CLIFFORD CHANCE

CONTENTIOUS COMMENTARY

A REVIEW FOR LITIGATORS

AUGUST 2018

CLIFFORD

CHANCE

CONTENTIOUS COMMENTARY – AUGUST 2018

CONTENTS

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

CONTRACT

CONTRACTUAL ESTOPPEL BOUND

Reliance on contractual estoppel is subject to the reasonableness test.

Ever since the Unfair Contract Terms Act came into being in 1977, there has been a debate over whether or when an exclusion clause should be treated as excluding liability (and therefore subject to the reasonableness test) or as defining the scope of the obligation (and therefore not). A more recent variation on this theme has arisen with the increasing prevalence of "no reliance" clauses (ie clauses that say that a party has not relied on a pre-contractual representation) and resulting assertions of (the misnamed) "contractual estoppel": does the clause prevent a claim for misrepresentation arising; or does it exclude the liability imposed by section 2 of the Misrepresentation Act 1967, with the result that it is subject to the reasonableness test in section 3? The answer of the Court of Appeal in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396 was firmly the latter.

The Court regarded the meaning of a no reliance clause as a matter of contractual interpretation in the usual way. But that is not the same as whether the clause is subject to the reasonableness test in section 3, which is a matter of the interpretation of section 3. The Court refused to allow that section 3's application could depend upon how the no reliance clause was drafted. The Court considered that any clause that sought to stop a party from asserting that it had relied on a (mis) representation fell within section 3, and is therefore of no effect unless it satisfies the requirement of reasonableness.

The decision in *First Tower Trustees* is policy driven, based, perhaps, on the feeling that reliance on no reliance clauses has got a bit out of hand. Allowing a judge to decide whether a particular clause is reasonable in the circumstances is a satisfactory landing place for judges. Logically, however, the decision is not without its difficulties. Liability for mis-representation depends on entering into a contract in reliance on the misrepresentation. If a party says that it hasn't done so in the very contract it later says was entered into in reliance on the misrepresentation, where is the liability that is excluded?

The facts of *First Tower Trustees* were not appealing. C took a lease of property, part of which turned out to be unusable because of asbestos. The landlord was told of this problem between answering the pre-contractual enquiries and entering into the contract. In the pre-contractual enquiries the landlord said that it knew of no environmental issues but, critically, it undertook to update its answers should anything new come to light; the landlord chose to stay silent. The landlord then adduced no evidence at the trial, relying solely on the provision in the contract in which the tenant acknowledged that it had not entered into the lease in reliance on any pre-contractual representations. Not a strong basis upon which to defend a claim.

The Court of Appeal thought that the defence pushed the boundaries of contractual estoppel too far. The Court therefore brought no reliance clauses within the scope of section 3 of the Misrep Act, and agreed with the first instance judge that the clause was unreasonable in the circumstances. The trigger for (un)reasonableness seemed to be that it applied to all representations; if it had contemplated that, eg, written representations could be relied on or only those in the contract, it might have stood a better chance.

COMMERCIAL REASONABLENESS

The court should be slow to strike down contractual clauses as unreasonable.

First Tower Trustees, above, places renewed spotlight on the reasonableness test in UCTA. In *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371, the Court of Appeal reiterated that, in commercial contracts between parties of equal bargaining power, party autonomy remains key and, accordingly, that the courts should be reluctant to decry the parties' agreement as unreasonable.

The facts of *Goodlife Foods* were more attractive than those of *First Tower Trustees*. The case involved a fire suppression system bought by C from D, for a price £7,490. The system was alleged to have failed, leading C to suffer property and business damage to the tune of £6.6m. D's standard terms excluded liability, adding that if C wanted cover for this risk, insurance arrangements could be made at C's expense. C did not ask for the cover (and since the claim in C's name was brought by C's insurers seeking to recover from D's insurers, C didn't need that extra cover).

The first point was whether the exclusion clause was incorporated in the contract. The Court of Appeal applied Denningesque cases, like *Thornton v Shoe Lane Parking Ltd*

[1971] 2 QB 163, in concluding that provisions in standard terms that are onerous or unusual will only be binding if those specific provisions are fairly and reasonably brought to the other's attention. The Court was insistent that this question was separate from any subsequent issue of reasonableness under UCTA. It remains hard to see how some provisions in a document incorporated into a contract can be binding and others not.

But the Court considered that the term in question was not onerous or unusual in the circumstances, which meant that it was incorporated in the contract, wherein it was subject to UCTA's reasonableness test. The Court of Appeal decided that the clause was reasonable as between these parties, who were of equal bargaining power.

LOAN ALONE

There is no implied obligation to pay interest.

Al Jaber v Al Ibrahim [2018] EWCA Civ 1690 concerned a loan, agreed orally, for $30m, with nothing said about interest. The Court of Appeal decided that an obligation to pay interest was not implied as a matter of law, nor would it be implied as a matter of fact in the circumstances of the case. It was not necessary to give business effect to the agreement, nor was it so obvious that it went without saying, and the loan didn't lack commercial or practical consequences without it.

DOUBLE NEGATIVE

Negative interest is not payable under an ISDA CSA.

Negative interest is an issue that crops up from time to time, particularly in the years since the global financial crisis when interest rates have been at historic lows. Some documents address the possibility directly (eg in 2014 ISDA produced a protocol that parties could adopt if they wished) but most documentation ignores it because it simply wasn't within the parties' contemplation when drafting the documentation.

One set of market standard documentation which does not address the issue expressly is the 1995 ISDA Credit Support Annex (unless the 2014 protocol is applied). The CSA requires a party to post collateral, which might be cash, and for the Transferee to pay interest on cash collateral. But if interest is negative, does the Transferor have to pay interest on the sum it has transferred? The absence of litigation so far indicates that most parties have reached deals, but nation states can be in a privileged position and more inclined to fight, especially if they have no obligation to post collateral themselves.

That was the case in *The State of the Netherlands v Deutsche Bank AG* [2018] EWHC 1935 (Comm). If marking to market the relevant transactions resulted in an exposure of the Netherlands to the Bank, no collateral was required; but if it resulted in an exposure of the Bank to the Netherlands, the Bank was obliged to provide collateral by way of transfer to the Netherlands, which the Bank did in cash. The interest rate applied to that cash was EONIA minus 4bp, which has been negative for most of the last four years. Did the Netherlands earn interest on the money it held?

No, according to Robin Knowles J. He accepted that the provisions in the CSA dealing with the calculation of interest on collateral could produce a negative sum, but he considered that the operative provision was that dealing with the payment of interest (paragraph 5(c)(ii)). This only provided for the Transferee of the collateral to pay interest to the Transferor, not vice versa. If the Transferor was meant to pay interest to the Transferee, it needed to say so expressly.

The Netherlands tried to meet this by arguing that payment was not actually required; rather, negative interest went into the calculation of the sums due, whether for repayment of the collateral or otherwise. Again, the judge considered that the parties could have said this if they had wanted, but they didn't do so. Positive interest was addressed expressly; why would the parties have wanted negative interest dealt with differently?

The bottom line is that negative interest wasn't contemplated in 1995, when the CSA was drafted, and it was too big a stretch to infer it from the wording. The parties could have amended the CSA to provide for the payment of negative interest. But they hadn't.

The Netherlands has publicly stated that it intends to appeal from Robin Knowles J's decision. Subject to that, will parties who have paid negative interest want to recover it? That could raise even bigger legal and, particularly, factual minefields.

CONSIDERATION FOR OTHERS

Misselling claim fails for want to consideration.

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 under the terms of their contracts with the FCA (the Supreme Court subsequently refused permission to appeal). In *Elite Property Holdings Ltd v Barclays Bank plc* [2018] EWCA Civ 1688, C attempted a re-run, in part, of that decision, arguing that, having accepted an offer of redress as part of the misselling review, the banks owed an implied contractual duty of a similar kind when looking into any consequential losses claimed by C.

The Court of Appeal rejected this, though for reasons that were not clearly expressed. The Court said that there was no consideration for the banks' agreement to look into consequential losses since C gave up nothing, but more generally the Court considered that the banks were carrying out the review because they were bound to do so under their contracts with the FCA and not because of a contractual obligation to their customers. Whatever the reason, *CGL* was not to be circumvented that easily.

FOREIGN AGENTS

Contract allows adherence to foreign court orders.

The Statis have been fighting Kazakhstan for years. They have a Swedish arbitration award in their favour, and have defeated all challenges to that award in the Swedish courts. Kazakhstan has not paid on the award, and seems intent upon not doing so. The obvious assets against which to enforce the award would seem to be Kazakh assets held under an English law custody agreement with D, the London branch of a Belgian bank. But the Statis cannot yet enforce directly against those assets because Robin Knowles J decided that a trial is first required to determine whether the award was obtained by fraud, despite courts in both Sweden and the US having rejected this argument: *Stati v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm).

So the Statis have been looking for a backdoor means to freeze the assets in London. And they have found one: *National Bank of Kazakhstan v The Bank of New York Mellon SA/NV* [2018] EWCA Civ 1390.

The Statis obtained some sort of pre-judgment attachment/garnishment from the Belgian courts. The precise nature of this attachment isn't clear from the English judgment except that it applies to assets held by D for Kazakhstan anywhere in the world. A failure by D to comply with the Belgian court order could lead to the imposition of penalties on D in Belgium even though the Belgian order is probably not sufficient to excuse D from complying with its English law contractual obligations to Kazakhstan.

But there is a clause in the custody agreement that excuses D from any liability for a failure to perform its obligations under the Agreement arising out of circumstances beyond its control, including an order imposed by "any judicial authority". D froze the Kazakh assets based on the Belgian court order and this contractual right.

The Court of Appeal upheld D's right to do so. The language of the clause was clear – the Belgian courts were a judicial authority and were outside D's control. The Court of Appeal refused to read in any limitation on the scope of the clause. In particular, the clause was not confined to foreign court orders that were enforceable in England. The custody agreement was international, not London-centric. D was a Belgian bank, and its London branch was not a separate legal entity. It was entirely plausible that D would want to protect itself from anything that might lead to its being punished in Belgium.

The only limitation that the Court was prepared to read into the clause was one of causation: if a comparable order was made by the Ruritanian courts, where D had no presence, the non-compliance by D with what would otherwise be its contractual obligations would not have been caused by the Ruritanian court order.

But what if D had assets in Ruritania (eg debts owed by a Ruritanian company) that were vulnerable to seizure for non-compliance (see *Hardy v India*, page 10 below)?

An English court might be expected to take a dim view of foreign courts interfering with assets in England (eg the standard proviso about overseas assets in a worldwide freezing injunction), but the Court of Appeal had greater sympathy for D's potential plight and gave full width to the contractual clause.

WORDS, CONSEQUENCES AND NEGLIGENCE

Silence can show sufficient common intention for rectification purposes.

Scenario: a parent company finds out that it has inadvertently failed to provide security to the group's lenders over an intra-group loan; this failure is an event of default; the time when the parent has to certify that there is no event of default is approaching rapidly; the group is in restructuring discussions with its lenders, and does not want to alert them to the event of default; the parent elects to remedy the failure by acceding in standard form to an existing security deed rather than negotiating a new security document because this will make life easier with the security trustee; the parent executed the accession deed, and sent a counterpart to the security trustee, which added its moniker; it emerges a little later that the existing security deed contains more onerous obligations than were required to correct the initial failure. Can the parent company have the accession deed rectified to strip out the unnecessary obligations?

In *FSHC Group Holdings Ltd v Barclays Bank plc* [2018] EWHC 1558 (Ch), Henry Carr J decided that the deed should be rectified.

The problem arose because the parent company's lawyers came up with the wheeze of acceding to the existing security deed in order to cure the default quickly and quietly, but no one at the lawyers or the client read the existing deed to see what additional obligations it contained – everyone thought that someone else was responsible for this tiresome task.

Rectification requires a common intention, objectively ascertained. The judge considered that the absence of any discussion as to what the deed might mean left the position that, objectively, the parties' intention was to cure the default and not to impose additional financial obligations on the parent (the security trustee, as is usual, had little commercial intention, save to do the right thing legally).

But the real moral is that documents, however boring, do need to be read.

PUNCTUATED BY ERRORS

Stray commas can readily be disregarded.

We know that the English courts are in a relatively literalist phase so far as the interpretation of contracts is concerned – at least, as long as the contract seems to have been professionally drafted. The parties control the words and, if they are clear, effect should be given to them.

But, according, to Moulder J in *Vitol E&P Ltd v New Age (African Global Energy) Ltd* [2018] EWHC 1580 (Comm), the same is not true of punctuation. "… there are no set rules for the use of commas… punctuation may be misunderstood, erroneously used or overlooked… there is a very great difference between inserting words which are not there, or removing words that are there, and concluding that the punctuation has gone awry." The judge was helped in her view by the fact that there were ample other reasons for concluding that the interpretation suggested by the punctuation was not intended.

TORT

THE WRONG EXEMPLAR

The Court of Appeal has expanded the scope of exemplary damages.

Axa Insurance UK plc v Financial Claims Solutions Ltd [2018] EWCA Civ 1330 arose from fraudulent insurance claims based on fictitious motor accidents, which involved mass deception and misrepresentation. But the insurers found out, defeated the claims, and were awarded damages for the fraud, including the internal costs of investigating the fraud. Prison sentences resulted. Justice done.

But C wanted exemplary damages on top of its losses. C claimed exemplary damages on the second basis set out in *Rookes v Barnard* [1964] AC 1129, namely that D had cynically disregarded C's rights having calculated that the money to be made out of the wrongdoing would exceed the damages at risk. The Court of Appeal thought that these criteria were met - indeed, it was a "paradigm case for exemplary damages" - because D's fraudulent insurance claim was far higher than the costs that C incurred in uncovering it.

But the Court does seem rather to have missed the point, which is surely that D would make money even after paying damages to C. That was not the situation here. C's success in identifying and defeating the fraud meant that D made no money at all because the only source of money was to be C, which paid nothing. D didn't profit from its tort. But if this case is followed, it would seem that most fraud claims should give rise to exemplary damages, despite their supposedly exceptional nature.

OLD MOTHER HUBBARD

A claim in tort is defeated by the reflective loss principle.

A judge gives the parties a draft judgment, which finds the defendant companies liable to pay \$5m. Before the judgment is formally handed down some ten days later, the person (S) behind the defendant companies removes \$9.5m from the companies, leaving a mere \$4,392.48 to (not) meet the judgment. C then sues S in tort for, first, inducing the companies to breach their obligations under the judgment and, secondly, intentionally causing loss to C by unlawful means (ie breach by S of fiduciary duty).

At first instance, Robin Knowles J found that these torts existed and that the case could proceed. But in *Sevilleja v Marex Financial Ltd* [2018] EWCA Civ 1468, the Court of Appeal found that the claims were barred by the reflective loss principle.

The reflective loss principle generally prevents shareholders recovering losses suffered by the company as a result of breaches of duty owed to the company (eg *Johnson v Gore Wood* [2002] 2 AC 1) but the Court of Appeal could see no reason why the principle should not also apply to corporate creditors. The companies, in liquidation in the BVI, had claims against S for breach of fiduciary duty; if C could also pursue a claim against S, that risked double recovery, ie C being paid directly by S and being paid by the companies out of their separate recoveries from S. It also risked, the Court thought, subverting the pari passu principle in insolvency.

The Court may have missed the point that C had an independent cause of action against S, albeit that the companies also had a cause of action against S. The solution might have been to ensure, through unjust enrichment principles or such like, that C was not paid twice, but barring C's cause of action takes it too far.

POLICE CAUTION

A legitimate expectation of privacy may exist in cases where someone is being investigated by the police, and damages for reputation can be awarded in privacy claims.

In *Sir Cliff Richard OBE v BBC and The Chief Constable of South Yorkshire Police* [2018] EWHC 1837 (Ch), an internationally-famous entertainer was, unknown to him, under investigation by South Yorkshire Police (D2) for historical sexual offences. A journalist from D1 found out about the investigation and met with D2 to discuss it. D2 agreed to give D1 advance notice of a planned search of C's home. This meant that, when the search took place, D1 had a helicopter flying over the property, as well as a journalist outside the gated community and teams of journalists staking out two of C's properties overseas with a view to doorstepping him. D1's story made clear the nature of the offences being investigated. The story received extensive international coverage, despite C not being arrested or charged with any crime. Two years after the search, C was told by D2 that no action would be taken against him.

C brought a privacy claim against both Ds. D2 eventually settled for £400,000 plus costs. D1 continued to trial, arguing that its story was in the public interest and that any finding against it would mean that the media could not hold the police to account (was that the purpose of the story?).

A number of recent cases have looked at whether a person has a reasonable expectation of privacy when being investigated by the police. Mann J held that C did:

> "If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not…"

The fact that C was a public figure did not detract from his expectation in that respect.

The next issue was whether D1 was nevertheless justified in infringing C's expectation of privacy by virtue of its right to freedom of expression. Mann J held that it was not:

> "I acknowledge a very significant public interest in the fact of police investigations into historic sex abuse, including the fact that those investigations are pursued against those in public life. The public interest in identifying those persons does not, in my view, exist in this case. If I am wrong about that, it is not very weighty and is heavily outweighed by the seriousness of the invasion."

That led to a debate about damages. Damages in privacy cases usually reflect the hurt and distress suffered by the claimant. However, Mann J accepted C's argument that C could also claim for the reputational damage that he had suffered:

> "It is… quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right."

The judge awarded £190,000 in general damages and a further £20,000 in aggravated damages, because D1 had entered the story for a broadcasting award. C also claimed special damages resulting from a cancelled book contract and other losses alleged to have been caused by D1's story. Those will be decided at a later hearing.

Does the same apply to FCA investigations?

EMPLOYERS' FREEDOM

Employers do not owe their employees a duty of care in the conduct of litigation.

A suspected terrorist, BA, accused the police of having seriously assaulted and injured him during an arrest. The policemen concerned were cleared by the Independent Police Complaints Commission. BA sued, and the Commissioner of Police for the Metropolis settled the litigation for a significant sum plus costs, in part because the officers refused to give evidence after the court declined to allow them to do so from behind a screen. She also issued a press release suggesting that the officers had in fact done something wrong. The officers were charged with assault, but were cleared again after a five week trial.

James-Bowen v Commissioner of Police for the Metropolis [2018] UKSC 40 concerned proceedings brought by the policemen alleging that the Commissioner - their (quasi-) employer - had failed in her duty of care to them to conduct the proceedings brought by AB as effectively as possible in order to protect the officers from economic or reputational harm.

The Supreme Court decided that no such duty of care was owed. Looking at the various tests for a duty of care, the Court favoured incrementalism over generalisation. The Court concluded that imposing this duty would not represent a prudent incremental development of the law, not least because of the conflicting interests that an employer and an employee might have in the conduct of litigation. The employer might, for example, not believe the employee's version of events, insurers may have a role, it may not be worth fighting a case financially, the employer may have a claim against the employee, and so on.

So, essentially, an employer can conduct litigation in its own interests, not those of the employees who were involved in the events in question. The same is presumably true of regulatory investigations and proceedings.

FOR WHOM THE BELL TOLLS

Responsibility can only be assumed to known parties.

Gambling retains a disreputable air to it. Even some gambling firms seem to think this, for when the London Playboy Club wanted a credit reference for a prospective gambler it didn't ask in its own name but in the name of Burlington Street Services Ltd in order to avoid disclosing to the referee the purpose behind the request. This discreet, or secretive, approach has cost the Playboy Club a significant amount of money.

In *Banca Nazionale del Lavoro SpA v Playboy Club London Ltd* [2018] UKSC 43 the Supreme Court decided that D had no liability to the Playboy Club (C) for a negligent credit reference provided to Burlington

Street Services Ltd because D did not know that the reference would be communicated to C or why. Since D had no idea that its reference would reach C, D had not assumed liability to C:

> "… the representor must not only know that the statement is likely to be communicated to and relied on by [C]. It must also be part of the statement's known purpose that it should be communicated and relied on by [C] if the representor is to be taken to assume responsibility to [C]."

C argued that it was an undisclosed principal. An undisclosed principal can, in some circumstances, enforce a contract entered into by its secret agent. The Supreme Court considered that the survival of this rule owed more to its "antiquity than to its coherence", and that, in any event, it was not applicable to a claim in tort. A *Hedley Byrne* claim might require a relationship "equivalent to contract", but that did not import all the legal incidents of a contractual relationship.

PRIVATE INTERNATIONAL LAW

NEW BANKING LAW

Measures taken under the BRRD in other EU member states are to be given broad recognition in the UK.

The basic rule in English law is that measures taken under a foreign law have limited, if any, effect on English law rights and liabilities. The discharge or modification of an English law contractual obligation is a matter for English law. Universal succession is a (sort of) exception, as is illegality in the place of performance, but, beyond these, measures taken under another law are generally disregarded.

The Bank Resolution and Recovery Directive (2014/59/EU), introduced in response to the global financial crisis, changes this basic rule in part. For example, article 66 states that where a transfer of assets is made by a competent resolution authority under the BRRD, that transfer must be recognised in other EU member states regardless of the law applicable to the asset or of its location. It goes on that the transfer must not be capable of being challenged under the law of another state.

"Any pan-European scheme for dealing with systemic risks of bank failure [ie the BRRD] must depend for its efficacy on the widest possible recognition of a home state's measures in other jurisdictions where banks in the course of any reorganisation may have interest or assets or under whose laws it may have contracted." Not quite bluebell time in Kent but close enough to flag the Supreme Court's direction of travel as early as paragraph [2] of *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34.

Novo Banco concerned an English law loan made on 30 June 2014 by Oak Finance Luxembourg SA to the Luxembourg branch of a Portuguese bank, Banco Espirito Santo SA. Five weeks later, the Portuguese resolution authority, Banco de Portugal, put BES into resolution under the BRRD and, as part of the process, transferred a bundle of BES's assets and liabilities to a bridge bank, D. The liabilities prima facie included the Oak loan - unless it was owed to a lender that held more than 2% of BES's share capital.

On 22 December 2014, BdP decided that there were "serious and grounded" reasons to conclude that Oak acted on account of GSI and that GSI owned more than 2% of BES's shares. BdP therefore concluded, or decided, or interpreted its initial resolution to the effect, that the Oak loan had not transferred to D. A loan marooned in BES is probably not worth much.

C sued D in England under the jurisdiction clause in the Oak loan documentation, arguing that the resolution measures in Portugal transferred liability on the Oak loan to D in August and that the December decision did not change that because it was not a resolution measure as such.

However, all parties accepted that, as a matter of Portuguese law, the December 2014 decision meant that the Oak loan had not been transferred to D unless and until a Portuguese court annulled the decision. The Supreme Court regarded this concession as conclusive. If Portuguese law did not regard the Oak loan as having been transferred to D, English law could not do so either. The UK was obliged to give effect to Portuguese law in its entirety; individual cherries were not to be picked. What's more, it was acte clair, so no reference to the CJEU was needed.

AN ITALIAN JOB

The English courts refuse to cede jurisdiction over a derivatives dispute to the Italian courts.

Italian parties seeking recourse to the Italian courts to escape from or mitigate the consequences of derivatives transactions is nothing new. English courts generally keep such cases within their limpet-like grasp, and so it was in *BNP Paribas SA v Trattamento Rifiuti Metropolitani* [2018] EWHC 1670 (Comm), which involved C seeking declarations in line with the representations in the ISDA Master Agreement (eg no reliance, entire agreement, no fiduciary duties etc). D's argument was that there was no dispute or that the declarations related to the financing arrangements, governed by Italian law, which overrode the ISDA Master Agreement in the event of inconsistency.

The arrangements were not atypical: C won a tender to provide financing, including interest rate hedging, for a project in Italy; the loan and intercreditor agreements were governed by Italian law and subject to Italian jurisdiction; the hedging was subject to an ISDA MA, with English law and English jurisdiction; the agreements cross-referred, with the loan and intercreditor agreements to take priority in the event of inconsistency.

D argued that there was no dispute because it was not challenging the validity of the ISDA MA; instead, it was alleging implied duties under the other agreements and Italian law (and D had started proceedings in Italy to that end). This was not sustainable because D was not prepared to consent to the declarations that C wanted.

The real argument was that the declarations, although echoing the terms of the ISDA MA, fell within the jurisdiction clause in the other agreements. Robin Knowles J rejected this. The declarations were based on the ISDA MA, which was a separate relationship from the loan, and there was no inconsistency. The judge also noted that use of the ISDA MA signalled an intent to adopt a certain and consistent international meaning, not one dependent on context. The judge therefore refused to allow the particular context to limit the application of the standard ISDA jurisdiction clause. If you use an ISDA MA, don't expect to be able to peep round its corners.

ANOTHER ITALIAN JOB

The English courts again retain a claim against an Italian party.

Deutsche Bank AG v Commune di Savona [2018] EWCA Civ 1740 is very similar to *Trattamento Rifiuti Metropolitani* both in the facts and in the outcome.

Advisory contract (Italian law and jurisdiction); followed by derivatives transactions under an ISDA MA (English law and jurisdiction); questions in Italy about the transactions, resulting in applications in England seeking declarations echoing the no reliance, entire agreement etc provisions of the ISDA MA.

The Court of Appeal decided that all declarations sought fell within the jurisdiction clause in the ISDA MA. Any claim arising from the specific interest rate swap contracts under the ISDA MA fell within the English jurisdiction clause; only issues arising from the generic advisory relationship fell within the prior Italian law contract.

SOVEREIGN SERVICE

Service of process on Iran is waived.

According to the FCO, Iran has a policy of refusing to accept service of foreign process in cases deemed contrary to its interests (presumably that means all proceedings against it). Faced with this obstruction, the FCO failed to effect service of the papers in *Havlish v Islamic Republic of Iran* [2018] EWHC 1478 (Comm). However, Teare J decided that he could dispense with service on Iran despite section 12(1) of the State Immunity Act 1978 providing that documents "required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign & Commonwealth Office…" If service is dispensed with, nothing is required to be served.

SITE UNSEEN

A debt owed by an English company is located in India.

The situs of a chose in action is an elusive, not to say absurd, concept. Physical things have to be somewhere (at least, outside the world of quantum mechanics); incorporeal things don't, indeed aren't. But fixing on the notional situs of a chose in action can be important, including as regards third party debt orders. A third party debt order can only be granted if both the debtor and the debt are within the jurisdiction.

Hardy Exploration & Production (India) Inc v Government of India [2018] EWHC 1916 (Comm) involved an attempt to enforce an arbitration award against D. T was ultimately owned and controlled by D but was incorporated in England. Its role was to provide foreign currency loans to Indian importers of capital equipment. T got its money by way of loan from the Reserve Bank of India, repayment of which was guaranteed by D. T paid an annual fee to D for the provision of the guarantee. C sought to attach T's obligation to pay that fee, but could only do so if the obligation was situated in England.

The judge concluded that the debt was situated in India and thus could not be attached in England. The situs of a debt is where it is enforceable/recoverable, which is normally the debtor's location. But (like quantum objects) corporates can be located in more than one place simultaneously, so the judge thought he could look at the contract giving rise to the debt. This provided for the exclusive jurisdiction of the Indian courts (with an arbitration clause of doubtful validity), which was therefore where the debt was enforceable. Enforceable for these purposes means, initially at least, the place where judgment against T can be given.

The judge also concluded that the debt in question was governed by Indian law, which made life easier. If the debt had been governed by English law but enforceable in India, a whole new tier of complexity would have been introduced.

The underlying reason for trying to identify the situs of a debt is to avoid a third party debtor facing the risk of having to pay twice because a foreign court will not accept that an English TPDO has discharged the debtor. To operate effectively, this requires a mutually recognised rule, and the English courts' view is that the closest there is to such a rule is the situs of a debt. But the more subtle the rule gets, the more scope there is for disagreement between courts and the greater the risk to third party debtors. Foreign courts can't be allowed carte blanche to recognise or not TPDOs as they see fit, so ultimately English courts must decide on the circumstances in which it is appropriate for them to assert their muscular authority over a third party debtor. The judge concluded that an Indian court would not accept that an English TPDO discharged T from its obligation to pay D and, as a result, he could not exercise that authority in this case.

In addition, a third party debt order can only be granted if the debt is "due or accruing due". The judge said that this means that the debt must be payable by reason of an existing obligation, whether payment is required instantly or in the future. He added that an existing obligation is one providing a cause of action that may be the subject of immediate court suit. But that can't be right: if a debt is not payable until next year, you can't sue on it now (other than for a declaration).

Be that as it may, the judge decided that the guarantee fee in question only fell due on 1 April each year, and so was not caught by an interim TPDO granted on 28 February.

CLIFFORD CHANCE

FINANCIAL SERVICES

RATING HELL

Five banks are fined for issuing credit ratings unlawfully.

A credit rating is "an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories" (article 3(1)(a) of the Credit Rating Agencies Regulation, 1060/2009/EC). Legal persons whose occupation includes issuing credit references on a professional basis require authorisation under the Regulation. ESMA has fined five Scandinavian banks for issuing credit ratings without authorisation – none of the five banks is amongst the 27 credit reference agencies authorised by ESMA. The offence was categorised as negligent rather than deliberate.

The core issue was whether what the banks did was investment research, which is exempt from the need for authorisation (though it is subject to oodles of other regulation, eg MiFID and MAR), or was a credit rating. ESMA declined to set out clearly where investment research ends and credit rating begins, but was clear that what was done in this case was credit rating. The main reason was the employment in the research of a "defined ranking system of rating categories", ie the banks ranked the entities the subject of their research AAA, A+ etc. Even though it might not have been done in as systematic a way as the intentional credit ratings agencies, it still constituted a credit rating.

PUBLISH AND BE DAMNED

An injunction to restrain publication of a critical report is, just, refused.

The Financial Reporting Council won in *Taveta Investments Ltd v The Financial Reporting Council* [2018] EWHC 1662 (Admin) in that it fought off an application for an injunction because the judge decided that he was bound to follow another decision which he thought was wrong. But, having reached that conclusion, the judge added a scorpion-like sting at the end of his judgment, which may have snatched substantive defeat from the jaws of legal victory as far as the FRC is concerned.

Taveta concerned PwC's audit of BHS, which collapsed in a blaze of notoriety. The FRC reached a deal with PwC and the relevant audit partner to fine and severely reprimand them. As usual, the FRC proposed to publish the settlement agreement and a 38 page statement of "facts" agreed between PwC and the FRC.

Recognising that C and, more particularly, those behind C were identified in these documents, the FRC gave C three working days to let the FRC know of any "accuracy concerns" that C might have with regard to the statement of facts. C objected strenuously that it had serious accuracy concerns and that three days was nothing like enough time to respond since C had not previously been involved in the disciplinary process. C eventually applied for an interim injunction.

Nicklin J decided that the FRC's documents were potentially defamatory of those behind C (despite the FRC's protestations to the contrary) and that a rider to the effect that the FRC meant no criticism of anyone other than PwC was not enough to cure this.

Further, the judge decided that there is a public law principle that a person should not be criticised in a public report without first having the opportunity to respond to that criticism. This "Maxwellisation" process applied even though the FRC was undertaking disciplinary proceedings against PwC and had no jurisdiction over C. A public body should ask itself whether it was necessary to include criticism of a third party and, if so, whether it could be anonymised. Only if that was impossible or impracticable would this duty of fairness arise.

(Cf *FCA v Macris* [2017] UKSC 19 and *Financial Conduct Authority v Grout* [2018] EWCA Civ 71 regarding the statutory Maxwellisation process under FSMA.)

But the FRC had notified C of the criticisms. The judge thought that there was a serious issue to be tried as to whether the FRC had only taken this step to protect itself rather than actually to offer C a fair opportunity to comment. It looked as if the "FRC is currently operating with a closed mind", and there was no suggestion that the actual decision makers within the FRC were at all involved in considering C's accuracy concerns.

Since he was faced with an interim application to restrain publication, the judge had to address section 12(3) of the Human Rights Act 1998 (no interim injunction unless the court is satisfied that C is likely to win at trial). Nicklin J was satisfied that this test was passed. But he concluded that the test for restraining publication in public law cases was even higher – broadly, it should seldom, if ever, be done. The judge had serious reservations as to whether this was the right approach, but felt obliged to follow it and, therefore, to refuse the injunction even though he clearly thought that an injunction was appropriate in this case.

But, in the penultimate paragraph of his judgment, Nicklin J added casually that since he had decided that the FRC's documents criticised those behind C and that since the FRC disavowed any intention to make such criticism, if the FRC were still to publish the documents in full, the FRC might not be able to rely on qualified privilege as a defence to a subsequent defamation action because publication might in these circumstances be malicious. Ouch. Would the FRC still dare to publish? Despite the judge's view that the documents could easily have the criticisms removed, the documents are not yet on the FRC's website. A Parliamentary select committee is getting restive about this lack of publication.

TIME HEALS

The confidentiality obligations of regulators wither with time.

MiFID2 (strictly, the local implementations thereof) imposes confidentiality obligations on regulators with regard to "confidential information" they receive in the course of their work (article 54). But it doesn't say what information is confidential for these purposes.

In *Bundesanstalt für Finanzdienstleistungsaufsicht v Baumeister* (Case C-15/16), the Court of Justice of the European Union decided that this does not require regulators to keep confidential all information they receive in the course of their work. Article 54 applies only if the information is not public and if its disclosure would adversely affect the interests of the person who provided the information or a third party. Not an easy test for regulators to apply.

Further, the CJEU decided that confidentiality must be decided at the time any request for the information is made (in this case, under German freedom of information legislation), not at the time the information is received, and that there is a presumption (albeit rebuttable) that information over five years old has ceased to be confidential.

But the CJEU conceded that national laws could extend the minimum protection against disclosure required by MiFID2 to the entire contents of a regulator's file. Section 348 of FSMA (subject to the exceptions in section 349) seems to have done just that. It defines confidential information as anything received by the FCA for the purposes of its functions and which relates to the business or affairs of any person. Since this goes beyond the baseline set by MiFID2, it seems unlikely that it could be read down to be the same as the CJEU's conclusion in *Baumeister*.

CLIFFORD CHANCE

COURTS

TRUMP TOWERS

An insolvency claim is within an arbitration clause.

In *Nori Holdings Ltd v Bank Otkritie* [2018] EWHC 1343 (Comm), Males J granted an anti-suit injunction to restrain proceedings in Russia that were based on the Russian equivalent of transactions at an undervalue. Even though this claim only existed under Russian insolvency law, and Russian insolvency law assigned the statutory claim to the Moscow courts, the judge considered that the proceedings in the Moscow courts were in breach of a London arbitration clause.

The judge rejected the argument that the claim was outside the scope of the arbitration clause as a matter of interpretation or that the claim was not arbitrable. He thought that it was, in essence, a fraud claim whatever legal basis was attributed to it, and there was no reason why a fraud claim couldn't be arbitrated. In reaching this conclusion, the judge followed, as he was bound to do, the decision in *Fulham FC v Richards* [2011] EWCA Civ 855 rather than the perhaps more sensible Singapore decision of *Larsen Oil & Gas Ltd v Petropod Ltd* [2011] SGC A 21.

But the judge did not grant an anti-suit injunction to restrain proceedings in Cyprus brought in breach of the same arbitration clause. He decided that the advent of the recast Brussels I Regulation had not reversed *West Tankers Inc v Allianz SpA* [2009] 1 AC 1138 in this respect. It remains impermissible to grant an anti-suit injunction to restrain civil or commercial proceedings in another EU or Lugano country even if those proceedings have been brought in breach of an arbitration clause.

OVERRIDING THE PARTIES

The court can vary a consent order.

Under the ancien régime (ie before the CPR), the courts divided consent orders into two kinds: those that were just ordinary orders to which one party had chosen not to object; and those that were genuine agreements. The courts considered that they could vary the requirements under the first kind of order in the same way that they could for any contested order. But the second kind constituted a contract, the courts have no power to vary contracts (absent mis-representation, mistake or such like), and so could not vary these orders.

But the CPR changed all that. The courts considered that new regime gave them untrammelled power to vary any court order, whatever its basis, though some judges thought that courts should be slow to do so where there had been a genuine agreement. But the width of the court's power was demonstrated by Foskett J in *Riordan v Moon Beevor Solicitors* [2018] EWHC 1452 (QB).

C had been whinging about the conduct of its former solicitors for some time, refusing to pay a large bill. Shortly before the 12 month deadline for doing so, C issued an application for a detailed assessment of the bill under section 70 of the Solicitors Act 1974. C failed to comply with procedural directions, and a year later the claim was struck out on the court's own initiative. A consent order was then agreed between the solicitors and their former client under which there would be an assessment of the solicitors' bill provided that C paid about half the bill by a specified date, over three months away; if C failed to pay, C's claim would be dismissed (again). C failed to pay, and, instead, applied for the consent order to be varied to stay the assessment (and thereby to delay any hope the solicitors had of being paid) until an uncommenced claim in negligence against the solicitors had been determined. C had known years earlier about the potential for this claim.

Foskett J considered that he could stay the assessment - indeed, the consent order as a whole – even though it manifestly undid the deal the parties had reached to allow reinstatement of the section 70 action. Quite where this power to vary contracts comes from is less than clear. Perhaps any contract that is embodied in a court order is subject to an implied term that the court can change it if it sees fit. The moral may be that agreements should be kept out of court orders.

DOUBLE TROUBLE

A judge can refuse permission to appeal and then hear the appeal.

Broughal v Walsh Brothers Builders Ltd [2018] EWCA Civ 1610 involved a judge who decided an application for permission to appeal on the papers. She refused permission. Another judge then granted permission at an oral hearing, and the appeal came on before the first judge. She rejected the appeal. Should that decision be set aside on grounds of apparent bias?

No, according to the CA. Feeling bound by *Senegal v Holmes* [2002] EWCA Civ 1104, the Court of Appeal decided that a decision on the papers regarding permission to appeal was only a provisional decision, and the fair-minded observer should appreciate this, the ability of judges to change their minds and the power of oral argument.

CLIFFORD

CHANCE

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

35245-5-87