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Agreements: the benefits of boilerplate

Boilerplate is important. The provisions lost at the end of a contract or ignored at the beginning of an information memorandum might not be subject to the same negotiation as the terms specific to the transaction, but they can be vital in defining the parties' relationship and, as a result, their legal obligations. Is a bank providing an execution only service or is it advising? Can the bank be paid first and fight the counterclaim later? Where must that fight take place? In this briefing, we consider the recent case law on boilerplate clauses, which demonstrates the need to understand the benefits that boilerplate can provide, but also its limits.

"Standardised pieces of text for use as clauses in contracts or as part of a computer program" is how the Oxford English Dictionary defines "boilerplate" (in addition to "rolled steel plates for making boilers"). But the fact that something is standardised does not mean that it is unimportant. Indeed, it demonstrates the reverse - why include something in every contract if it is not important?

Boilerplate comes to the fore when things go wrong - when, for example, a party wishes to escape from a contract or to throw the burden of losses on others. This is inevitably more common in bad times than in good, and so boilerplate clauses have come under increased scrutiny in the recent past. In this briefing, we discuss how no set-off, entire agreement, no reliance, no waiver and jurisdiction clauses and clauses giving discretion have been interpreted by the courts, and the uses and abuses to which they can be put.

No set-off clauses

If a bank is seeking to recover a loan, which the borrower cannot repay or does not want to repay, a common tactic for borrowers is to make a counterclaim against the bank for an alleged breach of duty, and then to set-off the two claims against each other. As inevitable as it is convenient, this set-off leaves nothing due to the bank or a balance in favour of the borrower. Claims can be set-off against each other on various grounds, including pursuant to a contractual term allowing one claim to be discharged by another. But what contract can give, contract can also take away.

Finance contracts typically require all payments to be made "without (and free and clear of any deduction for) set-off or counterclaim". This will in general be effective prevent a borrower from raising a counterclaim as an excuse to delay payment of a sum otherwise due under the finance documents, but whether it actually secures payment to the bank lies in the discretion of the court. This is illustrated in *Credit Suisse International v Ramot Plana OOD* [2010] EWHC 2759 (Comm).

In *Ramot Plana*, the bank sued the borrower for repayment of a sum due under a loan agreement. The borrower counterclaimed for a higher sum in damages as a result of the bank's allegedly wrongful refusal to agree to a refinancing of the loan, and claimed to set off its counterclaim against the bank's claim. The bank applied for summary judgment on both its claim and the borrower's counterclaim, ie judgment at an early stage in the proceedings on the basis that the borrower has no real prospect of succeeding in its defence to the claim or on its counterclaim. The judge declined to dismiss the borrower's counterclaim in this way, but he did grant the bank summary judgment on its claim because of the no set-off clause. The no set-off clause was effective to prevent the borrower raising its counterclaim as a reason for non-payment.

Key Issues

- **No set-off clauses accelerate payments but don't extinguish defences.**
- **Parties can agree that they have not relied on representations by the other, even if they have.**
- **Entire agreement clauses exclude collateral contracts but not claims in tort.**
- **Accepting a payment will usually constitute waiver of a right to terminate a contract.**
- **Calculations have wide, but not unfettered, discretion.**
- **Beware different jurisdiction provisions in the same transaction.**

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Judgment on its claim was not enough to give the bank an immediate right to payment. The borrower applied for a stay of execution of the judgment in favour of the bank, ie a court order to the effect that, despite judgment having been entered against it, the borrower did not have to pay the sum due on the judgment until the court determined its counterclaim. The judge refused the borrower's application. He concluded that although the court had a discretion to stay execution of a judgment, it would only do so in the face of a no set-off clause if there were strong reasons for doing so, which was likely to require proof of exceptional circumstances. The borrower was unable to demonstrate that the circumstances in question were exceptional, and so a stay of execution was refused.

The effect of the judge's decision is that the borrower must pay upfront the sum due to the bank. If it fails to do so, the bank can enforce the judgment against any assets it can identify in countries that permit the enforcement of English judgments (most usefully, all member states of the EU and Switzerland). But it is also important to appreciate the limits of no set-off clauses. No set-off clauses affect the timing of payments, not whether payments have to be made at all. For example, in *Ramot Plana*, the borrower may be obliged to pay the bank now, but its counterclaim remains outstanding. The borrower can pursue that counterclaim and, if it succeeds, the bank will be obliged to pay the sum due on the counterclaim. No set-off clauses prevent borrowers using a counterclaim as an excuse for non-payment, but do not prevent a determined borrower from pursuing that counterclaim to a successful judgment if it has merit on its side. In order to prevent claims arising at all, a different sort of clause altogether is required.

No representation and no reliance clauses

The law with regard to pre-contractual misrepresentations is strict. If one party to a contract relies on a material misrepresentation of fact by the other when entering into the contract, that party is entitled to rescind the contract, ie to treat the contract as if it had never been entered into and to recover payments made pursuant to the contract. If the misrepresentation was made negligently, the party can also recover damages on the wide basis available in fraud (section 2(1) of the Misrepresentation Act 1967). Even if a representation appears to be one of opinion rather than of fact (eg as to future market movements) and therefore outside these strict rules, the representation will often be construed as carrying with it the implication of fact that the maker has reasonable grounds for holding the opinion, and thus be subject to these rules.

A pre-contractual misrepresentation may also give rise to a duty of care in tort. If the maker is negligent, a party relying on the misrepresentation may have an independent claim in damages. Even if a misrepresentation is not negligent, a court can still award damages (albeit calculated on a narrow basis) instead of rescission under section 2(2) of the Misrepresentation Act 1967.

This strict legal position creates a tension between, on the one hand, a desire to sell a product (be it widgets, derivatives or loan participations), and, on the other, a desire to avoid unwanted legal liabilities. A salesman is employed to sell, which will often involve extolling the virtues of a product or explaining why it makes sense for the prospective buyer to acquire it. But over-enthusiasm can lead to misrepresentation and legal liabilities; a po-faced refusal to comment on the product may cause potential buyers to go elsewhere.

The purpose of no representation and no reliance clauses is to square this circle. The clauses come in various forms, but generally provide that the parties have not made any pre-contractual representations but, just in case they have, that neither party has relied on any representation made by the other that is not set out in the contract itself. As such, the parties seek to define their relationship as being purely on an arms' length, execution only basis as defined by the contract, not a relationship of adviser and advised, whatever may have happened on the ground. Examples of no representation/reliance clauses include the second sentence of section 9(a) of ISDA's 2002 (but not 1992) Master Agreement.

"there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case... even if that is not the case"

The English courts have been prepared to allow commercial parties to define their relationship in this way. For example, in *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), a manufacturer of wheels alleged that a bank had acted as its trusted adviser when the two of them entered into structured foreign exchange contracts. The manufacturer's problem was that the documents it signed said something else. The documents provided that the manufacturer would place no reliance on the bank for advice, and would seek independent advice if it considered it necessary. The court decided that the parties were entitled to agree the basis upon which they were dealing - to define their relationship - by contract. If one party agrees not to rely on anything said by the other, it is contractually estopped from subsequently arguing to the contrary.

This is the case even if the contractual definition of the parties' relationship is inconsistent with what has actually happened. As the Court of Appeal put it in the subsequent case of *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221:

> "... there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties."

If commercial parties agree contractually that one has not advised the other, they cannot go back on that agreement even if advice has in fact been given and

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relied on. The remedy is to ensure that a contract contains such representations as the parties want to rely on or that a separate advisory contract is entered into. Reducing these matters to writing provides certainty, so both parties know where they are, including what liabilities they are taking on.

A wrinkle in this smooth simplicity lies in the law that controls exclusion clauses. Section 3 of the Misrepresentation Act 1967 provides that a contract term that excludes or restricts any liability to which a party to a contract is subject by reason of a misrepresentation before the contract was made is only valid if the term is reasonable. A common problem is identifying whether a term excludes liability, in which case section 3 applies, or whether it prevents liability arising in the first place, in which case section 3 does not apply.

The courts' approach to this problem has been unsure. In *Titan Steel Wheels*, the judge suggested that the test might be whether there would have been liability but for the contractual provisions - if there would have been liability, section 3 applies. The more common approach is vaguer, and is set out in the box on this page. The curiosity of the more common approach is that it indicates that a clause in a contract with a consumer may exclude liability and thus be subject to section 3 of the Misrepresentation Act 1967, but the same clause in a contract between sophisticated commercial parties may define the parties' relationship and thus fall outside the Act. This is perhaps to merge the nature of a clause with the reasonableness test. The nature of a clause should be the same wherever it appears, but the application of the reasonableness test depends upon the circumstances. Consumers rightly receive more sympathetic treatment than businesses where questions of the reasonableness of exclusion clauses are concerned.

When does a reasonableness test apply?

"... the question... is whether the clause attempts to rewrite history or parts company with reality. If sophisticated commercial parties agree... to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on. Such parties are capable of distinguishing between statements on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statements may fall.

"Per contra, to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability." Christopher Clarke J, *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), approved by the Court of Appeal in *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221.

Whatever the theoretical difficulties, the courts have been ready to decide that no representation and no reliance clauses in contracts between commercial parties are reasonable. Freedom of contract may have vanished over large parts of consumer law, but caveat emptor retains a strong hold in commercial law.

In this respect, the claimants in *Titan Steel Wheels* and *Springwell* were clearly commercial parties who could be subjected to the full rigour of caveat emptor. The position may be less clear with, for example, high net worth individuals who, perhaps, have some experience of dealing in the financial markets. This also raises categorisation under the FSA's rules and, if the individual is a "private customer", the possibility of a direct cause of action under section 150 of the Financial Services and Markets Act 2000. Helpfully, in *Wilson v MF Global UK Ltd* [2011] EWHC 138 (Ch), the court was satisfied that, in deciding how to categorise a customer, it will generally be reasonable to rely on what the customer says about his or her experience. Customers cannot be forced to sit an examination before being categorised and allowed to deal.

Moving on, it is common practice to exclude fraud from the scope of a no representation and no reliance clause. This creates a logical conundrum. If fraudulent misrepresentations are not within the scope of the clause, the parties will be agreeing that they cannot rely on accurate representations, even negligent misrepresentations, but they can rely on representations that are fraudulently wrong. The problem is that, at the time of any reliance, a party will not know whether a representation is fraudulent or not and therefore whether it can rely on the representation (if it does know that a representation is fraudulent, it will obviously not rely on it). Nevertheless in *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), the judge accepted that, though illogical, if that was what the parties intended, he should give effect to it.

The exclusion of fraud from the scope of these clauses was caused - at least reinforced - by *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, in which the judge considered whether a no representation/reliance was reasonable. The test of reasonableness under the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977 relates not to whether it is reasonable to exclude liability in the particular circumstances that have arisen but whether the clause was a fair and reasonable one to be included in the contract having regard to the circumstances that were or ought reasonably to have been known to the parties at the time the contract was made. The judge considered that excluding liability for fraud is always unreasonable. As a result, a clause that apparently extended to fraud was instantly unreasonable and therefore unenforceable in all circumstances even if no question of fraud actually arose or it would otherwise have been entirely reasonable to exclude the liability in issue.

Subsequent courts (eg in *Six Continents Hotels Inc v Event Hotels GmbH* [2006] EWHC 2317 (QB)) have pointed out the logical flaw in the approach in *Thomas Witter*. It is not possible to exclude liability for one's own fraud (*S Pearson & Sons Ltd v Dublin Corporation*

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[1907] AC 351). A clause that purports to do so is therefore simply ineffective for that purpose. A clause cannot be considered unreasonable for attempting to do something that, as a matter of law, it fails to achieve. It therefore seems that it is not in fact necessary to exclude fraud from the scope of no representation and no reliance clauses. But if a party is fraudulent, it can expect no quarter from the courts. Fraud really does unravel all.

A final uncertainty is good faith (or, as the judge put in *Raiffeisen,* quoted in the box on page 3, honest belief). In *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811, it was accepted that a party sending out an information memorandum made an implied and continuing representation that it was acting in good faith. What is unclear is whether a lack of good faith differs materially from fraud. In *IFE*, one judge seemed to suggest that bad faith and dishonesty were the same - if so, it will not differ from fraud. However, in other cases (eg *Niru Battery v Milestone* [2004] QB 985, a case on constructive trusts rather than contract), the court has decided that lack of good faith involved behaving in an inequitable or commercially unacceptable manner or indulging in sharp practice. If this is correct, bad faith will encompass fraud, but could extend to conduct that falls some way short of fraud. The circumstances in which a obligation of good faith will be implied and what it means in practice remains uncertain.

Entire agreement clauses

Entire agreement clauses provide that the contract in question constitutes the entire agreement and understanding between the parties with regard to its subject matter, and supersedes any previous agreements and understandings (eg the first sentence of section 9(a) of ISDA's Master Agreement). In *BSkyB Ltd v HP Enterprise Services Ltd* [2010] EWHC 86 (TCC), one party argued that clauses of this sort also bar claims based on pre-contractual representations. Despite the clause in question referring expressly to representations, the judge did not accept this. He considered that:

> "the statement that the Agreement superseded any previous discussions, correspondence, representations or agreement between the parties with respect to the subject matter of the agreement prevented other terms of the agreement or collateral contracts from having contractual effect. It did not supersede those matters so far as there might be any liability for misrepresentation based on them."

The clause therefore prevented the representation becoming part of the principal contract or forming a collateral contract (a standard argument by a party seeking to rely on a representation that is not set out in the principal contract), but did not bar non-contractual claims for misrepresentation. In *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, the Court of Appeal added that an entire agreement clause will not, in general, prevent implied terms either. As a result, in order to defeat the full range of legal ingenuity, both entire agreement and no representation/reliance clauses are required.

Nor does an entire agreement prevent a court from rectifying an agreement. Rectification is the correction of the written form of a contract if the parties have made a mistake when reducing their understanding to writing. It is not easy to persuade a court to rectify a contract, but in *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) the court decided that an entire agreement clause was not a bar to rectification. The purpose of an entire agreement was, the court said, to limit possible contractual claims from dealings outside the contract. A claim to rectification was different. It rested on the parties having made a mistake in expressing their true agreement, a mistake that infected the entire agreement clause as much as any other aspect of the agreement.

No waiver clauses

A breach of contract will often give the non-defaulting party the right to terminate a contract, whether according to the express terms of the agreement or under the general law of contract. A non-defaulting party does not have to exercise its right immediately upon finding out about the breach - it is entitled to time to make up its mind but, if it does nothing for too long, there is a risk that it will be treated as having affirmed the contract (eg *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* [2002] EWCA Civ 889 at [87]).

More significantly, a right to terminate will be lost by doing something that is inconsistent with termination. A waiver of a right to terminate a contract requires: (a) knowledge of facts giving rise to the right to terminate (and possibly knowledge of the right to terminate: *Peyman v Lanjani* [1985] Ch 457); and (b) clear and unequivocal notice, whether by words or conduct, of the election to the other. (See *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 397-9.)

No waiver clauses aim to preserve termination (and other) rights, and might be thought to avoid inconsistent acts constituting a waiver of a contractual right of termination. No waiver clauses (eg clause 9(f) of ISDA's Master Agreement) generally provide only that no failure or delay in exercising a right will constitute a waiver of that right. These clauses may be relevant where the non-defaulting party has simply sat on its hands, but they have no application where the party with the right to terminate must take a step under the contract. The step will constitute an affirmation that the contract is to continue in existence.

> If a party either has to perform a contractual obligation or accept performance, there is a risk that this will result in the loss of the right to terminate.

For example, in *Tele2 International Card Company SA v Post Office Limited* [2009] EWCA Civ 9, one party had a right to terminate the contract at the end of one year because the other party had failed to provide a parent company guarantee on time. The party entitled to receive the guarantee continued to perform the contract throughout the next year, only then purporting to exercise its right of termination. The Court of Appeal

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decided that the no waiver clause did not keep alive the right to terminate. The clause applied if the relevant party failed to exercise its rights. The Court decided that the relevant party had not failed to exercise its rights - it had not even delayed in doing so. By performing the contract, it had elected to continue with the contract, and had therefore lost its right to terminate the contract.

As *Tele2* shows, conduct is the most common cause of a loss of a right to terminate a contract. If a party has to perform a contractual obligation or accept performance from the other side (eg receive a payment), there is a risk that doing so will result in a loss of an existing right to terminate a contract. A party could perform or accept performance expressly without prejudice to its right to terminate, but it is doubtful whether a unilateral declaration of that sort is effective (*Leofelis v Lonsdale Sports* [2008] EWCA Civ 640). A contract could provide expressly that once a party has a right to terminate, it can exercise that right at any time afterwards, no matter whether or not it has subsequently performed the contract, but clauses seldom go that far. With a usual clause, there is a real risk that any performance will be treated as inconsistent with a termination of the contract, and result in the loss of the right to terminate.

Contractual determinations and discretions

Contracts often give one party a contractual discretion or the ability to make determinations that are binding on the other. This will be the case if, for example, one party is appointed as a calculation agent, as is commonly the case in certain kinds of derivatives transactions. On what bases can these determinations be challenged? It all depends upon the terms of the appointment, but the courts have been reluctant to imply onerous obligations that are not spelt out expressly in the contract.

For example, in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, a master agreement governing a series of forward trades provided that, on default, the underlying assets were to be valued by the seller in order to work out who owed what to whom. No basis for valuation was stated. The Court of Appeal considered that "[i]mplications of good faith and rationality, and of lack of arbitrariness or perversity, are standard, for they represent the very essence of business (and other) relationships", but overturned the first instance judge's decision that there was also an implied term that required the seller to take reasonable precautions to value the assets at the fair, true market or proper value. As long as the seller acted in good faith in a manner that was not arbitrary or perverse, its decision was binding.

This approach gives the party making the valuation a wide discretion, but not a free hand. As long as it is genuinely trying to carry out its task properly, that should in theory be enough. In practice, the courts have recently shown themselves rather more interventionist. For example, in *WestLB AG v Nomura Bank International plc* [2010] EWHC 2863 (Comm), valuations had to be made in late 2008 of certain illiquid securities. The calculation agent conducted a dealer poll, but none of the dealers made an offer for the securities. The calculation agent therefore put a zero value on the securities. The agreement provided that valuations by the calculation agent were final and binding in the absence of manifest error.

The parties agreed, in accordance with existing case law, such as *Socimer*, that the calculation agent could not, despite this wording, act in a way that was irrational, ie capricious, arbitrary, perverse or so unreasonable that no reasonable calculation agent could have acted in that way.

The judge decided that the calculation agent's reliance on a dealer poll alone was irrational in this sense. The assets concerned were illiquid, and it was unlikely in late 2008 that anyone in the financial markets would bid for them. Faced with this situation, the calculation agent should have considered other approaches to valuation. In particular, the securities were issued by a fund, whose administrator had certain redemption obligations. The agent should have taken into account the valuations previously put on the fund's assets by the administrator or asked the administrator what it considered the securities to be worth. As a result of the calculation agent's failure to do this, its valuation was irrational and therefore was not binding on the parties.

In reaching his conclusion, the judge did not identify the particular head of irrationality the calculation agent's deficiencies offended. Was it capricious, arbitrary or perverse? His judgment gives the impression that the judge thought that the calculation agent had got it wrong, but the analysis as how that breached the legal principles is less clear. As a result, the judge's approach may suggest a relatively low threshold for irrationality. More practically, it suggests that a calculation agent must look at a number of valuation options, not just settle on one. And even if, as in *WestLB*, the calculation agent starts with a dealer poll, it should consider other options if it fails to receive a bid. Leaping to a zero valuation might be irrational.

Jurisdiction agreements

The law surrounding jurisdiction agreements is not without its difficulties. The most notable problem is the "Italian torpedo", ie the fact that proceedings brought in one EU member state prevent subsequent proceedings in another EU member state until the court first seised has declined jurisdiction, even if the parties have agreed that the courts of the other member state are to have jurisdiction. The European Commission has proposed a revision to the Brussels I Regulation to solve this problem, but, until a solution is implemented, a party wishing to ensure that the chosen court is not trumped by another court, which could take years to decide whether or not it has jurisdiction, may be forced into legal proceedings before it might otherwise have wished to take that step. At least, according to *UBS v Kommunale Wasserwerke Leipzig GmbH* [2010] EWHC 2566 (Comm), the claimant has the full four or six months in which to serve the claim form. The issue of proceedings may need to be rushed, but service can be taken at a more leisurely pace.

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The parties can, for now, do nothing about this issue (other than lobby for change). A problem that is within the parties' control is lack of consistency in jurisdiction clauses in different agreements concerned with the same overall relationship. So, for example, in *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998, most of the numerous agreements relating to the financial transactions between the parties were subject to the jurisdiction of the English courts, but a prime brokerage agreement was subject to the jurisdiction of the New York courts (another agreement provided for arbitration in London). Disagreement between the parties led to proceedings in both New York and London. In the light of the differing jurisdiction clauses in the various agreements, neither the London nor the New York courts stayed the proceedings before them, nor did they grant anti-suit injunctions to restrain the proceedings before the other. The parties are, therefore, faced with overlapping proceedings in both courts.

When disputes arise from a number of agreements governing a single relationship, those disputes are seldom neatly compartmentalised between the agreements. Issues affecting one agreement will affect another (eg one agreement may be terminated because of breach of a different agreement). It is invariably more convenient, as well as cheaper, for all disputes to be resolved by one tribunal. But if the agreements contain different jurisdiction provisions, the courts will be faced with the problem of deciding which jurisdiction clause governs any particular dispute. If, as will often be the case, issues flow from one agreement into another and cannot be said to lie solely within one jurisdiction clause, the parties will be faced with multiple overlapping proceedings. Agreement on a single method of dispute resolution before a dispute arises would render resolution far easier; agreement after a dispute has arisen will probably prove impossible to achieve.

Problems with proceedings raising similar issues being split across different courts can also arise when different companies in the same group are involved. In *Morgan Stanley & Co International plc v China Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm), parties (M and C) entered into currency swaps subject to an ISDA Master Agreement, which gave exclusive jurisdiction to the English courts. Prior to entering into the swaps, an affiliate of M had advised C on currency hedging. When M requested additional collateral, C sued M and its affiliate claiming to rescind the agreement, together with damages for misrepresentation.

M was able to persuade the English court to grant an anti-suit injunction restraining C from suing M in China in breach of the jurisdiction agreement in the Master Agreement. However, M's argument that the Master Agreement also prevented C from suing M's affiliate in China failed. The judge decided that, although the jurisdiction provision referred to "any... proceedings relating to any dispute arising out of or in connection with this Agreement", it only applied to proceedings between the parties to the Agreement. The affiliate was not a party to the Agreement, and so C could sue the affiliate in any court with jurisdiction. The contracts failed to tie the overall relationship down to one jurisdiction.

Local authorities, swaps and jurisdiction

Ultra vires is a common plea by public authorities who have lost money on structured products. The starting point may, however, be an attempt to use the plea in order to try to move any legal proceedings to a court perceived as more favourable.

Article 22(2) of the Brussels I Regulation gives exclusive jurisdiction over proceedings that have as their object "the validity of decisions of [the] organs of legal persons" to the courts of the (EU) country of incorporation of the legal person, whatever the parties may have agreed. The English courts (eg *Berliner Verkehrsbetriebe (BVG)Anstalt des Offentlichen Rechts v JP Morgan Chase Bank NA* [2010] EWCA Civ 310 and *Depfa Bank plc v Provincia di Pisa* [2010] EWHC 1148 (Comm)) have given article 22(2) a narrow interpretation (though *Berliner* is going to the Supreme Court): the question is whether proceedings are principally concerned with the decisions of the organs of a corporation. Since ultra vires arguments are seldom the only point in issue - misselling invariably features too - the English courts have found it easy to decide that vires is not the principal issue. English courts will not lightly allow public authorities to escape home.

Conclusion

Boilerplate may be standard, but it is important. It is ignored at the peril of the parties.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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