Dispute Resolution

**September 2016**

# DISPUTE RESOLUTION BULLETIN





## Welcome to the September edition of our Dispute Resolution Bulletin

In the first article in this edition Professional Support Lawyer, Nicola Gare and Trainee Solicitor, Adam Swierczewski look at how Brexit will impact upon disputes.

Our second article by Paris Associates, Soraya Salem and Perrine Bertrand reviews the new French contract law reform.

Next Partner, Jean Koh examines exclusion clauses in 'knock for knock' provisions, in our third item.

In our fourth article, Partner, Rick Brown, and Associate, Victoria Cowan discuss post judgment security for costs and the issues that arose in their recent case, *the Republic of Djibouti v Boreh*.

Lastly, Partners Noel Campbell and Rick Brown and their team discuss the trust issues arising in their case *Gorbunova v The Estate of Boris Berezovsky (deceased) and others*.

Should you require any further information or assistance with 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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## Brexit: disputes considerations following the vote

**On 23 June 2016, the UK voters indicated their wish to leave the EU. Although the process of leaving will not legally start until the UK formally serves its notice to leave under Article 50 of the Lisbon Treaty, the uncertainty caused by the result of the public referendum has already had far-reaching political and economic consequences. Following the service of its intention to leave in accordance with the Article 50, the UK will have two years to agree the terms of its exit. The UK will not only have to establish a trade relationship with the EU but also look into arrangements with other non-EU countries with whom the UK has previously traded by virtue of its EU membership. The resultant economic volatility and legal uncertainty is likely to continue until the UK leaves the EU and a negotiated co-operative framework is put in place.**

In this article we consider the potential impact that the UK's exit may have on disputes and, given the almost inevitable exit scenario, what contractual issues may be of immediate consideration for parties with current or future litigation exposure in the UK and the EU.

### Contractual profitability

Following the leave vote, the British Pound collapsed to a 31 year low against the US dollar. In the context of global trade, the scale of the fluctuations could significantly affect contractual profitability. Unhedged traders with exposure to the British Pound may seek to renegotiate the contracts or look for reasons to terminate. The risk of volatile markets will be magnified for commodity traders as the already oversupplied markets face continuing political instability.

Many companies will have entered into contracts on the assumption that the goods or services would be provided within a free market. Depending on the trade agreement entered into between the UK and the EU a company's ability to perform its contractual obligations may be significantly affected.

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Companies' profit margins may also be negatively affected by trade tariffs. Under EU regulations, goods wholly obtained or produced within the EU, when sold to a country with preferential arrangement in place, are subject to lower or nil rates of duty. The UK's decision to leave the EU may increase the underlying duty that will be added to the cost base. In addition, companies will need to consider the tax implications. For instance, currently most UK businesses do not need to be VAT registered in other member states and do not need to pay withholding taxes. This may be subject to change depending on terms of the deal agreed between the UK and the remainder of the EU.

### Scope

Many companies will have entered into contracts on the assumption that the goods or services would be provided within a free market. Depending on the trade agreement entered into between the UK and the EU a company's ability to perform its contractual obligations may be significantly affected.

Currently, certain authorised companies such as insurers and banks are able to provide their services across the EU from the UK without the need to establish any local presence. Unless the UK is able to negotiate a substantially similar framework, these so-called passporting rights will be no longer available to UK-based institutions. As a result, there could be a period of time when UK companies are unable to operate in the EU without establishing local subsidiaries and obtaining relevant licences.

### Contractual provisions

There are a number of contractual provisions and legal concepts upon which parties seeking to terminate may wish to rely.

Force majeure and Material Adverse Change clauses (MAC clauses) allow parties to avoid liability for non-performance when an extraordinary



event beyond their control prevents them from performing their contractual obligations. There is no common law definition of force majeure so it is up to parties to agree contractually what events are to be considered a force majeure event for the purposes of the contract. The concept is similar to the common law doctrine of frustration, albeit the purpose of the force majeure clause is to avoid the higher threshold for establishing "impossibility" under the common law.

MAC clauses are particularly common in the context of acquisitions and lending transactions where they are designed to protect one party against any deterioration in the other party's condition or circumstances. The breadth of the clause will vary from contract to contract.

Contracts may also include express representations as to territory, creditworthiness, and compliance with local laws. Dependent on how important these clauses are to the purpose of the contract they could be regarded as sufficiently serious to allow the non-defaulting party to repudiate the contract.

In the absence of special contractual provisions dealing with Brexit, we do not consider it likely that most of the standard wordings could be triggered by the sole act of the UK leaving the EU. The topic of referendum had been first announced around 2013 and as such it would be difficult to argue that it was a sudden or unforeseeable event. Nonetheless, some of its potential consequences discussed above may lead to circumstances falling within the scope of the abovementioned provisions.

This will be of particular reference to contracts dependent on free market access discussed above. Certain industry standard forms such as documentation prepared by the Loan Market Association include representations as to the contracting parties' ability to conduct business and their creditworthiness. If the UK-based institutions cease to benefit from the passporting rights, there will likely be arguments that the contracts have been breached or that early termination rights have crystallised for the benefit of the non-defaulting party. Alternatively, a party may wish to argue that the contract has been frustrated as a matter of law based on the counterparty being unable to perform.

In recent days we have also seen the UK's credit rating being downgraded by Moody's. If the same were to slowly filter through to the corporate sector, companies could find themselves in breach of financial covenants triggering events of default or raising arguments under force majeure or MAC clauses. We note that similar arguments have been raised before in the aftermath of the 2008 financial crisis. Please see our previous article on this[1].

We have previously advised the specific issues that will impact on disputes; these are summarised below and covered in greater detail in our publication Brexit Considerations: Dispute Resolution[2]. We anticipate disputes with an EU counterparty being affected as follows:

- Choice of governing law is unlikely to be affected.
- Choice of jurisdiction is likely to be affected as Recast Brussels will cease to apply, unless the UK/EU agree otherwise, or adopt other conventions such as the Lugano Convention or the Hague Convention on Choice of Court Agreements 2005.
- Service of litigation proceedings is likely to be affected as the EU Service Regulations will cease to apply. Inserting an agent for service of process clause (namely, a party nominated to accept service of proceedings in this jurisdiction) will circumnavigate the issues, otherwise it is likely that we will revert to the service provisions under the 1965 Hague Convention which will be time-consuming and costly.
- Enforcement of UK court judgments will be affected. There will be a major impact here – if parties facing an EU counter-party are close to judgment, or have obtained judgment already, they would be well advised to enforce under the current Recast Brussels regime whilst still in place. Unless similar regimes are adopted, UK and EU courts will look at the substantive nature of the claim leading to the judgment - there will be a mini-trial, in the same way as between the US/UK.

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1 http://www.hfw.com/Market-volatility-driving-oil-prices-November-2014

2 http://www.hfw.com/downloads/HFW-Brexit-Considerations-Dispute-Resolution-April-2016.pdf

# French contract law Reform: what's new?

**The French Government has, by Ordinance n° 2016-131 of 10 February 2016, amended the French Civil Code regarding contract law that had previously remained unchanged since 1804 (the Reform). This historical Reform is intended to enhance the attractiveness of France in a highly competitive international landscape especially by comparison with the Common Law system.**

French contract law has not, of course, remained frozen for over 200 years and the French Supreme Court (Cour de cassation) has ensured the modernisation of the Civil Code by adopting innovative solutions.

The goal of the Reform is not fundamentally to modify French contract law, but rather to codify the changes introduced by case law. Some new provisions are nevertheless slightly different from the legislation in existence and may entail some important changes, which are detailed below.

Provisions relating to contractual liability have not been amended. The existing provisions are however entirely renumbered.

## Entry into force

A major part of the Reform will enter into force on 1 October 2016 for contracts concluded or renewed after this date. Some complex situations (such as Framework Agreements and Application Agreements) will therefore be governed partly by the old provisions of the Civil Code and partly by the new ones. Likewise, judicial proceedings initiated before that date remain subject to the old regime.

A few procedural provisions will however apply immediately as from 1 October 2016 to contracts concluded before that date. These new provisions relate to circumstances when a contract is voidable (for example, because an essential element for its formation does not exist), in that event the contractual counterparty will be able to chose either to "confirm" the contract or to take further steps to declare the contract void.

## The "Introductory Provisions"

The first three new articles incorporated into the Civil Code are intended to facilitate the interpretation of the rules as a whole, and to fill in gaps where necessary.

1. **Freedom first**
   The central aspect of the Reform is the freedom of parties to opt out of those new provisions that are not mandatory, subject to compliance with French public policy (new Article 1162). The "contractual freedom", which exists in English law, is defined as freedom to enter into a contract, to choose a contracting party and also to determine the content of the contract.

2. **Binding force of the contract**
   The new Article 1103 reaffirms that that the contract represents the *"law between the parties"* as was already provided by the previous Article 1134. By way of comparison, contracts in English law are legally binding and enforceable by law.

3. **Good faith**
   Despite the absence of an express definition of the term "good faith" in the new Article 1103, the principle itself, which did exist in practice prior to the Reform, will continue to be a ground upon which parties can claim for contractual remedies. The reaffirmation of this principle is a main difference with English law, which does not recognise an implied duty of good faith even though there has been some case law which might suggest a shift towards recognising the principle in long-term contracts.

## Notable new Provisions

Key aspects of the Reform include:

### 1. Negotiations

- A mandatory duty to provide pre-contractual information
  Anybody *"who knows information which is of decisive importance for the consent of the other [party], must inform him of it where the latter legitimately does not know the information or relies on the contracting party"*. Any breach of such an obligation may lead to the nullity of the contract and/or to damages (new Article 1112-1). This duty does not exist under English law.

- Express confirmation that the principle of "good faith" is applicable at all stages of the contract
  This will now include the negotiations stage (new Article 1104).

- A duty of confidentiality
  Anyone who *"without permission makes use of or discloses confidential information obtained in the course of negotiations incurs liability"* (new Article 1112-2). English law does not recognise such principle unless a term of the contract is especially stated to be confidential.

### 2. Preferential contracts

- Regulation of preferential agreements (conferring preferential rights on another party)
  Where a contract has been concluded with a third party in breach of a preferential agreement, the beneficiary of such agreement may obtain compensation for the loss he has suffered.

  He may also sue for nullity of the contract concluded and ask the court to order its substitution for the third party, provided that the third party (i) knew the existence of the preferential agreement and (ii) the intention of its beneficiary to rely on it (new Article 1123).


- Regulation of unilateral promises to contract
  Courts traditionally award damages in case of breach of unilateral promises refusing specific performance (exécution forcée) of the contract. The Reform puts an end to this controversial solution. Henceforth, the revocation of a unilateral promise, by the promisor, during the period allowed to the beneficiary to exercise the option will not preclude the formation of the contract. Moreover, a contract concluded with a third party who knew the existence of the promise is null (new Article 1124).

### 3. Content and validity the contract

- The abandonment of the controversial concept of *"cause"*
  Where functions aiming at ensuring a certain equilibrium in the contract are separately codified. For instance, any clause which *"deprives a debtor's essential obligation of its substance is deemed not written"* (new Article 1170). A contract is null if the obligation of one party is *"illusory or derisory"* in comparison with the agreed counter-performance (new Article 1169).

- The codification of the concept of *"abuse of a state of dependence"* already accepted by the courts
  A contract may be null if it is proven that a party has abused of any state of dependence (moral and/or economic dependence) of its contracting party in order to secure a *"manifestly excessive advantage"*. Such a behaviour is deemed to be a case of duress as recognised in English law (new Article 1143).

- The prohibition of any clause that creates *"a significant imbalance in the rights and obligations of the parties to the contract"*
  Under the new Article 1171, this rule is limited to contracts whose general conditions have not been subject to negotiation or which have been established unilaterally and in advance by the other party (*contrat d'adhésion*). However, this category encompasses many types of contracts and many clauses may be thus threatened. Where such a clause exists, it will be invalid and unenforceable and the contract should be read as if it had never been included.

### 4. Performance of the contract

- The possibility of adapting the contract in the event of an *"unforeseeable change of circumstances"*
  Namely circumstances which render the performance of the contract "excessively onerous for one party who had not accepted the risk of such a change". That party may seek a renegotiation of the contract. If the renegotiation is unsuccessful the parties may decide to terminate the contract by mutual agreement or ask the court to set about its adaptation. Finally, as a last resort, the court seized by either party may revise the contract or terminate this (new Article 1195). This new principle in French private law is recognised in English law under the doctrine of frustration, which allows contracts to be set aside where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract.

### 5. Consequences of failure to satisfy contract validity conditions

- Possibility for the parties to decide by mutual agreement to annul the contract without having to resort to the judge (new Article 1178).

- The introduction of *"caducité"*
  A contract ends if *"one of its essential aspects disappears"* and if its performance is rendered impossible due to the disappearance of another contract to which it is closely linked (new Article 1189).

### 6. Remedies for non-performance of the contract

- Possibility for a creditor to suspend the performance of its obligations *"as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him."*
  Under the new Article 1220, this is a cost-effective remedy saving time, however care should be exercised to collect evidence before suspending performance, otherwise this may be considered a breach of contract.

- Specific performance becomes the principle compared to damages
  This remedy is however forbidden when it is materially impossible but also when there is a *"manifest disproportion between its cost to the debtor and its interest for the creditor"* (new Article 1221).

- Possibility of terminating a contract by unilateral decision of a creditor "at his own risk"
  No condition needs to be fulfilled except sending of a formal notice to the debtor requiring performance of the contract (new Article 1226).

- New remedy
  If the performance of the contract is different from what was expected by a creditor, he may accept "a proportionate reduction of the price" (new Article 1223). This solution is of course in conflict with the binding force of the contract (which is now a Guiding Principle – see above).

### Immediate need to review your contracts

If you are, or will be, party to a contract governed by French law, the following questions should be considered before its renewal or its signature. If the contract remains silent on these questions, the above mentioned provisions may be enforced.

- Adapt vocabulary: use the new terminology.
- Have all provisions (including general conditions) been negotiated or have all parties had the opportunity to discuss them?
- Does the contract form part of a more global operation? If so, is it necessary to bind the fate of all contracts participating in the whole operation?
- Who will bear the risk of an unforeseeable change of circumstances during the life of the contract? Do the parties accept to seize the court in case of disagreement? A hardship clause or MAC clause may be preferable.
- Do the parties accept a price reduction as compensation for imperfect performance of the contract? Who will determine the price reduction?
- Even if there is a legal obligation of confidentiality, a confidentiality agreement may be preferable to avoid any misunderstanding on what information is confidential.
- Consider preparing amendments to your contracts making the more favourable provisions under the new regime applicable.

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## Exclusion clauses in 'knock for knock' provisions – they work!

**The recent English Court of Appeal decision in *Transocean Drilling UK Ltd v Providence Resources Plc*[1] on the construction of an exclusion clause within a knock for knock regime illustrates the court's respect for the principle of freedom of contract – the courts will give effect to the parties' intentions as long as they are clearly and plainly stated in the contract. It also contains some helpful reminders on the principles of construction. This article follows the case update published in May 2016[2].**

### Facts

Transocean Drilling U.K. Ltd (Transocean), the owner of a drilling rig, entered into a contract with Providence Resources Plc (Providence) for the provision of a rig to drill an appraisal well off the Irish coast. The contract was based on an amended 'LOGIC' form. Drilling operations had to be suspended for more than two months due to the misalignment of part of the blow-out preventer. This delay caused Providence to incur additional overheads, namely costs of personnel, equipment and services contracted from third parties which were wasted as a result of the delay (referred to as "spread costs"). Providence sought to recover these spread costs from Transocean.

### First instance decision

At first instance, the court found that Transocean was in breach of the contract because the rig had not been in good working order on delivery and there had been crew negligence. The judge held that Providence was entitled to recover their claim, rejecting Transocean's reliance on an exclusion clause in the contract which Transocean argued excluded any liability for 'consequential loss' of that kind.

### Court of Appeal decision

In the Court of Appeal, Transocean appealed against the decision that Providence's claim was not excluded by the exclusion clause, but there was no appeal in relation to the finding of breach.

Central to the contract was a set of 'knock for knock' provisions – a scheme for apportioning responsibility between the parties for certain types of loss and damage, which was to apply irrespective of cause and notwithstanding any negligence, breach of duty of other failure. The exclusion clause which Transocean relied on was part of the 'knock for knock' provisions and contained mutual undertakings by the parties to indemnify each other against, and hold each other harmless from, its own 'consequential loss' as defined in the contract.

The question for the court was whether the spread costs claimed by Providence were 'consequential losses', defined in the contract as *"…loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption…"*

The court found that the spread costs fell clearly within the exclusion clause. In this contract, the words *'loss of use'* were to be given an expansive meaning and their scope was intended to be wider than the loss of the ability to make use of property or equipment

1 [2016] EWCA Civ 372

2 http://www.hfw.com/Transocean-Drilling-UK-Ltd-v-Providence-Resources-PLC-May-2016



owned by the parties to include cost of use of third party property which had been wasted. That this was the intention of the parties was made clear by the words in brackets that follow the words 'loss of use' and the repeated use of the words *'without limitation'*.

In reaching their decision, the court reiterated some helpful reminders when construing an exclusion clause:

- The starting point for construing any clause in a contract, including exclusion clauses, must be the language used in the clause itself. Here, the court found that the words *'loss of use … cost of use of property … services'* in the exclusion clause were plainly apt to cover the spread costs.
- Exclusion clauses are not automatically to be interpreted restrictively nor *contra proferentem*, namely against the interests of the party who inserted the clause, particularly in this case where the undertakings to accept the risk of consequential loss are mutual, the parties are of equal bargaining power and the meaning of the words used were unambiguous. Furthermore, the mutual nature of the exclusion clause and its role as part of the loss allocation provisions point in favour of an intention to give the words a broad meaning.
- The principle of freedom of contract is fundamental and the courts will respect it and give effect to the parties' agreement. This is so even if the parties' agreement may seem unreasonable. In this case, Providence had argued that the whole contract would have no legal content and could not be legally enforceable if no liability followed in the event of a breach of contract. This argument was rejected by the court who found that, rather than excluding all liability for any breach of contract, the clause only excluded liability for certain kinds of loss or damage. More importantly, the argument was rejected as it was contrary to the principle of freedom of contract.

### HFW perspective

In construing the exclusion clause, the court recognised that one of the striking features of this contract was the extent to which the parties had agreed to accept responsibility for certain losses that might otherwise have been recoverable as damages for breach of contract, which is the centrepiece of the 'knock for knock' regime. Apart from giving the words their plain and natural meaning, the court clearly construed the exclusion clause bearing in mind the context of the contract and the parties' intentions and upheld these in respect of the freedom of contract. This is reassuring in the commercial world where certainty for the contracting parties and, importantly, their insurers, is much desired, and particularly in offshore contracts where 'knock for knock' provisions are common place.

This decision is also in line with earlier cases on 'knock for knock' provisions, starting with *Smit v Mobius*[3] where the judge acknowledged that the knock for knock agreement is a *'crude but workable allocation of risk and responsibility'*, and will be given effect to, even if the apportionment may sometimes appear to be unfair. So if the court will give clear effect to parties' intentions, it is up to the parties to clearly state their intentions.

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3 [2001] CLC 1545

## Post judgment security for costs: additional comfort for defendants with enforcement concerns

### Summary

Where there may be difficulties enforcing costs orders against claimants with assets outside of the jurisdiction and when the claims brought are politically motivated, the Courts of England and Wales are willing to assist to ensure that justice prevails. In a recent case[1], Mr Justice Flaux ordered the claimants to provide further security for costs post judgment on an indemnity basis.

After the dismissal of all the claims brought by the Republic of Djibouti and its state-owned entities (the claimants) against former presidential candidate, Mr Boreh, and Net Support Holdings, the Commercial Court in London recently granted further, post judgment, security for the defendants' costs to include security for the defendants' costs on an indemnity basis, interest on those costs and, in addition, the likely costs of a potential detailed assessment. The total amount of security awarded was 85% of the defendants' costs.

The claimants had brought multiple claims against Mr Boreh and others, where they alleged dishonesty and bribery in respect of a series of construction contracts, consultancy agreements and security contracts. The majority of the claims were dropped by the claimants either before or during the trial and these abandoned claims exceeded US$35 million, insofar as they were ever quantified. In a lengthy and detailed judgment, Mr Justice

1 2016 EWHC 1035 (Comm)


The claimants had brought multiple claims against Mr Boreh and others, where they alleged dishonesty and bribery in respect of a series of construction contracts, consultancy agreements and security contracts. The majority of the claims were dropped by the claimants either before or during the trial and these abandoned claims exceeded US$35 million, insofar as they were ever quantified.

RICK BROWN, PARTNER

Flaux found overwhelmingly in favour of Mr Boreh on all of the claims and found that the claimants' claims were politically motivated. Consequently, costs were awarded on an indemnity basis. The claimants sought to appeal the judgment but were refused leave.

On the issue of further security for costs post judgment, the claimants argued that, as an earlier order for security had been made, there was no jurisdictional basis for the court to order security post judgment. They also distinguished between interim remedies and security for costs, noting that the Civil Procedure Rules provided for interim remedies post judgment, but there was no reference to security for costs. The defendants disagreed and relied on previous case law where original security was deemed insufficient due to a "material change of circumstances" and so further security was ordered post judgment.

Mr Justice Flaux found in favour of the defendants and ordered further, post judgment, security for costs to be paid. Claimants facing a similar situation can, however, take some comfort in the fact that the defendants provided cross-undertakings in damages.

**Key points:**

- This judgment provides a clear analysis of the points surrounding post judgment security for costs which, until now, have been sparse.
- The "material change of circumstance" test to allow post judgment security to be awarded was satisfied by, amongst other things, the first instance judgment itself and the award of indemnity costs and interest against the claimants.
- Where the court is persuaded that claims are politically motivated and the claimants have no discernible assets in the jurisdiction, the court will be prepared to award additional post judgment security.

**HFW perspective**

This case will be of general interest to all commercial litigators as it clarifies the circumstances in which a defendant may obtain further security post judgment. This is of real relevance as, particularly with cross border litigation and those involving politically motivated claims, there can be difficulties with enforcing orders or judgments because of a lack of available assets in the jurisdiction against which to enforce. If acting for a defendant in such cases, it is worth contemplating whether to apply for further security. The minimal case law available on this type of application means that Courts are open to the interpretation of the meaning of the "material change of circumstances" which may allow for security post judgment.

Rick Brown, Partner and Victoria Cowan, Associate in HFW's Fraud and Insolvency Group, acting for Net Support Holdings Ltd.

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## Summary determination of a proprietary claim: the court's willingness to "grasp the nettle"

**In the recent judgment of *Gorbunova v The Estate of Boris Berezovsky (deceased) and others*[1] the High Court has provided useful guidance as to when summary judgment is appropriate in deciding whether a trust was established.**

The success of the summary judgment application turned on the question of whether the hearing of that application was a suitable forum to decide whether two documents created a trust. The court held that it was, and the existence of a complex set of facts around the execution of the documents did not mean a full trial was required.

On a separate but equally important issue, the judgment also provides guidance on when, as in this case, the court will refuse permission to amend pleadings due to inconsistencies with evidence previously filed.

### Background

HFW are acting for three insolvency practitioners from Grant Thornton UK LLP as the trustees of the insolvent estate of Boris Berezovsky (deceased) (the Trustees). The Trustees applied for reverse summary judgment against the proprietary elements of a claim brought by Mr Berezovsky's long time partner, Helena Gorbunova, with whom he had two children.

Ms Gorbunova claimed that two documents created during Mr Berezovsky's lifetime created a trust over certain funds currently held by the Trustees. One document was signed by Mr Berezovsky as a deed, the other was an agreement signed by Mr Berezovsky and countersigned by Ms Gorbunova. Both concerned monies payable to Mr Berezovsky pursuant to a settlement with the family of his deceased business partner, Arkady Patarkatsishvili (the AP Settlement). The majority of those monies fell due for payment after Mr Berezovsky's death, and so were paid to the Trustees, then acting as Receivers.

During the summary judgment hearing, Ms Gorbunova also made an impromptu application to amend her particulars of claim to include further grounds for her proprietary claim. She attempted to introduce claims for equitable assignment, rectification, proprietary estoppel and other estoppels.

### Key points from Arnold J's judgment

#### Summary judgment

1. When interpreting a contract, the court should have regard to the "background knowledge which would reasonably have been available to the parties... at the time of the contract. This does not include evidence as to the subjective intentions of one or both of the parties or the pre-contractual negotiations." Arnold J held that the wording of the two documents did not amount to a declaration of trust and Ms Gorbunova could not rely on contextual evidence in an attempt to re-write the documents.
2. The AP Settlement was entered into by Mr Berezovsky during his lifetime, but the relevant payments were not due until after his death. As such, a trust could only have been established after Mr Berezovsky's death. Section 284 of the Insolvency Act 1986 (as modified to apply to insolvent estates) states that any disposition of a deceased insolvent's property after the date of his death is void. Therefore, even if a trust over the AP Settlement monies was established, such a trust would be void.

Arnold J concluded that Ms Gorbunova had no real prospect of success in establishing that either document created a trust.

During the summary judgment hearing, Ms Gorbunova also made an impromptu application to amend her particulars of claim to include further grounds for her proprietary claim. She attempted to introduce claims for equitable assignment, rectification, proprietary estoppel and other estoppels.

NOEL CAMPBELL, PARTNER

1 [2016] EWHC 1829 (Ch)

### The application to amend

1. There was no real prospect of success of Ms Gorbunova's argument that there was an equitable assignment. In addition, any assignment would be void by virtue of section 284 (as discussed above).
2. The amendments to the pleadings which sought to introduce arguments as to rectification, proprietary estoppels and constructive trust were inconsistent with Ms Gorbunova's evidence as previously filed.

Ms Gorbunova's application to amend was not allowed, save for minor amendments as agreed between the parties.

### Lessons

When a trust is allegedly created by way of a written document, the court will give very limited weight to evidence concerning the context into which the document was entered. This allows a decision to be made on the basis of the actual wording of the document.

When faced with an application to amend pleadings, the court will look at amendments in the context of the evidence already filed and will not allow obvious inconsistencies.

### HFW perspective

This judgment is particularly interesting in the context of insolvency proceedings as it opens a route for insolvency practitioners to have proprietary claims struck out and/or disposed of summarily without the need for a full trial. Despite the complex circumstances surrounding the execution of the documents, the court focussed on the strict principles applicable to the interpretation of written documents. This illustrates the court's willingness to "grasp the nettle" and decide a proprietary claim on a summary basis.

Ms Gorbunova's application to Arnold J for leave to appeal was denied. She has now made an application to the Court of Appeal.

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## hfw Conferences and events

### Resolving Shipping and Ports related Disputes Conference

India
2 September 2016
Presenting: David Morriss

### HFW International Arbitration event

"Twenty years on since the coming into force of the Arbitration Act 1996: has the growth of arbitration and adjudication prevented the development of English law?"
HFW London
14 September 2016
Chair: Damian Honey
Panellist: Max Wieliczko

### 4th International Arbitration Conference and 2016 CIArb Australia Annual Dinner

Sydney
22 November 2016
HFW are exclusive sponsors of this event.


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