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MY PLACE OR YOURS? WILL YOUR JURISDICTION AGREEMENT WORK?

BANKING AND FINANCE LITIGATION

KEY POINTS

Jurisdiction agreements are nearly always included as part of the "boilerplate" provisions in banking and finance agreements. Two recent cases provide useful guidance on how these clauses work. In particular, the cases show that:

- Whilst the English Court will usually give effect to an exclusive jurisdiction agreement, it has a discretion not to do so where there are "strong reasons" for litigating in a different forum.

- One-sided jurisdiction agreements are valid as a matter of English law. However, the position is not so clear in other jurisdictions and, in multi-jurisdictional transactions, it may be appropriate to seek local advice before relying on a one-sided jurisdiction agreement.

STRONG REASONS FOR LITIGATING IN A DIFFERENT FORUM.

The English Court will normally give effect to exclusive jurisdiction agreements either by: (i) staying English proceedings brought in breach of an agreement to litigate elsewhere; or (ii) making an anti-suit injunction restraining a party from issuing or continuing with proceedings brought outside the European Economic Area (the EEA), in breach of an agreement to litigate in England. (As a result of the decisions of the ECJ in *Erich Gasser GmbH v Misat srl*[1] and *Turner v Grovit*[2], the English Court is prevented from granting anti-suit injunctions in respect of proceedings brought inside the EEA).

However, the power to secure compliance with jurisdiction agreements in these ways is discretionary. In *Euromark Limited v Smash Enterprises Pty Ltd*[3], Coulson J considered the law applicable to the exercise of this discretion. His comments can be summarised as follows:

1. The Court will ordinarily enforce the parties' agreement to litigate in a particular forum – whether by staying its own proceedings, granting an anti-suit injunction or by making such other procedural order as is appropriate in the circumstances – *unless the party suing in the non-contractual forum can show strong reasons for suing in that forum.*

2. A party seeking to invoke the jurisdiction of the English Court in the face of an exclusive jurisdiction clause which provides for disputes to be determined in a foreign court, must point to a factor *which could not have been foreseen when the contract was made.*

3. Foreseeable questions of convenience are irrelevant. The reason relied on must extend either to some unforeseeable matter of convenience or engage the interests of justice itself.

4. The expression "interests of justice" does not require a broad consideration of the merits of the parties' competing positions, but is instead designed to deal with those rare cases where, although there is an exclusive jurisdiction clause, the contractually agreed forum may not afford a fair trial, or may, in some other way, be potentially unreliable or unjust.

In this case, the parties had entered into a distribution agreement (the Agreement), which gave the Claimant the exclusive right to distribute the Defendant's products in England. The Agreement contained an exclusive jurisdiction clause in favour of the Australian Courts. The Claimant argued that the Defendant had wrongfully terminated the agreement, not for any alleged default but because it was commercially convenient for the Defendant to deal directly itself with retailers in England. The Claimant also argued that its claim against the Defendant for repudiating the agreement was so strong as to be "effectively unanswerable", which meant that it should be permitted to continue with proceedings it had brought in England.

Coulson J held that, even if these submissions were correct, the broad merits of the Claimant's claim were insufficient grounds for avoiding the effect of an exclusive jurisdiction provision. The position might be different if the losses incurred as a result of the alleged repudiation meant that the Claimant was prevented financially from litigating in Australia. However there was no evidence that this was the case. Accordingly, Coulson J granted the Defendant's application for a declaration that the English Court did not have jurisdiction to hear the Claimant's claim.

ONE-SIDED JURISDICTION AGREEMENTS

One-sided jurisdiction agreements are useful because they preserve the flexibility for one party, often a lender, to issue proceedings where assets are located. This can make it easier to enforce any judgment made in a claimant's favour. For this reason, one-sided jurisdiction clauses are routinely included in loan agreements and other financial instruments.

Whilst such agreements are generally upheld in the English Court, they have not found favour in certain parts of Europe. In *Ms X v Banque Privée Edmond de Rothschild*[4], the French

[1] C-116/02, [2003] ECR I-14693
[2] C-159/02, [2004] ECR I-3565
[3] [2013] EWHC 1627 (QB)
[4] French Supreme Court, First Civil Chamber, 26 September 2012, No 11-26.022

Cour de Cassation held that a one-sided jurisdiction clause (which provided for Luxembourg jurisdiction) was invalid because (broadly) it did not fulfil the requirements of the Brussels Regulation. Similarly, in the case of *Sony Ericsson v Russkaya Telefonnaya Kompania* (19 June 2012), the Supreme Commercial Court of Russia held that a one-sided arbitration agreement was invalid on the basis that the clause was contrary to the basic principle of procedural equality between the parties. The same logic would apply to a one-sided jurisdiction agreement.

On the other hand, in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another*[5], the Commercial Court emphatically rejected the Defendants' attempt to argue that a one-sided jurisdiction agreement was invalid. Therefore, whilst the position remains in doubt in some other jurisdictions, it is clear that one-sided jurisdiction agreements are valid as a matter of English law.

MAURITIUS COMMERCIAL BANK LTD V HESTIA HOLDINGS LTD

In this case, the Claimant bank granted a loan facility to the First Defendant, which was guaranteed by the Second Defendant. The First Defendant defaulted on the repayment of the loan and the Claimant issued proceedings in England. In doing so, it relied upon a jurisdiction agreement in the relevant facility agreement, which conferred exclusive jurisdiction on the English Court, but went on to say that this was for "for the benefit of the Lender only" and that the "Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction".

The Defendants argued that this clause purported to confer on the Claimant a power to sue them in any court in the world, rather than those courts which would otherwise regard themselves under their own rules of private international law as having competent jurisdiction. As such, the Defendants argued, the entire jurisdiction agreement (including the part which conferred jurisdiction on the English Court) was invalid because it breached Article 6 of the European Convention of Human Rights (which provides for a right to fair trial).

[5] [2013] EWHC 1328 (Comm)

Popplewell J rejected this interpretation of the jurisdiction clause, holding that its effect was to preserve the Claimant's right to sue in any court which would regard itself as of competent jurisdiction rather than to create jurisdiction where none would otherwise have existed. He made it clear that clauses of this nature are valid as a matter of English law and quoted the following passage from a recent article by Professor Fentiman in the Cambridge Law Journal entitled "*Universal jurisdiction agreements in Europe*"[6]:

"Such unilaterally non-exclusive clauses are ubiquitous in the financial markets…despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so…"

Furthermore, the Judge went on to say that he would have upheld the jurisdiction agreement even if it did have the meaning put forward by the Defendants because the Court should give effect to the parties' contractual bargain.

[6] CLJ (2013) 72 (1) 24-27

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JULY 2013

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