

JURISDICTION AGREEMENTS – NOT JUST FOR CONTRACTING PARTIES?

BANKING AND FINANCE LITIGATION

BACKGROUND FACTS IN BRIEF

The Claimant (VTB) claimed that it had been induced to enter into a Facility Agreement with a Russian company, called Russagroprom LLC (RAP), by fraudulent misrepresentations made by the First Defendant pursuant to a conspiracy with the other Defendants. It sought to bring claims in deceit and conspiracy against the Defendants in England and applied for permission to serve proceedings outside the jurisdiction. This was granted, but the Defendants then applied to Arnold J to have service set aside, predominantly on the grounds that England was not the appropriate forum for the dispute. Arnold J upheld the Defendants' application and set aside service of the claim form. VTB made an unsuccessful appeal to the Court of Appeal and then made a further appeal to the Supreme Court.

THE NON-EXCLUSIVE JURISDICTION CLAUSE

Clause 35.1 of the Facility Agreement provided that: *"the courts of England have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement"*; that no Party would argue that *"the courts of England [were not] the most appropriate and convenient courts to settle"* such disputes, but that clause 35.1 was *"for the benefit of [VTB] only"*. Clause 35.3 entitled VTB *"to refer any dispute which may arise out of or in connection with this Agreement to final and binding arbitration in London"*.

VTB argued that the Defendants controlled the party which had entered into the Facility Agreement, namely RAP, and could therefore be considered responsible for RAP's contractual concession that VTB should have the right to demand that disputes arising out of the Facility Agreement could be resolved in the courts of England. This meant, VTB argued, that the Defendants could not complain if allegations of their fraudulent inducement of VTB to enter into the Facility Agreement were also resolved here. Clause 35 was, therefore, *"a powerful pointer to England being the proper place to bring [a] claim"*.

THE SUPREME COURT DECISION

The dissenting minority in the Supreme Court accepted VTB's arguments. Lord Clarke, with whom Lord Reed agreed, referred to an article by Professor Briggs (who is a recognised authority on jurisdiction issues) entitled *"The subtle variety of jurisdiction agreements"*, [2012] LMCLQ 364. Commenting on the Court of Appeal decision in this case, Professor Briggs argued that it was too simplistic to assert that a jurisdiction agreement is only ever effective in relation to a contracting party (not least because a jurisdiction agreement is separable from the substantive contract in which it is found) and that, even if a fraudster is not contractually bound to the jurisdiction, *"it should not be challenging to contend that the court which he signed*

his company up to, in circumstances of fraud, is also the proper place in which to assert any available claim of substantive liability against him".

Lord Clarke stated that he agreed with Professor Briggs and concluded that where a person fraudulently engineers a contract, not only subject to English law but also subject to an English jurisdiction clause, the proper (or natural) place in which to assert a claim for substantive liability against him, whether in contract or tort, is England. The same would be true *"mutatis mutandis"* if the agreed law and jurisdiction were that of another state. This, combined with the fact that the alleged torts took place in England and were governed by English law, led Lord Clarke and Lord Reed to conclude that England was the appropriate forum to determine VTB's tortious claims and that VTB's appeal should be allowed.

Ultimately, the majority in the Supreme Court reached a different conclusion on the appeal but they did accept that the non-exclusive jurisdiction clause was a relevant consideration. For example, Lord Mance stated that there was *"general attraction in a conclusion that persons committing deceit should answer in the jurisdiction which is not merely that where their deceitfulness manifested itself, but also a jurisdiction agreed to be appropriate under the contract which they are by such deceit inducing"*. Lord Neuberger accepted that Clause 35 was a *"factor in favour"* of the VTB's argument that England was the appropriate jurisdiction to determine the dispute and that, in different circumstances, it might be a powerful consideration in favour of such an argument.

However, the majority were not prepared to attach as much importance to Clause 35 as Lord Clarke. Lord Neuberger stated that it was not a particularly important factor on the facts of this particular case and Lord Mance identified other more important considerations: in particular that the major part of the factual subject matter involved Russia, and it was clear that the great bulk of evidence on both sides would have to come from Russian witnesses. In those circumstances, the majority was not prepared to conclude that the decision of the first instance judge was *"outside the ambit of permissible decisions"*, and the appeal was dismissed.

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