Dispute Resolution

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DISPUTE RESOLUTION BULLETIN

Should settlement agreements be final? - the 'Alexandros T'

If a claimant comprehensively settles English proceedings, should he be allowed to defeat that settlement by starting proceedings elsewhere in the EU and invoking the 2001 Brussels Regulation? This was essentially the question before the Supreme Court in the *'Alexandros T'* (6 November 2013).

The case arose from the tragic loss 300 miles off Port Elizabeth of the capesize bulker "Alexandros T" and three quarters of her crew in May 2006. The owners, Starlight Shipping, claimed against their London insurers. They rejected liability, prompting Starlight to commence proceedings in the English High Court in 2006. The proceedings were bitterly contested, but were eventually stayed following the conclusion of settlement agreements under which *"any and all claims"* under the policies were fully and finally settled. The agreements were governed by English law and subject to exclusive English High Court jurisdiction.

Then, in 2011, Starlight instituted proceedings against the insurers in Greece, claiming some US$150 million in losses. This sent a shock wave through the global insurance market, since it was clear that Starlight were bent on undoing the settlement agreements.

In the Greek proceedings, Starlight relied on allegations of skullduggery by the insurers, asserting that they had fabricated evidence and bribed witnesses. Starlight were particularly aggrieved at what they saw as the insurers' deliberate failure to pay promptly under the policies. Some of their claims in Greece were based on this alleged failure (which, importantly, is not actionable under English law).

The insurers responded by reviving the 2006 English proceedings and issuing further proceedings, seeking to hold Starlight to the settlement agreements. They successfully obtained judgment in the English High Court.

Starlight counterattacked. In the Court of Appeal, they referred to Article 27 of the 2001 Brussels Regulation which provides that only the court *"first seised"* (i.e. the court where proceedings were started first) had jurisdiction. They argued that the English proceedings were *"the same cause of action and between the same parties"* as the Greek proceedings and since the Greek court was first seised, the English court was bound to stay its proceedings. The Court of Appeal issued a judgment in Starlight's favour.

The implications were seismic. If the insurers were denied recourse to the English court, their only option would be to request the Greek court to enforce the English law settlement agreements, to adjudicate the insurers' claims for Starlight's breaches of both the release from *"any and all claims"* and the jurisdiction clause in the settlement agreements, and claim for an indemnity against Starlight.

The insurers appealed to the Supreme Court. Starlight now pursued a further argument, that the Greek and English proceedings were *"related actions"* under Article 28 of the Regulation. If they were correct, the court which was not first seised would have a discretion to stay its proceedings.

The Supreme Court reversed the Court of Appeal judgment. It held that the insurers' claims for: (i) damages for breach of the jurisdiction agreement; (ii) damages for breach of the release in the settlement agreements, and (iii) an indemnity against the consequences of Starlight bringing foreign proceedings did not have the same cause or object, and were not *"the same cause of action"*, as the claims brought in the Greek courts. As a result, the English court was not obliged to stay any of those claims under Article 27.

This judgment can be seen as a victory for common sense: what was at stake was no less than the authority of the English courts to police settlement agreements expressly subject to English law and exclusive English jurisdiction.

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However, if the insurers had not abandoned their separate claim for a declaration that they were not liable in the Greek proceedings, the Supreme Court would have been obliged to order a mandatory stay of that claim under Article 27, since it was a mirror image of, and the same cause of action as, the claims in Greece.

The insurers' claim for a declaration that the claims in the Greek court fell within the release (and had therefore been settled) was also problematic. By a majority, the Supreme Court decided that a stay would not have to be granted, but since two judges disagreed, this issue was referred to the European Court. The insurers' argument that Starlight were too late to invoke reliance on Article 27 in the Court of Appeal when they had not done so at first instance was also referred to the European Court.

Starlight's argument based on Article 28 was rejected: some parts of the 2006 proceedings had been stayed and some parts had not, but in both instances, the English court was first seised, so Article 28 did not apply. Even if the English court had not been first seised, the Supreme Court was not prepared to exercise its discretion to impose a stay in circumstances where the parties had expressly agreed to refer disputes under the settlement agreements to the exclusive jurisdiction of the English court.

In conclusion, whilst on the face of it, this judgment could be construed as a 'policy decision', the Supreme Court was assiduous in justifying its decisions by reference to highly technical arguments under European law. In doing so, it walked a legal tightrope, drawing a fine distinction between the damages and indemnity claims (which fell outside Article 27) and the ostensibly all-but-identical claims for declarations (which were caught by Article 27, or at least required a determination from the European court).

Above all, this can be seen as a victory for common sense: what was at stake was no less than the authority of the English courts to police settlement agreements expressly subject to English law and exclusive English jurisdiction. If Starlight's arguments had succeeded, the insurers would have

been forced to ask Starlight's home court to enforce those agreements, which Starlight had breached by commencing the Greek proceedings.

The judgment also reinforces the wider principle that settlements ought to bring finality to proceedings. This is plainly in the interests of legal and business certainty and therefore ought to be welcomed by the commercial community at large.

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Of jurisdiction clauses and standard terms: the importance of clarity

Any person who has recoiled from restaurant staff presenting a meal with a cheery but solitary "Enjoy!" will find much of interest in a recent decision of the English Commercial Court. *BNP Paribas SA v Anchorage Capital Europe LLP* (11 October 2013) considered whether a verb (in this case "submit" rather than "enjoy") was used in a transitive or intransitive sense. Whilst this may seem like a trivial issue of grammatical accuracy, the distinction highlighted the importance of being clear in drafting jurisdiction clauses. The case is also a reminder of the need for parties to agree which standard terms apply to their contractual relationship.

The parties were a French bank (BNPP), acting from its desk in London, entering into trades with the London and New York offices of an investment manager (Anchorage) who in turn acted as agent for undisclosed principals in Luxembourg. There was plenty of opportunity for confusion in the absence of clearly agreed terms of business between these parties.

When a dispute arose, the two sides rapidly adopted opposing positions as to whether the courts of either New York or London were appropriate to hear the matter. These positions were no doubt based on each party's views on the likelihood of a satisfactory outcome in the respective courts.

Lack of clarity over the applicable terms of the contract meant that the first issue for consideration was whether the English court should have jurisdiction over the dispute. Much of the judgment was concerned with questions of whether BNPP's written terms and conditions were adequately transmitted to the other parties such that they had both seen and agreed to them.

It was held that BNPP's written terms and conditions did apply, although only by virtue of these terms having been acknowledged by an in-house lawyer of the New York investment manager - even though the acknowledgement was provided over a year before the relevant dispute, in the context of another trade entirely. This tenuous link was found to be sufficient in the absence of any other more likely terms of business.

This may seem a surprising outcome: trading desks are well accustomed to using systems such as Bloomberg Instant Message and to recording all telephone conversations, yet these safeguards did not prevent a trade made on an assumption that terms and conditions had already been agreed. It highlights the need to ensure that in trading situations, the applicable terms are clearly and frequently referred to.

Once the applicable terms were established, the way in which they were drafted meant that it remained unclear whether the English courts were indeed appropriate to hear the dispute. The terms stated:

"This Agreement shall be governed by, and construed in accordance with, English Law and you irrevocably submit to the jurisdiction of the English courts in respect of any matter arising out of this Agreement, or our services to or Transactions with you under this Agreement." [our emphasis]

BNPP applied for an "anti-suit" injunction to stop Anchorage from bringing proceedings in the New York courts on the basis that such proceedings would be in breach of this jurisdiction clause.

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They claimed that this clause was *exclusive* because it should be construed *transitively*: Anchorage was agreeing that it would submit 'any claims' to the English courts.

Anchorage claimed that the word 'submit' should be read *intransitively*: rather than submitting some*thing*, they were just submitting themselves. This, they contended, meant that they were only under a duty to *acquiesce* to the English courts, and as such there was nothing prohibiting the courts of New York from taking control of the matter.

The Court acknowledged that the clause was less than clear, in particular noting that as it only applied to Anchorage (*"you irrevocably submit"*) it could never be regarded as completely exclusive since there was no equivalent promise by BNPP.

The Court solved the dilemma by looking at the intention behind the clause. Once the jurisdiction of the English court was decided upon, it would make no sense then to interpret the clause as permitting Anchorage to bring a claim in New York in respect of essentially the same matters as considered here. To do so would have created a "procedural nightmare." The anti-suit injunction was granted to BNPP.

There are some helpful lessons to draw from this decision: parties should take care with their choice of words and try to keep them simple. Avoid words with two different meanings; try to avoid passive forms of sentences. Bear in mind the risks associated with making jurisdiction clauses applicable only to one party. Most importantly, make sure that all parties are aware of the applicable terms.

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Conferences and Events

Litigation in West Africa

HFW London
5 February 2014
Presenting: Xavier McDonald and Stanislas Lequette

APRAG Melbourne 2014

Melbourne
28–29 March 2014
Presenting: Nick Longley
Attending: Damian Honey and Chris Lockwood

For more information about either of these events, please contact events@hfw.com

Corrigendum

Please note there is a typographical error in the article on Part 36 in the October 2013 edition of Dispute Resolution. The first sentence of the section headed "Example" should read "A claimant makes a Part 36 offer of £350,000 inclusive of **interest** which the defendant does not accept."

HFW extends Season's Greetings to all of our readers with our best wishes for 2014.

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