CLIFFORD
CHANCE

Newsletter April 2015

Contentious Commentary

Contents

- Contractual discretions made easier to challenge
- Contractual right to terminate not the same as repudiation
- Calculation by reference to the past not the same as accrual
- Limited set-off under the ISDA Master Agreement
- Goof faith used to strike down contractual terms
- Notice given under a contract is a nullity
- The limitations of implication
- Public bodies must act fairly, but get away with not doing so
- Acknowledging service can be a submission to the jurisdiction
- Actual authority is a matter of corporate law
- A failure to sue in England takes place in Germany
- Bondholders have no claim against the issuer
- Joint tortfeasor escapes on de minimis rule
- Misuse of private information is a tort for service out
- Court guarantee proceedings stayed for arbitration on underlying claim
- Court documents can be served by post on an embassy
- ECB policy framework struck down
- FOS's jurisdiction is a matter of law
- Information may be inside even if its effect is not clear

Contract

Discrete issues

The exercise of a contractual discretion may now be easier to challenge.

Contractual terms giving one party a discretion to decide something are common. *Braganza v BP Shipping Ltd* [2015] UKSC 17 may make the exercise of such a discretion easier to challenge. But then again, it may be confined to its facts or to employment contracts.

In *Braganza*, the Supreme Court decided that a contractual discretion must, perhaps, be exercised to the standards that are required of governmental decision-makers in judicial review. Certainly, the same two limbs apply: first, the discretion-exerciser must take into account matters which it ought to take into account and leave out matters that it not to take into account; and, secondly, it must not come to a conclusion that no reasonable person could come to.

Contractual cases have hinted at these two limbs, but the focus has generally been on the second limb, translated as a requirement to act in good faith and not arbitrarily, perversely or capriciously (eg *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116). This focus has made the exercise of discretion very hard to attack. The renewed emphasis on the first limb - only taking into account the right matters - may open up greater avenues for challenge by looking at the factors that the decision maker did take or might have taken or should have taken into account.

But then again, the majority of the Supreme Court commented that the employment context might make *Braganza* different. The majority also noted that the discretion in question was in the nature of an exclusion clause and involved the determination of facts, both of which might demand higher standards than other, purer, discretions. Drafting will, of course, always be important.

Braganza concerned a determination by an employer as to the circumstances of a ship's chief engineer's death. Under the engineer's contract of employment, his widow was entitled to death benefits unless the employer decided that the engineer had committed suicide. The employer looked into the matter and concluded that the engineer had committed suicide. In truth, there was precious little evidence as to what had happened to the engineer other than the sad fact that he had disappeared from a vessel in the middle of the Atlantic. The employer's decision was not condemned as perverse, but the majority considered that the employer had not directed itself properly as to the requirement that cogent evidence is needed to conclude that someone, especially a devout Catholic, had committed suicide. The employer had a large legal department, which should have been aware to these matters.

The Supreme Court examined the available facts and decided that they did not justify a conclusion of suicide. The Supreme Court stressed that a contractual discretion-exerciser was not the same as a judicial decision-maker, but this moves the discretion-exerciser in that direction.

The real difference between the majority (Baroness Hale, Lord Wilson

and Lord Kerr, two family lawyers and a former Northern Irish Chief Justice) and the minority (Lords Neuberger and Hodge) was their willingness to interfere with the decision of the person given the power under the contract - particularly in circumstances that deprived a bereaved family of a significant payment. The majority set the bar low; the minority higher. Which approach will prevail in genuinely commercial situations is an open question.

Conditional disloyalty

A failure to pay on time does not necessarily constitute a repudiatory breach.

Basic contract law provides that the terms of a contract can be conditions, warranties or innominate terms. Breach of a condition, be it ever so trivial, entitles the innocent party to terminate the contract and claim loss of bargain damages (ie damages for the loss of the contract as a whole); breach of a warranty, be it ever so serious, does not give a right to terminate the contract but only a right to damages caused by the breach; and breach of an innominate term gives a right to terminate if the breach goes to the root of the contract, deprives the innocent party of substantially the whole benefit of the contract or meets some other similar(ish) judicial expression of the test for repudiatory breach.

The parties are entitled to specify which category any term falls into. If parties say that a term is a condition, clearly intending that to carry the technical meaning, then so be it. But what if parties do not expressly provide that a term is a condition but instead say that breach of a particular clause (eg requiring payment on specific dates) entitles the innocent party to terminate the contract? Termination for breach pursuant to a contractual term does not, of itself, give a right to loss of bargain damages, at least unless the breach also, as a matter of the general law, constitutes a repudiatory breach (eg *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75). But can the fact that a clause allows termination be treated as impliedly converting the clause into a condition, such that breach is automatically repudiatory regardless of the consequences?

In *Kuwait Rocks Co v AMN Bulkcarriers Inc (The Astra)* [2013] EWHC 865 (Comm), Flaux J departed from first instance orthodoxy in the shipping world (*The Brimnes* [1973] 1 WLR 386) and held that a clause that allowed an owner to terminate a charter on non-payment of the hire after expiry of a grace period was, properly construed, a condition. The owner could therefore terminate pursuant to the contract the day after payment was due and collect loss of bargain damages. In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), Popplewell J disagreed at length with Flaux J, holding that the same clause was not a condition but only an innominate term.

The conclusion that punctual payment of the charter hire was not a condition of the contract meant that C was only able to obtain loss of bargain damages if the breach C relied on to terminate pursuant to the express terms of the contract was also a repudiatory breach. If it wasn't, C would have foregone a large amount of money representing the difference between the market rate and the contract rate under a long-term charter that C had terminated for non-payment at an early stage. But, fortunately for C, the judge found that the breaches - persistent non-

Accrued meanings

"Accrued" means coming into being even if not yet payable.

The LMA's form of agreement for the sale of participations in loan agreements states that any interest or fees payable under the loan agreement "which are expressed to accrue by reference to the lapse of time" shall, to the extent that they accrue in respect of the period before sale, be for the account of the seller and, to the extent that they accrue in respect of the period after sale, be for the buyer (clause 11.9(a)).

A loan agreement provides for a prepayment premium that is intended, with the interest payable in any event, to give a particular rate of return to the lenders over the life of the loan. The borrower exercised its right of prepayment after the sale of a participation in the loan. Is the seller entitled under clause 11.9(a) to a share of the premium?

No, according to the Supreme Court in *Tael One Partners Ltd v Morgan Stanley & Co International plc* [2015] UKSC 12. The premium was calculated by reference to the lapse of time, but did not "accrue" until the borrower exercised its prepayment right. "Accrual" means the coming into being of a right or obligation, even if it is not actually payable until a later date. Interest on a loan accrues daily but is only payable at the end of the interest period. In contrast, the premium only accrued when the borrower exercised its option, even if it was then calculated by reference to an earlier period.

payment or late payment - were repudiatory. Even though C had terminated under a contractual right, it could still recover loss of bargain damages for the entire scheduled duration of the charter.

The difference between Popplewell J and Flaux J is illustrated by how they treated the charter's express right to terminate on non-payment after expiry of a grace period. Flaux J regarded it as indicating that prompt payment was a condition because it set out the remedy afforded by the law on breach of a condition. Popplewell J treated it as indicating that prompt payment was not a condition because, if it had been a condition, there would have been no need to specify that the owner could terminate. The higher courts will have to sort out the matter.

Setting off down the wrong route

A damages claim cannot be set off against a sum due under the ISDA Master Agreement.

The ISDA Master Agreement is probably the most used form of agreement in the financial world, certainly in terms of the value subject to its provisions. Certainty in its application is therefore important. In *MHB Bank AG v Shanpark Ltd* [2015] EWHC 408 (Comm), Cooke J gave its set-off provisions a tight interpretation.

C (or, more accurately, a bank that assigned its ISDA claim to C) and D entered into both a loan agreement and a swap that hedged the interest rate risk on the loan agreement. The assignor was subject to an Event of Default, as a result of which D exercised its right under section 2(a)(iii) of the ISDA Master Agreement to suspend, potentially indefinitely, payment of sums otherwise due on the swap: *Lomas v Firth Rixson* [2012] EWCA Civ 419. D was therefore sitting pretty, able to avoid payments on what had become a disadvantageous swap.

But D then paid off the loan early. This was an Additional Termination Event under the swap and gave C the right to terminate the swap. C did so, leading to D's owing a substantial sum to C. D claimed to set off against that substantial sum damages arising from a misselling claim regarding the swap. The parties agreed that equitable set-off was not available, which left the terms of the ISDA Master Agreement.

D's first argument rested on section 2(c), which allows set-off of payments due on the same day, in the same currency and in respect of the same Transaction. Cooke J considered that this had no application after termination of the ISDA Master Agreement. It only applied to payments due whilst the ISDA Master Agreement was still standing. Further, a damages claim for misselling does not meet the requirements for section 2(c) (eg they are not payable in respect of the same Transaction, let alone on the same day).

Section 6 of the ISDA Master Agreement takes over from section 2 when the Agreement is terminated. This requires calculation of the Early Termination Amount on a net basis, but the1992 Master Agreement did not allow set-off of sums falling due outside the Master Agreement, though ISDA did publish an optional set-off clause. The 2002 Master Agreement includes a slightly wider version of this same set-off provision at section 6(f).

In *MHB Bank*, the parties were using the 1992 ISDA Master Agreement with the optional clause. This clause allows a non-Defaulting Party or, in circumstances not applicable, a non-Affected Party to set off sums against an Early Termination Amount. D argued that C was subject to an Event of Default, D was the non-Defaulting party and therefore that D could rely on the clause. Cooke J disagreed because a party is only a non-Defaulting Party for these purposes if it has terminated the Agreement by virtue of the other's default. D could have done so, but hadn't; instead, C had terminated the Agreement because of D's repayment of the underlying loan. D could not rely on section 6(f), and therefore had to pay the Early Termination Amount.

Cooke J's decision is probably in line with what most would have expected. D's attempt to use set-off was its last throw because its misselling claim lies against the bank that assigned its right to the Early Termination Amount to C, and that bank is insolvent. Absent set-off, D might not get much value even if it was missold the swap. The outcome might have been different had D not relied on section 2(a)(iii) in order to avoid payment on the swap but had terminated the swap before it paid off the loan.

Here we go again

A liquidated damages clause is limited by good faith and struck down as a penalty.

MSC Mediterranean Shipping Company SA v Cottonex Anstalt [2015] EWHC 283 (Comm) is an interesting case, but the outcome may have been overly influenced by the judge's enthusiastic attempts to bring obligations of good faith into English contract law, a topic on which he has form (*Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB)).

The case concerned the failure, in breach of contract, by a shipper (D) to return thirty-five containers to their owner (C). The contract contained a liquidated damages clause setting out a daily rate for the period of any delay in the containers' return. D's

underlying complaint was that the containers, stuffed with Iranian cotton, had been sitting on a dockside in Chittagong for so long that the liquidated damages exceeded the value of the containers by a factor of about ten.

Starting in orthodox fashion, Leggatt J decided that the principles on the mitigation of damages do not apply where there is a liquidated damages clause. Liquidated damages clauses make proof of actual loss unnecessary and irrelevant; accordingly, mitigation is also irrelevant.

So D argued that D was in repudiatory breach of contract by failing to return the containers for so long. Leggatt J agreed. If C had accepted the repudiatory breach, the primary obligations under the contract, including the obligation to pay liquidated damages, would have come to an end. That would have reintroduced issues of actual damage and mitigation. The judge was highly sceptical whether C had in fact suffered any loss.

But C had not accepted D's repudiatory breach. D's primary obligation to pay liquidated damages remained. That required the judge to address the question of whether C had a "legitimate reason" for keeping the contract alive (the difficult case of *White & Carter (Councils) Ltd v McGregor* [1962] AC 413). In *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)* [2012] EWHC 1077 (Comm), Cooke J decided that it required extreme perversity for an innocent party not to have a legitimate interest in keeping a contract alive.

With this invitation, Leggatt J brought good faith into play. A decision whether or not to accept a repudiatory breach was the same, he thought, as any other contractual discretion. As a result, a decision whether or not to accept a repudiatory breach must be exercised in good faith and not perversely, arbitrarily or capriciously (see *Braganza* above concerning express contractual discretions). No matter that the Court of Appeal has said that this is not so in (the uncited) *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200.

Thus, Leggatt J decided that C had no legitimate interest in refusing to accept the repudiatory breach solely in order to be able to continue to collect the liquidated damages. The purpose of liquidated damages is to quantify damages, not to give D a nice income stream when D was not in fact suffering any loss.

But even if he was wrong about that, Leggatt J concluded that if C had been entitled to keep the contract alive for ever, the liquidated damages clause would have been a penalty and therefore unenforceable. The basis for this appeared to involve looking at the losses actually suffered in the events that arose rather than as might have been anticipated when the contract was entered into; alternatively, it seemed to involve looking at the decision not to accept the repudiation, deciding that it was unreasonable and so concluding that the outcome must be penal.

MSC Mediterranean Shipping Company does raise interesting issues. Should C be able to collect liquidated damages for ever even if far in excess of the value of the containers? At what point should C buy replacement containers, capping its loss? When should the containers be considered to have been permanently lost? Who is the onus on to sort out the problem: the contract breaker or the innocent party? As with *Yam Seng*, there may not be enough at stake in *MSC Mediterranean Shipping Company* to merit an appeal, more's the pity.

To notice or not to notice

A notice served under a contract is wholly ineffective because it does not comply with the requirements of a contract.

A contract for the sale of a business requires a buyer to serve an Earn-out Notice setting out the profits (or losses) of the group it bought. Additional payments to the seller would be calculated as a multiple of those profits. The profits in question are to be taken from the audited accounts for two calendar years, ending on 31 December 2011.

The buyer has, however, changed the accounting year of the relevant companies so that they now end on 30 September. There are therefore no audited accounts for two calendar years ending 31 December 2011. Rather than having accounts specially prepared for this purpose, as it could have done (at a cost), the buyer prepares an Earn-out Notice based on such audited accounts as it has, coupled with a bit of extrapolation from unaudited management accounts. Is this an Earn-out Notice under the Agreement that triggers the obligation on the seller to object to it, or is it simply a nullity, which has different consequences.

In *Treatt plc v Barratt* [2015] EWCA Civ 116, the Court of Appeal considered that the Notice was a nullity, ie it was not an Earn-out Notice within the meaning of the Agreement. As a result, the procedures for challenging a Notice were not triggered. "There is a boundary which may be hard to define in the abstract, between errors

of that kind which do not invalidate such a notice, and substantial departures from the contractual provisions, which do", according to the Court of Appeal. The difficulties of approaching this in the abstract led the Court of Appeal to focus very much on the terms of the particular Agreement before them, ignoring any case law in which that boundary has previously been addressed.

Doing so, the Court of Appeal decided that the requirement to rely in the Notice on audited accounts was key. Audited accounts provided an objective basis for the figures, and allowed the expert determination procedures to work efficiently in the event of challenge to the Notice. An expert couldn't have been meant to carry out an audit himself. As a result, the Notice served did not do what the Agreement required it to do, and it was not therefore a valid Earn-out Notice.

Regulation

A fair cop?

Public bodies must act fairly as between defendants in negotiating settlements, but not that fairly.

The Office of Fair Trading's pursuit of the tobacco industry for fixing prices does not show the OFT in the best light. But as the OFT extracted some money from the industry, it might not mind too much.

The OFT (now the Competition and Markets Authority) induced some of those it was pursuing for tobacco price fixing to agree a settlement and to pay a fine. The OFT was presumably pleased with that outcome. Those who refused to settle took the case to the Competition Appeal Tribunal, where, on the 26th day of the hearing, the case collapsed. Not so pleasing.

Those who had agreed settlements in order to avoid the fight were, as the judge put it in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2015] EWHC 84 (Admin), "dismayed". They sought to appeal out of time, but their applications were rejected. A successful appeal by one conspirator does not mean that another conspirator who pleaded guilty or who did not appeal can automatically get off too. The demands of finality and certainty are firmly against this (*AssiDomain Kraft Products v European Commission*, Case C-310/97P and *DPP v Shannon* [1975] AC 717). Relief at the OFT.

But it didn't rest there. The OFT later slipped out a statement saying that it had repaid the fine, and paid some costs, to one of those (TMR) who had settled because of assurances the OFT had given to TMR regarding a successful appeal brought by anyone else. In *Gallaher*, those who had settled but who had not received comparable assurances were, doubtless, doubly dismayed. They demanded repayment of their fines, but were rebuffed by the OFT. So they sought judicial review of the OFT's refusal to refund.

In *Gallaher*, the OFT/CMA lost on all points, except the last, and critical, one. Collins J decided that assurances had been given to TMR. These assurances had not been included in the settlement agreement but had been set out in an email sent by TMR following a meeting between the OFT and TMR. The OFT had not responded to the email because it was concerned that, if it did, its response might be "misconstrued". Collins J did not see how a straight "no" could have been misconstrued (and "no" should have been the answer had the OFT applied its mind to *AssiDomain*). The failure to respond was, the judge thought, tantamount to an acceptance of the terms set out in the email. Repayment to TMR was unavoidable, despite the OFT's attempts to argue

Back door security

No term is to be implied into an agreement that allowed one party to sell the other's property.

A bank had security over certain assets for a loan. If the bank had enforced that security, it would have had the obligations imposed by equity on the exercise by mortgagees of powers of sale. But if the borrower failed to sell the assets within a certain period, the bank had a separate contractual right to take over the sale process under the terms of a power of attorney. This was the course it took. No express duties were imposed on the bank if it acted under its power of attorney. What duties were to be implied?

According to the judge in *Rosserlane Consultants Ltd v Credit Suisse International* [2015] EWHC 348 (Ch), none. The agreements were drafted by lawyers, and it was not necessary to imply any obligation on the bank to get the best price or such like. The bank had sufficient incentive because it was entitled to a share of the sale proceeds if they exceeded a certain amount (which they did). The judge refused to apply by analogy the principles applicable to mortgagees, agents or any other category. It was purely a question of implication in fact, and the agreement was efficacious without any additional terms. The agreements were carefully crafted by lawyers and understood by all. The implication of extra terms was a step too far.

that no assurances had been given and that the refund was entirely discretionary.

Collins J accepted that the failure to offer comparable assurances to the other settlers was a breach of the public law duty of fairness and equal treatment. The OFT couldn't simply say "don't ask, don't get". The OFT can treat parties differently if their circumstances are different, but the OFT's conduct in this case constituted the offer of an unfair and unknown advantage to one party; the others did not ask for that advantage because, rightly, they thought the OFT should not give it.

But this still wasn't enough for the other settlers to be repaid. The OFT should never have offered the assurances to TMR. It was a "blunder". The judge considered that this blunder should not be replicated across other parties where replication would require the disbursement of scarce public funds. So the OFT/CMA got away with it. Two wrongs do not make a right.

Conflict of laws

Acknowledged surrender

A party that loses a jurisdictional challenge but wants to appeal must not acknowledge service.

In order to challenge the jurisdiction of the English court, it is necessary first to acknowledge service: CPR 11(2). If the application fails, the acknowledgment of service ceases to have effect, and the defendant can acknowledge service again: CPR 11(7). If the defendant files a second acknowledgment of service, it will be treated as having accepted the court's jurisdiction: CPR 11(8).

But what if D both appeals against the failure of its jurisdictional challenge and files a second acknowledgment of service? According to the Court of Appeal in *Deutsche Bank AG v Petromena ASA* [2015] EWCA Civ 226, the appeal is bound to fail because the submission to the jurisdiction under CPR 11(8) trumps the appeal: the act of acknowledging service for a second time gives the court jurisdiction even if the appeal would have succeeded. The correct course is for D to appeal and, at the same time, to ask for an extension of time for filing the second acknowledgment of service until after the hearing of the appeal. Under no circumstances must D acknowledge service.

That was enough to dispose of the case in *Petromena*. Under article 24 of the Lugano Convention (relevant because D was domiciled in Norway and which is the same as article 26 of the Brussels I Regulation (recast)), a court has jurisdiction if a defendant enters an appearance other than purely to challenge jurisdiction, and that was what D had done with its second acknowledgment of service.

But even apart from this, the Court of Appeal was satisfied that the English courts had jurisdiction. C had bought bonds issued by D, which was in financial distress. According to D, C then forced itself on D as an adviser in order to try to solve D's problems. Eventually, however, C sold its bonds to a rival of D, and D went into insolvency. This conduct, said D, gave rise to obligations under Norwegian law somewhat akin to fiduciary duties and negligent misrepresentation. C sought a negative declaration in England.

D challenged the jurisdiction of the English courts on the basis of a clause in the bonds giving exclusive jurisdiction to the Norwegian courts in relation to disputes arising out of or in connection with the bonds. However, the Court of Appeal decided that the clause was inapplicable. Article 23 of the Lugano Convention (article 25 of the recast Brussels I) upholds jurisdiction clauses dealing with disputes arising "in connection with a particular legal relationship". The legal relationship on the bonds was not the same as the advisory relationship on which D based its claim.

The Court of Appeal was satisfied that the English courts had jurisdiction whether D's claims were characterised as arising in tort/delict or in contract. Everything D did, it did in London. If D's claims were properly characterised as contract claims, the place of performance of the obligations in question was London; and if they were in tort, the harmful events took place in London.

Form and void

A contract lacking the two signatures required by Swiss law is unenforceable.

Two Swiss companies purported to enter into an English law contract. For D, the contract was signed by one "prokurist", but the commercial register made it clear that, to be binding on D, the contract had to be signed by two prokurists. Is the contract binding? In *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144, the Court of Appeal decided that the contract was not binding.

The first issue was characterisation. Was the issue "formal validity", and therefore governed by article 11 of Rome I, or was it agency, and therefore outside the scope of Rome I (article 1(2)(g))? What formal validity means has never been clear, but the Court of Appeal was sure that this was not it. Formal validity might

include the requirement for a signature to be witnessed, but not the prior question of the authority of the signatories.

The Court of Appeal decided that the question was one of the authority of the signatories, which is not covered by Rome I. Under English conflict of laws rules, the actual authority of an agent depends on the law governing the contract between agent and principal or, in a corporate context, the law of the place of incorporation. Under Swiss law, a single prokurist had no authority to bind the company. End of story.

Integral was an (unsuccessful) appeal from a decision by Popplewell J. In *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm) above, Popplewell J reiterated that actual authority depends on the law applicable to the agency relationship - in *Spar Shipping*, Chinese law as the place of incorporation of the relevant guarantor company - but went on that apparent authority (not raised in *Integral*) depends upon the law governing the contract. The judge decided that the signatory of the guarantee had actual authority under Chinese law or, if not, apparent authority under English law.

Popplewell J also decided that a failure to comply with Chinese exchange control laws by registering the guarantee with, and securing the approval of, the Chinese authorities was irrelevant given that the guarantee was governed by English law and payment was required to take place in Norway (*The Vine* [2010] EWHC 1411 (Comm); cf article VIII(2)(b) of the Articles of Agreement of the IMF).

Legal highs

Lawyers cannot be sued in England for inducing their clients to break an English exclusive jurisdiction clause.

Marzillier, Dr Meier & Dr Gunther Rechtsanwaltgesellschaft mbH v AMT Futures Ltd [2015] EWCA Civ 143 might have been entertaining had it gone the distance. C, an execution only broker for derivatives, was sued by its German customers in the Duisberg courts, courts apparently known to be investor-friendly, on the basis of a standard model claim marketed by D, a firm of German lawyers. The basis of the customers' suit was that C had a liability in tort ancillary to that of the customers' advising brokers.

Faced with litigation in Germany on the basis of ancillary liability, it is not surprising that C should consider whether any of the same sauce might flow in the other direction. So C sued D for inducing breach of contract because the contracts between C and its customers gave exclusive jurisdiction to the English courts. D resisted on the ground that the English courts had no jurisdiction. Reluctantly, the Court of Appeal agreed with D.

The basis of jurisdiction asserted was article 5(3) of the Brussels I Regulation (now article 7(2) of the recast Regulation), namely that the tortiously harmful event occurred in England. The first instance judge reasoned that the harmful event was the failure to sue in England, the absence of which took place in England. The Court of Appeal disagreed, holding that the harmful event was the expense and liabilities caused by the litigation in Germany, which took place in Germany.

Even though the Court of Appeal expressed reluctance at being driven to this conclusion, it must have been relieved to do so. Had it decided otherwise, the English courts would have had to sit in judgment over decisions of the German courts on, for example, their jurisdiction and liability, not something the CJEU approves of.

Bonded servitude

The party ultimately interested in a bond cannot sue the issuer.

Secure Capital SA v Credit Suisse AG [2015] EWHC 388 (Comm) involved a typical bond structure. D issued a global bearer bond governed by English law to a common depositary, which held the bond for a clearing system, in this case Clearstream in Luxembourg. The clearing system then allowed its members to trade interests in the bond through book entries at the clearing system, whether the members did so in their own right or (as here) as custodians for others such as C. The initial contractual link is between the issuer and the common depositary as holder of the bearer bond; the common depositary pays whatever it receives from the issuer to the clearing system, which in turn passes the money to those shown in its books as entitled to the payments. The common depositary/clearing system has a claim against D; the clearing system's members have a claim against the clearing system; and the clearing system's member's customers have a claim against the clearing system's members. A trifle convoluted perhaps, but it generally works fine.

Typical though this structure is, in *Secure Capital* it gave C a problem. C wanted to sue D for breach of one of the terms of the bonds, namely a representation that there were no

facts that would make any of the statements in the bond documents misleading. But how to bring that claim? There was a deed of covenant that gave C direct rights against D in certain circumstances; unfortunately (for C), those circumstances were not applicable. So C sought to rely on Luxembourg law as the law of the location of the common depositary, and thus of the bearer bond, and which, C said, gave it a direct right to sue D for breach of the English law contract between C and the common depositary formed by the bond.

Hamblen J was not impressed. Indeed, he condemned C's arguments as "to a significant extent legally incoherent". Strong stuff, for a judge.

The starting point, as in much of private international law, was the characterisation of the relevant issue. Hamblen J considered that the issue was whether D was in breach of contract. The conflict of laws rule applicable to claims in contract requires identification of the governing law of the contract. A contract is generally governed by the law the parties decide that it is governed by, in this case English law (though there is an academic issue as to whether a bond, as a unilateral instrument, is a contract for Rome I purposes and thus whether Rome I or the common law applies, but that made no difference here).

The conflict of laws rule therefore required the application of English law to C's claim, including whether C, as a non-party, could sue D on the contract between D and the common depositary/clearing system. Under English law the answer is clearly no: lack of privity (presumably third party rights were, as ever, excluded). Luxembourg law cannot confer on a third party a claim under an English law contract. C should have sued in tort, but that may not have offered the remedy C wanted.

Tort

A joint of tuna

Assistance as a joint tortfeasor must not be de minimis.

Aiding and abetting a crime is itself a separate crime. Aiding and abetting a tort is not a tort. Aiding and abetting can, however, make two parties joint tortfeasors, with the law treating them both as having committed the same tort. In *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, the members of the Supreme Court were agreed on the requirements for two parties to be joint tortfeasors. The requirements are: D must have assisted in the commission of an act by the primary tortfeasor; the assistance must have been provided pursuant to a common design to do the act in question; and the act in question must constitute a tort. The requirement for a common design is the control mechanism to prevent otherwise legal acts being converted into torts, like mens rea in crime and unconscionability or dishonesty for constructive trusts.

The Supreme Court also agreed that any assistance provided must not be de minimis. But the judges couldn't agree on what was and was not de minimis for these purposes.

The case (a jurisdictional dispute) involved a UK charity that assisted its US affiliated charity - effectively its parent - by raising money for a campaign against fishing for blue fin tuna in the Mediterranean. The campaign was clearly going to involve cutting the nets of fishermen and other activities that could be tortious. Prima facie, the UK charity was

Tort/conflict of laws

Tortuous torts

Misuse of private information is a tort.

To create the cause of action required by article 8 of the ECHR (respect for private life), the English courts shoehorned the claim into breach of confidence, realised it wasn't really the same, so called it misuse of private information instead. Breach of confidence is not a tort since it comes from equity, and torts are creatures of the common law: *Kitechnology BV v Unicor GmbH Plastmachinen* [1995] FSR 765. But is misuse of private information a tort?

The obvious answer is who cares about such sterile terminological issues. But it does matter because of the odd, for historical reasons, structure of the grounds for permission to serve a claim form out of the jurisdiction. If misuse of private information is a tort, it falls in PD6B, §3.1(9) if the damage was suffered within the jurisdiction. If it's not a tort, the claim form is much harder to serve out.

In *Google Inc v Vidal-Hall* [2015] EWCA Civ 311, the Court of Appeal decided that misuse of private information is a tort. That allowed a claim form to be served on Google in the US alleging that Google improperly implanted cookies in Safari (Apple's browser) to collect private information.

The Court of Appeal also decided that, although the section 13(2) of the Data Protection Act 1998 limits the circumstances in which a party can obtain damages for non-pecuniary loss, that was an incorrect implementation of the relevant EU Directive. More significantly, it was also a breach of the EU Charter of Fundamental rights and, as a result, must be disapplied.

therefore a joint tortfeasor. But the UK charity only raised £1730, which doesn't go far when sailing ships around the seas

Lords Sumption and Mance (both shipping lawyers in their pasts) said that this sum could not be dismissed as de minimis for the purposes of deciding whether the UK charity was a joint tortfeasor. The majority, however, concluded that it could; the UK charity was not therefore a joint tortfeasor (nor were individual donors); and the English courts had no jurisdiction over the US tortfeasor.

Courts

Stay guaranteed

A stay of a claim on a guarantee is granted while the principal claim is arbitrated.

In *Stemcor UK Ltd v Global Steel Holdings Ltd* [2015] EWHC 363 (Comm), Hamblen J stayed proceedings on a guarantee to await the outcome of an arbitration between C and the underlying debtor. The guarantors said they were content to abide by the outcome of the arbitration while C said that it was not. On a legal basis not fully explained (but seemingly case management as in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173), Hamblen J felt that a stay was appropriate. He was particularly concerned about the possibility of conflicting decisions (something that always troubles the judiciary deeply because it might suggest that the outcome of a case depends upon the identity of the tribunal rather than upon the superhuman ability of judges to discern truth from falsity) and because he didn't really believe that, if C went through the arbitration and lost, C would have the stomach to fight the same battle against the guarantors in the courts.

Sovereign immunity

Diplomatic service

Service of court process by post on an embassy does not infringe the diplomatic inviolability of the embassy.

Conventional wisdom has been that a sovereign making, eg, a bond issue cannot appoint its London embassy as its address for service of process unless the ambassador waives diplomatic immunity. This is because an embassy is, under the Vienna Convention on Diplomatic Relations (given the force of law in the UK by the Diplomatic Privileges Act 1964), "inviolable", and service of a claim form would infringe that inviolability. However, the Court of Appeal decided in *Reyes v Al-Malki* [2015] EWCA Civ 32 that while personal service on a diplomat or at an embassy might infringe this inviolability, service by post does not.

The facts of *Reyes* have nothing to do with sovereign bonds. The case concerned a claim against diplomats by former domestic staff alleging people trafficking, racial discrimination, harassment and payment of less than the minimum wage. The case raised issues of the substantive immunity of the diplomats, but it also raised the procedural issue of whether the process had been validly served on the diplomats.

Service of the court process in *Reyes* had been attempted by sending it by post to the embassy and to the diplomats' residence. Article 22(1) of the Convention states that the "premises of the mission [ie the embassy] shall be inviolable"; article 30(1) provides that a diplomat's residence enjoys the same inviolability as the mission. As a result, the diplomats argued that they had not been validly served.

The Court of Appeal started its analysis from the proposition that a diplomat's immunity under the Convention is not absolute. There is, for example, no immunity for commercial activity performed in the receiving state outside diplomatic functions. The Court of Appeal considered that if service of process was barred even if the court proceedings related to these non-immune areas, these exceptions from immunity would be futile. That is, however, open to question. Service of process might be barred within the receiving state, but that does not mean that the process cannot be served at all. Service of court process, both English and other, is regularly effected outside the jurisdiction of the relevant court.

The Court of Appeal accepted that personal service of court process would infringe the inviolability of diplomats and their premises. However, the Court concluded that service by post does not do so. Article 22(1), quoted above, goes on that the agents of the receiving state must not enter the mission without consent. The Court of Appeal seemed to consider that this coloured the meaning of inviolability. A postman approaching the letterbox of a mission did not involve entry into the mission by agents of the state, nor did it affront an ambassador's personal dignity, cause public embarrassment or cause him to restrict his movements to avoid service.

This reasoning is, again, open to question. A postman carrying junk mail of the sort that drops on doormats daily may not be the agent of the state, but a postman carrying court process is delivering documents that assert the receiving state's authority over the diplomat. As such,

the postman is acting as an agent of the state (even if, in most cases, the postman will be unaware of this). Nor does the Convention offers any grounds for suggesting that service by post can be treated differently from personal service.

Dubious though the Court of Appeal's reasoning may be, it does represent pragmatism. Service by post on an embassy is generally harmless. It simply speeds up the time at which the state or its diplomats must assert such substantive immunity as they may have. Unless the Supreme Court decides otherwise. Until then at least, it remains prudent to obtain an Ambassador's waiver of the Embassy's immunity.

Financial services

Location, location, location

ECB location requirements for CCPs struck down.

Article 127(2) of the Treaty on the Functioning of the European Union gives the ECB the "basic task" of "promot[ing] the smooth operation of payment systems". Article 22 of the ECB's statute (in Protocol No 4 to the TFEU) allows the ECB to make regulations "to ensure efficient and sound clearing and payment systems" within the EU and elsewhere. In its *Eurosystem Oversight Policy Framework*, published in July 2011, the ECB argued that these provisions required it to exercise oversight of payment and clearing systems, including of securities settlement systems and central counterparties (CCPs).

This would not have caused any ructions had the ECB not gone on to say that, in order to the exercise this oversight, it required CCPs to be incorporated and to operate within the euro area. The only exception to these requirements were CCPs that, by virtue of their small size, were unlikely to affect the stability of the euro area, ie those that settle less than €5 billion per day or that account for less than 0.2% of the total daily average of payment transactions processed by the euro area systems.

The ECB's policy posed a challenge to London, the EU's largest financial centre. It might have required CCPs operating in London to reincorporate in, and relocate to, the euro area, with a potential loss of jobs and income in the UK, as well as diminishing London's influence. Faced with this threat, the UK challenged in the CJEU the legality of the ECB's *Policy Framework* insofar as it set out a location policy for CCPs established in the EU but outside the euro area. In *United Kingdom v European Central Bank* (Case T-496/11), the UK proved successful.

The ECB's first argument was the UK's claim was inadmissible before the CJEU because the *Policy Framework* had no legal effect and because the UK had no standing to challenge the document.

The CJEU decided that the claim was admissible. The *Policy Framework* would have been read as being mandatory, even though it was not in the form of a regulation. Further, it was not just a restatement of an older policy. Similarly, the CJEU decided that the fact that the UK is outside the euro area did not prevent the UK from challenging the ECB's decisions.

The UK raised five substantive objections to the ECB's *Policy Framework*: first, the ECB had no jurisdiction to regulate CCPs; secondly, the ECB's policy infringed EU law on freedom of establishment; thirdly, the ECB's policy infringed EU anti-trust laws; fourthly, the ECB's policy infringed EU anti-discrimination rules; and, fifthly, there was no sufficient justification for any discrimination.

The CJEU only addressed the first of the UK's five objections since that was enough to decide in favour of the UK. The CJEU considered that the ECB's powers came from article 127 of the TFEU, and the ECB's statutes had to be read in the context of that article. The ECB's oversight was therefore confined to payment systems, which might include the cash leg of clearing operations, but not the securities leg. As a result, the requirement to promote the smooth operation of payment systems was not sufficient to grant the ECB "autonomous regulatory competence" in respect of all clearing systems and CCPs.

This might not have been the end of this issue. For example, the CJEU discussed the issue in the context of securities' clearing, where there is a cash leg and a securities leg to the transaction. What about CCPs for, eg, derivatives that are settled in cash? Logic dictates that they are not payment systems either, even though all they involve is the transfer of cash. The CJEU could have been forced to address this and the UK's remaining issues in other proceedings or as a result of further decisions by the ECB. However, harmony has broken out and a settlement has been reached. Politics, politics, politics.

Chancery division

FOS cannot decide its own jurisdiction.

When the Financial Ombudsman Service makes a decision, it does not have to follow the law but can simply decide on the basis of what it

considers to be fair and reasonable. The same does not, however, apply to decisions on the FOS's jurisdiction. According to Ouseley J in *R (Chancery (UK) plc) v Financial Ombudsman Service Ltd* [2015] EWHC 407 (Admin), questions of jurisdiction are points of law, ultimately for the court, not matters on which the FOS can reach a fair and reasonable decision. The FOS must decide the facts and reach its own conclusion on its jurisdiction. But the court (if asked) will then consider whether, as a matter of law, those facts give the FOS jurisdiction, not merely whether the FOS's conclusion on its jurisdiction was reasonable. Jurisdictional questions are right or wrong, not reasonable or unreasonable.

None of this helped C in this case. Ouseley J upheld the FOS's decision that C's film finance tax avoidance scheme was investment advice and that it was a collective investment scheme and, as a result, that the FOS had jurisdiction to rule upon it.

Ups and downs

Information can be inside information even if it is not clear which way the market will move.

Under the EU's insider trading and market abuse regime, inside information must be (i) precise, (ii) not public, (iii) relate to financial instruments or issuers, and (iv) if made public, must be likely to have a significant effect on market prices. However, the demand for precision is not such that it must be clear which way the information will move the price. According to the CJEU in *Lafonta v Autorité des marchés financiers* (Case C-628/13), the complexity of the financial markets is such that it is particularly difficult to evaluate correctly whether information will cause prices to rise or to fall. It is enough that the information will have a significant effect on prices, even if you don't have a clue what that effect will be. The decision is therefore contrary to the Upper Tribunal's decision *FCA v Hannam* [2014] UKUT 233, which attempted to provide guidance that would answer the vast majority of questions on inside information. The guidance didn't last long.

Contacts

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Anna Kirkpatrick
Senior PSL

T: +44 20 7006 2069
E: anna.kirkpatrick
@cliffordchance.com

Susan Poffley
Senior PSL

T: +44 20 7006 2758
E: susan.poffley
@cliffordchance.com

This publication 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.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

35245-5-66-v0.9