors* [2019] EWCA Civ 1708 held that jurisdiction will not be refused on this basis provided that the claimant has a sustainable claim against the anchor defendant which it intends to pursue to judgment. The Court of Appeal was considering the Lugano Convention but confirmed that the same reasoning would apply for Brussels 1 and the Brussels Recast Regulation. Also notable was the court's willingness to apply the Lugano Convention rules concerning parallel proceedings in another Convention state by analogy to circumstances which fell outside the Lugano Convention's scope (ie where parallel proceedings were in a non-Convention state).

Liability for actions of foreign subsidiaries

Finally, the Supreme Court's decision in *Vedanta Resources Plc & anr v Lungowe & ors* [2019] UKSC 20 has important consequences for British multinationals whose subsidiaries and suppliers operate abroad. The claimants alleged that toxic water pollution had been caused by the subsidiary's mine and brought a claim against the parent and subsidiary in the English courts. In holding that the English courts had jurisdiction over both parent and subsidiary, the Supreme Court stated that: (i) the duty of care owed by parent companies in relation to the activities of their foreign subsidiaries depends on the extent and type of the parent's involvement in the operations of the subsidiary; and (ii) where a parent company has submitted to the jurisdiction of the relevant foreign court then the risk of irreconcilable judgments will not be a "trump card" to allow the English courts to assume jurisdiction, but the court may then go on to consider any barriers to substantial justice in that foreign court.

Further guidance on the weight to be given to the risk of irreconcilable judgments in the *forum non conveniens* analysis was provided by the High Court in *E, D & F Man Capital Markets Ltd v Come Harvest Holdings Ltd & ors* [2019] EWHC 1661 (Comm) where it distinguished *Vedanta*. In holding that England was the proper place to bring the relevant claims, the High Court placed considerable weight on the risk of irreconcilable judgments. The question therefore appears to be whether the risk of irreconcilable judgments is of the claimant's own making (it was not of the claimant's making in *E, D & F*).

Vedanta indicates an increased willingness by the English courts to hear claims against parent companies in respect of actions of their subsidiaries. Initial worries that the decision would discourage parent companies from implementing environmental and social policies in respect of their subsidiaries (for fear of being held to have assumed a duty of care) appear to be misplaced as the risks of not implementing such policies far outweigh the risks of having assumed a duty of care. That said, it fits with a trend that business and human rights disputes are likely to form an ever more important part of the litigation landscape in the years to come.

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