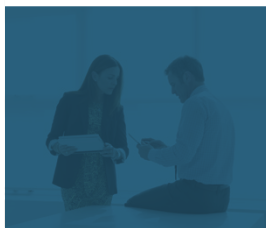


Dispute
Resolution
March 2015

DISPUTE RESOLUTION BULLETIN



Welcome to the March edition of our Dispute Resolution Bulletin.

In our first article this month, Associate Eleanor Midwinter provides an overview of the 'one stop adjudication presumption' by examining the recent English court decisions in *AmTrust Europe Ltd v Trust Risk Group SpA* (10 December 2014) and *Monde Petroleum SA v Westernzagros Limited* (22 January 2015).

Next, Partner Christopher Lockwood reviews the decision in *Shagang South Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics*, looking in particular at the importance of expressing a choice of law when drafting arbitration agreements.

Finally, Associates Dragan Zeljic and William Hold look at the law and practice of freezing Swiss bank accounts.

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 Competing jurisdiction clauses and the 'one stop adjudication' presumption

When faced with competing jurisdiction clauses in agreements between the same parties, the English Court operates a 'one stop adjudication' presumption, assuming that as rational business people, parties are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal'. This is to prevent inconsistent findings and increased costs, inconvenience and delay.

Two recent cases required the English Commercial Court to address circumstances where agreements between the same parties contained differing jurisdiction provisions and consider the application of the 'one stop adjudication' presumption.

Related agreements

In *AmTrust Europe Ltd v Trust Risk Group SpA* (10 December 2014), the parties had entered into a terms of business agreement (TOBA) as a schedule to a framework agreement. Both agreements concerned insurance broking arrangements in Italy. The framework agreement was subject to Italian arbitration and the TOBA was subject to the jurisdiction of the English courts.

Disputes arose between the parties and arbitration was commenced in Milan. The claimant alleged that funds had been misappropriated by the defendant and sought an injunction from the English Court pursuant to



After very detailed consideration of the contractual provisions, the Court acknowledged the weight of the 'one-stop adjudication' presumption but ultimately concluded that both dispute resolution clauses operated and granted the injunction.

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the dispute resolution clause in the TOBA. As the claimant was seeking an injunction, it was required to show a good arguable case that the Court had jurisdiction. The defendant challenged the Court's jurisdiction.

The claimant succeeded. After very detailed consideration of the contractual provisions, the Court acknowledged the weight of the 'one-stop adjudication' presumption but ultimately concluded that both dispute resolution clauses operated and granted the injunction. This was primarily because the two agreements concerned different aspects of the parties' business relationship. In particular, the judge was swayed by the claimant's argument that the framework agreement made references sometimes to the "agreement" in the singular as opposed to the "agreements" in plural, which suggested that not all provisions in it were intended to apply to both. It was also significant that the agreements had been entered into at different times.

These principles should be kept in mind when annexing contracts to framework or master agreements.

Settlement agreements

The decision in *Monde Petroleum SA v Westernzagros Limited* (22 January 2015) confirms that where a settlement is agreed that relates to a previous contract between the same parties, the jurisdiction clause in the settlement agreement will generally supersede any previous clause entered into between the parties.

The parties had entered into a consultancy agreement (CSA) under which Monde was to provide services to assist Westernzagros in the exploration and production of oil in Iraq. The CSA contained an arbitration clause. A dispute arose and was settled by a settlement agreement, providing for the termination of the CSA upon payment of certain sums to Monde. The settlement agreement was subject to the exclusive jurisdiction of the English Court.

1 See: *Fiona Trust & Holding Corporation & others v Privalov & others* [2007] EWCA Civ 20, in addition to the cases referred to in this article.



Monde subsequently alleged that it had entered into the settlement agreement following misrepresentation and duress by Westernzagros and commenced both court and arbitration proceedings. Westernzagros counterclaimed in the arbitration proceedings. The tribunal dismissed the counterclaim because the settlement agreement had significantly limited the scope of its jurisdiction to hear disputes relating to the CSA. Westernzagros appealed to the Court.

The Court noted that the presumption in favour of one-stop adjudication can be very strong where there is an agreement entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes under an earlier agreement. Where the settlement/termination agreement contains a dispute resolution provision different from, and incompatible with, the dispute resolution clause in the earlier agreement, the parties are likely to have intended the settlement/termination agreement clause to supersede the clause in the earlier agreement, for a number of reasons:

- The settlement agreement came second in time and was agreed in light of the circumstances and disputes which gave rise to the settlement.
- The settlement agreement contains the only clause capable of applying to disputes arising out of it and governing issues concerning its validity and effect.
- The risk of inconsistent findings.

It concluded that where a terminating agreement contains a new dispute resolution provision which differs from the underlying agreement, the dispute resolution clause in the terminating agreement will supersede the earlier clause and apply to all disputes arising out of both agreements, subject to the actual language of the clause and other surrounding circumstances.

Conclusion

When faced with conflicting dispute resolution clauses, the English Court will begin with the ‘one stop adjudication’ presumption. However, the following principles should be borne in mind:

1. Where related agreements address different aspects of the parties’ relationship, conflicting dispute resolution clauses can both be upheld.
2. If a later agreement is a settlement agreement relating to a former agreement, the dispute resolution provision in the settlement agreement is likely to prevail.
3. Care should be taken to define the scope of dispute resolution provisions and other provisions having an effect on the interpretation of previous agreements, such as ‘entire agreement’ clauses.

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hfw Arbitration agreements and determining the choice of law: a recent English case

The recent decision of the English Commercial Court in *Shagang South Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* (5 February 2015) is a timely reminder to parties to arbitration agreements to take care to express a choice as to the law that is to apply to their arbitration.

The facts

Daewoo agreed to charter a ship from Shagang, based on a fixture note which provided: “*Arbitration to be held in Hongkong. English law to be applied*” and “*Other terms/conditions and Charter Party details base [sic] on Gencon 1994 Charter Party.*”

When a claim arose, Daewoo commenced arbitration proceedings against Shagang in London and gave notice of the appointment of a sole arbitrator. Shagang failed to respond. The arbitrator wrote to Shagang giving notice that he had accepted the appointment as sole arbitrator. Shagang then queried both his appointment and his jurisdiction, suggesting that the seat of the arbitration was Hong Kong and the law applicable to the arbitration was not English law but Hong Kong law, so that the arbitration was subject to the Hong Kong Arbitration Ordinance (HK Ordinance).

The dispute then centred on the proper construction of the clause in the fixture note and the relationship between that clause and the printed law and arbitration clause in the standard form Gencon charterparty, which provided for arbitration in London in accordance with English law.



The arbitrator issued an award, determining that the arbitration was subject to the English Arbitration Act 1996 (English Act) and that the standard form clause applied. He therefore concluded that he had been properly appointed as sole arbitrator.

Shagang applied to the English Commercial Court under Section 67 of the English Act to set aside the award and for a declaration that the Tribunal was not properly constituted. They argued that the clause in the Fixture Note provided for arbitration in Hong Kong and therefore the applicable procedural law was the HK Ordinance.

Daewoo argued that when the clause in the fixture note was read together with the standard form clause, it provided for Hong Kong to be the geographical location for the arbitration but for the arbitration to be subject to the English Act and English procedural law.

The issues

The essential issues in the case were:

- Whether arbitration under the charterparty was subject to English or Hong Kong procedural law.
- If the arbitration was subject to English procedural law, whether the appointment of the arbitrator as sole arbitrator was valid.

The Court first noted that it was important to bear in mind a number of separate concepts:

1. The venue/place of arbitration (the geographical location where the arbitration is to be held).
2. The “seat” of the arbitration (the country intended to provide the procedural law).



The Court emphasised that clear words were necessary for the parties to choose a seat of arbitration which differs from the place of arbitration.

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3. The law governing the arbitration agreement.
4. The law governing the substantive contract (in this case the charterparty).

Issue one

The Court noted that the arbitration clause in the fixture note had two limbs: (1) where the arbitration was to be held; and (2) what law was to be applied. The most natural meaning of the two limbs was that it was intended to address where and how disputes were to be determined (by arbitration in Hong Kong) and the law governing the determination of the disputes (English law). Agreeing that disputes were to be held in Hong Kong suggested that all aspects of the arbitration process were to take place there, including

any supervisory court proceedings that might be required. It was far less usual to make an express choice of procedural law, which is often left to be inferred from the chosen place of arbitration. When an express choice is made, this is normally by reference to the governing statute.

The Court emphasised that clear words were necessary for the parties to choose a seat of arbitration which differs from the place of arbitration.

The authorities did not support Daewoo’s case that there was clear wording or other contrary indication sufficient on the facts of the case to displace the conclusion that the agreement that the arbitration was to be “held in Hong Kong” carried with it an implied choice of Hong Kong as the seat of the arbitration and Hong Kong law as the procedural law. The words “English law to be applied” in the Fixture Note were not sufficiently clear to have that effect since they most naturally referred to the substantive rather than procedural law applicable.

The Court concluded that the parties intended to do something which did not fit with the standard form charterparty scheme.

Issue two

As Daewoo had appointed the sole arbitrator under the standard form scheme, which was inapplicable, the appointment was invalid. Further, even if English law did apply, the provisions of the English Act had not been correctly followed and so the appointment was invalid in any event.



Conclusion

Where an arbitration agreement provides for arbitration “to be held” in a particular geographical location, that location will be deemed to be the seat of the arbitration unless there are clear words or something else that indicates that was not the intention of the parties.

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hfw How to freeze a Swiss bank account

In recent years, Switzerland has developed into a significant commodity hub, thanks to a high living standard, a strong financial sector, low taxes and light government regulation. Revenues from this sector rose fourteen-fold between 2001 and 2011.

Today, six of Switzerland's ten highest-grossing companies are commodity companies and more than 20% of the global commodities trade is handled in Switzerland.

Switzerland is also renowned as a financial centre. There are approximately 283 domestic and foreign banks in Switzerland with an estimated CHF 6,136 billion under management. More than half of these assets originate from abroad (equating to 26% of the global asset management business).

This makes Switzerland a global leader in both cross-border asset management and trade finance.

It is perhaps not surprising then that the question regularly arises whether and under what conditions a creditor can arrest a debtor's Swiss bank account. This article will set out the current legal framework and recent developments.

Arrest of Swiss bank accounts

Under the Swiss Debt Enforcement and Bankruptcy Act, (the “Act”)¹, a creditor of an unsecured debt may apply for arrest of a debtor's assets located in Switzerland in the following circumstances:

There are approximately 283 domestic and foreign banks in Switzerland with an estimated CHF 6,136 billion under management. More than half of these assets originate from abroad (equating to 26% of the global asset management business).

- The debtor has no permanent residence.
- The debtor hides his assets with the intent to evade the fulfilment of his liabilities, or is preparing his flight.
- The debtor is in transit or in Switzerland for fairs and markets and the claims are to be fulfilled immediately by their nature.
- The debtor has no domicile in Switzerland and no other grounds for arrest apply, but the debt has a sufficient link to Switzerland or is based on an acknowledgment of debt within the meaning of the Act.
- The creditor is in possession of a temporary or definite certificate of loss against the debtor.
- The creditor is in possession of a final judgment or award against the debtor.

¹ <http://www.admin.ch/opc/de/classified-compilation/18890002/index.html>.



The arrest will be granted if the applicant can establish all of the following on the balance of probabilities:

1. One of the six sets of facts set out above exists.
2. The debt is payable.
3. There are assets in the jurisdiction. (There is no need to show a risk of dissipation of assets.)

In practice, where there is no executory judgment or award, an arrest is usually sought when the debtor has no domicile in Switzerland. For the application to succeed in those circumstances, it must be shown that the debt has a sufficient link to Switzerland. Whilst the term has not been defined in the Act, the courts have found a “sufficient link” in the following circumstances:

1. The creditor is based in Switzerland.
2. There is a contract in place containing a Swiss law clause.
3. The seat of arbitration is in Switzerland.
4. The place of performance is in Switzerland.
5. There was a tortious act in Switzerland.
6. The place of signature of the underlying contract is in Switzerland.
7. There is a business activity in Switzerland.
8. A Swiss bank is providing guarantees or acting as an escrow agent.
9. Funds have been transferred to Switzerland in order to prevent seizure through creditors from abroad.

In practice, where there is no executory judgment or award, an arrest is usually sought when the debtor has no domicile in Switzerland. For the application to succeed in those circumstances, it must be shown that the debt has a sufficient link to Switzerland.

Recent case law has found a “sufficient link” to include circumstances where funds are transferred to Switzerland which are the product of an unjust enrichment or fraud.

The mere existence of a banking relationship is not sufficient on its own to establish a sufficient link to Switzerland, even when payments under the contract were made from a Swiss bank.

An application can also be made on the basis of an “acknowledgement of debt” as defined in the Act. For the application to succeed, the debtor’s unconditional intent to pay a determined amount must be evidenced in written form. The intention can be shown from several documents read together. The debtor must have physically signed at least one of the documents.

With respect to banks, the courts are very wary of fishing expeditions, so they will generally demand some form of tangible evidence of the location of the assets, such as an invoice or an agreement with the parties’ payment details.

Perfection and aftermath

The arrest application is made *ex parte* and decided on the papers. Once the arrest has been granted, an *inter partes* hearing is held, during which the debtor or any other affected party can contest the arrest.

The court may require the applicant to provide counter security against a subsequent claim for wrongful arrest. The court has a very wide discretion but will generally ask for up to 20% of the amount to be arrested.

It is worth noting that due to their duties of confidentiality, banks will generally not disclose how much has been arrested until the arrest has been confirmed by the courts and all appeals have been disposed of.

Finally, as the arrest is designed to provide security for a claim, the applicant must perfect the arrest by starting proceedings within 10 days of receipt of the minutes of arrest.

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Conferences and events

Chartered Institute of Arbitrators Hong Kong Centenary Conference

Hong Kong

19–21 March 2015

Presenting: Nick Longley

Chartered Institute of Arbitrators

Sydney

26 April 2015

Attending: Amanda Davidson

Marine Terminal Finance & Investment Summit 2015

New York

5–6 May 2015

Presenting: Alistair Mackie

IBA – Maritime and Transport Law Conference

Geneva

7–8 May 2015

Presenting: Andrew Chamberlain

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