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Pending litigation, impending Brexit: What next for dispute resolution clauses?

There has been a recent influx of cases before the English courts in relation to jurisdiction to determine a dispute. Whether this is linked to the impending departure of the UK from the European Union or whether this is just a coincidence is unclear. What is apparent is that this complex area of law is about to become increasingly complicated as well as contentious. Selecting a future-proof dispute resolution clause is never easy. In the current uncertain times, it is particularly challenging. In this article, we highlight the key issues to be aware of from a review of recent case law.

What are the key differences between the legislative instruments in the European Regime?

An outline of the European Regime (including the Hague Choice of Court Convention 2005, the "**Hague Convention**") is available in our Brexit Disputes guide here . By way of a brief reminder, the Brussels Recast[1] will no longer apply to the UK from the end of the transition period (31 December 2020). The UK has applied to join the Lugano Convention 2007[2] but has not yet received the consent of the other contracting states (notably the EU). The UK has acceded to the Hague Convention and this will apply to it (in its own right) from 1 January 2021.

Parallel proceedings

There are many differences between the different European instruments. In this article, we consider in particular the differing approaches to the issues of pending litigation and parallel proceedings.

Under the Lugano Convention (and earlier Brussels Regulation[3]), if parties commence parallel proceedings in the courts of contracting states, priority is always given to the court first seised. That is the case whether the court first seised is the chosen court in a jurisdiction clause or not. All other courts must then stay proceedings until the court first seised determines jurisdiction. This is known as the "*lis alibi pendens*" rule. The rule is open to abuse by a litigation tactic called the "Italian Torpedo", where a party deliberately commences proceedings in a slow-moving jurisdiction (in breach of a jurisdiction clause) to delay or prevent being sued in the chosen court.

Brussels Recast (and to a certain extent the Hague Convention) "defused" the torpedo by providing that where there is an exclusive jurisdiction agreement in favour of a member (or contracting) state court, any other court has to stay proceedings until that court has decided jurisdiction, irrespective of which court was seised first. The scope of investigation that the chosen court can undertake is discussed later in this article. Under Brussels Recast, this provision only applies to exclusive jurisdiction agreements in favour of member state courts. In ***Gulf International Bank BSC v Aldwood*** **[2019]** ***EWHC 1666 (QB))***, the court held that where proceedings are brought in

[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[2] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007

[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

breach of an exclusive jurisdiction clause in favour of a non-member state, a member state court has no discretion to stay proceedings unless the non-EU court was seised first. This issue will obviously have more relevance when UK courts become non-EU courts next year.

Where the "anti-torpedo" provisions protecting exclusive choice of court agreements do not apply, Brussels Recast retains the general *lis alibi pendens* rule providing that where proceedings involving the same cause of action between the same parties are brought in different member state courts, all courts other than the court first seised must stay proceedings (Article 29). Where related (but not the same) actions are pending in different member state courts, Brussels Recast allows member state courts a discretion to stay proceedings in favour of the court first seised (Article 30). The Lugano Convention contains similar provisions.

The Hague Choice of Court Convention

The Hague Convention is similar to Brussels Recast but is more limited in scope. It only applies (from both a recognition and enforcement perspective) to exclusive jurisdiction agreements in favour of courts of contracting states entered into after 1 October 2015. So it has no application where there is no specified clause (for example in a tort claim) or where the clause is non-exclusive[4]. The UK has indicated that it considers its membership to have been without interruption since its original accession (as part of the EU) in October 2015. The EU Commission, on the other hand, has indicated it believes the Hague Convention will only apply to jurisdiction clauses in favour of the English courts entered into after it has acceded in its own right (i.e. from 1 January 2021 onwards). Ultimately, its application will be determined by the relevant court in which any dispute is heard.

The Hague Convention mirrors the Brussels Recast in its "anti-torpedo" provisions. Articles 5 and 6 provide that a court designated under an exclusive choice of court clause has jurisdiction to determine the dispute (with very limited exceptions), and that any court other than the chosen court must suspend or dismiss their proceedings, unless limited exceptions apply.

Where the Hague Choice of Court Convention differs from Brussels Recast is that it does not have any general *lis alibi pendens* rule by which the courts of contracting states can coordinate their approach to parallel proceedings. It has been suggested (although there is no case law yet) that this may mean that remedies such as anti-suit injunctions and / or actions for damages for breach of exclusive jurisdiction agreements are permissible. This is in contrast to the position under Brussels Recast (and the Lugano Convention) which prohibits such remedies as an infringement of the principles of mutual trust and effectiveness.

Case law on parallel proceedings *Lis alibi pendens*

In ***Generali Italia SpA v Pelagic Fisheries Corporation [2020] EWHC 1228 (Comm)***, the court confronted the issue of the Italian Torpedo. This was a fishing vessel insurance dispute with multiple parties. The contractual position was complex but there were arguably contradictory clauses in favour of both the Italian and the English courts. Pelagic Fisheries issued proceedings in Italy under what it argued were Italian jurisdiction clauses. Generali Italia (the insurer) then issued proceedings for declaratory relief here in England under what it claimed were English jurisdiction clauses. The Italian courts stayed proceedings to allow for the English courts to determine whether they had jurisdiction. The High Court was asked to consider two key questions:

1. Should it go ahead and consider the jurisdiction question or should it await the decision of the Italian courts (bearing in mind Pelagic had issued in Italy first under what it claimed were jurisdiction clauses in favour of the Italian courts).

2. If it should examine the clause, was it in fact an exclusive jurisdiction clause under Brussels Recast?

The court concluded it should examine the clause - and that it was an exclusive jurisdiction clause under Brussels Recast. The key factor in the court's decision was its analysis of the relative strength of the arguments about which jurisdiction clause prevailed. The Italian jurisdiction clause was deemed, at best, a non-exclusive clause whereas the clause in favour of the English courts was, on initial analysis, an exclusive jurisdiction clause. That meant that Article 31(2) of Brussels Recast mandated the Italian courts, not the English courts to stay proceedings. Further, the court held that because the clause potentially conveying jurisdiction on the

[4] Although English courts have indicated that they may treat asymmetrical clauses as "exclusive". See our article afor further information.

Italian courts derived from standard terms, more weight should be given to the bespoke, specifically agreed provision in favour of the English courts.

The analysis in this case was under Brussels Recast. If the Hague Convention applied (which would depend on a number of factors), the exclusive jurisdiction clause in favour of the English courts would similarly take precedence. If, on the other hand, the Lugano Convention applied, the position would be more evenly balanced.

Obiter, the court observed that had there been a legitimate argument that both jurisdictions benefitted from exclusive jurisdiction clauses, the position would have been more complex. In that instance, it observed that the general *lis alibi pendens* rule would apply. Further, as to the appropriate level of review, it suggested this might be the "*prima facie*" test approved in ***Ablynx NV v VHsquared [2019]*** **EWCA Civ 2192** or whether there was a serious issue that the other jurisdiction clause applied. This, the court observed, was preferable to an attempt to determine who had the better of the argument, where "*the inevitable result would be that the court second seised would proceed to determine its own jurisdiction in all cases without waiting for the court first seised to rule*".

Federal Republic of Nigeria (FRN) V Royal Dutch Shell & Ors [2020] EWHC 1315 (Comm)

Judgment in this case came just a few days after *Generali Italia v Pelagic* and also relates to the *lis alibi pendens* doctrine. In this case, the claimant (FRN) alleged that oil rights in Nigeria had been procured by fraud, with the knowledge of Shell and 12 other companies. In 2017, the Public Prosecutor of Milan commenced proceedings against Shell. Subsequently, the FRN joined the Italian proceedings as a *parte civile* and then commenced proceedings against Shell in England.

Shell successfully challenged the jurisdiction of the English court under Article 29(3) of the Brussels Recast Regulation. Article 29(3) provides that an EU court must decline jurisdiction if proceedings involving the same cause of action between the same parties already exist. In giving judgment the court clarified the following points:

1. There does not have to be complete identity of the parties to the two proceedings for Article 29 to apply. Here, even though the Italian Public Prosecutor was not a party to the English proceedings, the court held the test was broadly satisfied.

2. On the "same cause of action" test, the court held that the basic facts and basic rights claimed were the same in both proceedings. Any differences fell within the "due allowance" for differences between national courts.

3. On the same "*objet*" test (this test derives from the French text. It is not expressly reflected in the English text but the CJEU has held it applies), the court held the test was whether or not the two proceedings have the same "*end in view*". There is no requirement for them to be identical. The court interpreted this broadly and concluded that both sets of proceedings sought redress for alleged bribery and corruption. The inclusion of a claim for rescission made in the English but not the Italian proceedings did not mean the objet test was not met.

The judgment is important because it confirms that the doctrine applies even if the existing proceedings are essentially criminal in nature. Further, because Shell was an "anchor" defendant, the decision to decline jurisdiction against it meant that jurisdiction was also declined against the other parties included under the "necessary and proper party" gateway.

Koninklijke Philips NV (a company incorporated under the laws of The Netherlands) v Tinno Mobile Technology Corp and other companies [2020] EWHC 2553 (Ch),

In *Koninklijke v Tinno Mobile*, the court gave further consideration to Article 29 and Article 30 Brussels Recast. In this patent infringement case, proceedings were brought in both England and France with a challenge to French jurisdiction being dismissed by the French courts. Following the French court's decision, Tinno Mobile brought an application under Article 29 & 30 Brussels Recast seeking a stay of the English proceedings on the grounds that the French decision on jurisdiction was binding and / or that the French court was first seised of the relevant issue (a new issue had arisen in existing proceedings which made the analysis of which court was first seised complex).

The court rejected the application for a stay, holding that where a foreign court rejects a jurisdictional challenge, a party cannot rely on that decision alone to determine a similar challenge in another court. The court must examine the *ratio* of the judgment,

not just the outcome. In this instance, the English court determined that the French court had not found the English and French proceedings to contain the "same cause of action". Article 29 did not therefore apply. As to Article 30, (which enables a court second seised to stay its own proceedings to avoid the risk of inconsistent findings), the court determined that it been seised of the claim first. Crucially, it held that were that not the case, it would not have exercised its discretion in any event because the possibility of irreconcilable judgments was not such as to outweigh the benefits of a prompt resolution of the dispute. Of particular significance to the court was the fact that the French proceedings would not reach a conclusion until 2023 whereas the English trial was set for November 2020.

What does this mean for dispute resolution clauses?

All of the cases analysed relate to the Brussels Recast Regulation. The approach taken by the English courts to these issues is, however, likely to remain relevant next year when Brussels Recast no longer applies. Where the Hague Choice of Court Convention does not apply (or where there is a challenge to the validity of a clause to which it potentially applies), EU member state courts are likely to continue to apply the *lis alibi pendens* rules deriving from Brussels Recast. English courts, by contrast, will apply the common law rules of *forum non conveniens*, under which issues such as the risk of irreconcilable judgments or parallel proceedings will remain a relevant factor. From the analysis of the recent case law, a number of clear points arise:

1. If you have a watertight exclusive jurisdiction clause in favour of the English courts, it is much less likely (although not impossible) that you will become embroiled in parallel proceedings across multiple jurisdictions.

2. If you have a non-exclusive jurisdiction clause (or potentially simply a jurisdiction clause entered into in favour of the English courts prior to 1 January 2021), the scope for multi-jurisdictional challenges is greater. A non-exclusive clause may still, however, remain an attractive option to some parties, given the flexibility it affords.

3. If you have an arbitration clause, the position remains unchanged and you retain the benefits of a tried and tested regime governing both recognition and enforcement.

Whatever regime applies, the English courts have a long-established reputation for adopting a flexible yet robust approach to jurisdictional challenges. The benefits of an exclusive jurisdiction clause in favour of the English courts were recently highlighted in the case of ***Catlin Syndicate Ltd (as the sole member of Lloyds Syndicate 2003 for the 2015 year of account) and others v Amec Foster Wheeler USA Corp and another [2020] EWHC 2530 (Comm)***. Here, the court not only upheld an anti-suit injunction against the defendants (who had commenced proceedings in New Jersey in breach of an exclusive jurisdiction agreement) but also granted a further mandatory injunction requiring the defendants to withdraw the New Jersey proceedings. If, as some commentators suggest, the English courts can proceed to grant anti-suit injunctions in cases governed by the Hague Choice of Court Convention, this will be another point in their favour.

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