CLIFFORD
CHANCE

Client newsletter April 2016

# Contentious Commentary

*Contract*

## Careless whispers

**A derivatives confirmation cannot be construed to avoid a mistake, but it can be rectified.**

The ISDA Master Agreement applies to derivatives transactions in, generally, one of two ways. First, by the parties entering into a long-form confirmation, which says that a vanilla Master Agreement applies to the transaction until the parties have negotiated a full Master Agreement, including a schedule of amendments and additions, which will then take over. Secondly, a short form confirmation, which refers to the negotiated Master Agreement entered into by the parties.

But mistakes happen. So in *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), the parties entered into a swap under a long-form confirmation. They then negotiated and entered into a full Master Agreement, which took over and applied to the swap. So far, so normal. The parties then restructured the swap, but documented the restructured swap under a long-form confirmation that did not refer to the negotiated Master Agreement. C terminated the restructured swap under an Additional Termination Event in the schedule to the negotiated Master Agreement but which was not in the vanilla Master Agreement referred to in the long-form confirmation for the restructured swap. Was the Additional Termination Event applicable?

C argued that the failure of the long-form confirmation for the restructured swap to refer to the negotiated Master Agreement was an obvious mistake, which could be corrected by interpretation (*Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101). This requires a clear mistake and an equally clear correction. Cooke J did not accept that these requirements were met. The documents did not contain any ambiguity, any syntactical difficulty, any uncommerciality or any clear mistake. The documents worked just fine, even if it was intrinsically unlikely that the parties intended to abandon the negotiated Master Agreement. Interpreting the confirmation in the way that C wanted would involve re-writing the confirmation, which was a step too far when it was not obvious on the face of the document that something had gone wrong.

But Cooke J did order rectification of the long form confirmation for mutual mistake. Rectification requires a common intention as to the terms, an outward expression of that accord, the intention continuing to execution and, by mistake, the instrument executed not reflecting that intention. Cooke J expressed the now ritual concerns about aspects of this test (laid down in *Chartbrook*), in particular its reliance on what a hypothetical reasonable observer would understand the parties' intention to be, which could lead to a document being rectified in a way that does not reflect the parties' actual intention. However, Cooke J decided that, whatever the test, rectification so that the restructured swap was governed by the negotiated Master Agreement was appropriate.

A possible problem arose from the circumstances. C produced the confirmation for the restructured swap but, by mistake, someone forgot to input into C's system that there was a negotiated Master Agreement in place. The computer therefore spewed out a long-form confirmation. No neurons fired within C; and D just signed whatever was put in front of it. But

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Cooke J still considered that the parties' continuing intention was that the negotiated Master Agreement should apply. Nothing had changed since signature of the negotiated Master Agreement.

D also argued that the entire agreement clause in the Master Agreement incorporated into the long-form confirmation prevented rectification. Echoing earlier authority, Cooke J rejected this. If the terms were set out mistakenly, the entire agreement clause was similarly infected by the mistake.

Finally, C sought indemnity costs because the Master Agreement contains an indemnity for costs (section 11). The parties agreed that costs were a matter for the CPR, but that such a clause usually results in indemnity costs. D argued that C was an assignee, and the ISDA Master Agreement does not allow assignment of this right to an indemnity. Cooke J rejected this. Section 7 of the Master Agreement allows a party to assign its interest in an Early Termination Amount and "any other rights associated with that interest" pursuant to section 11.

Since C's claim was for the Early Termination Amount, the claim under section 11 was also assignable, and indemnity costs were duly awarded.

## Video killed by the radio star

**Payment is due following default under an ISDA Master Agreement despite lack of reasonable detail as to the calculation of the sum due.**

If a party designates an Early Termination Date under the ISDA Master Agreement following an Event of Default with regard to the other party, the designating party must as soon as reasonably practicable serve a notice setting out in reasonable detail its calculation of the sum payable by the other party (section 6(d)(i)). This sum is then payable "on the day when notice of the amount payable effective" (section 6(d)(ii)).

It is probably fair to say that most assumed that the notice referred to in section 6(d)(ii) was the notice served under section 6(d)(i). However, in *Videocon Global Ltd v Goldman Sachs International* [2016] EWCA Civ 130, the Court of Appeal decided that the notice required by section 6(d)(ii) of the ISDA Master Agreement is not necessarily the same as the notice required by section 6(d)(i). A notice that simply sets out correctly the sum due as a result of the designation of the Early Termination Date will suffice to make that sum payable under section 6(d)(ii) even if the notice does not provide reasonable details of the calculation of that sum. Those details can follow later.

In practice, the notices required by sections 6(d)(i) and (ii) will usually comprise the same piece of paper – if a party can calculate correctly the sum due on the Early Termination Date, why not provide the reasonable details at that time? The impact of *Videocon* may be that as long as the correct figure is given in the notice, a technical failure to provide all the reasonable details required will not absolve the party in default of its payment obligation. Supplementary information as to the calculation can be given in response to a query.

## Wide of the mark

**A settlement agreement excludes unknown claims.**

Solicitors sue a guarantor of its clients' fees for those fees. The solicitors, the guarantor and the client

*Costs*

## Silence secured

**A lack of information about resources is a ground for ordering security for costs.**

One of the bases upon which a court can order security for costs is that there is "reason to believe" that C will be unable to pay D's costs if D wins (CPR 25.13(2)(c)). But what is required in order for the court to have this reason to believe? In *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120, C was a BVI company with no obligation to publish any accounts and which had not responded to requests for information about its financial condition. Is that enough?

Yes. If there is no public information about C, and the one person who could fill that gap (ie C) does not do so, the court can, and generally should, conclude that there is reason to believe that C will not be able to pay D's costs if D wins. Security for costs should be ordered.

D had joined T as a third party to the proceedings, claiming an indemnity under a back to back contract. The Court of Appeal decided that if D won, it would likely be ordered to pay T's costs, but would be able to recover those from C. T's costs should therefore be included in the security that C had to provide. Costs budgets had been filed, which provided an "appropriate reference point" to work out the amount of the security. Beware, therefore, that budgets can have wider implications.

enter into a settlement agreement covering "any claim, potential claim... whether known or unknown, suspected or unsuspected... arising out of in connection with the Action or the invoice... referred to in the Action". The client later alleged negligence on the solicitors' part. Does the settlement agreement bar the negligence claim?

Yes, according to the judge in *Khanty-Mansiysk Recoveries Ltd v Forsters LLP* [2016] EWHC 522 (Comm). The wording was sufficiently wide to cover unknown claims, and the negligence claim was "in connection with" the Action or the invoice, even if it did not arise from either. The client might not have known that it had a claim against the solicitor when it entered into the settlement agreement but, by doing so, it prevented itself from ever bringing that claim. Look out for known or unknown unknowns.

## Exclusionary tendencies

**The *contra proferentum* principle may not be dead.**

A Sale and Purchase Agreement requires the buyer to give notice of a warranty claim, including reasonable details of the nature of the claim, within 20 days of "becoming aware of the matter". Does this mean that a claim must be brought within 20 days of the buyer becoming aware of the facts giving rise to the claim (even if unaware that those facts gave rise to a claim), becoming aware that there might be a claim, or becoming aware that there was a proper basis for bringing a claim?

In *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128, Briggs LJ regarded this clause as thoroughly ambiguous, and thus had resort to what he regarded as the general principle that ambiguous exclusion clauses should be construed narrowly (the parties referred to this as contra proferentum, but Briggs LJ did not require identification of a proferens). He recognised that this might be somewhat old-fashioned but, when contemporary approaches to interpretation failed, he thought it was a reasonable fallback position. He therefore followed the conclusion that Blair J had reached at first instance (though Blair J had rejected any reliance on contra proferentum) in deciding that the clause meant becoming aware of the right to bring a claim.

Hallett LJ and Moylan J were not quite so sure about Briggs LJ's approach. They agreed with the outcome but commented, somewhat cryptically, that, like Blair J, they would have placed greater emphasis on the greater commerciality that they felt flowed from this interpretation.

## Without effect

**Without prejudice communications cannot be relied on as a repudiatory breach of contract.**

The without prejudice rule rests on the public policy of encouraging settlement (it can also, in some instances, particularly without prejudice save as to costs, rest on contract). In *Alan Ramsay Sales & Marketing Ltd v Typhoo Tea Ltd* [2016] EWHC 486 (Comm), C wanted to rely on a without prejudice communication as constituting a repudiatory breach of contract, and so argued that a countervailing public policy overrode the without prejudice public policy with the result that the court should admit the without prejudice communication in evidence.

Flaux J accepted that it was possible for there to be a public policy that would override the public policy on which without prejudice rests. But he did not think that this was engaged merely because the without prejudice communication contained a repudiatory breach of contract. As a result, C could not rely in court on the without prejudice communication and failed in its claim that D had repudiated the contract – the repudiatory conduct was not admissible in evidence and therefore did not exist as far as the court was concerned.

This meant that C's open acceptance of D's without prejudice repudiatory breach was itself repudiatory, which D could then accept. C's good fortune was that D couldn't point to a sufficiently clear acceptance of the repudiation. As a result, the contract continued, allowing C to claim damages under the Commercial Agents Regulations. If D had accepted C 's repudiation, it would have escaped those damages.

## Richmond parked

**Acceptance of repudiatory breach does not have to follow contractual procedures.**

A contract preserves remedies available at law. It also provides that either party may terminate the contract on any breach by the other after giving notice to remedy the breach if remediable. One party repudiates the contract but in a manner that is capable of remedy. The other accepts the repudiation and terminates without first giving notice to remedy. Is the termination valid?

Yes, according to Teare J in *Vinergy International (Pvt) Ltd v Richmond Mercantile Ltd FZC* [2016] EWHC 525 (Comm). He decided that, as a matter of construction, it was impossible to construe the clause requiring notice as applying to acceptance of a repudiatory breach at common law as well as to termination

in accordance with the contractual provisions. He did not discount the possibility that a contract could impose obligations of this sort as a condition to termination at common law, but this contract didn't do so.

## Damaged goods

***Wrotham Park* damages will be awarded if the justice of the situation demands it.**

The courts have displayed very considerable reluctance to award an account of profits as a remedy for breach of contract (unless a notorious spy is involved: *Attorney General v Blake* [2001] 1 AC 268). Instead, they have developed what are called *Wrotham Park*, or negotiation, damages, ie the sum that D would have had to pay to negotiate a release from its contractual obligations (even if C would not have accepted any sum for that purpose). But when will these damages be awarded? It's probably fair to say that the Court of Appeal in *Morris-Garner v One-Step (Support) Ltd* [2016] EWCA Civ 180 was very uncertain on this point - which doesn't offer any great hope for the rest of us.

Cases where this issue arises inevitably involve a negative covenant – in *Morris-Garner* a non-competition covenant. But what more? The Court of Appeal rambled about the difficulty of identifying financial loss, but came down to the generalised observation that *Wrotham Park* damages could be awarded where justice required – where the absence of any financial compensation would result in the conclusion that justice manifestly had not been done.

*Morris-Garner* involved the sale of a business, the sellers agreeing not to compete with it for three years. They did compete, successfully. C whinged that it was hard for it to prove loss, so it should have *Wrotham Park* damages instead. The alternative view was that if C couldn't prove loss, it shouldn't have damages at all because it hadn't suffered any loss. The Court of Appeal didn't really know what to do, so decided that it could not overturn the first instance judge's decision to award *Wrotham Park* damages, eventually observing that justice required that C get something.

*Tort*

## Sex and the supermarket

**Vicarious liability is explained but not necessarily clarified.**

The desire to ensure that the victims of sexual abuse have an effective financial remedy in tort has led to an extension of the rules on vicarious liability. This has arisen because abuse was often committed by people who weren't employees of the obvious target for vicarious liability and because abuse was never within the scope of the offender's employment. But the resulting extension is of general application. In two non-abuse cases, *Cox v Ministry of Justice* [2016] UKSC 10 and *Mohamud v Wm Morrison Supermarkets plc* [2016] UKSC 11, the Supreme Court explored where the law currently stands.

The Supreme Court considered that vicarious liability depends upon the answers to two questions. First, what sort of relationship must exist between the individual tortfeasor and (the usually corporate) D before vicarious liability can be imposed on D. Secondly, in what manner does the conduct of the individual have to be related to that relationship in order for vicarious liability to be imposed.

*Cox* concerned the first of these two questions. A prisoner working in the prison kitchen negligently dropped a sack of rice on the catering supervisor,

*Conflict of laws*

## Portuguese men of law

**Just because a deal looks Portuguese, doesn't mean that Portuguese law applies.**

Article 3(3) of the Rome Convention on the law applicable to contractual obligations (now in similar terms in the Rome I Regulation) is intended to prevent parties to a domestic transaction in one country from choosing the law of another country in order to escape inconvenient mandatory laws in their home country. It requires all elements relevant to the situation (other than the choice of law) to be related to one country only. In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWHC 465 (Comm) the parties were a Portuguese bank and Portuguese public transport authorities, and performance was in Portugal. Shouldn't Portuguese mandatory law apply?

No, said Blair J. There were sufficient international factors relevant to the situation to oust article 3(3). These included the use of the ISDA Master Agreement to document the transactions (on this point, Blair J disagreed with Walker J's conclusion in *Dexia Crediop SpA v Commune di Prato* [2015] EWHC 1746 (Comm)), the bank's right to assign the benefit of the transaction to a non-Portuguese bank, the fact that the bank entered into back to back transactions with a non-Portuguese bank, the international nature of the swaps market in which the deals were done (the authorities were being wooed by non-Portuguese banks) and the practical need for the Portuguese bank to obtain assistance from its Spanish parent.

In short, Blair J considered that article 3(3) is to be confined very tightly. If parties choose English law for a transaction in the international financial markets, English law is what they will get.

injuring her. Employment is the archetypal relationship between the individual tortfeasor and D, but prisoners are not employed by the prison (they are paid, though only a nominal amount). Employment in the strict sense is not necessary, according to the Supreme Court. The key features for vicarious liability are that the tort will have been committed by the individual as a result of an activity undertaken for D, the individual's activity is likely to be part of the business activity of D, and by employing the individual to carry on the activity, D will have created the risk of the tort being committed by the tortfeasor.

Taking a broad view, these three inter-related features were present in *Cox*. The tortfeasor was working in the prison kitchen as part of D's obligation to feed and rehabilitate prisoners. This was D's "business" or aim (profit is not a necessary motive). Pretty much a slam dunk once you get away from a need for a traditional employment relationship.

Interestingly, the Supreme Court at least partially rejected two other features that the Supreme Court had identified as relevant to in an earlier case, *Catholic Child Welfare Society* [2012] UKSC 56 (generally referred to as *Christian Brothers*). In *Christian Brothers*, the Supreme Court had suggested that the fact that someone was more likely to be able to pay damages and to have insurance were reasons for imposing vicarious liability. In *Cox*, the Supreme Court pointed out that wealth is not a reason to impose liability. Employers insure themselves because they are liable; they are not liable because they insure themselves.

In *Christian Brothers*, the Supreme Court had also referred to control over the tortfeasors' activities. In *Cox*, the Supreme Court thought it was old-fashioned to think of an employer as being able to control how an employee carries out his or her activities. There might be control over what the tortfeasor does (and the lack of even this might negate vicarious liability), but there was no need for control over how the tortfeasor does it.

*Mohamud* concerned the second of the two questions. A person working at a petrol station declined to print some documents for C, abused C verbally, and then followed C out to the forecourt and assaulted him. The first requirement was met since D employed the tortfeasor, but D didn't employ him to hit its customers.

The Supreme Court decided that it is necessary to look at the field of activities entrusted to the tortfeasor and then to ask whether there is a sufficiently close connection between the position in which he was employed and his wrongful conduct. The Supreme Court knew that asking whether there was a "sufficient connection" is not really a test, but they couldn't think of any other way of ensuring that employers are liable for the acts of employees that the employees are definitely not supposed to do (whether fraud, assault or sexual abuse). None of the other tests really worked (course of employment, unauthorised mode of doing an authorised activity etc).

Disagreeing with the Court of Appeal, in *Mohamud* the Supreme Court considered that D should be liable. The tortfeasor's initial refusal to print documents and the verbal abuse that followed this refusal were part of the tortfeasor's job of attending to customers. The tortfeasor might then have come out from behind his counter and followed C to his car before assaulting him, but it was all part of a seamless episode. The tortfeasor had also told C, before hitting him, never to return to the garage, which indicated work-related conduct rather than merely personal antipathy. The fact that the tortfeasor acted out of personal racism rather than to benefit D's business was irrelevant.

*Arbitration*

## Apparent latitude

**An arbitrator is not apparently biased despite his situation being non-waivable under the IBA guidelines.**

In the first half of 2012, a partner in a Canadian law firm was appointed as an arbitrator in a dispute between C and D. Later that year, D was taken over by P, amidst much publicity. The arbitrator's firm earned significant sums from advising Q, another subsidiary of P, though did no work for P. The arbitrator failed to declare this. He went on to make an award.

The IBA's 2014 Guidelines on conflicts of interest in arbitration provide that an arbitrator has a non-waivable conflict of interest if "the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom". It might have been thought that this provided a strong case to set aside the award on grounds of apparent bias.

But not according to Knowles J in *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm). The judge accepted evidence from the arbitrator that he had not personally ever worked for Q, that he did not know that Q was an affiliate of D, and that he was semi-detached from his firm since he acted only as an arbitrator. Whether Knowles J should have been so

accepting is less obvious. Judges and arbitrators cannot be cross-examined in these circumstances. Some might have thought that a fair-minded and informed observer - through whose eyes apparent bias is assessed - would still have concluded that there was a real possibility of bias. Where privilege is concerned, the English courts operate on the assumption that information moves within law firms. Shouldn't the same apply in spades to apparent bias? It might be thought that an arbitrator should aspire to the attributes of Caesar's wife.

*Courts*

## All gas and gaiters

**Seriousness of breach of an unless order depends on the underlying order.**

The approach to an application for relief from an automatic court sanction comes in three stages, according to *Denton v TH White Ltd* [2014] EWCA Civ 906. First, assess the seriousness or significance of the breach. Secondly, assess whether there was a good reason for the breach. If the breach was serious and there was no good reason, then, thirdly, consider all the circumstances in order to deal justly with the application.

When considering the significance or seriousness of breach of an unless order, is the assessment confined only to that order, or is it permissible to look at the conduct that led to the making of the unless order? An unless order will usually only be made after an earlier failure to comply with an ordinary order. A party may be trivially late in complying with an unless order, but may be in more serious default on the underlying order.

In *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153, the Court of Appeal observed that, in *Denton*, the Court of Appeal had said that the first stage involved considering the breach in question, not the party's conduct generally, which came at stage three. But where an unless order is concerned, the Court of Appeal in *British Gas* thought that the breach in question included breach of the underlying order because unless orders are not made in isolation. Both were relevant to the seriousness or significance of the breach of the unless order.

In *British Gas*, D was two days late in filing a pre-trial checklist required by an unless order. This default caused the defence to be struck out. But D was 18 days late in complying with the underlying order, which was serious, especially since D had had three months to prepare the checklist.

In *Denton*, the Court of Appeal said that good reason for a breach might include the solicitor involved suffering a debilitating illness. In *British Gas*, the solicitor was absent due to complications in his wife's pregnancy. This was dismissed peremptorily. The solicitor had known about these complications for a long time; the firm involved was of a significant size, and cover should have been arranged. In short, unless the solicitor involved is at a micro-firm or is struck down by lurgy immediately before compliance is required, this excuse will not run.

As to stage three, it took D a month to apply for relief from the sanction. Far too long.

## A taxing delay

***Mitchell/Denton* apply in the Tax tribunal as well as the courts.**

In *BPP Holdings v HMRC* [2016] EWCA Civ 121, the Court of Appeal decided that the stricter approach to compliance with rules and orders exemplified by *Denton* (above) applies equally in the First Tier Tribunal (Tax Chamber) and in the Upper Tribunal, even though their rules were not changed by the Jackson reforms that affected the courts. The interpretation of the overriding objective, essentially the same in the tribunals as in the courts, was enough to lead to that result.

HMRC bleated that, in a time of public sector austerity, it should be treated as a litigant in person and thus given special leniency, or just given leniency because it was the state. The Court of Appeal rejected this, finding HMRC's approach to compliance "disturbing". Everyone must expect to comply with orders made by a tribunal.

## Fraud ravels all

**An allegation of fraud is not sufficient to set aside a default judgment.**

In *Gentry v Miller* [2016] EWCA Civ 141, an insurer had allowed default judgment on liability to be entered against its insured and then generally been dilatory in dealing with the claim. Eventually, it concluded that the claim was fraudulent – a conspiratorial car accident between friends – and sought to set aside the default judgment, though it still acted with no due haste. The Court of Appeal decided that an application to set aside the judgment had to meet the *Denton* criteria, and the fact that it involved an allegation, even a credible allegation, of fraud did not affect the position. The insurer failed the *Denton* test through its conduct – there had to be finality at some point. If the insurer wanted to vindicate its position, it would have to bring a separate action.

## Delayed payments

**A court orders payment of the minimum sum that will be owed.**

If a party will be required to pay $177m if it loses an action and $120m if it wins, it might be thought obvious that it should pay the $120m immediately and confine its squabbling to the remaining $57m. And so the Court of Appeal decided in of *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119, reversing the first instance decision.

C sued for sums due on a loan and a related derivative transaction. After the Court of Appeal had (following the first instance judge) rejected all other possible defences, D's only remaining argument was that it had been induced to enter into the transactions as a result of an implied representation by C that LIBOR was squeaky clean. If D succeeded in that defence, it might be able to rescind the transactions (ie treat them as if they had never been entered into), but that would be on terms that D refunded the net payment it had received under the transactions ($120m).

For technical reasons, the first instance judge decided that he could not order the immediate payment of that sum, but the Court of Appeal was made of sterner stuff. D could not postpone its entire payment obligation by raising an argument that, in practice, could only excuse it from the obligation to pay about one-third of the sum claimed.

*Immunity*

## Diplomatic incidents

**The courts cannot assess whether someone is carrying out diplomatic functions.**

In *Al-Juffali v Estrada* [2016] EWHC 213 (Fam), Hayden J decided that a diplomat accredited by the Foreign & Commonwealth Office was only entitled to immunity if he passed a functional test, ie he had actually taken up his position in the sense of performing diplomatic functions. In *Al-Atiyya v Al Thani* [2016] EWHC 212 (QB), Blake J decided that the courts could not undertake this functional assessment. If the FCO had accredited a diplomat, immunity followed regardless of what the diplomat actually did.

In *Al-Juffali v Estrada* [2016] EWCA Civ 176, the Court of Appeal decided that Blake J was right and that Hayden J was wrong. Neither legally nor for practical reasons could the courts undertake a functional review of a diplomat's activities. If a diplomat is accredited by the FCO, end of story.

But that did not help D in *Al-Juffali*. Someone who is resident in the UK only has immunity when carrying out diplomatic functions. The Court of Appeal accepted Hayden J's finding that D was resident in the UK. The proceedings related to D's divorce, which was not part of his diplomatic functions, and so he had no immunity.

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