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Litigation & Arbitration Group Client Alert: Significant English Court Cases in H1 2017

The first half of 2017 has seen a number of significant decisions from the English Courts; this briefing provides an overview of 5 of these cases, and considers their possible implications going forward.

1. COMPENSATION FOR BREACH – WHAT AMOUNTS TO MITIGATION?

In *Globalia Business Travel S.A.U. v Fulton Shipping Inc of Panama* [2017] UKSC 43 (the "New Flamenco"), the Supreme Court was asked to decide whether the capital gain from the sale of a ship following the early redelivery of the vessel (which was in breach of contract), amounted to an act of mitigation and thus would have the effect of reducing the loss recoverable by the owners.

Facts

- The cruise ship 'New Flamenco' was scheduled to be chartered until 2009, but in 2007 was redelivered early by the charterers.
- Having failed to find an alternative charterer, the owners decided to sell the vessel in 2007 for approximately $23m and to claim the two years' lost income from the charterers (approximately $11m).
- By 2009, when the charter would have ended, the re-sale market for cruise ships had declined and, had the vessel been sold at that juncture, it would only have fetched approximately $7m ($16m less than the owners had received from the sale in 2007).

Dispute

- The charterer claimed that the sale of the vessel in 2007 was an act of mitigation by the owner, and that the capital gain (when compared to a sale in 2009) should reduce/extinguish the amount of damages recoverable by the owner.

Outcome

- In its judgment handed down on 28 June 2017, the Supreme Court held that the sale of the vessel was not an act of mitigation.
- Lord Clarke held that "*the essential question is whether there is a sufficiently close link between*" the damage and the alleged act of mitigation. He held that there was nothing about the premature termination of the charter which made it necessary to sell the vessel, and that an appropriate act of mitigation would have been the acquisition of an alternative income stream to replace the charter fees.[1]

Implications

- This decision by the Supreme Court may offer some helpful clarification for innocent parties to a repudiatory breach claim. In particular, the case would suggest that a decision to sell an income producing asset should not have the effect of decreasing the amount of recoverable loss, provided, it would seem, the breach did not make the sale necessary.

2. ARBITRATION AGREEMENTS AND COMPETITION CLAIMS – WILL A COURT STAY COMPETITION DAMAGES PROCEEDINGS IN FAVOUR OF ARBITRATION?

In *Microsoft Mobile Oy (Ltd) v Sony Europe Ltd & Others* [2017] EWHC 374 (Ch) Microsoft Mobile (which acquired Nokia's mobile phone business) brought a follow-on competition damages claim against Sony Europe and a number of other manufacturers of lithium-ion batteries. The High Court was asked to decide, amongst other things, whether to stay the proceedings against Sony Europe in favour of a pre-existing arbitration agreement.

Facts

- In December 2016, the European Commission found that a price fixing cartel existed in the market for lithium-ion batteries (COMP/39904).
- The only Defendant domiciled in England and Wales was Sony Europe. All of the other Defendants were domiciled in Japan or South Korea.
- Microsoft Mobile served proceedings on Sony Europe and obtained permission from the Court to serve proceedings on the other Defendants outside of the jurisdiction. However, shortly thereafter, Sony Europe applied for a stay of these

[1] This judgment was subsequent to earlier conflicting decisions from: the Arbitral Tribunal (which found that the sale was an act of mitigation and credited the gain from the sale to the charterers); the High Court (which held that the sale was not an act of mitigation); and the Court of Appeal (which found that it was an act of mitigation and credited the gain from the sale to the charterers).

proceedings in light of a pre-existing arbitration agreement, and the other Defendants applied to set aside the order permitting service out of the jurisdiction.

- The arbitration agreement provided that: "*[a]ny disputes related to this Agreement or its enforcement shall be resolved and settled by arbitration...*".

Dispute

- In relation to the arbitration agreement, two important questions arose:
  - was the arbitration agreement sufficiently wide to encompass a competition damages claim against Sony Europe; and
  - if so, whether enforcing the arbitration agreement would unduly hamper the effectiveness of Article 101 TFEU, which prohibits practices which have the object or effect of restricting competition.

Outcome

- As to the first question, Smith J held that because parallel claims in contract could be brought that would encompass Microsoft's claims against Sony Europe, the arbitration agreement was sufficiently wide to encompass the competition damages claim.
- As to the second question, Smith J held that enforcing the arbitration agreement and staying the follow-on damages action would not unduly hamper the effectiveness of Article 101. Although he noted that the effect of enforcing the arbitration agreement would undoubtedly lead to a fragmentation of the proceedings, such fragmentation did not render the arbitration agreement an obstacle to the enforcement of Article 101, or somehow inimical to EU law. Accordingly, the Court stayed the proceedings in favour of arbitration.[2]

Implications

- The Court's decision to enforce the arbitration agreement makes it important for Claimants seeking to bring competition damages actions to first consider whether a pre-existing arbitration agreement may bite on their intended claim.

[2] Smith J also considered service out of jurisdiction under CPR PD 6B §3.1(3), the "*necessary and proper party gateway*" and CPR PD 6B §3.1(9)(a), the "*tort gateway*". He held that, had Sony Europe still been a party to the proceedings, then the other parties would have been necessary and proper parties. However, in circumstances where, due to the arbitration agreement, Sony Europe was no longer a party and Microsoft Mobile could not establish that it had suffered loss in England and Wales sufficient to satisfy the "*tort gateway*", the Court refused to accept jurisdiction.

3. ASYMMETRIC JURISDICTION CLAUSES – ARE THEY EXCLUSIVE?

The High Court in *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc. and another* [2017] EWHC 161 (Comm) addressed the question of whether asymmetric jurisdiction clauses (in which Party A is restricted to suing Party B in a designated jurisdiction, whilst Party B is unrestrained) confer exclusive or non-exclusive jurisdiction.

If the contractual jurisdiction clause conferred exclusive jurisdiction, the Court named in that clause would be entitled to retain jurisdiction, even if proceedings had already been commenced in the Court of another EU member state, pursuant to Article 31(2) of the Brussels Recast Regulation.

Facts

- The Defendants, Liquimar and another, owned and managed certain ships, and in the course of their business entered into loan agreements and a guarantee with the Claimant, Commerzbank. The jurisdiction clauses in these agreements, which were all similar, stated:

  "…For the exclusive benefit of the Lender, the [Borrower/Guarantor] irrevocably agrees that the courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this [Agreement] and that any proceedings may be brought in those courts.… Nothing contained in this Clause shall limit the right of the Lender to commence any proceedings against the [Borrower/Guarantor] in any other court of competent jurisdiction.…"

- Following a dispute over sums owed under the guarantee, the Defendants pre-empted any action from Commerzbank by issuing proceedings in Greece.

- In response, Commerzbank initiated proceedings in England.

Dispute

- The Defendants asked the English Court for a stay under Article 29 of the Recast Regulation, in favour of the first (Greek) Court seized.

- They argued, amongst other things, that asymmetric jurisdiction clauses should not be considered exclusive under the Article 31(2) exception and, in the alternative, that such jurisdiction clauses are incompatible with the Recast Regulation and are, therefore, void.

Outcome

- The High Court dismissed the Defendants' arguments.

- Notwithstanding that the relevant clause did not use specific language pertaining to exclusivity and that such exclusivity only applied to one party, the Court considered that the jurisdiction clause was sufficient to confer exclusive jurisdiction on the Court of an EU member state (the UK), and the English Court could therefore proceed with the case irrespective of how far advanced the Greek proceedings were.

- In dismissing the Defendants' alternative argument that asymmetric clauses are invalid under the Recast Regulation as a matter of policy, the Court reasoned that asymmetric jurisdiction clauses are a regular feature of financial documentation in the EU and there was nothing to suggest that the Recast Regulation renders such clauses ineffective.[3]

Implications

- This case provides contracting parties who commonly use asymmetric jurisdiction clauses, such as financial institutions, with some reassurance that such clauses should be accepted in England and Wales, and are capable of conferring exclusive jurisdiction on a particular Court.

4. SUBMISSION TO JURISDICTION – WHEN HAS A DEFENDANT GONE TOO FAR?

In *Dennis v Tag Group Ltd and others* [2017] EWHC 919 (Ch) the High Court was asked to decide when a party's conduct may amount to a submission to the Court's jurisdiction.

Facts

- The Claimant, an individual, represented by Herbert Smith Freehills (HSF), brought an action for unfair prejudice pursuant to section 994 of the Companies Act 2006 against two Respondents: TAG (a Jersey based company) and BMH (a Bahrain based company).

- In pre-action correspondence, HSF asked for the identity of the solicitors for the Respondents for the purposes of service. The solicitors for TAG, Cleary Gottlieb, declined to accept service and reserved their rights as to jurisdiction. Hogan Lovells, representing BMH, made similar reservations.

- HSF then indicated their intention to seek injunctive relief and offered to provide the relevant documents to the Respondents' solicitors. Both firms

[3] This follows the French decision in *Société eBizcuss.com v Apple, First Civil Chamber, 7 October 2015*, Case No. 14-16898, in which the Cour de Cassation rejected the argument that an asymmetric jurisdiction clause was invalid and contrary to the object and purpose of the Recast Regulation. The jurisdiction clause in that case provided Apple with the ability to sue in Ireland or "*where a harm to Apple is occurring*".

accepted the documents and TAG's solicitors, again, restated their reservation of rights as to jurisdiction.

- The hearing of the injunction application proceeded soon thereafter, in which the Respondents successfully opposed the application.

Dispute

- Following the conclusion of the injunction application, the Claimant then sought to argue that both of the Respondents had, by their conduct, submitted to the jurisdiction of the English Courts.

- The Respondents argued that no submission occurred as a party is entitled to defend an interim and urgent injunction application without being taken to have submitted: pointing to both prior correspondence in which their position on jurisdiction had been reserved and the special circumstances of an injunction application.

Outcome

- The High Court determined that the Respondents had submitted to the jurisdiction of the English Courts.

- Amongst other things, the Court considered the following conduct of the Respondents as indicative of a submission to jurisdiction:

    - the Respondents' focus at the injunction hearing on the merits of the matter, without any clear or express statement that jurisdiction was in issue and would be contested;

    - the fact that the agreed order following the injunction hearing contained no express reservation as to jurisdiction; and

    - the failure by the Respondents to tell the Court that, notwithstanding their argument that damages would be an adequate remedy, enforcement would have to take place in a different jurisdiction.

Implications

- This case provides helpful guidance as to when, notwithstanding a reservation of rights with respect to jurisdiction, a party's conduct may amount to a submission to jurisdiction. By way of further guidance, the Court noted that a foreign Respondent could undoubtedly contest an application for Litan injunction without submitting to jurisdiction if, before doing so, the Respondent were to seek a declaration from the Court as to jurisdiction.

5. THIRD PARTY FUNDERS AND SECURITY FOR COSTS – WHEN IS IT APPROPRIATE TO ORDER COSTS AGAINST FUNDERS?

In the recent case of *RBS Rights Issue Litigation* [2017] EWHC 1217 (ch), the High Court granted an order for security for costs against a professional third party funder, but declined to do so against another funder whose primary motive was to assist the Claimants, including Claimant entities which were associated with the funder.

Further details of this case and an in-depth analysis of recent developments in relation to security for costs can be found in our recent client alert dated 8 August 2017.

LITIGATION & ARBITRATION GROUP

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Litigation & Arbitration Group.

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