CLIFFORD

CHANCE

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Contentious Commentary

Contract

Standard and deliver

Use of an industry-standard form of contract (eg LMA terms) will seldom bring UCTA into play.

Section 3 of the Unfair Contract Terms Act 1977 applies if one party deals on the other's standard written terms. Where it applies, section 3 allows the court to strike down certain clauses deemed to be unreasonable. Some early cases took a comparatively wide view as to what one party's standard terms might be (eg *St Albans City Council v ICL Ltd* [1996] 2 All ER 481), suggesting that terms can still be one party's standard terms even if they are industry standard and even if they are subject to some negotiation. Recent case law is more rigid, suggesting that, to be standard terms, a party must use them for virtually all relevant transactions without alteration.

In *African Export-Import Bank v Shebah Exploration & Production Company Ltd* [2016] EWHC 311 (Comm), Phillips J was very much in the contemporary camp. A borrower wanted to rely on an alleged set-off to avoid loan repayments, but the loan agreement included a no set-off clause. The only way escape this clause was to show that the loan agreement was on the lender's standard terms within section 3 of UCTA and that the no set-off clause was unreasonable.

The loan agreement was based on the LMA's model form. D accepted that it couldn't show that C habitually used the LMA's form such as to adopt it as C's own but argued that it should have disclosure from C in order to allow it to attempt to do so. Phillips J would have none of this. He did not consider that there was any basis for inferring that C habitually used the LMA form as if it were its own, and there was even less basis for inferring that C habitually refused to negotiate the terms of loan agreements such that the LMA's form became C's "standard" terms.

In any event, the terms had been negotiated in this case. The solicitors for the parties had exchanged drafts. It was true that most of the borrower's suggested amendments had been rejected, but not all and that was enough to render the terms no longer standard.

Sternly, the judge went on that "where commercial parties, represented by solicitors, have utilised a "neutral" industry model form as the basis for a complex and detailed financial contract, executed after the usual process of negotiation, including revising a travelling draft, it will require cogent evidence to raise even an arguable case that the resulting contract is made on the written standard terms of one of those parties." This approach reflects current policy in the courts. The English courts could hardly establish the Financial List in order to encourage financial litigation in England and, at the same time, say that any bank that bases its contract on the LMA loan agreement is subject to UCTA. Substantive law and procedural initiatives must go hand in hand.

D did, however, win a Pyrrhic victory on the validity of C's acceleration of the loan. The loan agreement

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allowed C to declare the loan immediately due and payable if an event of default had occurred. In *African Export-Import Bank*, however, C declared that if D did not pay outstanding sums within the following six weeks, an event of default would then occur. The judge decided that this did not cause the automatic acceleration of the loan after the six week period. The (LMA standard) clause allowed C to declare all sums to be immediately due and payable but not to give notice that the sums would become due and payable on a future date in certain contingencies.

But it didn't matter. C had served a new notice declaring all sums to be immediately due and payable. The fact that this had been done after the proceedings had been commenced and was only introduced by amendment was not an obstacle. The fact that a cause of action post-dates the issue of proceedings is no longer an absolute bar to its being added to a claim that would otherwise fail. In any event, D had consented to the amendment, and could not subsequently object.

Home truths

Exclusion clauses are not construed in a limited manner.

Neubergerism - the strict approach taken by the English courts to the interpretation of contracts - was illustrated in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2015] EWHC 3573 (TCC). A contract for engineering services for a development site in South Wales capped liability, including liability for negligence, and then went on that "[l]iability for any claim in relation to asbestos is excluded". C found asbestos on the site, and sued D for D's supposedly negligent failure to alert C to the asbestos. C argued that the words couldn't really mean what they said – policy limitations on the exclusion of liability for negligence and all sorts of supposedly commercial commonsense reasons.

Stuart-Smith J was wholly unimpressed. The correct approach, he thought, was that unambiguous words mean what they say, whether exclusion clauses or not. Parties should be free to determine where the risks arising under a contract fall, since that is a factor that affects the price. This was a claim in relation to asbestos; it was therefore excluded. Impeccably Neubergian.

Privilege

A privileged position

The SFO must take reasonable measures to ensure that privileged material is not seen by investigators.

If a solicitor wishes to act against a former client, the primary legal issue is whether relevant confidential information held by the solicitor, which will likely also be privileged, has been sufficiently protected from the risk of disclosure or misuse. The court will intervene to stop the solicitor acting unless the solicitor can satisfy the court that there is no real risk of improper disclosure or misuse of confidential information. The former client is entitled to be protected from any avoidable risk that the information will be used in a manner not authorised by the client. See *Bolkiah v KPMG* [1999] 2 AC 222.

The Serious Fraud Office seizes huge volumes of material in its pursuit of criminals. This often includes privileged documents. The SFO has protocols in place to seek to ensure that the investigating team does not see anything privileged, but the sifting of the potentially privileged from the non-privileged is done inhouse by the SFO. Once the initial sifting has been done, an independent external lawyer decides what is and what is not privileged, subject to court challenge.

In *R (oao McKenzie) v Director of the Serious Fraud Office* [2016] EWHC 102 (Admin), C argued that the SFO was subject to the same obligations as solicitors with regard to privileged material and, as a result, that the sifting should be done outside the SFO in order to avoid any risk of improper disclosure.

The court disagreed. A body exercising statutory powers for the public good in order to obtain evidence of wrongdoing was not in the same position as a solicitor wishing to act against a former client. The SFO has an obligation to devise and operate a system to isolate potentially privileged material from other material. This system must reasonably be expected to ensure that the privileged material is not read by members of the investigative team until the independent lawyer has determined whether the materials are in fact privileged. The onus is not on the SFO to show that its systems are secure but rather on the complainant to show that they are not. The courts assume that information flows within solicitors' firms, but makes no such gossip-based assumption as regards the SFO.

The court accepted that the measures that the SFO had in place – effectively, Chinese walls (aka ethical or information barriers) – were sufficient. The SFO did not have to outsource the sifting of potentially privileged materials to a third party in order to ensure that nothing could reach the investigators. Protocols and procedures prohibiting impropriety were enough. And what is sauce for the SFO will doubtless be considered to be a dressing of similar quality by other regulators.

Capital result

A bank can redeem regulatory capital instruments because of Basel III.

Neubergerism might be the dominant interpretative philosophy, but that does not necessarily make it easy to apply in practice, as *LBG Capital No 1 plc v BNY Mellon Corporate Trustee Services Ltd* [2015] EWCA Civ 1257 illustrates.

The case concerned capital instruments (contingent convertible notes) issued by a bank in 2009 that were intended to help it pass its regulator's stress tests. By the time of the stress tests in December 2014, regulatory capital requirements had changed to such an extent that the instruments were no longer material to the stress tests. The instruments were also expensive for the bank. The question in *LBG Capital* was whether in these circumstances, the bank was entitled to redeem the notes. In concluding that it was, the Court of Appeal made three main points.

First, the approach to interpretation depends upon the audience for the terms and conditions of the notes. Despite some of the notes being held by retail investors, the Court of Appeal decided that this audience should be treated as one of the utmost sophistication with a detailed knowledge (either personally or through advisers) of the relevant markets, the regulatory background, the use of stress tests and the function within regulatory capital that the notes fulfilled. The offering circular for the notes stressed the notes' complexity and the need for investors to understand the detail, and so investors should be taken as doing so. (The FCA now prohibits the sale of notes such as those in question in *LBG Capital* to retail investors.)

Secondly, the Court of Appeal (like the Chancellor at first instance) concluded that there was an obvious mistake in the drafting of the notes. Literally, the bank could only redeem the notes as long as the definition of the top tier of loss absorbing capital remained as it had been in 2009. Needless to say, it has not done so. For long-term notes, the Court thought this absurd. The reference should be read as being to the top tier of loss absorbing capital from time to time, not tied to the date of issue.

Thirdly, and in disagreement with the Chancellor, the Court of Appeal decided that "shall cease to be taken into account... for the purposes of any 'stress test'" meant cease to be capable of contributing to the bank's ability to meet the relevant ratio in a stress test. This, the Court considered, was how the reasonable reader would have understood the wording at the relevant time given the regulatory background. So although the notes would have been taken into account had the bank's capital ratios been so bad as to trigger certain features of the notes, because the bank's ratios were better, the notes were not in practice taken into account because they didn't need to be.

Briggs LJ, who ultimately agreed with the outcome, confessed that his "mind ha[d] vacillated several times since first reading the papers for this appeal". The difficulty of the decision and the bank's desire to exercise its redemption option as soon as it can is doubtless why the Supreme Court will hear, on 21 March 2016, an expedited appeal. Lord Neuberger is slated to be on the panel.

Companies

Raiders redeemed

Directors must always act for a proper purpose.

The general rule is that directors (and, indeed, other fiduciaries) must only exercise powers for the purposes for which they are conferred (now in section 171(b) of the Companies Act 2006). In *Eclairs Group Ltd v JKX Oil & Gas plc* [2014] EWCA Civ 640, the Court of Appeal held that this rule did not apply to the exercise by directors of a power provided by the company's articles to impose restrictions on the voting and transfer of shares following a failure by the shareholder to comply with a notice given under section 793 of the Companies Act 2006. A notice under this section requires shareholders in public companies to disclose interests (very widely defined) in the shares. The effect of the Court of Appeal's decision was that once a shareholder went into default, the directors could impose restrictions on the shares for wholly unrelated reasons.

The Supreme Court disagreed with the Court of Appeal, deciding that the general rule applies equally to this power ([2015] UKSC 71). The main causative purpose for the majority of the directors' decision was to protect the company from the shareholders in question, not to extract the information or to punish non-compliance, which were the proper purposes. The directors acted for an improper motive, and so their decision was set aside.

The case raised, but did not answer, a number of other questions. For example, at first instance Mann J enquired in closing as to position if the directors would have made the same decision if they had acted solely for a proper purpose. But it was then

too late for the company to run the point. The Supreme Court itself raised the question of how the doctrine applies if the directors act for multiple reasons; Lord Sumption (with whom Lord Hodge agreed) was happy to answer that question even though it had not been fully argued; the remaining three, though agreeing on the outcome, preferred not to express a view.

Controlling stake

A new companies register is required from April 2016.

From 6 April 2016, all UK companies and LLPs (unless exempted) must maintain a register of individuals who have significant influence or control over the company, within the statutory definition. Non-compliance is a criminal offence. As a result, all companies need to consider whether there is a person who falls within the definition, which can be a complicated exercise.

Equity

Limited mortgages

The duties of a mortgagee in realising the security are owed only to those with an interest in the equity of redemption.

PK Airfinance SARL v Alpstream AG [2015] EWCA Civ 1318 is factually complex, but offers three useful pointers.

First, equitable duties can in the main be excluded by contract. Certainly, the courts should not invent equitable duties that undermine the parties' bargain.

Secondly, when realising its security, a mortgagee owes a duty only to those with an interest in the equity of redemption in the secured property. In *PK Airfinance*, D had mortgages over two groups of aircraft. First, D had mortgages over seven aircraft as security for loans to the purchasers of those aircraft. Secondly, D had mortgages over three further aircraft as security for loans to the purchasers of those three aircraft but, to the extent that there was any surplus after meeting these loans, the mortgages also stood as security for the loans in respect of the initial seven aircraft.

C was a junior creditor of the buyers of the three aircraft, and stood to benefit if anything was left over after the prior obligations secured by the mortgages on those aircraft had been paid off. The agreements detailing the arrangements made it clear that C had no interest in the mortgages over the seven aircraft.

D enforced its security over the seven aircraft, selling those aircraft by auction (the security over the remaining three further aircraft has not been enforced). An associate of D bought the aircraft at the auction. C alleged that the price paid by the associate was less than it should have been and, as a result, that C had suffered a loss because, as the party at the bottom of the waterfall for the three aircraft, it would ultimately receive less (ie because less was received on the sale of the seven aircraft than should have been, the debt secured on the three aircraft was higher than it should have been, which meant that C would ultimately receive less).

The Court of Appeal considered C's claim to be unsustainable. A mortgagee owes a duty to those with an interest in the mortgaged property, but not to anyone else. That conclusion is consistent with existing authority, and also avoids the mortgagee paying twice. If a mortgagee realises the mortgaged property for less than it should have obtained, the mortgagee must compensate the mortgagor by correcting the mortgage accounts so that they show the proper figure. That correction will then flow through to those further down any relevant waterfalls. The Court of Appeal also considered C's claim to be premature since the three aircraft had not been sold, so it was unclear what, if any, loss C would suffer. It was certainly difficult to characterise it as a loss arising immediately the sale of the seven aircraft took place.

The Court of Appeal was also concerned to give effect to the deal agreed by the parties. The deal in this case provided that C could not receive anything until D had been repaid both loans. A conclusion that C was entitled to damages before D had been paid in full undermined the parties' arrangements. Equity should not recognise any duty that would "confound the arrangements as to priority which the parties, including [C], agreed".

Thirdly, enforcing mortgagees can sell to themselves, but they have an enhanced duty to show that they have obtained the best price reasonable obtainable. This generally requires mortgagees to obtain a valuation of the security, but that is not necessary in every case, nor does it allow a mortgagor to ignore the mortgagee's absolute right to chose when to realise its security. The price D paid at the auction, even though not based on a valuation, was higher than anyone else was prepared to pay, so C suffered no loss even if its criticisms of the sale process had any validity.

Clifford Chance LLP acted for the successful appellant in *PK Airfinance*.

Conflict of laws

Diced and spliced

A submission to the jurisdiction sufficient to allow enforcement of a foreign judgment must be clear.

Enforcement of foreign judgments is most commonly now considered in the context of the Brussels I Regulation, which makes – or is intended to make – the process easy. But there remain large tracts of the world outside the EU whose courts give judgments that could with advantage be enforced in England. The US is the most obvious place. Enforcement of a non-EU judgment will be effected under the Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 or the common law. Each of these means requires the foreign court to have jurisdiction, as a matter of English law, over the judgment debtor. Whether the New York courts had jurisdiction for these purposes was the subject of *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, a case arising from the collapse of the Madoff empire, in which D resisted the enforcement of a NY default judgment.

Agreement in advance to submit to the jurisdiction of the relevant courts is sufficient to confer jurisdiction on those courts for English law purposes. But the case law debated whether this agreement had to be express or whether it could be implied. Lord Collins (who, as editor of the main text in this area, *Dicey, Morris & Collins*, tends to be redeemed from retirement for conflicts of laws issues – see, eg, *Rubin v Eurofinance SA* [2012] UKSC 46) considered that an agreement in advance could be implied, but went on that this was not the real question. The real question was whether D had actually consented in advance to the jurisdiction of the NY courts, whether expressly or impliedly. The courts have been reluctant to imply consent merely because, eg, a contract is governed by a foreign law or is to be performed in a foreign country.

In *Vizcaya Partners*, the agreement in question was expressly governed by NY law, but that does not carry with it an implied term that the NY courts have jurisdiction sufficient to constitute actual consent to the NY courts as a matter of English law. Instead, it (with other factors) gave the NY courts jurisdiction under New York's long arm statute. So there was no actual agreement to the jurisdiction of the NY courts on D's part sufficient to allow enforcement of the judgment.

That must have come as a relief to D. D had allowed a default judgment for $180 million to be entered against it, presumably in reliance on being able to resist enforcement elsewhere. If D had fought the claim, that would have been sufficient to give the NY courts jurisdiction as a matter of English law and thus to allow enforcement. It takes courage (as well as no presence or assets in the US) to allow a large judgment to be entered against you.

Portuguese man of law repelled

Foreign law can only rarely oust the parties' choice of law.

The decision in *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWHC 465 (Comm) runs to 163 pages, most of which is taken up by Portuguese law issues such as whether public transport authorities have the capacity to enter into exotic, "snowball", swaps (they do).

The principal English – or, more accurately, EU – issue turned on article 3(3) of the Rome Convention on the law applicable to contractual relations (now, in substantially the same form, article 3(3) of the Rome I Regulation). This provides that where the parties have chosen the law applicable to a transaction, that choice does not prejudice the application of another country's mandatory rules of law that cannot be derogated from by contract if all elements relevant to the situation (apart from the choice of law) are connected with that other country.

In *Companhia de Carris*, the transactions were between Portuguese public authorities and a

Disclosure

Coded predictions

A court allows the use of predictive coding for disclosure searches.

In *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch), the court allowed the parties to use predictive coding (or computer assisted disclosure) to conduct a search for documents to disclose.

However, the decision is not especially ground-breaking. The parties were all agreed that its use was the sensible course for their case, so no one argued to the contrary. Indeed, given the harmony, they probably didn't need to go to court at all but felt it prudent to do so in view of the "novelty" of its use. Further, the decision was by a Master, and is therefore of limited precedential value.

Nevertheless, the decision shows that word-searching is not the only method of trying to reduce to a sensible number an otherwise disproportionate or unmanageable volume of documents. Predictive coding is one of various techniques now available that can achieve this. But it will always be necessary to consider what is suitable for each particular case.

Portuguese bank, they were arranged in Portugal and performance was to take place in Portugal. So, said D, Portuguese mandatory law applied notwithstanding the parties' choice of English law to govern the transaction and the use of the ISDA Master Agreement.

Blair J did not agree that article 3(3) applied. He disagreed with the decision in *Dexia Crediop Spa v Commune di Prato* [2015] EWHC 1746 (Comm), which concluded that the use of the ISDA Master Agreement was not an element that could bring internationalism to an otherwise domestic transaction. The judge thought that the use of an international market standard agreement, like the ISDA Master Agreement, was material. This, along with the bank's right to assign the benefit of the swap to a non-Portuguese bank, the fact that the bank needed its Spanish parent's assistance, the international nature of the swaps market in which the transactions were concluded and the bank's back to back arrangements with non-Portuguese counterparties, was enough to exclude the application of article 3(3).

Despite the exotic nature of the swaps, the bank was therefore entitled to enforce them against the transport authorities.

Scotch missed

Forum non conveniens applies as between England and Scotland.

Forum non conveniens has no role to play in deciding whether a UK court or another EU court has jurisdiction (or, more accurately, should exercise its jurisdiction) over a matter. Within the EU, jurisdiction should be (largely at least) rule-based and certain, not subject to decisions as to whether one court might be a more appropriate forum than another. Forum non conveniens can have some role, though uncertain, in relation to a question of jurisdiction between the English court and a non-EU court. And in *Cook v Virgin Media Ltd* [2015] EWCA Civ 1287, the Court of Appeal decided that forum non conveniens applies in its full glory as between the English courts and the Scottish courts.

The case concerned accidents that took place in Scotland, though the claims were brought against English registered companies. The Brussels I Regulation does not determine jurisdiction as between England and Scotland because the Regulation only applies where there is an international element. Despite the best efforts of the SNP, so far as the EU is concerned there is no international element as between England and Scotland. The Regulation's general aversion to forum non conveniens is therefore not relevant.

Jurisdiction as between England and Scotland is determined by Schedule 4 of the Civil Jurisdiction and Judgments Act 1982, which sets out a revised version of the Regulation and requires the courts to take into account CJEU decisions on the Regulation. However, section 49 of the Act provides that nothing prevents a court from staying proceedings on forum non conveniens grounds unless contrary to EU law. EU law does not apply as between England and Scotland; as a result applying forum non conveniens within the UK cannot be incompatible with EU law. The English courts must therefore apply the forum non conveniens doctrine if the issue is whether the claim should be pursued in England or Scotland.

The background to *Cook* is odd. The claim was brought in the Carlisle County Court. D did not challenge jurisdiction, but the district judge took the point himself. He complained that a large number of "claims coming out of Scotland" were being brought in his court, which he didn't like. His court was, he thought, becoming "the County Court for Scotland". He took the somewhat curious view that active case management required him to repel the invaders, despatching them back over Hadrian's Wall.

Arbitration

Penalty shoot out

An arbitration award including a penalty can be enforced.

Paulo Dybala is a promising young Argentine footballer who cost Juventus €32 million last summer, having reportedly turned down Arsenal, Manchester United and Liverpool. He was previously with Palermo, before which he had played for an Argentine club, Cordoba. However, in the curious way of these things, the registration rights to Mr Dybala were owned not by Cordoba but by another company, C, which sold them to Palermo. (To add spice to the curiosity, C was said, in *Pencil Hill Ltd v US Citta di Palermo Spa* (19/01/2016), to have acquired its rights from the Spanish club called Cordoba, not the Argentine club of that name, but that may be nominally-induced geographical confusion.)

Odd background aside, the issue in *Pencil Hill* arose because Palermo failed to pay the transfer fee to C. The contract said that, by way of penalty, if Palermo did not pay any sum due, the unpaid amount would automatically be doubled. C therefore sued for €14,440,000, comprising double the overdue fee of €6,720,000,

plus another €1,000,000 owed under a separate agreement.

The contract was governed by Swiss law and gave jurisdiction to the Court of Arbitration for Sport. Swiss law requires any excessive contractual penalty to be reduced. The arbitrators concluded that doubling the unpaid sum was excessive, and cut it to 25% (or €1,680,000). They therefore gave an award for €9,420,000. Still not bad, but probably beyond even the looser, *Makdessi*, test for penalty clauses in English law.

C sought to enforce the arbitration award in England under the New York Convention. Palermo argued that the penal element should not be enforced because contractual penalties were contrary to English public policy.

The judge did not agree. Public policy went to basic principles of morality – universally condemned activities – not mere contractual issues upon which English law might take a different approach from Swiss law. Palermo had made its bed in Switzerland, and had to lie in it. So if Palermo sells any players to an English club or has outstanding any instalments on past transfers, it can expect a third party debt order to intercept the payments otherwise due to it.

Permissive obligations

A clause providing that parties "may" submit disputes to arbitration gives an option exercisable on notice.

Anzen Ltd v Hermes One Ltd [2016] UKPC 1 involved an arbitration clause that provided that, after negotiation, "any Party may submit the dispute to binding arbitration". The question for the Privy Council was whether the clause (i) required the parties to submit disputes to arbitration, making any court proceedings a breach of contract; (ii) was permissive, giving either party the option to take the dispute to arbitration, the option exercisable by starting an arbitration; or (iii) was permissive, giving either party the option to take the dispute to arbitration, the option exercisable by giving notice to that effect or by seeking a stay of legal proceedings.

The Privy Council rambled around the arguments before concluding that (iii) was the correct analysis. The Privy Council considered that (i) failed to distinguish sufficiently between "may" and "shall", and that (ii) was uncommercial because neither party might want to arbitrate if the courts were not available. However, the reality is that (iii) is so close to (i) that it makes no difference in practice. Even if arbitration is mandatory, the parties can always agree to the contrary; that is effectively what happens if neither party chooses to invoke the option for arbitration given by (iii) in the face of court action.

Another aspect in *Anzen* is that the Privy Council did not question the validity of arbitration clauses that offer the option of arbitration, even if the option is given to one party only. No one argued to the contrary, but the case reinforces the position that unilateral option clauses are valid under English law.

Gold in them there hills

Making an investment requires more than just buying a company.

Bilateral investment treaties between states generally protect those from one state who make an investment in another state. Venezuela has various BITs and, as a result of the activities of the late President Chavez, has also faced numerous arbitrations brought against it by disgruntled foreign investors complaining about expropriation and such like. BIT claims tend to end up before the ICSID tribunal, a search on whose website indicates that Venezuela has been a respondent in 39 cases. In 2012, Venezuela denounced (ie withdrew from) the ICSID convention, but one that got through before denunciation was the subject of *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm). This claim, started in 2009, led to an award in 2014 of over US$700m against Venezuela under the BIT between Canada and Venezuela.

In *Gold Reserve*, C sought to enforce its award in England. This required the English court to review the arbitrators' jurisdiction, which depended upon whether C had made an investment in Venezuela. The judge was satisfied that the mere acquisition of a company that held mineral rights in Venezuela was not an investment in Venezuela for these purposes (influenced by the acquisition being the shuffling of corporate entities and assets between the US and Canada, in part to get advantage of the BIT between Canada and Venezuela). But C had afterwards pumped a significant amount of money into the project, and the judge concluded that this money did constitute an investment. The arbitrators therefore had jurisdiction, and the award could be enforced in England.

Whether C will be able to find any Venezuelan assets on the streets of London, which aren't exactly paved with Venezuelan gold, or anywhere else is a different matter. Enforcing against a sovereign is very difficult, as Argentina's creditors have found.

Russian dolls

Foreign law determines who can be a party to an arbitration.

According to Burton J in *Egiazaryan v OJSC OEK Finance* [2015] EWHC 3532 (Comm), article 105 of the Russian Civil Code makes a parent company jointly and severally liable with its subsidiaries on contracts entered into by the subsidiaries. If a contract entered into by a subsidiary includes an arbitration clause governed by English law, can the parent be joined to the arbitration?

Burton J thought the parent could be joined. English law, as the law applicable to the arbitration, can look to a foreign law in cases of agency, assignment and succession to determine who can be parties to an arbitration. So in this case, where foreign corporate law provides for another party to be liable on the contract, that party can be joined to the arbitration. It is, however, hard to see how agency, assignment or succession provide an appropriate analogy. In those cases, English law is trying to find out who is now a party to the contract including the arbitration clause. That is rather different from allowing a foreign law to impose itself by adding an extra party.

In more orthodox fashion, Burton J also decided that a customarily wide arbitration clause covered claims in tort relating to the contract as well as claims on the contract itself.

Courts

A cunning plan

A scheme to delay payment of court fees is an abuse of process.

Lewis v Ward Hadaway [2015] EWHC 3503 (Ch) reveals a curious scheme aimed at delaying the payment of court fees on claim forms issued at the end of the limitation period. The reason for the scheme was that the solicitors in question didn't have disbursement funding in place at the time of issue, and therefore had to pay the court fee themselves (presumably the solicitors were acting on a no win, no fee conditional fee agreement). They didn't want the cash flow hit of paying the full fee, and therefore found a way to avoid doing so until they were ready to serve the claim form (by which time, presumably, funding was in place).

The solicitors concerned wrote letters before action claiming millions. To stop time running, they then issued a claim form, but marked the form as only claiming a trivial sum because, by doing so, they reduced the court fee to a relatively low amount. Approaching four months later, the solicitors amended the claim form to increase the amount claimed, paid the proper fee, and served the claim form. So the right fee was paid before service, but the Courts were deprived of cash flow and suffered the minor hassle of having to issue an amended claim form.

D applied to strike out the proceedings as an abuse of process. The judge decided that this scheme was an abuse of process, but considered that striking out the claim would be disproportionate.

But the judge found a way to strike out some of the claims before him. This involved claim forms that had reached the court before expiry of the limitation period but that had not been issued until after. In these circumstances, as long as C has done in time all that is required of it to issue the claim form, the proceedings have been brought in time for limitation purposes (*Page v Hewetts* [2012] EWCA Civ 805). But *Lewis*, the judge decided that C had not done all that was required of it. It had abused the process by deliberately not paying the right fee. Perhaps a rather random outcome.

Quit or double

Misselling allegations do not defer payment of the minimum liability.

In *Deutsche Bank AG v Unitech Global AG* [2013] EWCA Civ 1372, the Court of Appeal gave D permission to plead that, in essence, a bank impliedly represented when entering into a facility agreement and a swap that LIBOR was genuine when, according to D, LIBOR was actually being rigged. If D failed in this plea, it would be liable for US$177m on the agreements; but if D succeeded, it would be on condition that it paid C US$120m in order to return the net sum it had received under the agreements, which agreements D was entitled to avoid by virtue of the misrepresentation.

Unsurprisingly, C asked for the immediate payment of US$120m. At first instance, the judge concluded, with reluctance, that the court's rules did not allow him to require payment. However, the Court of Appeal disagreed. If D wishes to pursue its defence, it must pay US$120m now. The allegation of a misrepresentation does not allow D to defer the minimum payment that will be due as a result of the agreements, whatever the nature of the liability.

Regulation

Out of bounds

A sole shareholder cannot claim for his company's losses.

In April 2015, a company accepted £2.4m in full and final settlement of all claims it had against D arising from D's alleged misselling of interest rate hedging products. Shortly afterwards, the company's sole shareholder sued D under section 138D of the Financial

Services and Markets Act 2000 on the basis that D was in breach of the FCA's rules in its dealings with the company and that he was a private person who could sue for that breach. In *Sivagnanam v Barclays Bank plc* [2015] EWHC 3985 (Comm), Cooke J had little difficulty striking out C's claims. C might be a private person, but that did not mean that he could claim for wrongs supposedly done to the company he owned. Further, any losses were suffered by the company. The shareholder's losses were reflective losses only, for which the shareholder had no independent claim (*Johnson v Gore Wood* [2002] 2 AC 1).

No public inconvenience

The independent person in the FCA's swaps misselling review is not judicially reviewable.

In *R (oao Holmcroft Properties Ltd) v KPMG* [2015] EWHC 1888 (Admin), C was given permission to seek judicial review of a decision taken by the independent person under the FCA's swaps misselling review. On the full hearing of the JR application ([2016] EWHC 323 (Admin)), the court decided that the independent person was not in fact judicially reviewable.

In 2012, the FCA entered into agreements with a number of banks under which the banks agreed to carry out a review of their sales, going back to 2001, of interest rate hedging products and, if misselling was detected, to offer redress. In order to give confidence in the review (and to relieve the FCA of the potential need to become involved in huge numbers of individual cases), an independent person was appointed to review all offers of redress by the bank in question. The bank could not offer redress unless the independent person considered the offer fair.

At the full hearing, the court considered in greater depth C's contention that decisions by the independent person could be judicially reviewed in the same way that decisions by public authorities can be reviewed. C complained that the offer of redress it had received from the bank was not fair because it failed to include consequential losses that C claimed were attributable to the bank's misselling. The independent person should not, C said, have approved the bank's offer, and its decision to do so should be quashed.

The Court, while not finding the question easy, decided that the independent person was not subject to JR. JR is a public law remedy, and there was insufficient public law element in the independent person's work. It was a voluntary scheme under which the independent person had no relationship with customers. The scheme might have been set up to secure public law objectives, but that did not of itself make it subject to JR. The FCA was under no obligation to carry out the independent person's role, nor did it have the resources to do so. Finally, the FCA could consider whether any particular person had been treated unfairly.

Even if the independent person's decisions had been capable of being judicially reviewed, the application would still have failed. C's complaint was that the bank had not provided it with a sufficient explanation of why it had excluded consequential losses from its offer of redress; C could not therefore give an informed response; and the independent person acted unfairly in approving the bank's approach. The court concluded that the bank had given ample information to C, and that there was, therefore, no public law unfairness.

Swapping claims again

Banks do not owe a duty of care to customers arising from the FCA's misselling review.

In *Suremime Ltd v Barclays Bank plc* [2015] EWHC 2277 (Comm), a judge decided that a bank might owe its customers a duty of care in negligence in relation to the conduct of the swaps misselling review carried out pursuant to an agreement between the bank and the FCA. The claim was not so obviously meritless that it could be struck out. (One case referred to in *Suremime* was the original decision in *Holmcroft Properties Ltd* (above), which gave permission to bring the judicial review proceedings. The substantive application for JR has since failed: see above.)

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In *CGL Ltd v The Royal Bank of Scotland* [2016] EWHC 281 (Comm), a different judge decided that *Suremime* was wrong (or, at least, distinguishable) and that no duty of care was owed in those same circumstances. The contract between the banks and the FCA expressly excluded any obligation to customers, and the FCA and the skilled person were there to protect the interests of customers. There was no arguable basis upon which to impose a tortious duty of care, and the claim should be struck out. (The underlying misselling claim was also struck out for limitation reasons.) The Court of Appeal will have to sort it out.

Contentious Commentary is a review of legal developments for litigators

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