Dispute Resolution

May 2015

DISPUTE RESOLUTION BULLETIN

Welcome to the May edition of our Dispute Resolution Bulletin.

In our first article this month, Nathalia Lossovska provides an update following the launch of the Singapore International Commercial Court (SICC), which is now hearing its first claim. She reflects on what the SICC offers parties and how it is dealing with difficulties relating to enforcement.

Next, Yang Zhao looks at the difficult area of exercising contractual discretionary powers and reports on an English Supreme Court decision that offers some assistance, *Braganza v BP Shipping Limited*.

Finally, Jane Hugall considers the recent English Court of Appeal decision in *Marzillier, Dr Meier and Dr Guntner Rechstanwaltgesellschaft mbH v AMT Futures Limited*, which has provided some clarification on establishing jurisdiction in tort claims under the Brussels Regulation.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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hfw The Singapore International Commercial Court: an update

In the July 2014 edition of our Dispute Resolution Bulletin (http://www.hfw.com/Dispute-Resolution-Bulletin-July-2014), Partner Paul Aston reflected on Singapore's announcement of the launch of two new dispute resolution centres, the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC), in pursuance of its ambition to establish itself as the Asian dispute resolution hub.

Following the launch of the SIMC in November 2014, the SICC launched in January 2015. The SICC's published aim is *"to further boost Singapore's value as a leading forum for legal services and international commercial dispute resolution, offering litigants the option of having their disputes adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore and international judges from both civil law and common law traditions"*. It aims to combine elements of both litigation and arbitration.

The first case to be heard by the new SICC is a SGD$1 billion dispute over a joint venture agreement involving Australian, Indonesian and Singapore business interests, relating to the production and sale of upgraded coal.

A key issue for the new court is likely to be the ease of enforcement of its judgments. Whilst it remains to be seen how straightforward this will be, the Singapore government has taken steps to improve the position.

Jurisdiction

The SICC is a division of the Singapore High Court and part of the Supreme Court of Singapore. It will hear cases which are international and commercial in nature and has jurisdiction over the following categories of cases:

- Where parties consent to use the SICC.
- Where there is a contractual clause giving the SICC jurisdiction over issues arising out of the contract.
- When the Chief Justice transfers the cases commenced in the Singapore High Court to the SICC, regardless of the consent of parties.

Where parties to a dispute would like their claim to be heard by the SICC, and do not want to wait for the issuance of a notice for transfer by the High Court, they can apply for a 'pre-action certificate', which serves as proof that the claim is international and commercial in nature and can therefore be heard by the SICC.

The SICC will not decline jurisdiction solely on the ground that there are few or no connecting factors to Singapore.

SICC proceedings

The bench: the SICC uniquely comprises both Singapore High Court judges and international judges. The newly appointed international judges come from both civil and common law jurisdictions, including the US, UK, Australia and France and have a mandate of three years. An indication that the SICC will draw on this blend of expertise is demonstrated in the first case to be heard, in which judges from Singapore, the UK and Hong Kong have been appointed.

Foreign representation: registered foreign counsel are permitted to appear before the SICC, subject to certain limitations.

Joinder of parties: one of the key differences with arbitration is that the SICC can join third parties to the proceedings regardless of consent. A joinder can be ordered whether or not the third party is a party to the SICC agreement. This feature can prove useful in a multiparty dispute.

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Confidentiality: confidentiality is considered a key advantage of arbitration over court proceedings. The SICC has powers to order for (i) a case to be heard in private; (ii) parties not to disclose any information pertaining to the case; and (iii) the file on the case to be sealed.

Disclosure: disclosure is limited to documents on which the parties rely, subject to specific requests from the other parties. The SICC has power to order disclosure from a non-party and a party can apply for disclosure before a case has started.



Appeals: appeals against SICC judgments are heard by the Singapore Court of Appeal, in the same way as appeals from decisions of the Singapore High Court.

Enforcement

This is likely to be a significant issue for international parties considering the SICC to deal with their disputes. Unlike holders of SIAC arbitral awards, holders of SICC judgments will not have the advantage of the widespread ratification of the New York Convention to assist with enforcement in other jurisdictions.

However, on 25 March 2015, Singapore signed the Hague Convention on Choice of Court Agreements (the Convention). Other signatories to the Convention include the EU, USA and Mexico. If, as expected, the Convention comes into force later in 2015[1] and Singapore ratifies it, this will mean that courts in EU countries and the US will be obliged to recognise and enforce SICC judgments.

Conclusion

The SICC seems to offer some of the best advantages of both litigation and arbitration and the first claim to be heard will attract considerable interest. However, its long term success is likely to depend on the ease of enforceability of its judgments internationally.

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1 The EU completed its approval process in December 2014 and will now deposit its instrument of approval. The Convention will enter into force three months from the date when the EU deposits its instrument of approval.

hfw Exercising your contractual discretionary power: how rational should you be?

A contractual decision maker may find themselves in breach of contract if they fail to exercise a contractual discretionary power fairly and in good faith. However, the law has not provided parties, especially their senior managers, with sufficiently clear guidance on how to do so. The recent Supreme Court decision of *Braganza v BP Shipping Limited* (18 March 2015)[1] attempts to provide some guidance.

It is a well-established principle under English law that a party does not have an unfettered right to exercise a seemingly absolute discretionary power conferred on it by a contract. English law imposes implied restrictions, rooted in the general principles of good faith and fair dealing.

It is clear that a contractual discretion has to be exercised rationally, in good faith and consistently with its contractual purpose, avoiding arbitrariness, capriciousness and perversity. However, case law has not set out in precise terms what it means to say that a contractual discretion should be exercised rationally.

In this case, the Supreme Court sought to clarify the extent to which principles of judicial review of administrative action should be applied in the context of contractual decision making.

The factual background

Mr Braganza disappeared while working as the Chief Engineer on an oil tanker managed by BP. The BP internal investigators assessed six factors and formed the opinion that the most likely explanation for his disappearance was that he had committed suicide. Based on their report, the relevant manager decided that his widow was therefore not entitled to death benefits under his contract of employment, which provided that compensation would not be payable if *"in the opinion of the Company or its insurers, the death… resulted from…the Officer's wilful act, default or misconduct"*.

The decision of the Supreme Court

The question for the Supreme Court was the proper test to apply when deciding whether the manager's decision was reasonable.

In terms of the requirement of reasonableness in the contractual context, the Court recognised the distinction between:

1. Reasonableness in the sense of taking reasonable care or fixing a reasonable time/price – which is subject to entirely objective criteria and where the decision maker becomes the court itself.

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2. That in the context of the contractual decision making function - where the decision remains that of the decision maker.

The Court considered that there is an obvious parallel between a decision making function of a contractual party and that of a public authority, in that in neither case is the court the primary decision maker. The standard of review adopted by the courts to the decisions of a contracting party should not be more demanding than the standard of review adopted in the judicial review of administrative action. The question is whether it should be any less demanding.

In judicial review, the decision making process is subject to the so called *Wednesbury*[2] rationality test which has two limbs:

1. Whether the decision maker has taken into account matters which they ought to take into account.

2. If so, whether they have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. This second limb may require that the decision maker should not exercise the discretion arbitrarily, capriciously, perversely or irrationally.

The Court recognised an understandable reluctance to apply the full rigour of the principles of judicial review of administrative action by a public authority in a contractual context and concluded that the precise extent to which the *Wednesbury* test applies to a contractual decision making process will depend on the contractual context concerned.

1 [2015] UKSC 17
2 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223

Although the standards required will depend on the contractual context, it is arguable that the decision making process of most properly advised management teams of large corporations, such as international insurers, would be expected to demonstrate high standards.

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In this case, the Court held that the decision making manager should have considered whether the evidence was sufficiently cogent to overcome the inherent improbability that an employee has committed suicide. On the facts, the manager should not simply have accepted the view of an internal inquiry conducted for a different purpose. It was unreasonable in the *Wednesbury* sense to reach that decision without taking relevant matters into account.

Conclusion

Standard wordings in many insurance policies, particularly in the field of P&I mutual insurance, often confer discretionary powers on the insurers to determine the scope of their policy cover and issues in relation to claims. According to this decision, the exercise of such a discretionary power would be subject to the *Wednesbury* rationality test.

Although the standards required will depend on the contractual context, it is arguable that the decision making process of most properly advised management teams of large corporations, such as international insurers, would be expected to demonstrate high standards.

It is important to note that under the first limb of the *Wednesbury* test, it is imperative for the contractual decision maker to take into account matters that are relevant to the decision making process. Otherwise, they could still fail the rationality test, even if they have acted in good faith.

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The Brussels Regulation: English Court of Appeal decision on jurisdiction in tort claims

The Brussels Regulation (44/2001/EC) (the Regulation) determines jurisdiction in civil and commercial matters where the defendant is domiciled in an EU member state. The basic principle is that a person domiciled in a member state shall be sued in that member state. However, there are certain exceptions in which the courts of another member state can take jurisdiction.

One of these exceptions in tortious claims is that a person may also be sued *"in the courts for the place where the harmful event occurred or may occur"* (Article 5(3))[1].

That may sound straightforward, but a recent decision of the English Court of Appeal in *Marzillier, Dr Meier and Dr Guntner Rechstanwaltgesellschaft mbH v AMT Futures Limited* (26 February 2015) both demonstrates that identifying where the harmful event occurred may not be clear cut and offers guidance in how to approach the question.

The facts

The appellant is German law firm Marzillier, Dr Meier and Dr Guntner Rechtsanwaltgesellschaft mbH (MMGR) and the respondent, AMT Futures Limited (AMTF), is a UK company which acts as an execution-only broker for the purchase and sale of derivatives.

MMGR acted for 70 of AMTF's former clients (the former clients) in proceedings brought against AMTF in Germany, despite the contracts between AMTF and its former clients providing for English law and the exclusive jurisdiction of the English courts to determine any disputes between them.

The claim

AMTF issued a claim in tort against MMGR in the English High Court, alleging that MMGR had induced the former clients to breach the terms of the exclusive jurisdiction and choice of law clauses causing AMTF losses, including legal costs and settlement payments, as a result.

The claim relied upon Article 5(3) of the Regulation as the jurisdictional basis for bringing the claim in England.

The English High Court found that it did have jurisdiction to hear the claim on the basis that the harmful event (the breach of the obligation to bring proceedings in the English courts) occurred in England. MMGR appealed.

The issue for appeal: where *"the harmful event"* occurred

The English Court of Appeal had to consider whether *"the harmful event"* under Article 5(3) occurred in England or Germany.

AMTF argued that the harm which it suffered was the loss of the benefit that any litigation would be in England; the harmful event therefore took place in England and the fact that AMTF was sued in Germany was a consequence of the harmful event rather than the harmful event itself.

MMGR argued that the fact that litigation was not begun in England had no negative consequences for AMTF; the real complaint was that MMGR induced the former clients to commence proceedings in Germany, as a result of which AMTF suffered loss predominantly in Germany.

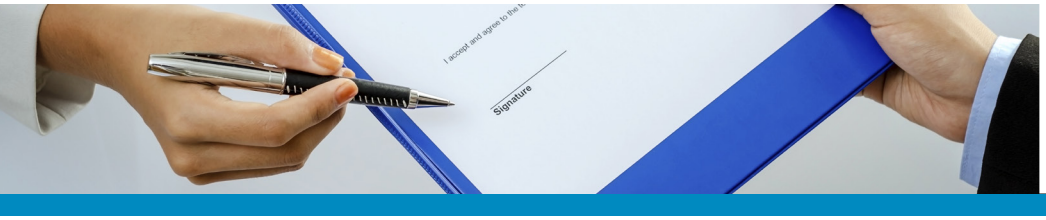
The decision of the English Court of Appeal

The Court of Appeal allowed MMGR's appeal, on the basis that the failure to issue proceedings in England had not caused AMTF any harm. It was in Germany that the harm (i.e. the costs and expenses caused by the German litigation) was suffered and it was therefore the German courts which had jurisdiction to hear the claim.

In its judgment, the Court of Appeal reviewed the European Court of Justice's leading decisions on the meaning of the expression *"where the harmful event occurred or may occur"* and summarised the following key principles:

- Where harm might be regarded as happening in two different states, the search is for the state in which "the harm" occurred i.e. the element of damage which is closest in causal proximity to the harmful event.
- The Regulation is to be given a community, not a national, construction.
- The European Court of Justice has set itself against any interpretation of the Regulation which would mean that a claimant would, in practice, always be able to sue in tort in the courts of its own domicile.

1 The Regulation has recently been recast as Regulation (EU) 1215/2012 (the Recast Regulation), which applies to proceedings issued on or after 10 January 2015. The Recast Regulation contains an identical provision regarding jurisdiction in tort claims at Article 7(2), so this decision will remain relevant.



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- Article 5 of the Regulation was designed to cover cases where there is a particularly close connecting factor between the dispute and courts other than those of the member state where the defendant is domiciled, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of the proceedings. It does not involve any form of *forum conveniens* test.
- One of the aims of the Brussels Convention (and the Regulation) is that there should be foreseeability and certainty as to the State where jurisdiction may lie.

Conclusion

It is perhaps surprising that in a claim in tort for inducement of breach of contract, the courts of the member state where the inducement and breach occurred should have jurisdiction, rather than the courts which the contract breaker agreed should have jurisdiction in respect of claims under the contract. This was acknowledged by the Court of Appeal, which expressly stated that it had reached its decision without any great enthusiasm.

However, in respect of a claim in tort against a third party, the choice of law and exclusive jurisdiction clauses in the contracts between AMTF and its former clients were not a determining factor in the allocation of jurisdiction under the Regulation.

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hfw Conferences and events

Sanctions Seminar
HFW Paris
11 June 2015
Presenting: Daniel Martin and Vincent Benezech

National Infrastructure Summit
Sydney
11-12 June 2015
Attending: Amanda Davidson and Chris Eves

IBC - Construction Law: Contracts & Disputes Management
London
26 June 2015
Presenting: Michael Sergeant

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