

## PROFORMA CONTRACTS AND JURISDICTION CLAUSES

Agreeing and including a jurisdiction provision in a contract is very important and while parties entering into contracts very much hope that there will be no problems or claims it is important to agree an established and reliable jurisdiction provision so that if there are any issues then these can and will be determined fairly, impartially and objectively. This should be part of any risk assessment and not knowing the laws under which a dispute would be determined would leave a party open to huge uncertainty. When negotiating commercial contracts all too often attention is focused upon the commercial objectives and little if any regard is paid by some to possible disputes – after all most parties enter into contracts hoping and expecting that they will be performed to the mutual benefit of the parties and the thought of having to consult lawyers rarely crosses their minds. Thus, little if any particular regard is paid to jurisdiction provisions when negotiating contracts. I will be confining my discussion to English law.

If using a standard or pro-forma form of contract then this will invariably include a jurisdiction and a choice of law provision. Do not however be lulled into a sense of false security. It is necessary even when using a standard or pro-forma contract to check the law and jurisdiction provisions and some forms do require parties to select the choice of law and jurisdiction. Similarly, just because a standard or pro-forma form is being used it does not mean that the law and jurisdiction provision in a pro-forma has to be accepted and used. Parties might wish to change the law or jurisdiction provisions.

If a one-off contract form is being negotiated rather than using a standard or pro-forma form then it is important to ensure that it contains a specific choice of law and jurisdiction provision. If no choice of law and jurisdiction provision is included then, if there is a dispute there will almost certainly be conflicting arguments by the parties as to which law and jurisdiction is to apply. Considerable time and costs can be spent arguing the respective benefits of one jurisdiction over that of another because once there is a dispute there are perceived to be benefits of one jurisdiction over that of another. All this can be avoided by agreeing a choice of law and jurisdiction provision.

As a matter of English law an arbitration provision must be agreed in writing (Section 5 of the Arbitration Act 1996). Unless there is an agreement in writing between the parties to refer disputes to London arbitration then there is no basis to pursue a claim in London arbitration – there is no basis to imply an arbitration agreement. Similarly, unless a different form of arbitration provision is spelled out in the agreement Section 15 of the Arbitration Act provides that if there is no agreement as to the number of arbitrators then the arbitration tribunal shall consist of a sole arbitrator – thus, if the parties wish arbitration but not with a sole arbitrator then this must be spelled out in the agreement.

If there is no express choice of law and jurisdiction provision then it might still be possible to pursue a claim in the English courts. English court proceedings can be pursued provided that the opposing party can be served with a Claim Form. A Claim Form can only be served within England and Wales but the leave of the court

can be obtained to serve a Claim Form outside the jurisdiction if the claiming party can bring themselves with the requirements of the Court Rules – in broad terms in relation to contracts this involves the contract being made in England, being governed by English law or containing an English jurisdiction provision. It is possible to challenge such leave and the court will then determine if the claim should proceed in England or not.

I refer to choice of law and jurisdiction provision because these are not necessarily the same thing. Usually the same law and jurisdiction will apply (for example English law and London arbitration) but the parties are free to reach a different agreement and they could agree that a dispute be determined in one jurisdiction but subject to the law of another country (for example London arbitration subject to Ukrainian law). If there is such a provision the arbitrators and courts will start by assuming that the foreign law is the same as English law but the parties can adduce evidence of the foreign law and in such circumstances the arbitrators or courts in England would apply the foreign law. All too often there is a dispute as to what the foreign law provides and in such circumstances each party will have a foreign lawyer attend to give evidence and they will be cross-examined and the English arbitrators or courts will determine the foreign law.

This can be seen in the Tropical Reefer where the English courts had to consider a case of a Cyprus registered vessel carrying cargo from Ecuador to Germany on bills of lading providing for English law and subject to a mortgage which was also subject to English law and where the vessel was arrested in Panama by the mortgagee bank. After considerable argument the court concluded that the critical events – that is the arrest and loss of the cargo - all happened in Panama, where the bank availed itself of a judicial procedure which, in the result, caused loss to the cargo owner. The court held that the law pursuant to which that procedure was put in force by the bank should also determine whether the bank misused its right to invoke it. These were factors that established a close connection with Panama. The court concluded that these factors were of considerably greater significance than adopting the law of the ship's flag would have lead to certainty. The court held that the applicable law was that of Panama. The English court, having decided that the applicable law was that of Panama then heard evidence from two eminent Panamanian lawyers to ascertain what Panamanian law provided.

Having agreed a choice of law and jurisdiction provision will the courts give effect to such agreement. As you will readily appreciate, if the courts will not enforce a jurisdiction provision which the parties have agreed then a major part of the contract can be frustrated and consequences different to those the parties had intended might result.

The position under English law in relation to an arbitration clause was recently considered by the House of Lords in Fiona Trust v Privalov & Others. The background to that case is that eight charterparties had been concluded by Sovcomflot with companies controlled by Mr Niktin and the shipowners said that the charterparties had been procured by bribery and contained highly favourable terms for Charterers. The shipowners maintained that the eight charterparties had been validly rescinded by reason of bribery and they commenced proceedings in the High Court seeking damages for conspiracy and an account of profits. The

Charterers then commenced London arbitration proceedings asking the arbitrators to determine the effectiveness of the shipowners' rescission of the charterparties. Owners responded by applying to the court under Section 72 Arbitration Act for an order restraining the arbitration on the basis that the charterparties (and thus the arbitration agreements) had been rescinded for bribery. Charterers' response was to apply to the court under Section 9 Arbitration Act for a stay of the court proceedings because there was a valid arbitration agreement between the parties. Clearly, one side saw tactical benefits and advantages of arbitration whereas the other saw benefits to litigation.

The High Court allowed Owners claims and stayed the arbitration proceedings. The Court of Appeal reversed this and held that the issue of whether the charterparties had been rescinded for bribery came within the arbitration clause. The House of Lords agreed with the Court of Appeal and said that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. An arbitration clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. There was, said the House, every reason to presume that reasonable parties would wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals. This approach appears to be the approach adopted in Germany too.

The principle of separability enacted in section 7 Arbitration Act means, said the House of Lords, that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. There could, they said, be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid, for example if the signature to the agreement was forged, but absent such considerations the issues must be determined by the agreed method, that is by arbitration.

The comments of the House of Lords were applied in a decision Albon v Naza Motors which involved disputes as to a distribution agreement and proceedings were commenced by the claimant, Mr Albon, in England for sums overpaid. The response by the defendants was to seek a stay alleging that there was a Joint Venture Agreement between the parties which included a Malaysia arbitration provision. The claimant maintained that the signature on the JVA was a forgery so that he was not bound to refer the dispute to arbitration in Malaysia. The claimant maintained that his signature had been forged after he had commenced proceedings to stop the English proceedings. The case went to the Court of Appeal which allowed an anti-suit injunction to prevent the defendants proceeding with the arbitration in Malaysia until the English courts had determined the issue of the forgery. While there was, said the Court of Appeal, much to be said for the argument that the caution exercised by the court relating to anti-suit injunctions should be increased or even redoubled in the case of an anti-arbitration injunction, this was not an ordinary case. It was, said the court, properly arguable that the agreement to arbitrate had been

forged in order to defeat proceedings properly brought in England and the autonomy of the arbitrators had thus already been undermined because they were precluded from determining that question.

Another case The Electricity Board of Tamil Nadu v St-CMS an electricity supply agreement to provide electricity to the province of Tamil Nadu was subject to arbitration in London under the ICC Rules. A dispute arose as to the tariff payable and the supplier referred the dispute to arbitration. The claimants applied to the English court under section 72 of the Arbitration Act 1996 seeking a declaration that the matters submitted by the suppliers to arbitration were not within the scope of the arbitration agreement. They sought an injunction restraining the suppliers from continuing the arbitration. The court rejected the application and held that on a true construction of the wide arbitration provision disputes as to tariff did fall within the arbitration provision. The court went on to say that the parties had agreed to arbitration in accordance with English law and it was by that law alone that the ambit of the arbitration provision could be determined.

In El Nasshey v Sainsbury the claimants made a claim in the High Court against Sainsbury to avoid having to proceed by way of ICC arbitration in Paris because the ICC arbitrators required the claimants to provide a very substantial advance on fees. Claimants sought to avoid the application by Sainsbury for an anti-suit injunction upon the ground that the arbitration agreement was entered into as a result of duress. The High Court held that a challenge to the existence of an arbitration agreement based on duress had to be based on facts specific to the arbitration agreement, and not simply on the basis of a challenge, on like grounds, to the validity of the contract containing it. The facts relied on by the claimant did not specifically impugn the arbitration agreement itself but were a challenge to the validity of the main contract and thus were insufficient.

The Fiona Trust case and the other cases to which I have referred make it clear that effect will be given to an arbitration provision to determine a dispute between the parties.

A standard form of bill of lading often incorporates the terms of a charterparty which in turn is subject to English law. On the basis of this many carriers will confidently assume that all disputes under the bills of lading are to be referred to London arbitration. All too often receivers seek to try and frustrate the agreed jurisdiction provision by commencing proceedings in the local courts and this is a breach of the agreed jurisdiction provision.

The High Court recently expressed a very clear view in The Kallang which involved the alleged shortlanding of some 3,000 bags of cargo in Senegal. The cargo was carried under bills of lading which incorporated a charterparty which in turn contained an English law and London arbitration clause. Receivers' insurers demanded substantial security and maintained that the arbitration provision did not apply because they were not a party to the bill of lading contract. The shipowners' insurers offered to provide a letter of undertaking on the usual club terms subject to English law and London arbitration. The vessel was arrested and receivers' insurers insisted on a bank guarantee subject to Senegalese jurisdiction while the shipowners'

insurers were only prepared to provide a letter of undertaking on the usual club terms subject to English law and London arbitration. There was thus stalemate!

Shipowners made an urgent application to the English Commercial Court which granted the shipowners an anti-suit injunction. The parties then agreed the terms of a Club undertaking, against which receivers' insurers released the vessel and undertook to pursue its cargo claim only by way of London arbitration proceedings. However, receivers' insurers then applied to set aside the anti-suit injunction on the basis that it should never have been granted and they also applied for declarations that the Court had no jurisdiction over them. The shipowners said that the anti-suit injunction should be continued or renewed pending trial on the basis that such an injunction would send out the appropriate message to the defendants in respect of their conduct in dealing with future claims, where shipowners had the backing of Club letters. The shipowners accepted that the actual order granted by the Dakar Court when the vessel was arrested was for the purpose of obtaining security for the claim and that that of itself would not constitute a breach of the London arbitration clause – a party is allowed to arrest a vessel to obtain security for a London arbitration claim. The court said that it would not have restrained the receivers from applying for the arrest of the vessel in order to obtain security for their claim in Senegal but if no adequate security had been forthcoming an English court would have restrained the receivers by way of personal injunction

- (a) from insisting before the Dakar Court on a form of security to be provided by the claimant that required resolution of the cargo claim in Senegal
- (b) from putting forward submissions to the Dakar Court that the only reasonable security which the Dakar Court should accept to prevent release of the vessel was a bank guarantee which required resolution of the cargo dispute in, and subject to, Senegalese jurisdiction, and
- (c) from contending before the Dakar court that only a Senegalese Bank guarantee was acceptable security in circumstances where the American Club had offered its letter of undertaking.

Such an approach by the English Court would have been perfectly consistent with the principle that it was for the arresting court to decide on the appropriate nature of the security and would have not offended any notions of comity. In that claim where, the shipowners' insurers letter was clearly adequate and reasonable security and there was uncertainty about the willingness of local banks speedily to provide security that responded to determination of the cargo claim by London arbitration, the receivers conduct in contending for security provisions that would bring about a situation where the London arbitration clause was frustrated, amounted not only to a breach of implied terms of the arbitration clause but also oppressive conduct. Accordingly, the Court declined to discharge the anti-suit injunction.

Thus the court in that case took prompt and active steps to give effect to the agreements reached between the parties.

A similar result was achieved in The Alexandros T where a vessel was time chartered for a voyage from Brazil to China and was sub-chartered on back-to-back terms to cargo owners. The charterparties included English law and London arbitration provisions. Bills of lading were issued and these expressly incorporated

the law and arbitration provisions of the head charterparty. In the course of the voyage cargo was lost and cargo interests obtained a “civil award” from the Chinese courts and then commenced legal proceedings in China and also London arbitration proceedings. Owners applied for an anti-suit injunction and this was granted and the court held that the cargo interests were bound by the arbitration clause incorporated in the bill of lading and that where contracting parties had agreed to refer disputes to arbitration, and a claim falling within the scope of the arbitration agreement was made in proceedings elsewhere, the English court would ordinarily exercise its discretion to restrain the prosecution of those proceedings in the non-contractual forum unless the party suing in that forum could show strong reasons for proceeding there. The court further refused to accede to the proposal by cargo interests that the arbitrators deal with the jurisdiction point as the court considered that it was “straightforward”. Although head owners were successful in obtaining an anti-suit injunction the court held that it had no jurisdiction to grant an interim anti-suit injunction in support of the claims against the managers saying that the managers’ claim was not a claim “in respect of” any such contract. This is thus a possible approach some parties might seek to exploit to try and avoid the consequences of an anti-suit injunction.

In a recent dispute between two banks, Nat West Bank v Rabobank, the court dealt with the issue of the recoverability of damages where one party commences proceedings in breach of an agreement. The court held that the costs incurred in the overseas proceedings (in that case in California) should be allowed on an indemnity basis and that so too should the costs of the English action. The court said “Provided that it could be established by a successful application for a stay or an anti-suit injunction as a remedy for breach of an arbitration or jurisdiction clause that the breach had caused the innocent party reasonably to incur legal costs, those costs should normally be recoverable on an indemnity basis. The conduct of a party who deliberately ignored an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage was in substance acting in a manner which not only constituted a breach of contract but which misused the judicial facilities offered by the English courts or a foreign court. In the ordinary way it could therefore normally be characterised as so serious a departure from “the norm” as to require judicial discouragement by more stringent means than an order for costs on the standard basis. There was, the court said, no material distinction between the appropriate approach to costs when there had been breach of an anti-suit provision and where there had been breach of an exclusive jurisdiction clause or of an arbitration agreement.

Possibly the most potentially important decision in regard to jurisdiction is the House of Lords decision in The Front Comor where the vessel collided with Charterers oil jetty in Syracuse causing damage in excess of US\$15,000,000. Charterers’ insurers commenced proceedings in Sicily relying upon their rights of subrogation under the Italian Civil Code and the shipowners commenced proceedings in England on the basis that the claim arose out of the charterparty which contained a London arbitration provision and the Owners claimed an anti-suit injunction. The High Court upheld the shipowners’ argument and granted the anti-suit injunction. The case proceeded to the House of Lords without going to the Court of Appeal and the House regarded the question of whether to grant the injunction to restrain the Sicilian proceedings as “not obvious” and referred the

matter to the European Court of Justice, the reason being that the arbitration agreement lay outside the system of allocation of court jurisdictions which the European regulations [the E.C. Judgments Regulation (Council Regulation (EC) No 44/2001)] created. The House said that the arbitration clause took effect outside the Regulations and its enforcement was not subject to its terms. The House observed that courts of the United Kingdom had for many years exercised the jurisdiction to restrain foreign court proceedings. Whether the parties should submit themselves to such a jurisdiction by choosing the United Kingdom as the seat of their arbitration was entirely a matter for them. The courts were there to serve the business community rather than the other way round. No one was obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly did not deter parties to commercial agreements. On the contrary, it might be regarded as one of the advantages which the chosen seat of arbitration had to offer.

Finally, the House noted that the European Community was engaged not only with regulating commerce between member states but also in competing with the rest of the world. If the member states of the European Community were unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there was no shortage of other states which would. New York, Bermuda and Singapore were also the House of Lords noted, leading centres of arbitration and each of them exercised the jurisdiction which was challenged in the present appeal. There seemed to be no doctrinal necessity or practical advantage which required the European Community to handicap itself by denying its courts the right to exercise the same jurisdiction. This decision was handed down by the House of Lords in February last year and so it will be some time before the European Court of Justice is able to hear and determine this interesting and important issue.

I hope that the foregoing comments are of assistance. The English courts will usually hold a party to the jurisdictional bargain they agreed, especially if it was London arbitration or the English courts, but the English courts will also assume jurisdiction if they are satisfied that there is a suitable link or connection with England rather than a party seeking the benefits of the English courts for some tactical reason.