Watson, Farley & Williams

International Commercial Disputes

Briefing

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Contents

Note from the editor

Welcome to the latest edition of WFW's International Commercial Disputes Briefing, in which we reflect on a number of significant cases in relation to international commercial litigation and arbitration from the courts of England and Wales. In this edition we consider an important case on the courts' changing attitudes to failure to comply with procedural rules and court timetables, look at the question of whether a binding contract can be formed over instant messaging and examine the circumstances in which a party can be restrained from calling on an on demand guarantee. We hope that you find this briefing useful and would welcome any comments that you have. If you would like to discuss any of the matters raised in the briefing, please feel free to contact me or your usual contact at Watson, Farley & Williams.

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Alternative Dispute Resolution

What happens if you fail to respond to an invitation to mediate?

In recent years various forms of alternative dispute resolution (ADR), including mediation, have played an increasingly important role in the settlement of commercial disputes. These have been supported by the courts through a number of procedural rules which encourage the parties to take stock at various stages in the litigation and consider whether it would be appropriate to suspend their action to enable ADR to take place. In addition the courts can impose costs sanctions on parties who have unreasonably refused to mediate. In the recent decision of *PGF II SA v OMFS Company 1 Ltd*, the Court of Appeal went one step further, and confirmed that a party may be penalised for simply failing to respond to an invitation to mediate.

The case concerned a dispute over repairing covenants under a commercial lease. At an early stage in the case the claimant had written to the defendant inviting it to take part in an early mediation. However, the defendant failed to respond to this, and a subsequent invitation. Eventually the case settled, but the parties were unable to agree liability

“In reaching this decision, and going on to hold that in this case the defendant had unreasonably refused to mediate, the Court of Appeal has firmly demonstrated the judiciary’s support for ADR.”

for costs, the claimant contending that the defendant’s silence in response to its offer of mediation was itself unreasonable, regardless of whether there were reasonable grounds to refuse to mediate, and that the claimant was therefore entitled to its costs.

Although, as the Court of Appeal acknowledged, this was a novel submission, the Court noted the increasing importance of mediation and other forms of ADR in relation to all forms of litigation. The Court observed that much had occurred to underline the effectiveness of mediation since the landmark decision in *Halsey v Milton Keynes General NHS Trust (2004)* confirmed that, whilst the courts cannot and should not compel parties to mediate, it is permissible to encourage them to do so, in some cases robustly, by imposing costs sanctions for unreasonable refusals to mediate. Making reference to the increased focus on proportionality in light of the review into the costs of civil litigation by Lord Justice Jackson, the Court concluded that the time has now come to say that silence in the face of an invitation to participate in ADR will, as a general rule, of itself be held unreasonable, regardless of whether an outright refusal, a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.

In reaching this decision, and going on to hold that in this case the defendant had unreasonably refused to mediate, the Court of Appeal has firmly demonstrated the judiciary’s support for ADR. It will now be more important than ever for parties to consider carefully whether their dispute is suitable for mediation or some other form of ADR, and if not to explain the reasons clearly to the other side.

PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288

Arbitration

Can a party who has taken no part in arbitral proceedings object to enforcement of the arbitral award?

As with litigation, in arbitration, winning an award is almost always only the first step in the process to achieving the desired outcome, particularly when dealing with a recalcitrant respondent. After the award is given, it will often then be necessary to take steps to enforce it. Enforcement of international arbitral awards is usually more straightforward than enforcement of court judgments thanks to the widespread ratification of the New York Convention. However, as the recent decision in *The London Steam Ship Owners Mutual Insurance Association v The Kingdom of Spain* demonstrates, obstacles may still stand in the way of successful claimants seeking to enforce, particularly where the validity of the arbitration agreement is disputed.

The claimant in this case had brought a claim in arbitration against the Kingdom of Spain arising out of oil pollution damage. At the same time, parallel proceedings, including criminal proceedings, were brought against the claimant in Spain. Spain denied any obligation to arbitrate, and refused to participate in the arbitration, which was seated in London. Nevertheless, the arbitrator held that Spain was bound by the relevant arbitration agreement, and issued an award in the claimant’s favour. Under section 72 Arbitration Act 1996, a party who has taken no part in the arbitral proceedings is entitled to challenge the jurisdiction of an arbitral tribunal. However, the claimant contended that such a challenge must be brought within 28 days of the award being made, or else the right to object will be lost under section 73(2). After that time period had expired with no challenge to the award by Spain, the claimant sought leave to enforce the award. However, Spain then applied to challenge the award, arguing that the time limit was inapplicable but in any event seeking an extension of time.

In determining whether an extension should be given, the judge drew particular attention to the principle identified by the Supreme Court in *Dallah Real Estate & Tourism Holding Co v Pakistan (2010)* (in which WFW acted for the successful respondent), that a person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. This principle was "so fundamental" that it should not be "whittled down" unless the interests of justice so required, and in this case the claimant's argument that Spain's inaction following the award should count against it when seeking an extension of time was such an impermissible "whittling". The judge observed that in other cases the *Dallah* principle may not carry so much weight, but in this case he considered it was sufficiently important to enable him to exercise his discretion in favour of granting the extension. Although the judge went on to comment that in his view it was clear that the 28 day time limit does apply to the power to challenge an award where the objector has played no part in the arbitral proceedings, the judge expressed the view that this would not result in any injustice to the objector, as they would be able to seek an extension of time and, in determining whether to grant such an extension, the court would consider any particular factors arising from the application of the *Dallah* principle.

In a subsequent judgment a different judge rejected Spain's challenge to the arbitration agreement, holding both that Spain had "agreed in writing" to submit the dispute to arbitration, and that it had lost state immunity pursuant to the State Immunity Act 1978. However, the first judgment is nevertheless significant for its emphasis on the importance of affording a disputing party the opportunity to object to enforcement of an award, even if the time limit for normally doing so has expired and also emphasises the considerable value the English courts place on the consensual nature of arbitration.

The London Steam Ship Owners Mutual Insurance Association v The Kingdom of Spain [2013] EWHC 2840 (Comm)
The London Steam Ship Owners Mutual Insurance Association v The Kingdom of Spain & Anr [2013] EWHC 3188 (Comm)

> "...the first judgment is nevertheless significant for its emphasis on the importance of affording a disputing party the opportunity to object to enforcement of an award, even if the time limit for normally doing so has expired..."

Civil Procedure

How important is to comply with procedural rules and court timetables?

Nearly four years ago, in January 2010, Lord Justice Jackson published his final report in his review of civil litigation costs in England and Wales. His landmark report set out over 100 recommendations to reform civil litigation so as to promote access to justice at proportionate cost. In April 2013, a raft of legislation and procedural rules came into force, making the proposals a reality. Although many of the changes have had limited impact on commercial disputes, as the recent judgment in *Mitchell v News Group Newspapers Ltd* shows, one rule change in particular looks set to have a significant impact on the conduct of litigation at all levels.

Civil Procedure Rule 3.9 is the rule which grants relief from sanctions. It is most commonly relied on where parties miss deadlines, or make other procedural errors. Prior to April 2013, the rule set out a list of nine factors for the courts to consider when determining whether to grant relief from whatever sanction may have been imposed as a result of the error. However, expressing the view that courts in general have become too tolerant of delays and non-compliance with orders, Lord Justice Jackson recommended that the rule be amended, and in April 2013 the list of factors was replaced with just two key considerations: the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions and orders. The courts have responded to the rule change in varying ways. Some judges have

"...the Court of Appeal's tough stance and enthusiastic embrace of Lord Justice Jackson's new regime is a significant reminder of the need for strict compliance with rules and orders."

appeared reluctant to embrace this stricter regime, while others have embraced it. Few, though, have embraced it more enthusiastically than the judge in *Mitchell*.

The decision emerged from the libel action brought by Andrew Mitchell MP, and relates to the need for parties to exchange budgets for the case at an early stage in such proceedings (another recommendation of Lord Justice Jackson). Mitchell's solicitors provided his budget six days late, and only following prompting from the judge. As a result the judge held that, even if Mitchell was successful in his claim, he would only be limited to recovering his court fees of £2,000, rather than his full budget of around £500,000. Mitchell appealed, but the Court of Appeal has handed down a ringing endorsement of the first instance judgment, holding that while the decision may seem harsh, overturning it would deal a major setback to the attempts to achieve a change in litigation culture.

The Court of Appeal did acknowledge that if the non-compliance might properly be regarded as trivial, the court will usually grant relief, provided that an application has been made promptly. However, where the non-compliance cannot be regarded as trivial, the defaulting party will need to persuade the court that there has been a good reason for its error. The courts are already taking this guidance into consideration when determining applications for relief from sanctions and while some judges may still remain reluctant to impose harsh sanctions on litigants for apparently innocent errors where the other party suffers no prejudice, the Court of Appeal's tough stance and enthusiastic embrace of Lord Justice Jackson's new regime is a significant reminder of the need for strict compliance with rules and orders.

Mitchell v News Group Newspapers [2013] EWCA Civ 1537

Commercial

Will a director's illegal actions prevent the company making a claim against them?

The *ex turpi causa* principle is an important rule of public policy which essentially provides that the court will not assist a party to bring a claim where that claim is founded upon an immoral or illegal act. However, application of the rule can present particular difficulties in circumstances where a company seeks to bring claims arising out of the illegal activities of its own officers, as two recent decisions demonstrate.

In *Jetivia SA & Anr v Bilta (UK) Ltd & Ors* it was alleged that as a result of the actions of its two directors, Bilta had been engaged in a fraud with the result that the company could not meet its tax liabilities. Bilta was wound up and the liquidators brought proceedings against the former directors and also against various co-defendants, including Jetivia, for conspiracy and dishonest assistance. However, on a summary judgment application Jetivia contended that the alleged illegal actions of the directors could be attributed to Bilta, such that the *ex turpi causa* principle precluded the claim.

However, as the Court of Appeal commented, the question of whether a director's wrongful act can be attributed to the company will depend on the context in which the issue arises. In cases where the intended victim of the fraud is the company itself, the law will not attribute the fraud to the company, even where the fraudulent director was the directing mind and will of the company (*In re Hampshire Land Co (1896)*). Thus in a case such as this, where the company brings a claim against its directors and those complicit with them based on the directors' breach of duty, the company will be the victim, and the law will not allow enforcement of that duty to be compromised by the directors' reliance on their own wrongdoing. Jetivia sought to argue that the true victim of the conspiracy was in fact HMRC. The Court of Appeal considered that this was a matter that had to be determined at trial, but commented that even if Jetivia was right and Bilta was merely a secondary victim, its loss being consequential on that to HMRC, it would still be able to bring a claim.

Meanwhile, in *Madoff Securities International Ltd (in liquidation) v Raven & Ors*, claims for breach of duty were brought by the liquidators of Bernard Madoff's London business against five of its former directors. The directors sought to rely on Madoff's fraud and the *ex turpi causa* doctrine, but the Commercial Court concluded that the claim was not in fact founded on any illegality, and so, although ultimately the directors successfully resisted the claim, this defence failed. However, had a sufficient connection between the fraud and the claim been established, the Court considered that the wrongful acts could have been attributed to the claimant company. In reaching this decision, the Court distinguished *Jetivia*, holding that in that case the key point was that the defendants were seeking to attribute to Bilta the very wrong in which they were complicit, but that otherwise the principle that the law will not attribute a director's fraud to a company where the company itself is a victim of that conduct will not operate where the company is only a secondary victim.

These decisions set out useful and importance guidance on the application of the notoriously complex *ex turpi causa* principle. Nevertheless, it is clear that seeking to rely on the *ex turpi causa* principle is a difficult and extremely fact sensitive path.

Jetivia SA & Anr v Bilta (UK) Ltd & Ors [2013] EWCA Civ 968
Madoff Securities International Ltd (in liquidation) v Raven & Ors [2013] EWHC 3147 (Comm)

Can a binding contract be formed over instant messaging?

Email and instant messaging is now an ubiquitous part of almost every business, with rapid communications taking place day and night. However, it can still be all too easy to forget that even the hastiest and most informal of exchanges might be found to lead to a binding contract, as shown in the recent decision in *BNP Paribas SA v Anchorage Capital Europe LLP & Ors.*

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The case concerned the purported sale of subordinated private placement notes by the London branch of BNP Paribas to Anchorage, a hedge fund group. The bank contended that two binding English law contracts had been concluded between the parties via a handful of Bloomberg Instant Message communications which set out very briefly the price of the notes and the quantity to be sold. However, Anchorage disagreed that a binding agreement had been reached when the instant messages were sent, as it contended that material terms remained to be agreed, and disputed the English court's jurisdiction to hear the claim.

Although it was not necessary to finally determine the matter for the purposes of the jurisdiction dispute, the Commercial Court held that the bank had demonstrated that it had a good arguable case that a contract had been formed. The Court noted in particular that the traders had used the language of binding contract in their messages, including terms such as "done" and "thanks for the trade", with no suggestion that either trade was subject to further negotiation of detailed terms and conditions. There were also other circumstances which suggested that a binding contract between the parties had been concluded, including the fact that Anchorage had entered into a credit default swap, demonstrating an intention to hedge the notes, and the fact that Anchorage was aware that the bank was on-selling the notes, and so it was essential to strike a deal which would be immediately binding.

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The case of *Proton Energy Group SA v Lietuva* was similar, where an oil and gas company trader contended that it had entered into a contract with a petroleum refining company, but the refiner argued no contract had come into existence. In that case the Commercial Court concluded that a contract had come into existence when the trader received a one-word email from the refiner stating "confirmed", and that more detailed terms were left to be negotiated later on. The judge commented that this was a classic spot deal, where the speed of the market required the parties to agree the main terms, and to leave the details, some of which may have been important, to be discussed and agreed later. These cases serve as an important warning to parties that although contracts may often be complex and lengthy documents, entering into legal relations does not need to be complicated, and can be achieved through the exchange of a few words via email. However, parties can at least take some comfort from the fact that the court will look at the full circumstances of the case to determine whether there was an intention to be bound.

BNP Paribas SA v Anchorage Capital Europe LLP & Ors [2013] EWHC 3073 (Comm)
Proton Energy Group SA v Lietuva [2013] EWHC 2872 (Comm)

Financial

If one party does not sign a joint guarantee, are the other guarantors liable?

A joint and several guarantee provides creditors with the comfort of having a choice of sureties to call on in the event of the borrower's default and, unless it provides otherwise, also entitles each individual guarantor to claim a contribution from their co-guarantors. However, as the decision in *Harvey v Dunbar Assets Plc* demonstrates, this may mean that liability will only be imposed on any individual guarantor if all the named guarantors do indeed sign.

The case concerned a composite joint and several guarantee which was provided to secure a loan made to a development company. When the company failed to meet a demand for repayment, the creditor made a call on Mr Harvey, one of the guarantors. However, it emerged that one of the co-guarantors claimed that his signature had been forged and so Mr Harvey contended that, because the co-guarantor had never signed it, Mr Harvey had not become bound under the terms of the guarantee.

The Court of Appeal observed that the question of whether a signatory to a guarantee has assumed liability, in circumstances where other contemplated security has not been obtained, is essentially one of construction of the relevant guarantee against its admissible factual matrix. There is no enshrined rule that in all circumstances where an intended guarantor does not sign a guarantee, the other guarantors are not bound. However, where the guarantee shows on its face that it is intended to be a joint composite guarantee, contained in a single document, which assumes that it will be signed by all the guarantors named in the document, the starting point will be that the guarantee will be regarded as subject to the condition that the signatures of all guarantors are necessary for its validity.

In this case the Court considered that the guarantee was clearly a single composite document, prepared for signature by several persons as joint and several guarantors, and in which all the intended guarantors were together defined as the "guarantor". This pointed to the likely conclusion that the signatures of all the individuals were an essential precondition to the liability of each individual guarantor who signed the document.

Construing the guarantee as a whole, the Court did not consider that there was an express or implied provision in the guarantee displacing this position. Thus, proceeding on the assumed basis that the co-guarantor's signature had been forged, it was held that Mr Harvey would not be liable under the guarantee.

This decision is an important warning to creditors to ensure that all parties to a joint and several guarantee execute the document validly. However, it may also be appropriate to include wording in such documents providing that each party who has validly executed the guarantee will be bound by its terms, even if not all the intended guarantors have validly executed the document.

Harvey v Dunbar Assets Plc [2013] EWCA Civ 952

Should a CHAPS payment be made to a specified account number or to the named beneficiary?

The CHAPS system, an electronic payment system which is used to make high value, same day payments, plays a vital role in the UK's financial infrastructure, with nearly £72 trillion processed through the system in 2012. In addition to its 20 direct members, over 4,500 other financial institutions make CHAPS payments through agency agreements with the direct members. In the recent decision of *Tidal Energy Limited v Bank of Scotland Plc*, the Mercantile Court provided helpful clarification on the obligations owed by those financial institutions in relation to the system.

The claimant in the case had been indebted to a company called Designcraft Ltd in the sum of £217,781.57 and gave an instruction to the defendant bank to pay the debt via a CHAPS transfer which was fulfilled on the same day. However, the claimant contended that, unbeknownst to it at the time the instruction was sent, the information it had been given about the receiving account was false and in fact the sort code and the account number stated in the transfer form belonged to an entity called Childfreedom Ltd. The claimant argued that its instruction to make a payment to Designcraft was therefore not carried out, and so it was entitled to have the money that was transferred returned to it. However, the bank argued that the instruction was to make the payment via CHAPS to the payee's account number and sort code, and this is what it did.

The Court agreed with the bank. It was observed that, although the identity of the beneficiary was important to the claimant, the evidence was that CHAPS does not operate in such a way that the beneficiary's name forms part of the identifier which determines the destination of payment, since the volume of transactions conducted through CHAPS each day would mean that a process of manual checking would prevent payments being accomplished within the requisite short timescale. Although the CHAPS rules do cater for including the name of the beneficiary in the identifier, there is no requirement that the beneficiary's name be included, and in practice CHAPS transfers are processed without reference to it. The identity of the beneficiary is irrelevant to the way in which the payment is processed, and it is the destination account number and sort code which matter. Thus a receiving bank which is able to match the account number and sort code to one of its accounts will be expected to credit that account with the money and send a "logical acknowledgement" back to the paying bank to indicate acceptance of the payment. At that point the payment is complete. Whether the instruction was contractual or simply an authority, the transfer to which it related was carried out on the terms of the CHAPS transfer form, which included an express acknowledgement from the claimant that "we agree that no responsibility is to attach to you for any loss caused by delays, interruptions or errors in transmission of payment, which are not directly due to the negligence or default of your own officers or servants". There was no evidence that the bank was responsible for any error in transmission, or that its employees were negligent. The bank faithfully discharged its mandate and the payment only ended up with the

"The CHAPS system...plays a vital role in the UK's financial infrastructure, with nearly £72 trillion processed through the system in 2012."

wrong payee because the claimant gave the wrong sort code and account number.

Although the decision in this case is perhaps unsurprising, as the judge noted it appeared there was no previous guidance in the authorities on where the responsibility for an error in payment lies, and this judgment is therefore a useful clarification and a valuable reminder to users of the CHAPS system of the importance of ensuring that CHAPS instructions are carefully checked.

Tidal Energy Ltd v Bank of Scotland Plc [2013] EWHC 2780 (QB)

Can a party be restrained from calling on an on demand guarantee if the underlying contract prevents them from making such a demand?

One of the particular benefits of performance bonds or on demand guarantees is that they can be treated as a substitute for cash such that, provided the beneficiary seeks payment in accordance with the terms of the guarantee, the bank must pay, regardless of any underlying dispute between the provider and the beneficiary of the guarantee. There are, however, exceptions to this general rule, and although fraud may be the most well-known ground for preventing payment under an on demand guarantee, it is not the only exception, as demonstrated by the Technology and Construction Court's decisions in *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada.*

The claimant had supplied two boilers to the defendant for use in a power plant in Brazil and provided on demand guarantees which would expire either on the issue of a "Taking-Over Certificate" for the boilers, or on 31 December 2013, whichever was earlier. The claimant argued that it was entitled to Taking-Over Certificates as both boilers were being used. However, the defendant maintained that the use of the boilers was a temporary measure and intimated a claim for damages in respect of what it said was the claimant's delayed and defective performance of the contract. The claimant took the view that this was a cloak to enable the defendant to make a call on the guarantees, and sought an interim injunction restraining the defendant from making demands for payment.

> " ...a claimant who wishes to restrain a beneficiary from making a demand must show that it has a strong case that, under the terms of the underlying contract, the beneficiary is not so entitled."

As the Court in *Doosan Babcock* observed, it has previously been held that if the underlying contract, in relation to which a bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the court from making such a demand. However, having regard to the commercial importance of bonds and letters of credit in the commercial world, a claimant who wishes to restrain a beneficiary from making a demand must show that it has a strong case that, under the terms of the underlying contract, the beneficiary is not so entitled. In this case the Court had no doubt that the claimant had shown that it had a strong case that the boilers had been put into commercial operation as the contract contemplated, and that the defendant should therefore have issued Taking-Over Certificates. Its failure to do so was a breach of contract, and it was only as a result of that breach that it would have been able to make a call on the performance guarantees. The Court commented that it was self-evident that a beneficiary should not be permitted to make a demand on a bond if it is only able to do so by virtue of its own breach of contract and thus the injunction was granted, and on the return date, continued.

In reaching this view, the judge accepted that his decision had extended the law in this area, but he considered that a principled and incremental approach had been adopted that did not undermine the general principles applicable to interim injunctions to restrain a party making a call on a bond. The requirement that a strong case must be established before the court will grant injunctive relief will be of some comfort to beneficiaries of demand guarantees, but the case may well mean that the courts will now see more attempts to restrain payment due to an underlying dispute.

Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada [2013] EWHC 3010 (TCC)
Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada [2013] EWHC 3201 (TCC)

When will the doctrine of marshalling apply?

The equitable doctrine of marshalling applies where there are two or more creditors, each of whom is owed a debt by the same debtor, but one can enforce his claim against more than one security and the other can resort only to one. If the first creditor enforces against the property which secures both debts, then the second creditor can enforce against the property which only secured the first creditor's debt. However, in *Szepietowski v The National Crime Agency* the Supreme Court was asked to consider whether the doctrine could apply where the common property does not secure a debt.

The case concerned attempts by a predecessor of the National Crime Agency to recover monies allegedly obtained through various criminal enterprises by the appellant's husband. Various properties, including "Claygate" and "Ashford House" were registered in the appellant's name and mortgaged to RBS. By way of a settlement deed, some of the properties were sold, with the proceeds being paid over in part satisfaction of the RBS debt, and a second charge was granted over Claygate entitling the respondent to recover a sum of up to £1.24 million from its sale. Claygate was subsequently sold and once the net proceeds of sale had been used to pay off the RBS debt, all that was left to satisfy the respondent's rights was the "relatively derisory figure" of about £1,325. The respondent therefore sought to invoke the right to marshal against Ashford House.

However, observing that the appellant never owed any money to the respondent other than such sum which was payable out of the proceeds of sale of Claygate, as was confirmed by the settlement deed, the majority of the Supreme Court concluded that as a matter of principle, marshalling will not normally be available to a second creditor where, as here, the common property does not secure a debt due from the "debtor", but is merely available as security for what the second creditor can extract from that property. The majority considered that this was because in such a case there was simply nothing from which the right to marshal could arise and that equity should proceed on the basis that the second creditor normally takes the risk that the first creditor will realise his debt through the sale of the common property rather than the sale of the other property. Given that marshalling is an equitable remedy, the Court did observe that whether it is available in any particular case may depend on the circumstances, but considered that absent express words permitting or envisaging marshalling, it was hard to conceive of such a case. The minority agreed that marshalling was not available in this case, but reached that conclusion by construing the settlement agreement as operating to preclude a marshalling claim.

As the minority of the Supreme Court observed, it is unusual for a charge to be granted in circumstances where there is not also an underlying personal debt. Thus the majority's view that the essence of marshalling lies in the nature of the liability which is secured, rather than the existence of concurrent securities, while of importance in limiting the application of the doctrine, may have less impact in practice.

Szepietowski v The National Crime Agency [2013] UKSC 65

"The equitable doctrine of marshalling applies where there are two or more creditors, each of whom is owed a debt by the same debtor, but one can enforce his claim against more than one security and the other can resort only to one.."

“Determining where a contract is made can have considerable importance in establishing where a dispute regarding the contract should be heard, particularly where the contract does not contain a governing law and jurisdiction clause.”

International

Can a contract be made in more than one jurisdiction?

Determining where a contract is made can have considerable importance in establishing where a dispute regarding the contract should be heard, particularly where the contract does not contain a governing law and jurisdiction clause. The traditional position under English law is that a contract is made at the time and place where acceptance of the offer is communicated to the offeror. The courts have previously held that, in relation to instantaneous communications, the contract will be made where the acceptance is received, but in the recent decision in *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc*, a different approach was taken.

Conductive Inkjet Technology concerned a dispute between an English company and a Texan company in relation to the technology for touch screens. The relevant contract did not contain an express choice of law or jurisdiction clause and was signed by the claimant in England and by the defendant in the US, having been agreed to by the parties by email exchange shortly beforehand. Proceedings were issued in both England and Texas and the English court had to determine whether to allow the English claims to continue, or to stay them in favour of the Texan proceedings. One of the issues addressed by the court was whether the claimant had established that there was a good arguable case that the claim fell within one of the jurisdictional “gateways” which would enable the claimant to serve the claim form out of the jurisdiction, and in particular whether it was a claim in respect of a contract where the contract was made within the jurisdiction.

The court observed that it has previously been held that it may be possible, in principle, for a contract to be made in two places at once and that in such circumstances, if one of those two places is England, the jurisdictional requirements for service out will be met. The court considered that in this case too there was a good arguable case for saying that the contract was made in both England and Texas, and that it would be wholly arbitrary to determine the place of the making of the contract simply on the basis of which party happened to send the fully executed document to the other. It was therefore held that, at least in relation to this part of the claim, the English court had jurisdiction, and the English claim should be allowed to continue.

It is important to remember that the question of where a contract is made will not be the only factor relevant to establishing that the English court has jurisdiction to hear a claim and to avoid lengthy disputes over jurisdiction it is advisable for parties to include jurisdiction and governing law clauses in their contracts. However, where parties are unable to agree such terms, this decision offers an alternative to the sometimes artificial analysis required by the traditional rules on where a contract is made.

Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc [2013] EWHC 2968 (Ch)

Should you like to discuss any of the issues raised in this Briefing, please get in touch with a member of our Dispute Resolution team below, or your regular contact at Watson, Farley & Williams.

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