CLIFFORD CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

JUNE 2018

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CONTENTIOUS COMMENTARY – JUNE 2018

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Contentious Commentary is a review of recent developments in the English courts

CONTRACT

OF PRAGMATISM AND CONCEPTS

No oral modification (or variation) clauses are valid.

Most written contracts, certainly bilateral contracts in the financial world (eg ISDA and GMRA), include a no oral variation clause. Yet the enforceability of these clauses has for decades been highly questionable – indeed, the received wisdom has been that they are not enforceable. English law has (with limited exceptions) no formal requirements for contract formation; parties can always enter into an oral contract; and if they do so, that contract is, so the argument goes, valid even if it amends a prior written contract containing a no oral variation clause (the subsequent oral variation must imply a decision to vary the no oral variation clause).

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24 swept away all that theory. Parties include no oral variation clauses in their contracts because the clauses are commercially sensible (eg they prevent someone seeking to undermine the certainty of a written contract and provide enhanced clarity). The business of the law is to uphold sensible business practices, which is what the Supreme court considered that it was doing.

Essentially, it is a battle between two contracts: a prior written contract, and a later oral one. There is no reason, according to the Supreme Court, why the parties cannot agree in advance which is to prevail. They would thereby be restricting their subsequent autonomy of action, but that is what contracts do. If statute can impose requirements of form on, eg, contracts for the sale of land, the parties can do so themselves.

The only escape the Supreme Court allowed was estoppel. If the parties agree an oral variation and then act on it, one party might be estopped from later denying the validity of the variation. But the Supreme Court stressed that estoppel in this context must be kept under control. The mere oral agreement itself would not be a sufficient representation on which to found an estoppel; more would be needed.

But a decision upholding perceived commerciality can bring problems because what is commercial depends upon a party's circumstances. Normally, for the reasons given by the Supreme Court, insisting on formality in order to change a contract is prudent. But if a party wants - perhaps needs for regulatory purposes - to amend a contract but knows that obtaining the other party's signature will be hard, an oral agreement or notice followed by conduct consistent with the change might be the only realistic option. *Rock Advertising* won't necessarily make that easier, but that is what no oral variation clauses are for.

SPIES REPACKAGED

The ability to recover negotiating damages is restricted.

The one thing that is clear from *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 is that the Supreme Court wants to limit the circumstances in which negotiating damages (aka *Wrotham Park* damages) are available as such. Negotiating damages are damages for breach of contract calculated not on the basis of actual loss suffered by the innocent party but as the price that a reasonable party would have charged to vary the contract to allow the breach that has occurred.

According to the Supreme Court, the aim of contractual damages is to compensate for the failure of one party to perform, not to punish deliberate breach of contract (unless traitors called Blake are involved) or to strip out profits. But, just to keep everyone on their toes, the Supreme Court added that sometimes negotiating damages might be the appropriate measure of such compensation.

The Supreme Court concluded that where property (tangible moveable, immovable or IP) has been wrongly used, and its use is commercially valuable, the compensation is the amount that it would have cost to use that property. A similar approach applies when damages are awarded under Lord Cairns Act (now section 50 of the Senior Courts Act 1981) in place of specific performance or an injunction: the loss is the economic value of the right which the court has declined to enforce directly (though the loss could also be calculated in different ways).

But the normal measure of damages for breach of contract remains the difference between the effect of performance and non-performance on the claimant, who must prove loss (and if the claimant can't do so, the claimant will only get nominal damages). Where loss is hard to measure, the law is tolerant of imprecision. Negotiating damages can be awarded when the measure of loss is appropriately measured by reference to the economic value of the right breached, but, for this to be the case, the right that is lost by the breach must be something akin to a property right.

The facts of *Morris-Garner* were that D had breached a non-competition covenant. C found calculating its losses hard, so claimed the price that a reasonable person would have charged for releasing D from the covenant.

The Supreme Court was satisfied that *Morris-Garner* was not a case for negotiating damages as such. C had to prove that the breach had caused it to suffer losses (eg profits or goodwill), hard though this might be. The covenant in question did not result in the loss of a valuable, property-like, asset (though breach of a confidentiality obligation might be of that sort). The trial judge had to do the best he or she could to assess damages, but how it should be done was a matter for the judge, who could in doing so take into account a hypothetical release fee, even if that was not, as such, the measure of loss. All rather curious.

SETTLEMENT WILL

A wide settlement agreement can do what it says.

Settlement agreements are generally intended to be wide in their scope in order to bring an end to a relationship and/or prevent further litigation on the same subject. The wisdom of that course may seem obvious at the time a settlement agreement is entered into but, if an unsuspected claim later emerges, it may seem rather less obvious – to one party at least. But *Khanty-Mansiysk Recoveries LLP v Forsters LLP* [2018] EWCA Civ 89 shows that wide wording can achieve its aim.

Khanty-Mansiysk concerned a dispute over solicitors' fees, which was settled on the usual wide terms. The settlement covered claims known or unknown, suspected or unsuspected and so on, as long as the claims arose in relation to the solicitors' work. Later, C wanted to bring a claim in negligence against the solicitors, who responded that the claim was blocked by the settlement agreement. But, said C, it didn't know about the alleged negligence at the time of the settlement, so the parties couldn't possibly have intended negligence to be within the scope of the settlement agreement.

The Court of Appeal agreed with the solicitors. "… any contract must be interpreted in the light of the admissible background facts, and… interpretation is an iterative exercise in which competing interpretations are tested for their commercial consequences. Having said all that, the most important aspect of contract interpretation is loyalty to the text." The text was clear that it settled all claims arising from the solicitors' work covered by the invoices in question, known or unknown. C's claim was blocked.

A QUESTION OF ATTRIBUTION

A sole shareholder's knowledge is not to be attributed to his company.

In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA 84 (Civ), the Court of Appeal agreed with the first instance judge that, in paying away money, a bank (D) was in breach of its implied duty of care to its client, ie not to pay funds away if a banker is put on inquiry in the sense of having reasonable grounds, though not necessarily proof, for believing that the payment instruction is an attempt to misappropriate funds from the company (*Barclays Bank plc v Quinecare Ltd* [1994] 4 All ER 363).

The core issue arose from the fact that the payment instruction in question was given by the company's sole shareholder and controller. If his knowledge (ie that he was misappropriating funds from his company) was attributed to the company, the company could not claim. (This issue has recently been raised in a number of cases where the claim rests on illegality.)

The Court of Appeal decided that the sole shareholder's knowledge should not be attributed to the company. The reasons for this non-attribution are hard to pin down, other than the circular assertion that attribution would have defeated the claim: that is the question, not the answer. If C had not been insolvent, would the answer have been the same? Perhaps not.

ONE TIME CHARLIES

There is only one chance to get a 2002 ISDA Master Agreement close-out right, and the amount must be objectively reasonable.

It's a bit hard to follow what Knowles J really meant in *Lehman Brothers Special Financing Inc v National Power Corporation* [2018] EWHC 487 (Comm). He reached two conclusions on close-out under the 2002 ISDA Master Agreement, both of which are potentially far-reaching but neither of which is necessarily obvious.

Close-out under the ISDA Master Agreement following an Event of Default is, essentially, a two-stage process (absent Automatic Early Termination). First, notice of early termination designating the Early Termination Date. Second, the Non-defaulting Party sends a statement of the Close-out Amount it claims as a result of the occurrence of the Early Termination Date.

LBSF had the curious feature that the Non-defaulting Party contended that its statement of the sum due was incorrect, that the statement should therefore be disregarded, and that a revised statement, sent eight years later (after the legal proceedings had started), should be used instead.

Knowles J considered that a Non-defaulting Party has only one chance to get its statement right. If it later thinks that the first try was wrong, it is not entitled to make another attempt to produce a better figure. It can propose revisions, to which the Defaulting Party may agree, but otherwise it is for the court to declare that the first attempt is invalid and to state what the Close-out Amount would have been on a determination that was made without error.

But, to complicate things, Knowles J was prepared to accept that, in theory, a determination that was, for example, based on a misinterpretation of the Agreement might not be a determination under the Agreement at all; if so, the second determination might in fact be the first. He was clearly not keen on that approach, and it would take some persuading that a statement of the Close-out Amount was so wrong as not to be a statement at all.

The second conclusion was as to the bases upon which a Close-out Amount can be challenged. Under the 1992 ISDA Master Agreement, the test is good faith coupled with *Socimer/Wednesbury* unreasonableness, ie the approach or result must be so unreasonable that no reasonable person could have reached it. That gives the Non-defaulting Party real latitude, making it hard to challenge the sum claimed.

The 2002 ISDA Master Agreement changed the wording of what is required to good faith plus the use of "commercially reasonable procedures in order to produce a commercially reasonable result." Knowles J considered that this was no longer *Socimer/Wednesbury* unreasonableness; instead, it imposed an objective standard. The procedures used must, objectively, be commercially reasonable, and the outcome must be an objectively reasonable figure. It is not, he thought, the exercise of a discretion. There might still be a range of commercially reasonable results but, according to the judge, that does not mean that the Non-defaulting Party can necessarily pick the end of the range that suits it best (what else is it supposed to pick?).

Where this leaves matters is not entirely clear, but Knowles J's approach will make it easier to challenge Close-out Amounts under the 2002 ISDA Master Agreement. Knowles J quoted the User's Guide in support of his view: the 2002 Agreement was intended to bring "a certain objectivity and transparency" lacking in the 1992 Agreement. Whether it was meant to be as strict as Knowles J considered is less clear. The 2002 Agreement widened considerably the means available to the Non-defaulting Party to calculate the Close-out Amount. Did it also intend there to be only one objectively reasonable approach from all those means and one, objectively ascertainable outcome?

MARKETING DISTRESS

A fair market value can be a distressed market value.

By the time *LBI EHF v Raiffeisen Bank International AG* [2018] EWCA Civ 719 reached the Court of Appeal, a mere decade after the events in question, the only issue was whether the "fair market value" determined by the non-defaulting party on close-out under a Global Master Repurchase Agreement was confined to the price between a willing seller and a willing buyer, with no compulsion, or whether it could extend to the price in a distressed or illiquid market. The Court of Appeal opted for the latter. GMRA gave the non-defaulting party a broad discretion, bounded only by *Socimer* limits (good faith and not arbitrary or perverse – cf *LBSF* above); there was no justification for reading in additional limitations.

THE (NOT) GOODIES

Downloaded software is not goods.

Despite fearing that it might be thought old-fashioned, in *Computer Associates Ltd v Software Incubator Ltd* [2018] EWCA Civ 518, the Court of Appeal decided that software supplied by means of a download does not comprise "goods". This decision was for the purposes of the Commercial Agents Regulations, but it confirms the general view for sale of goods purposes. To be a good, there must be something tangible.

UNLEASED

An entire agreement clause does not prevent the implication of terms.

In *JN Hipwell & Son v Szurek* [2018] EWCA Civ 674, the Court of Appeal upheld an entire agreement clause, rejecting a lower judge's attempt to evade it because she didn't think it represented the parties' true intentions. Absent fraud, a contract means what it says.

But an entire agreement clause does not prevent the implication of a term, and the Court of Appeal was prepared to imply a term into a poorly drafted lease. The Court of Appeal considered that, following *Marks & Spencer plc v BNP Paribas Securities Services Trust* [2016] AC 742, the approach to implication is: first, is there any provision that expressly covers the area? if not, did the parties deliberately decide not to include the term sought to be implied? if not, whether to imply must be judged at the date the contract was entered into, and the test is necessity in the sense that, without the term, the contract would lack commercial or practical coherence; and implication is not the same as interpretation, and requires strict restraint.

Despite this restraint, the Court of Appeal was prepared to imply a term into the lease in question, and to uphold a finding that the landlord was in repudiatory breach of that term, permitting the tenant to terminate the lease.

FAMILY 3, THE REST 2

A notice is effective when the intended recipient has had a chance to consider it.

An employer resolves to make an employee redundant. Twelve weeks' notice is required. If notice is given before 27 April, it will expire before the employee's 50th birthday, and she will not be entitled to a pension; if it is given on or after 27 April, it will expire on or after her 50th birthday and she will get a pension. The contract says nothing about when notices are effective. An attempt is made to deliver the notice by registered post to the employee's house on 21 April, but she is on holiday. On 26 April, her father-in-law, who came to her house to water the plants, found the registered delivery slip and kindly collected the letter from the sorting office. The employee arrived home from holiday the next day, when she read the letter. When was the notice given?

In *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22, the Supreme Court decided by three (Ladies Hale and Black and Lord Wilson, family lawyers all) to two (Lords Briggs and Lloyd-Jones) that notice was only given when the employee had a reasonable opportunity to read the letter, ie on 27 April. This was a question of what term was to be implied into the contract. The majority considered that there was no established law on this, that Employment Tribunals had followed this approach, and that it was the right approach. The minority considered that there was long established law, largely from landlord and tenant cases, that a notice was effective when delivered to the address in question.

The solution? Include provision on the effectiveness of a notice in the contract itself.

TORT

PARENTAL RESPONSIBILITY

A parent company does not owe a duty of care for the failings of a subsidiary.

Okpabi v Royal Dutch Shell plc [2018] EWCA Civ 191 is the latest in the series of cases that, on their face, concern the liability of a parent company for the sins of an overseas subsidiary, commonly in an emerging market. There is an industry of lawyers that seeks to remedy the failings of local courts by asserting that the UK-based parent owes a direct duty of care to those injured by the subsidiary and, as a result, that both the parent and the local subsidiary can be sued in the English courts. The judicial approach is to analyse the issues up hill and down dale, but it really comes down to a visceral response as to whether the English courts should take the case and to the nature of group structures and the corporate veil. The resulting uncertainties are illustrated by the 2-1 split in *Okpabi*.

Okpabi concerned oil spills in the Niger delta from a pipeline operated by Shell's local subsidiary as part of a joint venture with various others. A claim was brought in England against the subsidiary on behalf of 42,500 people affected but, to proceed, it required the English courts to have jurisdiction over the subsidiary. This was to be achieved by including in the action a claim against the subsidiary's parent, incorporated in England, and joining the subsidiary as a necessary and proper party to the action against the parent (PD6B, §3.1(3)).

In reality, once jurisdiction over the subsidiary is established at the interim stage, the claim against the parent is less important because a major group is unlikely to allow a judgment, if one is obtained, against a subsidiary to go unfulfilled.

But for this scheme to work, there must be a claim against the parent that does not fail on a test equivalent to summary judgment (in different judicial words, there is a serious issue to be tried against the parent or the claim is not bound to fail) – a conveniently low threshold. That depends upon whether it is sufficiently arguable that the parent owes a duty of care to protect those injured from the failings of its subsidiary.

In *Okpabi*, the Court of Appeal decided by majority that there was no such claim against the parent. For a parent company to have a personal duty of care to individuals who suffer at the hands of a subsidiary, the parent must meet the three stage *Caparo* test (as, sort of, reinterpreted in *Chandler v Cape* [2012] EWCA Civ 525), and, in particular, it must have taken on direct responsibility for the subsidiary's relevant business operations. This depends very much on how you think that groups work, should work and where responsibility should lie.

All the judges in *Okpabi* agreed that it is not enough if the parent merely lays down policies and procedures intended to apply throughout the group. The parent must do more than provide centralised assistance in order to create sufficient proximity to give rise to a duty of care. Sales LJ considered that the evidence showed that the parent in this case arguably did so, but Simon LJ and Vos C did not.

Vos C's starting point was that it would be surprising if a parent had responsibility for the actions of all its subsidiaries, and the fact that it operated through subsidiaries militated against the necessary proximity (a somewhat circular argument, perhaps). Basically, the Shell group acted in a typical corporate manner, which didn't get close, in the majority's view, to showing that the parent had taken on responsibility for the day to day operations of any particular subsidiary. This reflects an acceptance of the way corporate groups work and of the corporate veil. English judges are not necessarily there to remedy the failings in overseas legal systems.

The Court of Appeal also uttered the customary judicial whinge about the duration and complexity of jurisdiction challenges. This is somewhat naïve. The Cs depended upon the claim against the parent being viable in order to bring the claim in the English courts; the Ds knew that if the group was not sued in the English courts, it probably wouldn't be sued at all. In these circumstances, the jurisdiction challenge is bound have everything, not to say more besides, thrown at it in terms of evidence and argument. To say (as Lord Neuberger did in *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337) that the relevant factors should be capable of being identified simply and uncontroversially is unreal. It can't even be said that the three days in the Court of Appeal were disproportionate because those days resulted (subject, at least, to the Supreme Court) in a trial of many weeks, perhaps months, being avoided.

ASSUME NOTHING

It must be reasonable to rely on a statement in order to lead to liability.

In *Steel v NRAM Ltd* [2018] UKSC 13, the Supreme Court stressed that a claim in negligent misrepresentation requires reasonable reliance by the representee. If it is not reasonable to rely, there will be no duty of care (or, alternatively, the misrepresentation will not have caused the loss). And it will require special circumstances for one party to rely on a representation by a solicitor acting for another party.

The Supreme Court also rather dished the *Caparo* threefold test for a duty of care (foreseeable loss, sufficient proximity and it being fair, just and reasonable to impose liability), reverting to assumption of responsibility as the "foundation" of liability, though with an overlay of cautious incremental development of case law.

FRAUD UNRAVELS

A principal is not liable for the fraud of its agent.

The trend has been for principals to be made vicariously liable for the conduct of their agents, whether employees or not. *Frederick v Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431 is an exception though, as with everything, it is heavily fact specific. Nevertheless, it is interesting that the Court of Appeal retreated to the language of the course of employment/agency and frolics of the agent's own, language rather shunned by the recent cases.

Frederick involved fraud. The Cs were induced by Q to mortgage their house in order to invest in a property development scheme. The mortgaging was done by W, who was a self-employed agent of D. W never met the Cs but filled in the mortgage application with false information via a portal he only had access to because he worked for D. The mortgaging took place; the money reached Q; Q and the money then disappeared; and W was made bankrupt. C sued D on the basis that D was vicariously liable for W's actions.

The Court of Appeal ducked whether there is a different rule for vicarious liability in fraud than for other claims, but was clear that D was not liable. W's conduct was not an integral part of D's business; it was a frolic of W's own, conducting the fraud as a side-line. The use of the portal enabled W to obtain the funds, but the investment in a fraudulent scheme was nothing to do with D. Similarly, not all the elements necessary to establish liability took place in the course of W's agency, which prevented vicarious liability.

FLANKING OUTFLANKED

A court will not grant a declaration on irrelevant issues.

In *CGL Group Ltd v Royal Bank of Scotland plc* [2017] EWCA Civ 1073, the Court of Appeal decided that banks did not owe their customers a duty of care when carrying out the swaps misselling review on the instructions of the FCA. The Supreme Court has since refused permission to appeal against that decision.

Undaunted, in *Day v Barclays Bank plc* [2018] EWHC 394 (QB), C applied to amend its Particulars of Claim to seek a declaration that D was in breach of the FCA's requirements for the conduct of the review. This couldn't lead to any financial recompense in court but might, C argued, provide a basis for the FCA then to require D to compensate C.

The judge was having none of it ("absurd and inappropriate"). In order to consider C's underlying misselling claim, the court did not need to look into the conduct of the FCA's misselling review. Further, it would be inappropriate for the court to do so since it was a matter for the FCA. The court would not decide regulatory issues not germane to C's substantive misselling case.

ANOTHER ONE BITES THE DUST

A misselling claim fails.

Rehman v Santander UK plc [2018] EWHC 748 (QB) was a misselling claim unusually not arising from the global financial crisis. Rather it was a later financing by D1 of two nursing homes based on a valuation by D2 and with guarantees given by C. After all went wrong and the guarantees were called, C sued D1 and D2 on the basis that D1 owed C (one stage removed from even the borrower) a duty of care in the selection of D2 as valuer, that D1 impliedly represented that the valuations were a true and fair estimate of the homes' values, that D1 owed C a fiduciary duty, and that D2 owed a duty of care to C in carrying out the valuations.

The judge rejected all the claims, giving summary judgment for D1 and D2. D1 wanted the valuations for its own purposes, D1's sending the valuations to the borrower didn't involve any responsibility, and D2 didn't consent to the valuations being given to C. All hopeless.

DIRECTING MINDS

Conspiracy requires an intention.

The House of Lords and Supreme Court have explored the economic torts on a number of occasions in recent years, doubtless because they are somewhat anomalous and obscure. The most recent instance arose in the saga of *JSC BTA Bank v Khrapunov* [2018] UKSC 19, a sequel to the long-running *Ablyazov* litigation.

In *Ablyazov*, D was found to be in contempt of court for flagrant breach of various orders, including freezing injunctions. D did a runner when given a copy of the draft judgment finding him in contempt, was later arrested in France at the behest of Russia but, following release by the French authorities, has disappeared from view. C has not recovered its money. Its latest gambit is to sue K, D's son-in-law, for conspiracy to break the injunctions.

The tort of conspiracy has two forms: the use of lawful means, in which case the predominant purpose must be to injure C; and unlawful means, where the intention must be to injure C - the unlawful means must be directed at C - even if the predominant purpose is something else.

Criminal acts constitute sufficient unlawful means, though what else might do so is open to question (cf inducing breach of contract, where the unlawful means must be actionable in their own right by C: *OBG Ltd v Allen* [2008] AC 1). Contempt of court is a crime, so it constituted unlawful means. And it was directed at C since the intention was to prevent C from recovering D's assets even if the predominant purpose was for D to retain them. The Supreme Court didn't think that there was anything special about contempt that affected this analysis.

The Supreme Court also flagged the possibility that contempt of court might give rise to a claim in damages, though recognising that recent authority points against this.

Finally, the Supreme Court considered jurisdiction over K. K was domiciled in Switzerland, so the Lugano Convention applied. Jurisdiction turned on article 5(3), ie whether the tortiously harmful event occurred in England. C alleged that the conspiracy had been formed in England, though all K's actions took place elsewhere. The harmful event can be either the place where the damage occurred or the place of the event giving rise to it. The Supreme Court was satisfied that the formation of the conspiracy – where the tort originated – was the event giving rise to the damage. It happened in England, so the English courts had jurisdiction.

PRIVATE INTERNATIONAL LAW

STATUS CONSCIOUS

The law establishing a trust determines the liability of its trustees.

A trustee enters into a loan agreement in its capacity as such but without expressly limiting its liability to trust assets. Under the law applicable to the loan agreement (English law), the trustee is personally liable for the loan, even unto the trustee's last groat. But under the law under which the trust was created (Jersey law), the trustee's liability is limited to the trust assets it holds. Which prevails: the law applicable to the transaction or the law applicable to the trust?

According to the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7, the law applicable to the trust wins:

> "In the Board's opinion, the time has come to recognise that as a general rule the common law will recognise and give effect to limitations of liability which arise under an entity's constitutive law by reason of the particular status or capacity in which its members or officers assume an obligation.
>
> The Board would not confine this rule to entities which have separate legal personality but would apply it to partnerships, including firms registered under the Limited Partnerships Act 1907 or similar foreign legislation, associations or persons without legal personality and also a Jersey or Guernsey trust."

So if a stiftung, a cell company or some other foreign thing enters into an English law contract, questions as to its liability start with the English law contract, but corporate or similar constitutive limitations (eg to assets held as a trustee) from the law applicable to that thing will apply.

DUAL NATIONALITY

An English court asserts its jurisdiction over a financial dispute.

The underlying issue in *Citbank NA v Oceanwood Opportunities Master Fund* [2018] EWHC 305 (Ch) is whether one particular creditor (O) is entitled to vote on what a security trustee should do under an Intercreditor Agreement, or whether it is debarred from doing so because, in effect, it controls the obligor. The immediate question was whether this issue should be determined in London or New York. This arose because the ICA was governed by English law and gave exclusive jurisdiction to the English courts, whilst the provision that arguably debarred O from voting was in an Indenture governed by NY law and which gave jurisdiction to the NY courts.

The judge decided that the claim fell squarely within the jurisdiction clause in the ICA. The question of who could vote on what the security trustee should do was manifestly a matter arising out of or in connection with the ICA, even if the NY law agreement needed to be taken into account. The English courts therefore had jurisdiction, and that was not displaced by the Indenture. The court will therefore dash ahead to decide the real issue, but it does show, again, that the easiest course is to have one jurisdiction clause, or at least consistent jurisdiction clauses, wherever possible, in order to avoid jurisdictional squabbles.

POWER PLAYS

A foreign administrative decision cannot make a contract ultra vires.

A Mexican company, D, subject to Mexican public procurement laws entered into a contract with C containing an arbitration clause. C terminated the contract, and commenced an arbitration. Just under three weeks before the arbitration hearing, D obtained (perhaps procured) an order from a Mexican regulator to the effect that the proper public procurement procedures had not been followed and that the contract was thus a nullity. The arbitrator still awarded C $7m.

D tried to get out the award by arguing that the effect of the regulator's decision was to deprive D of its capacity to enter into the contract, with the result that the arbitrator had no jurisdiction to make the award. Even leaving to one side whether D had lost the right to challenge the arbitrator's jurisdiction by virtue of section 73 of the Arbitration Act 1996, the judge decided that the challenge failed.

Mexican law might treat the regulator's decision as depriving D, with retrospective effect, of the capacity to enter into the contract (though that was open to question), but the consequences of that for an English law contract depended upon how English law characterised what had happened. Andrew Baker J decided that the events that occurred should not be characterised as going to capacity but to the question of whether Mexican administrative law measures could discharge an English law contract. They cannot. The contract therefore remained valid in English law, and the arbitrator had jurisdiction.

SERVICE HASSLE

Service by the wrong means does not justify retrospective validation.

The Supreme Court doesn't usually deal with lowly matters such as whether the court's discretion should be exercised to authorise retrospectively service that was not in accordance with the CPR. In *Barton v Wright Hassall LLP* [2018] UKSC 12, it did so, but split 3-2 on the issue. The five other judges who had heard the case previously had no such hesitation in reaching the same ultimate conclusion.

In *Barton*, C, a litigant in person, exchanged some desultory pre-action emails with D's solicitors, and then on the last available day purported to serve the claim form on the solicitors by email. D's solicitors had not said that they would accept service by email, so service was not validly effected and the claim was time-barred. So C applied for retrospective authorisation of this attempted service under CPR 6.15, which allows the court to approve service by a means not otherwise allowed by the rules if there is "good reason" to do so. The question was whether there was a good reason in this case.

The majority (Lords Sumption, Wilson and Carnwarth) thought that there was no sufficiently good reason to approve the service. C might be a litigant in person, but the rules are clear. C just failed to look at them, as well as opting to effect service himself and leaving service to the end of the validity period. Approving service would also have deprived D of a limitation defence. D's solicitors weren't obliged to rush to tell C that his attempted service was invalid. Rules is rules. Some bright lines are necessary.

(Though not mentioned, it is hard to supress the thought that the majority might have regarded C's claim as nonsense since it was, in part at least, seeking to reopen orders made in earlier proceedings.)

The minority (Lady Hale and Lord Briggs) wrung their hands in anguish. The purpose of service was to ensure that D knew about the claim (though on its own that would not be enough to authorise alternative service). Here D not only knew about the claim, but it actually had a copy of the claim form, and was not hampered by any problems regarding email service. So, said the minority, there was good reason to approve service, or at least there were no insufficiently bad reasons not to approve alternative service (and loss of C's limitation defence was irrelevant). An innocent mistake was made by a litigant in person; have a heart.

Both majority and minority considered that the Civil Procedure Rule Committee should look again at CPR 6.15 and whether the restrictions on service by email continue to be justified

HOME ADVANTAGE

Exclusive jurisdiction clause overridden because of the presence of other defendants.

The Brussels I Regulation governs jurisdiction over defendants domiciled in the EU and in certain other situations. But even where the Regulation has no direct application, it can still determine the outcome of a jurisdictional application, as it did in *The Republic of Angola v Perfectbit Ltd* [2018] EWHC 965 (Comm).

In *Perfectbit*, C sued an English company for its involvement in an alleged Angolan fraud. Under Brussels I, the English court has jurisdiction over the English company and cannot stay the proceedings in favour of another court: *Owusu v Jackson* [2005] QB 801. C also joined to the same proceedings other (non-EU) Ds involved in the alleged fraud, but their joinder was in breach of an exclusive jurisdiction clause in a relevant agreement. Those other Ds sought to have the proceedings against them stayed because of the exclusive jurisdiction clause.

Bryan J regarded the fact that C asserted that the English proceedings against the English company would go ahead in any event as largely determinative of the issue. The proceedings in England involved the same alleged fraud, which meant that there was a strong reason not to decline jurisdiction against the other defendants despite the jurisdiction agreement. Duplicate costs and, in particular, the risk of inconsistent judgments weighed heavily on Bryan J, as it does all judges, and couldn't be allowed to happen. The fact that C could have sued all the parties in Angola was dismissed as irrelevant.

CONTINUITY CONUNDRUMS

Breach of a jurisdiction clause is a continuing breach.

In *AMT Futures Ltd v Marzillier* [2017] UKSC 13, an execution only broker sued German lawyers for inducing their mutual clients to break their contracts with the broker by suing the broker in Germany in breach of an exclusive jurisdiction clause in favour of the English courts. The Supreme Court decided that the English courts did not have jurisdiction over the German lawyers with regard to that claim because the breach took place in Germany, not England.

But the broker is also suing its former clients for breach of the jurisdiction clause. In *AMT Futures Ltd v Boural* [2018] EWHC 750 (Comm), it sued in 2017 a former client who had started proceedings at the Landgericht Duisberg in 2008, lost at trial on jurisdictional grounds in 2014, won on appeal in the Oberlandesgericht Düsseldorf, and is now (a mere ten years on from starting proceedings) awaiting a further trial in Duisberg. This led to the former client applying to strike out the English claim on limitation grounds.

The judge rejected this. He concluded that an exclusive jurisdiction clause includes an implied undertaking not to begin proceedings in a court other than that nominated and also not to continue such proceedings. Every step that the former client took in the German proceedings was therefore a new or continuing breach of the implied obligation. The English proceedings might have been started nine years after the German ones, but the broker could still sue in respect of conduct in Germany within six years of issue of the English proceedings.

FINANCIAL SERVICES

BLIND IDENTIFICATION PARADES

It is easy for the FCA to avoid identifying persons in decision notices.

In *Financial Conduct Authority v Macris* [2017] UKSC 19, the Supreme Court took a very narrow view as to when a person is identified in a warning or decision notice issued by the FCA. Essentially, it requires the name of the person or, if not, a synonym for the person such that the kind of information available to the general public would allow a member of the general public to interpret the notice as referring to the person. This makes it easy for the FCA to avoid identifying third parties, and thus to avoid the need to give a third party identified the right to comment on the notice, as required by section 393 of Financial Services and Markets Act 2000.

In *Financial Conduct Authority v Grout* [2018] EWCA Civ 71, the Court of Appeal followed the Supreme Court's ruling in *Macris* with enthusiasm. A reference to "the traders of the SCP", of whom there were only four, could not be treated as a reference to each of them because of the apparent need to identify one person. The result would even have been the same, the Court of Appeal thought, if the reference had been to "all of the traders of the SCP".

Further, ordinary members of the English public do not, apparently, read the *Financial Times*, and so it would not be permissible to use that as a source of interpretation. All of which limits, not to say extinguishes, the protections in section 393. But it is perhaps flattering (or otherwise) for those who pick up the *Financial Times*, whether physically or online, that they thereby cease to ordinary members of the public.

COURTS

SECURED FUNDING

Litigation funding is not a sufficient reason not to order security for costs.

If a party has litigation funding, but the funding does not include an obligation to pay adverse costs, is the funding a reason not to order security for costs if security would otherwise be required? Obviously not.

What if the funder writes to the world saying that it will pay adverse costs? Again no. The letter is neither contractually binding nor an undertaking to the court (and, in any event, the remedy for breach of an undertaking is contempt, not payment).

What about the ability to seek a third party costs order against the funder under section 51 of the Senior Courts Act 1981? Again no: too speculative to be equivalent to security. Nothing shifts the basic question of whether the claimant has assets available to meet an adverse costs award. If so, the answer is no, the existence of a funder making no difference.

See *Progas Energy Ltd v The Islamic Republic of Pakistan* [2018] EWHC 209 (Comm), an application under section 70(6) of the Arbitration Act 1996 to a challenge to an award.

This is obviously similar to the question of whether an after the event insurance policy, covering liability for the other side's costs, is sufficient to prevent or dissuade the court from ordering security for costs. This issue has been around for a number of years, with different approaches and answers, addressed, if not put to bed, in *Premier Motorauctions Ltd v PricewaterhouseCoopers LLP* [2017] EWCA Civ 1872 (see February's edition).

ZEALOUSLY JEALOUSLY

Only the CJEU can decide EU law.

The Court of Justice of the European Union is almost pugnaciously conscious of its own status and position within the EU's Pantheon. It has resisted any scintilla of a suggestion that someone else might be able to make a binding decision on EU law. Hence, for example, the EU's inability to accede to the ECHR because the CJEU cannot contemplate that the ECtHR might ever have the final say. In *Slovak Republic v Achmea BV* (Case C-284/16), the CJEU extended its protectiveness to Bilateral Investment Treaties.

In 1991, the Netherlands entered into a BIT with Czechoslovakia, to which the Slovak Republic succeeded. In 2004, Slovakia joined the EU. The BIT provided for aggrieved investors to have a right to arbitration, to be decided "on the basis of the law, taking into account… the provisions of this Agreement, and any other relevant agreements between the Contracting States".

Achmea complained about Slovakia's conduct, went to arbitration in Frankfurt, and won. But the German court referred to the CJEU the compatibility of the arbitration clause in the BIT with EU law. The CJEU decided that the arbitration clause was precluded by the EU's treaties.

The CJEU took it as read that EU law trumps all, including the BIT itself. The arbitral tribunal could, therefore, be called upon to decide issues of EU law. Article 344 of the Treaty on the Functioning of the European Union prohibits member states from submitting disputes regarding the interpretation or application of the EU's treaties to any method other than those set out in the treaties, and article 267 requires "any court or tribunal of a member state" to be able to request a ruling on EU law from the CJEU.

The BIT's arbitral tribunal was not, according to the CJEU, a "court or tribunal of a member state" (indeed, it was only sitting in Frankfurt because the tribunal decided to do so). German law allows the German courts to review the jurisdiction of the tribunal, to decide questions of public policy and to refer questions to the CJEU. The German courts' ability to refer matters to the CJEU was insufficient to comply with articles 344 and 267 of the TFEU. The tribunal could reach a decision within its jurisdiction on EU law, which decision would be final and binding on the parties, including an EU member state, with no ability to refer the question to the CJEU. (How does this differ from normal arbitration, which has long been accepted as consistent with EU law?)

So the CJEU's conclusion, contrary to the view of the German courts and its own Advocate General, was that the arbitration clause in the BIT was precluded by the TFEU. This presumably means that it became void on Slovakia's joining the EU. That, of course, renders the protections of the BIT largely useless. How can those rights be enforced? National courts applying national law are unlikely to be a fruitful route. It could be, however, that arbitral tribunals sitting outside the EU will not follow the CJEU's decision, but that might not help if an EU member state refuses to take part in an arbitration or to pay an award.

BITs between two members of the EU are, perhaps, somewhat anachronistic. But the issue could become of interest to the UK if, after Brexit, Labour wins the next general election (currently due in 2022) and nationalises utilities, the Post Office etc without paying top whack for them. The UK, like the Netherlands, entered into a number of BITs with the former members of the Warsaw Pact in the period after the fall of the Berlin Wall, some of which former members have since joined the EU. Will the arbitration provisions in these BITs revive on Brexit, or are they gone beyond post-Brexit redemption?

In another case on a BIT, *GPF GP Sarl v The Republic of Poland* [2018] EWHC 409 (Comm), Bryan J provided interesting expositions on how to interpret BITs in accordance with the Vienna Convention on the Law of Treaties and on the nature of creeping expropriation.

The judge concluded that a tribunal, sitting in London under the BIT between Poland, Belgium and Luxembourg (not therefore strictly a *B*IT), had taken an unduly narrow view of its jurisdiction under the BIT and therefore that it could hear much more of C's claim than it thought it could.

But the judge observed that Poland had reserved the right to argue the (in)compatibility of the BIT with EU law in the light of the then pending decision in *Achmea*, which was given four days after the judgment in *GPF*. Poland will presumably be back before the tribunal and, if need be, the court as soon as possible, intent upon rendering C's initial jurisdictional success nugatory. It will be interesting to see if C can find grounds to distinguish *Achmea*.

PRIVILEGE

CONTROLLING PRIVILEGE

Litigation privilege belongs to the party to the litigation.

One party (D) is conducting litigation in Peru in the name of another party (C), as it is entitled to do under an agreement selling a business. When C sues D for an indemnity under the agreement, can D assert litigation privilege against C over documents created for the dominant purpose of the Peruvian litigation?

In *Minera Las Bambas SA v Glencore Queensland Ltd* [2018] EWHC 286 (Comm), Moulder J concluded that the answer is no. C is the party to the Peruvian litigation, and any litigation privilege therefore belongs to C even though the litigation is being conducted by D. D cannot assert C's litigation privilege against C.

WOBBLY WAIVERS

A limited waiver will rarely imply more.

Limited waiver of privilege is now an accepted part of the legal landscape, including within Government, as was acknowledged in *Belhaj v DPP* [2018] EWHC 513 (Admin), ie privilege can be waived against one person without necessarily doing so against the rest of the world. But in *Belhaj*, C argued that where a waiver was limited to a particular purpose, that purpose could not be too narrowly defined. In particular, C contended that where legal advice was disclosed by the Government to the Police, Crown Prosecution Service and the Director of Public Prosecution on a limited waiver basis to assist an investigation into possible prosecutions for involvement in unlawful rendition to Libya, that waiver necessarily extended to anyone seeking a judicial review of the DPP's decision not to prosecute.

The court rejected C's argument. For this wider waiver to be inferred, there had to be one composite process, a necessary nexus between the two things. A decision whether or not to prosecute and a judicial review of that decision were far too distinct.

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