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Contentious Commentary

A review for litigators

Jurisdiction

Off the rails

The jurisdiction exception in the Brussels I Regulation relating to decisions by a company's organs must be narrowly construed.

The Berlin transport authority is fighting a battle royal with a bank. Unsurprising, perhaps, since the bank is claiming over $100m from the Authority on a credit derivative written by the Authority, and the claim could go up to $220 million. The bank has won all the interim rounds so far.

The Authority's strategy has been to claim that the transaction was outside its powers and, using that argument, to try to move any litigation from London to Berlin. As a result, when the bank started proceedings in England under the jurisdiction clause in the credit derivative's contractual documentation, the Authority applied to stay the proceedings under article 22(2) of the Brussels I Regulation. Article 22(2), which overrides an agreement as to jurisdiction, would give the German courts exclusive jurisdiction if the claim has as its object a decision of the Authority's organs. The Court of Appeal rejected the Authority's argument that article 22(2) applied (*Berliner Verkehrsbetriebe v JP Morgan Chase Bank* [2010] EWCA Civ 310), but the Supreme Court referred the matter to the CJEU (the court formerly known as the ECJ).

Stereotypically, the German courts got there first. Not content with defending proceedings in England, the Authority started its own proceedings in Berlin, arguing that the Berlin courts had jurisdiction under article 22(2) and were not obliged to stay proceedings under article 27 even though the English courts were first seised. The Berlin courts referred the question to the CJEU. In *Berliner Verkehrsbetriebe v JP Morgan Chase Bank NA* (12 May 2011), the CJEU decided resoundingly against the Authority.

The CJEU decided that where a claim is made on a contract, as by the bank, the subject matter of the dispute is the contract. If one party claims that the contract was ultra vires, that raises an ancillary question only, and does not lead to the whole claim falling within article 22(2). Article 22(2) only applies where the principal subject matter of the dispute is the decision of a company's organs, and that will, it seems, never be the case where ultra vires is used as defence to a contractual claim. The CJEU was not prepared to allow corporations, public or private, to evade jurisdiction agreements by the simple device of asserting a lack of power.

The Supreme Court's reference to the CJEU now looks, to the outsider, otiose. The near absolute nature of the CJEU's decision is better than most suing foreign local authorities in England on derivatives transactions could have hoped for (eg *UBS v Kommunale Wasserwerke Leipzig GmbH* [2010] EWHC 2566 (Comm) and *Depfa Bank plc v Provincia di Pisa* [2010] EWHC 1148 (Comm)). If a contract gives jurisdiction to a court, that court is where a dispute on the contract should be resolved no matter what defence the other side throws out.

Problem relatives

Actions may become related after they are commenced, but only the action originally started second can be stayed.

English judges mourn the loss of the forum non conveniens in a European context. A broad discretion to accept or refuse jurisdiction is attractive; rules,

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which dictate what the judge must do, are far less enticing. So judges are inclined to force fnc's equivalent into the nooks and crannies of the Brussels I Regulation, even though the fit is never less than ill. In *Stribog Ltd v FKI Engineering Ltd* [2011] EWCA Civ 622, the Court of Appeal strained the Regulation at the seams.

To be fair, the facts of *Stribog* are as odd as the name. A sold a company to B, which then sold it to C. B became insolvent, and assigned to A its contractual claim for the purchase price not paid by C. A also made rumbling noises about other possible claims against C, which led C to start proceedings in Germany against A in which C sought a negative declaration. C expressly excluded from its German proceedings A's claim for the price due under the contract between B and C. This exclusion was, it seems, either because of the exclusive English jurisdiction clause in the sale agreement between B and C (the contract, according to Mummery LJ, "contain[ed] a clause which, in an eccentric excess of particularity, names Milton Keynes as the exclusive place of jurisdiction"), or because including the contractual claim would have increased hugely the German court fee.

Faced with this, A duly started proceedings in England against C claiming the sum owed by C under the sale agreement with B. C then filed something in the German proceedings that was not strictly an amendment but in which C asserted the invalidity of the assignment from B to A. On the back of this, C applied to stay the English proceedings under article 28 of the Brussels I Regulation. Article 28 gives a court other than the court first seised the discretion to stay its proceedings if there is a risk of conflicting judgments.

For article 28 to apply, there must be related proceedings. If there are related proceedings, it is then necessary to consider which court was first seised because only the court second seised can stay its proceedings. But if the proceedings that were started first only became related through an amendment or similar made after the second proceedings were commenced, which court is first seised of the related proceedings?

Overturning the first instance decision (and implicitly disapproving a number of other first instance decisions), the Court of Appeal decided that a broad approach was necessary ("broad" = good, like wholemeal bread; narrow is white sliced). The German and the English proceedings were unquestionably related at the time the Court of Appeal was considering the stay issue. The German court had been first seised of its proceedings regardless of the time at which they became related to the English proceedings. As a result, the English courts could, and would, stay their proceedings.

The difficulties with this approach are considerable. For example, it ignores the English jurisdiction agreement (which barely featured in the exercise of discretion). By issuing proceedings in Germany, and then later saying that those proceedings raised an issue that was relevant to the English proceedings, C has neatly stifled the jurisdiction clause. If C wins in Germany, the English proceedings will be stillborn. If the C loses in Germany, C can still contest the English proceedings on the basis of whatever other defences it may have. At least the German courts are generally very efficient, which cannot be said for all European courts.

The Court of Appeal's approach is also not easy to reconcile with the law on article 27. Article 27 similarly hinges on which court has been first seised, but has no discretionary element. If a claim involves the same cause of action and the same parties, the court second seised must stay its proceedings. It is clear that if a cause of action or a party is added by amendment, the court is only seised at the time of the amendment, not at the time the original claim was issued. Yet *Stribog* indicates that two proceedings can only become related by amendment, but the first court remains first seised even if the amendment is in response to the second proceedings. Rather too much opportunity for games.

The bottom line was really that the Court of Appeal considered that C was not forum shopping and that it was appropriate for the German court to determine the validity of the assignment from B to A. That was an issue of German law, but ignoring a jurisdiction agreement to achieve that end is dubious.

Reverse injunctions

Injunctions can be granted to restrain foreign arbitrations.

An English court cannot grant an injunction to restrain proceedings in an EU court brought in breach of an arbitration agreement (the infamous *West Tankers* case). But, according *to Claxton Engineering Services v TXM Olaj-Es Gazkutato KTF* [2011] EWHC 345 (Comm), an English court can grant an injunction to restrain arbitral proceedings in a foreign country, within or without the EU, if there is no arbitration agreement.

In *Claxton Engineering*, an action was started in England, but D applied to stay it on the basis that the parties had agreed to arbitration in Hungary. The court rejected the application, deciding that there was no agreement to arbitration and that the English courts had jurisdiction under the Brussels I Regulation. Despite, or because of, this, D commenced a Hungarian arbitration. C applied for an anti-arbitration injunction. Hamblen J decided that an injunction would not offend the Brussels I Regulation because arbitration falls outside the scope of the Regulation. Nevertheless, an injunction should only be granted in exceptional circumstances. The circumstances were exceptional given that the English court had already decided the issue. Asking arbitrators in Hungary to decide the issue again would infringe C's legal rights and be vexatious. The injunction was therefore granted. But will D or the arbitrators pay any attention?

Costs

The poverty trap

Parties pleading poverty must show evidence.

In *Mahan Air v Blue Sky One* [2011] EWCA Civ 544, C sought permission to appeal against a decision of Beatson J, and a stay of the judgment against C. CPR 52.9(1) allows an appeal court to impose conditions on

which an appeal may be brought, so the Ds sought orders that C pay US$66 million into court and a further sum as security for the costs of the appeal. C said it lacked the means to comply with any substantial condition imposed pursuant to the rule, or to provide more than "limited funds" as security for costs. C argued that any substantial order made on the Ds' applications would stifle its appeal (for which permission had already been granted), would be wrong as a matter of domestic law and would infringe their Article 6 rights to a fair trial. C also pointed out that the appeal court could only exercise the power to impose conditions where there was a "compelling reason to do so".

The Court of Appeal agreed that the power to impose financial conditions on an appeal should not be used to stifle a meritorious appeal, but said that an appellant who seeks to make such an argument must put before the court full and frank evidence as to its means. It is not for the party seeking the order to prove that the other party has financial means. In this case, the Court of Appeal found that C's evidence as to its financial position had not been full and frank, but rather "seems to vary with their forensic tactics". The Court of Appeal therefore made an order requiring security for costs to be paid, and for US$55 million to be paid into court.

Clifford Chance acted for the successful party in this case.

Privilege

Tidal waives

Impliedly waiving privilege is easy to do.

In *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm), D sought summary judgment against C. Defending that application, C deployed certain documents in respect of which he waived privilege. These included interviews between a former business associate, P, and C's former solicitors. After the hearing, which D lost, D made an application for C to provide specific disclosure of documents which included other materials recording or reflecting the content of P's discussions with the solicitors.

C objected, on the bases that (i) there had been no express waiver of privilege in respect of all of the materials by the use of limited parts of them in the summary judgment application; and (ii) for an argument of collateral waiver to succeed, D would have to show that it would be unfair for privilege to be maintained in respect of the class of documents. This is what is called the "cherry-picking principle", which D said was a "limited concept of fairness". But Gloster J agreed with C that "where, as here, there has been extensive deployment in interlocutory proceedings, such as a summary judgment application, of privileged material… in order to support a party's case on the substantive merits of his claim or defence, such deployment engages the collateral waiver principle and it is then too late for the deploying party to attempt to turn the clock back." If you use privileged material, make sure you know what you are doing and, in particular, how far the waiver might go.

Financial services

Mortgage redeemed

The Financial Services and Markets Act can apply more widely than people realise.

Agreeing to provide credit on the security of a charge means entering into a regulated mortgage contract within the meaning of the Financial Services and Markets Act 2000. That is a prohibited activity for anyone but an authorised person or an "exempt" person. In *Helden v Strathmore Limited* [2011] EWCA Civ 542, D, which was neither authorised nor exempt, loaned C £1 million so C could buy a property, and the loan was secured by a charge, to which two other loans were later added. Neither party appreciated the FSMA angle at the time of the loan, but C later sought a declaration that the charge was not enforceable against him.

Fortunately for D, the judge at first instance and the Court of Appeal let D off the hook. The judge decided that D was "carrying on by way of business" a regulated activity, which would have made the agreement unenforceable, but that it would nevertheless be just and equitable to permit D to enforce the charge and the obligation to repay two of the loans because it had been reasonable for D to fail to realise that FSMA was relevant. D's solicitors had not raised the issue. The legislation had not, until shortly before the transaction, extended to mortgages. D and its managers did not usually enter into transactions to which FSMA applied, and neither manager had ever attended any training courses on financial matters. In addition, C had had the use of the property, which had increased substantially in value, and there was no question of C having been taken advantage of.

The Court of Appeal did disagree with the judge's reasoning that D "reasonably believed that he was not contravening the general prohibition by making the agreement". How, asked the Court of Appeal, can you reasonably believe you are not doing something when you are wholly unaware of the existence of the prohibition in the first place? The Court of Appeal declined to resolve the issue but held that the judge had reached the right decision anyway. It did, however, overturn the order giving D its costs on an indemnity basis. The judge had made the order because in most cases a mortgagee is entitled contractually to recover all costs of enforcing and preserving its security on the indemnity basis, but in fact there was no such provision in the charge document in this case.

Anti-trust

A matter of time

Competition follow on claims must be brought within two years of the decision against each particular cartelist becoming final.

If the European Commission decides that there has been a cartel, those injured by it can bring a claim for damages against the cartelists before the Competition Appeal Tribunal under section 47A of the Competition Act 1998. The advantage of this course, and cause, of action is that the cartelists cannot challenge the

Commission's findings. The only questions are causation, damages and so forth. But Commission decisions can be appealed. As a result, the CAT's permission is required to bring a follow-on claim if the time for appealing the Commission's decision has not passed or if an appeal has been brought. But, at the other end of the time-line, claims must be brought within two years of the Commission's decision or, if an appeal is lodged, within two years of the determination of the appeal. All very straightforward, the naive might suppose.

In 2003, the Commission decided that Morgan Crucible and others had operated a cartel in relation to "electrical and mechanical carbon and graphite products" (don't ask). Morgan Crucible was not fined because it had tipped off the Commission about the cartel. Unsurprisingly, Morgan Crucible didn't appeal against the Commission's decision, but other cartelists did. Before those appeals were completed, Emerson brought a follow on claim against Morgan Crucible for damages ([2007] CAT 28). The CAT decided that Emerson required permission to bring its claim because, although Morgan Crucible had not appealed against the Commission's decision, others had. A Commission decision was a unitary instrument: if one cartelist appealed, the decision was under appeal, and permission was required to bring a claim against any cartelist, even a non-appealing one.

Logically, therefore, the two year limitation period doesn't start to run until all appeals by any cartelists have been disposed of. But not if a differently constituted CAT thinks that the *Emerson* decision is wrong (a decision by one CAT panel is not binding on another panel). In *Deutsche Bahn AG v Morgan Crucible Company plc* [2011] CAT 6, the CAT did just that. This new CAT concluded that a Commission "decision" really comprises a series of individual decisions with regard to each cartelist. If one cartelist does not appeal, the decision is final against that cartelist, and the two year limitation period starts running; if another cartelist does appeal, the limitation period against that cartelist starts running from the determination of the appeal, but this does not affect the limitation period against the non-appealing cartelist.

DB raised all sorts of supposed practical problems with this construction (cartelists' liability is joint and several, how can proceedings be brought against all the cartelists together, how are contribution proceedings between the cartelists to be handled etc). The CAT was not impressed and, in any event, was clear that its construction was the only proper construction of the legislation (and, in reaching this conclusion, it was less than complimentary about the earlier judgment in *Emerson*). So DB's claim against Morgan Crucible is time-barred. You can't take chances on limitation.

Clifford Chance acted for Morgan Crucible in this case.

Contract

It's in the game

Obligations under a letter of credit can be set off.

Letters of credit are generally treated as if they were sacred instruments on a par with cash. Absent fraud, an LC must be paid without question. But there is in principle no reason why a sum due under an LC cannot be set off if that is what the parties have agreed. And agree they did in *Lehman Brothers Commodity Services Inc v Crédit Agricole Corporate and Investment Bank* [2011] EWHC 1390 (Comm).

C and D had entered into a New York law governed ISDA Master Agreement. The Agreement had an extended set-off provision that, following an Event of Default, allowed one party to set off any obligation against what was otherwise due under the Master Agreement. On termination of this Master, C owed D $15m. D had also provided a €50m LC in favour of C to support obligations owed by a third party to C under an entirely distinct ISDA Master Agreement. C called on the LC, but D paid only the difference between €50m and $15m, setting off the two obligations.

Much turned upon the construction of the NY law Master Agreement, but ultimately Field J could find no reason in NY or English law not to give full effect to the wide-ranging set-off provision agreed by the parties. If they had intended to exclude the LC in particular or LCs in general from the scope of the set-off clause, they should have said so.

Clifford Chance acted for Crédit Agricole in this case.