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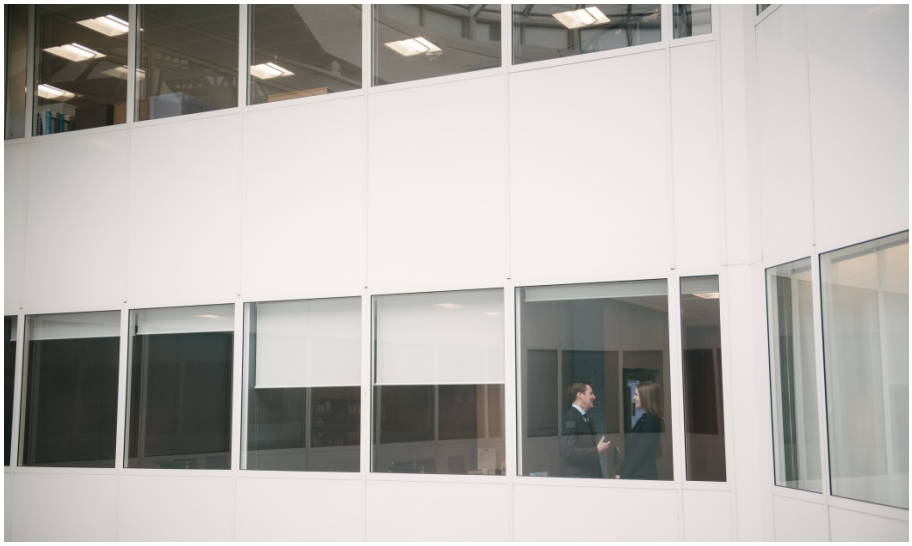

NOTE FROM THE EDITOR

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 what happens where there are doubts as to an arbitrator's impartiality, the latest developments in the ongoing relief from sanctions debate, Supreme Court decisions on the illegality defence and the interpretation of the LMA terms, and the danger of negotiating without making clear you are doing so "subject to contract".

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, please feel free to contact me or your usual contact at Watson Farley & Williams.

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ARBITRATION

When can an arbitrator be removed for bias?[1]

Under the Arbitration Act 1996, a party to arbitral proceedings is entitled to ask the court to remove an arbitrator if circumstances give rise to justifiable doubts about the arbitrator's impartiality. This rule is intended to preserve the parties' right to a fair hearing by an impartial tribunal. However, the occasions on which the power has been successfully used are relatively rare. The recent case of *Sierra Fishing Company & Ors v Farran & Ors* was an unusual example of such an occasion.

"… A PARTY TO ARBITRAL PROCEEDINGS IS ENTITLED TO ASK THE COURT TO REMOVE AN ARBITRATOR IF CIRCUMSTANCES GIVE RISE TO JUSTIFIABLE DOUBTS ABOUT THE ARBITRATOR'S IMPARTIALITY … HOWEVER, THE OCCASIONS ON WHICH THE POWER HAS BEEN SUCCESSFULLY USED ARE RELATIVELY RARE."

The case concerned a dispute relating to a loan agreement for the purchase of two fishing vessels. The arbitrator was appointed by the defendants but the claimants objected, contending that he lacked the necessary independence in light of his legal and business connection with the defendants, his involvement in negotiating and drafting certain documents which were relevant to the dispute, and his conduct of the arbitration. In particular, the claimants complained about the fact that the first defendant had been chairman of a bank at the same time as the arbitrator had been retained as legal counsel to the bank and the fact that the arbitrator's father, who was also a partner at the same firm as the arbitrator, continued to act for the bank.

The test to determine bias in arbitral proceedings is the same as that in court proceedings, and is therefore whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal would be biased. In the judge's view the relationships between the arbitrator and the defendants in this case would give rise to such a possibility in the mind of the fair minded observer. The fact that the arbitrator had been involved in advising and assisting on documents which were at issue in the proceedings similarly gave rise to such concerns. Finally, the judge observed that, whilst an arbitrator is entitled to put evidence before the court in relation to an application for their removal, they should be careful not to appear to take sides and in this case the arbitrator had gone too far. His submissions involved detailed and vehement argument as to why the claimants had lost the right to object to his appointment, and he appeared to have taken up the battle on behalf of the defendants rather than maintain his objectivity.

It was thus held that the arbitrator should be removed. In reaching this conclusion the court referred to the IBA Guidelines on Conflicts of Interest in International Arbitration, which provide illustrations of what the international arbitral community considers to be cases of conflicts of interest or apparent bias. Although the Guidelines are not legal provisions and do not override applicable national law or arbitral rules chosen by the parties, this case is nevertheless an indication of the increasingly significant role that they play and the importance of both parties and arbitrators considering them carefully.

[1] *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWHC 140 (Comm)

CIVIL PROCEDURE

"WHEN A PARTY APPLIES FOR A FREEZING INJUNCTION, TEMPORARILY PREVENTING THE RESPONDENT FROM DEALING WITH THEIR ASSETS, THEY WILL ALMOST ALWAYS BE REQUIRED TO GIVE AN UNDERTAKING IN DAMAGES TO COMPENSATE THE RESPONDENT IN THE EVENT THAT THE COURT HOLDS THAT THE INJUNCTION WAS WRONGLY GIVEN."

When should fortification of a cross-undertaking in damages be provided?[2]

When a party applies for a freezing injunction, temporarily preventing the respondent from dealing with their assets, they will almost always be required to give an undertaking in damages to compensate the respondent in the event that the court holds that the injunction was wrongly given. The court may also require the applicant to fortify this "cross-undertaking in damages" by providing a bank guarantee or paying a sum of money into court. In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*, the Court of Appeal confirmed the appropriate test to apply when determining whether such fortification should be provided.

EVP had obtained a worldwide freezing order against Malabu up to the value of $215 million and was initially required to fortify its cross-undertaking in damages by means of a written guarantee in favour of Malabu in the sum of $150,000, a level which reflected the fact that the $215 million had not yet been paid into court. However, after Malabu paid the $215 million into court, it sought further fortification of the cross-undertaking, referring to the losses being caused to it by being kept from the use of the money in court. At first instance the High Court agreed that further fortification should be provided and EVP appealed.

The Court of Appeal, endorsing the tests applied by the courts at first instance, held that in order to determine whether fortification should be provided, it is necessary to make an intelligent estimate of the likely amount of any loss which may be suffered by the applicant for fortification by reason of the making of an interim order, and ascertain whether there is a sufficient level of risk of loss to require fortification. This could equally be summarised as a requirement that the applicant for fortification must show a good arguable case for it. It is also necessary to show that the loss must have been, or be likely to have been, caused by the granting of the injunction, but it is sufficient for the court to be satisfied that the making of the order is a cause without which the relevant loss would not be suffered. In this case, applying those principles, the Court of Appeal upheld the earlier decision to order further fortification. Malabu could show a good arguable case that the freezing injunction prevented it using its money as it chose and it was irrelevant that it may have had a liability to pass that money onto third parties.

By the time that the Court of Appeal came to give its judgment in this matter the trial on liability had already taken place and EVP had been largely successful in its underlying claim. As a result it was entitled to recover 90% of its reasonable costs of fortifying the cross-undertaking and the appeal was very largely academic. The decision nevertheless remains useful in clarifying and confirming the correct test to be used when determining whether to order fortification.

Will the court take the merits of a case into consideration when enforcing sanctions for non-compliance with orders?[3]

The enforcement of case management decisions was the surprise hot topic for commercial parties to emerge out of the reforms to the conduct of civil litigation that took place in 2013. Following the upheaval of the Court of Appeal's

[2] *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295
[3] *Al Saud v Apex Global Management Ltd & Anr* [2014] UKSC 64

"…THE SUPREME COURT HAS RECENTLY ALSO WADED INTO THE DEBATE, COMMENTING ON THE CIRCUMSTANCES IN WHICH THE ULTIMATE MERITS OF A CLAIM WILL BE RELEVANT WHERE THE COURT CONSIDERS THE IMPOSITION OF SANCTIONS."

decision in *Mitchell v News Group Newspapers* (2013), and the subsequent tempering of that decision in *Denton v TH White Limited* (2014), the Supreme Court has recently also waded into the debate, commenting on the circumstances in which the ultimate merits of a claim will be relevant where the court considers the imposition of sanctions.

In *Al Saud v Apex Global Management Ltd & Anr* the High Court had ordered the parties to file and serve statements certified by a statement of truth "signed by them personally in the case of individuals". The appellant, a member of the Saudi Arabian royal family, argued that he should not be required to sign as, under Saudi law he was not permitted to be personally involved in litigation, and so the statement of truth was signed by his adviser. The appellant maintained that position in the face of an unless order providing that, unless he signed the statement of truth, his defence would be struck out. Accordingly judgment was entered in the respondent's favour. An application for relief from the strike out sanction was refused and that decision was upheld on appeal to the Court of Appeal. The appellant then appealed to the Supreme Court, contending that the sanction was disproportionate, particularly in light of the strength of his defence.

As to this Lord Neuberger, giving the leading judgment on behalf of the majority, accepted that there was initial attraction in the suggestion that the appellant should not be prevented from challenging liability in circumstances where he appeared to have a substantive defence simply because of his failure to sign a document. However, having found that each of the intervening case management orders had been rightly made, it was difficult to suggest that the final result was wrong on the grounds of proportionality, and the importance of litigants obeying court orders was self-evident. Lord Neuberger went on to hold that the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to the sort of case management issues that were at issue in this case. An exception to this rule might be made in circumstances where a party has a case whose strength would entitle him to summary judgment (ie, where there is no real prospect of the claim succeeding and there is no other compelling reason for the case to be disposed of at trial). However, in normal circumstances it was hard to see why the strength of a party's case should affect the nature or enforcement of case management decisions or indeed how a court could take account of a party's ultimate prospects of success when making such decisions in a principled way. In this case the appellant had good prospects of establishing his defence, but his prospects could not be said to be any higher and thus the appeal was dismissed.

"… IN NORMAL CIRCUMSTANCES IT WAS HARD TO SEE WHY THE STRENGTH OF A PARTY'S CASE SHOULD AFFECT THE NATURE OR ENFORCEMENT OF CASE MANAGEMENT DECISIONS OR INDEED HOW A COURT COULD TAKE ACCOUNT OF A PARTY'S ULTIMATE PROSPECTS OF SUCCESS WHEN MAKING SUCH DECISIONS IN A PRINCIPLED WAY."

As Lord Neuberger noted, case management matters are primarily matters for the Court of Appeal to resolve and the Supreme Court will generally be diffident about interfering with guidance given or principles laid down by that court. Nevertheless, in suggesting that the merits of a case may, in some circumstances, be relevant in the context of case management decisions, the Supreme Court does appear to have added a certain gloss to the guidelines set out in *Denton*. It remains to be seen how far the lower courts take up that gloss.

Can you serve proceedings on a UK establishment of an overseas company?[4]

In the context of commercial disputes, it is not uncommon for a claimant to have to serve proceedings issued by the English courts on a defendant located in

[4] *Teekay Tankers Ltd v STX Offshore & Shipping Co* [2014] EWHC 3612 (Comm)

another jurisdiction. The rules on service are complex and complying with the relevant formalities for serving a foreign defendant can often be time consuming, depending on where that defendant is located. However, the Commercial Court's recent decision in *Teekay Tankers Ltd v STX Offshore & Shipping Co* is a welcome confirmation that section 1139(2) of the Companies Act 2006 can sometimes provide a quicker and cheaper alternative.

The case concerned a dispute over the construction of four oil tankers. Although the defendant was incorporated in Korea, it had registered a UK establishment (meaning that it set up a UK branch, being the same entity as the Korean entity, to do business out of the UK) at Companies House pursuant to section 1046 of the Companies Act and identified Mr Kang as a person authorised to accept service of documents in the UK on its behalf. Section 1139(2)(a) provides that a document may be served on an overseas company whose particulars are registered under section 1046, and so the claimant served its claim form on the defendant in London via Mr Kang. However, the defendant contended that service of the claim form was not effective and Mr Kang was only authorised to accept service of documents on behalf of the UK establishment, which was not the entity being sued.

The Commercial Court rejected that argument, noting that section 1139 is expressed in general terms and not limited to claims in respect of the UK establishment. Further, the court observed that section 1056 of the Act requires that regulations relating to registration of overseas companies must require an overseas company to register particulars identifying every person resident in the UK authorised to accept service on behalf of the company or state that there is no such person. However, if the defendant's argument was right, the register would only provide details of a person authorised to accept service on behalf of the company in respect of a limited class of business, and thus the mandatory statutory purpose in section 1056 would not be carried out. The court also commented that there was force in the argument that, having voluntarily registered the London address, the defendant could not deny it had a "place of business" within the jurisdiction, thus permitting service to be effected pursuant to both section 1139(2)(b) and the Civil Procedure Rules. In any event, the evidence as a whole established that the defendant was carrying out business activity and had a place of business in the UK at the material time. It was therefore held that the defendant had been validly served.

"THIS DECISION IS TO BE WELCOMED BY LITIGANTS SEEKING TO BRING PROCEEDINGS IN ENGLAND AND WALES. IT CONFIRMS THAT … CLAIMANTS WILL THUS BE ABLE TO AVOID THE TIME CONSUMING PROCESS OF SEEKING PERMISSION TO SERVE OUT OF THE JURISDICTION, AND THEN ENSURING THAT THE RELEVANT INTERNATIONAL CONVENTIONS ARE COMPLIED WITH WHEN SERVICE IS EFFECTED."

This decision is to be welcomed by litigants seeking to bring proceedings in England and Wales. It confirms that, where a foreign company has a registered UK establishment, it will be possible to serve proceedings at that address, even if the subject matter of the claim does not relate to the activities of that establishment. Claimants will thus be able to avoid the time consuming process of seeking permission to serve out of the jurisdiction, and then ensuring that the relevant international conventions are complied with when service is effected.

COMMERCIAL

How will the court determine damages when a buyer fails to accept delivery of goods?[5]

Where a purchaser refuses to pay for goods or to accept delivery of them, the Sale of Goods Act 1979 provides that where there is an available market for the goods in question, the measure of damages will usually be ascertained by reference to the difference between the contract price and the market price at the time when the goods ought to have been accepted. This rule is underpinned by the mitigation principle, which provides that a claimant can only recover for loss which could not have been avoided by taking reasonable steps. However, it is a *prima facie* rule only, and as the Commercial Court's decision in *Lakatamia Shipping Co Ltd & Ors v Nobu Su* shows, in some cases it may be appropriate to depart from it.

The case concerned an oral agreement to buy-back a forward freight agreement (FFA) position. The buy-back did not take place as anticipated and so the claimant sellers brought a claim for breach of contract. The defendants contended that, pursuant to section 50(3) Sale of Goods Act 1979, damages should be limited to the difference between the contract value and the market value of the relevant FFA position on 8 August, when the repurchase should have taken place.

"… ALTHOUGH SECTION 50(3) IS INTENDED TO PROVIDE A STRAIGHTFORWARD AND READILY APPLICABLE MEASURE OF DAMAGES, THE COURT WILL NOT ALWAYS APPLY IT, EVEN WHERE THERE IS AN AVAILABLE MARKET."

While the court accepted that there was an available market for the purposes of the rule, even if it was not possible to dispose of the positions at once, it took the view that the overriding compensatory principle, by which the claimant should be placed in the same position as if the contract had been performed, should in this case oust the *prima facie* rule. The defendants had not renounced the contract and indeed, had sought to perform it, albeit tardily. The court observed that the *prima facie* rule proceeds on the basis that it is open to the seller to go out into the market on the date of breach and sell the goods to others at the market rate, with the resultant loss falling on the defaulting buyer. However, where, as in this case, the buyer constantly and insistently represents that it will complete the purchase and thereby encourages the seller not to go out into the market and dispose of the goods, the court considered that the buyer could not contend that the seller's measure of damages should fall to be assessed on the basis of such disposal taking place at the date of breach.

Thus, as *Lakatamia* demonstrates, although section 50(3) is intended to provide a straightforward and readily applicable measure of damages, the court will not always apply it, even where there is an available market.

What level of "moral turpitude" is necessary to engage the illegality defence?[6,7,8]

As the Supreme Court recently noted, English law has a long-standing repugnance for claims which are founded on the claimant's own illegal or immoral acts. This distaste led to the establishment of the illegality or *ex turpi causa* defence, which provides that no court will lend its aid to a man who founds his cause of action on such an act. However, notwithstanding the antique

[5] *Lakatamia Shipping Co Ltd & Ors v Nobu Su/Hsin Chi Su* (*aka Su Hsin Chi; aka Nobu Morimoto*) [2014] EWHC 3611 (Comm)
[6] *Les Laboratoires Servier & Anr v Apotex Inc & Ors* [2014] UKSC 55
[7] *Jetivia SA & Anr v Bilta (UK) Limited (in liquidation) & Ors* [2015] UKSC 23
[8] *RTA (Business Consultants) Ltd v Bracewell* [2015] EWHC 630 (QB)

"…NOTWITHSTANDING THE ANTIQUE NATURE OF THE DOCTRINE, QUESTIONS AS TO ITS NATURE AND APPLICATION PERSEVERE."

nature of the doctrine, questions as to its nature and application persist.

Les Laboratoires Servier v Apotex Inc concerned a patent claim in which an injunction restraining the respondent from selling a drug in the UK was discharged and the respondent made a claim on the cross-undertaking in damages. However, the appellant contended that, as the drug to be sold in the UK would have been manufactured in Canada in infringement of a Canadian patent, it would be contrary to public policy to allow the respondent to recover damages for its loss.

In this case the key issue was the level of "moral turpitude" necessary to engage the defence. While the paradigm act will be a criminal offence, the Supreme Court considered that the defence is also concerned with acts which could be described as "quasi-criminal" on the basis that they engage the public interest in the same way. Such acts would include cases of dishonesty and corruption, anomalous categories of conduct which are contrary to public policy such as prostitution, and infringement of statutory rules enacted for the public interest which attract civil sanctions of a penal nature. However, the defence would not be engaged by torts (other than those of which dishonesty is an essential element), breaches of contract, or statutory and other civil wrongs, since such wrongs offend against interests which are essentially private and not public and the public interest is sufficiently served by the availability of a system of justice to regulate the consequences as between the parties affected. Accordingly in *Les Laboratoires Servier* it was held that the illegality defence was not engaged since the public interest was not engaged by a breach of the patent holder's rights.

"… THE ILLEGALITY DEFENCE IS NOT A DISCRETIONARY POWER. THE STRICT APPLICATION OF THE PRINCIPLE MAY THEREFORE RESULT IN BENEFITS OCCASIONALLY BEING CONFERRED ON UNDESERVING DEFENDANTS, AND PRODUCE DISPROPORTIONATELY HARSH CONSEQUENCES FOR SOME CLAIMANTS."

In reaching this decision Lord Sumption endorsed the judgment of the House of Lords in *Tinsley v Milligan* (1994) that the illegality defence is not a discretionary power and thus its strict application may result in benefits occasionally being conferred on undeserving defendants, and disproportionately harsh consequences may be suffered by some claimants. However, this opinion was not shared by other members of the Supreme Court in the subsequent case of *Jetivia SA v Bilta (UK) Limited*, who either considered that the defence is a rule of public policy or took the view that this issue needs to be reviewed more fully in an appropriate case. Significant questions clearly thus remain as to the operation of the defence.

Meanwhile *RTA (Business Consultants) Ltd v Bracewell* was an example of the operation of the illegality defence and the relevance of moral turpitude in the context of contracts prohibited by law. The case concerned an agreement for estate agency work entered into by a company which should have been registered with the Office of Fair Trading pursuant to Money Laundering Regulations but which was not. The High Court had to determine whether that fact rendered the contract illegal, even though it was accepted that the failure to register did not indicate dishonesty or moral turpitude.

Ultimately, it was held that the question of whether a contract is illegal is a matter of construction of the relevant statutory provision, and the question of moral turpitude is irrelevant. It therefore wasn't for the court to consider whether the sanction of rendering the contract illegal was disproportionate, but rather a matter for Parliament. In this case the court held that the failure to register did indeed render the agreement illegal under the Money Laundering Regulations, and thus prevented its enforcement.

"…THE WRONGED PARTY CAN NORMALLY CHOOSE WHETHER TO ACCEPT THE REPUDIATION AS TERMINATING THE CONTRACT OR WHETHER TO AFFIRM THE CONTRACT, KEEPING IT IN FORCE. HOWEVER … THAT FREEDOM OF CHOICE MAY SOMETIMES BE RESTRICTED."

Does an innocent party always have a choice as to whether to accept a repudiatory breach?[9]

As well as entitling a wronged party to damages, breach of certain contractual terms will also entitle the wronged party to terminate the contract. Such a "repudiatory breach" does not automatically bring the primary obligations of the parties to perform the contract to an end. Instead, the wronged party can normally choose whether to accept the repudiation as terminating the contract or whether to affirm the contract, keeping it in force. However, as the recent decision in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* shows, that freedom of choice may sometimes be restricted.

The claim concerned a contract to carry a cargo of cotton in shipping containers owned by the claimant carrier. The defendant shipper had sold the cotton to a company in Bangladesh but, following a fall in the price of cotton, the buyer refused to collect the goods. The goods thus remained in port, stored in the containers, with both the carrier and the shipper taking the position that they were unable to unpack them and the Bangladeshi customs authorities refusing to release them in any event without a court order. The carrier therefore sought to charge the shipper "demurrage" pursuant to a liquidated damages clause in the contract which provided that, after an initial period, a daily rate would be charged for each day the containers were not returned. By the time of the hearing the demurrage that was said to be payable was around ten times the value of the containers. One of the arguments the shipper raised against the claim was that its inability to return the containers amounted to a repudiation of the contract which had brought its obligation to pay demurrage to an end.

"… THE COURT NOTED THAT A CONSTRAINT ON THIS CHOICE, ALBEIT A WEAK ONE, IS IMPOSED BY THE "LEGITIMATE INTEREST" PRINCIPLE."

While the Commercial Court accepted that the shipper was in repudiatory breach, the carrier had not accepted the breach as terminating the contract and so the question was whether the carrier was entitled to keep the contract alive. Whilst, in general, a party is entitled to choose how to enforce their contractual rights, the Court noted that a constraint on this choice, albeit a weak one, is imposed by the "legitimate interest" principle. This provides that the choice may be limited where a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages. The Court considered that this principle, first recognised in the leading case of *White & Carter (Councils) Ltd v McGregor* (1962), can now be seen in the wider context of the increasing recognition of the need for good faith in contractual dealings, and that materially identical questions to those concerned with the exercise of a contractual discretion would apply to the exercise of an option to terminate the contract.

Here there was no doubt that there was a legitimate interest in keeping the contracts of carriage in force as long as there was a realistic prospect that the shipper would perform its obligations and procure the collection of the goods. However, once it was clear that was not going to happen and the shipper was in repudiatory breach, there was no reason to keep the contracts open in the hope of future performance. The carrier's only interest in keeping the contracts in force at that point was to continue to claim demurrage and it would only be proper to continue to claim demurrage in those circumstances if the carrier's inability to use the containers was causing it to suffer ongoing financial loss. In this case there was no reason to suppose that by the time it was clear that the shipper was

[9] *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm)

"IN THE VAST MAJORITY OF CASES A WRONGED PARTY WILL BE UNABLE TO CONTINUE TO PERFORM A CONTRACT WHERE THE OTHER SIDE REFUSES TO DO SO, AND SO IN PRACTICAL TERMS THE RIGHT TO AFFIRM A CONTRACT IN THE FACE OF A REPUDIATORY BREACH WILL BE OF LIMITED VALUE."

in repudiatory breach the carrier was suffering any financial loss and indeed the Court considered that a continuing obligation to pay demurrage in such circumstances would be penal. Accordingly it was held that there was no legitimate interest in keeping the contract in force after that date.

In the vast majority of cases a wronged party will be unable to continue to perform a contract where the other side refuses to do so, and so in practical terms the right to affirm a contract in the face of a repudiatory breach will be of limited value. However, even where a party may be able to unilaterally keep a contract going, this decision apparently places further limits on the circumstances in which they can do so.

What approach should the court take when judicial review is sought in a commercial setting?[10]

Judicial review applications, the process by which individuals, businesses and other interested parties can challenge the lawfulness of decisions taken by public bodies and those exercising a public function, have grown significantly in recent years. So much so that the Government has recently introduced reforms intended to reduce the number of unmeritorious applications being made. The Court of Appeal's decision in *R (on the application of United Company Rusal Plc) v The London Metal Exchange* is a relatively unusual example of a challenge made against a decision of a commercial body.

"JUDICIAL REVIEW APPLICATIONS, THE PROCESS BY WHICH INDIVIDUALS, BUSINESSES AND OTHER INTERESTED PARTIES CAN CHALLENGE THE LAWFULNESS OF DECISIONS TAKEN BY PUBLIC BODIES AND THOSE EXERCISING A PUBLIC FUNCTION, HAVE GROWN SIGNIFICANTLY IN RECENT YEARS. SO MUCH SO THAT THE GOVERNMENT HAS RECENTLY INTRODUCED REFORMS INTENDED TO REDUCE THE NUMBER OF UNMERITORIOUS APPLICATIONS BEING MADE."

The claimant, a producer of aluminium and alumina, had sought judicial review of a decision made by the London Metal Exchange (LME) to change the rules for the acceptance of stock into LME approved warehouses. Although the LME is a commercial metals exchange, as a recognised investment exchange under the Financial Services and Markets Act 2000 it is obliged to uphold certain standards and it was thus accepted that it was subject to the principles of public law. The relevant rule change, which was intended to reduce warehouse queues, had been made following consultation. However, at first instance it was held that the consultation process was procedurally unfair as no explanation was given as to why one of the alternative proposals for reducing queues had been rejected.

The Court of Appeal, however, took a different view. It noted that a common law duty of fairness when consulting is imposed on a public body to enable those affected by its decisions to respond to proposals the consultant body proposes to make. There is therefore a duty to include sufficient information to allow respondents to give intelligent consideration and intelligent response. However, that duty does not, in general, extend to providing options or information about proposals which the body is not making, unless there are very specific reasons for doing so and an explanation provided by a consultant body in its consultation document will not be unfair unless something material had either been omitted or materially misstated. In this case the respondents did not need information about the alternative proposal, which the claimant did not even support, and the first instance court had thus been wrong to say that the consultation was unlawful.

In reaching this decision the Court acknowledged that the fact that this was a comparatively rare example of commercial judicial review did not mean the standard of fairness should be diluted. However, it was observed that where

[10] *R (on the application of United Company Rusal Plc) v The London Metal Exchange* [2014] EWCA Civ 1271

judicial review is sought in a commercial setting, parties may make or lose money as a result of the delay caused by a legal challenge and the regulation of the market may be undermined. Accordingly, it was held that in such circumstances the court must act with considerable care lest the integrity of the market is prejudiced by an unsustainable legal challenge. It thus seems likely that commercial judicial review will remain a rare and noteworthy event.

FINANCIAL

"SINCE IT WAS ESTABLISHED IN 1996, THE LOAN MARKET ASSOCIATION HAS SOUGHT TO ESTABLISH SOUND MARKET PRACTICE IN THE PRIMARY AND SECONDARY SYNDICATED LOAN MARKETS IN EUROPE, THE MIDDLE EAST AND AFRICA WITH THE AIM OF IMPROVING LIQUIDITY, EFFICIENCY AND TRANSPARENCY."

Do the LMA terms allow for the seller of a loan to recover a proportion of the payment premium from the buyer?[11]

Since it was established in 1996, the Loan Market Association has sought to establish sound market practice in the primary and secondary syndicated loan markets in Europe, the Middle East and Africa with the aim of improving liquidity, efficiency and transparency. Its standard terms and conditions for par trade transactions (the LMA terms) are now commonly used in the secondary loan market and were recently the subject of consideration by the Supreme Court in *Tael One Partners Limited v Morgan Stanley & Co International Plc*.

Tael had agreed to participate, together with various other lenders, in a syndicated loan which provided for a payment premium to be paid by the borrower at the same time as prepayment or repayment of the principal. In January 2010 Tael transferred some $11 million of its total participation to Morgan Stanley, under a contract which incorporated the LMA terms but made no provision for any payment to be made in respect of the payment premium. Morgan Stanley subsequently sold its participation to a third party. After the loan was prepaid, Tael contended that Morgan Stanley was required by condition 11.9(a) of the LMA terms to pay it the payment premium in respect of its $11 million participation, so far as it had accrued at January 2010.

Condition 11.9(a) provides: "Any interest or fees (other than PIK Interest) which are payable under the Credit Agreement in respect of the Purchased Assets and which are expressed to accrue by reference to the lapse of time shall, to the extent they accrue in respect of the period before (and not including) the Settlement Date, be for the account of the Seller…"

Although the Supreme Court accepted there was room for argument as to whether the payment premium could be described as "interest or fees", or whether it might be PIK interest ("any interest, fees or other amounts … which are either: (a) automatically deferred or capitalised; or (b) deferred or capitalised at the option of any Obligor"), it was clear that it was not "expressed to accrue by reference to the lapse of time". As to this the Court noted that the word "accrue" is generally used to describe the coming into being of a right or an obligation, and that while an amount to which there is an entitlement may not be payable until a future date, an entitlement may nevertheless have accrued. The conclusion that 11.9(a) did not cover the payment premium was reinforced by the commercial context, and in particular the fact that the LMA terms are

[11] *Tael One Partners Limited v Morgan Stanley & Co International Plc* [2015] UKSC 12

intended for use in a market in which loans are traded, in some cases many times, between different parties, over a number of years. In those circumstances the Court did not consider that one would infer that a contract was intended to create continuing rights and obligations between the parties which might exist over a substantial period of time, particularly where there was no mechanism in place which would enable the holder of the putative right to the payment premium, following sale of interest in a loan, to know when the right had vested or in what amount.

"…DEBT TRADERS WOULD BE WELL ADVISED TO ENSURE THAT IF THE INTENTION IS TO TRANSFER RIGHTS TO THE PAYMENT PREMIUM AS WELL AS THE LOAN, PROVISION IS EXPRESSLY MADE WITHIN THE AGREEMENT."

Although perhaps unsurprising, the Supreme Court's decision in *Tael* is nevertheless a helpful confirmation that the right to a payment premium will not continue following the assignment of a loan. It is understood that the LMA Secondary Documentation Committee is currently considering revising the LMA terms to include provision for premium, but until then debt traders would be well advised to ensure that if the intention is to transfer rights to the payment premium as well as the loan, provision is expressly made within the agreement.

FUNDING

"…THE ENGLISH COURTS' OPPOSITION TO SUCH FUNDING ARRANGEMENTS HAS DIMINISHED TO THE EXTENT THAT THE FUNDING OF LITIGATION BY THIRD PARTIES NOW PLAYS AN IMPORTANT ROLE IN ENSURING ACCESS TO JUSTICE AND THE FUNDING MARKET IS BUOYANT."

When will third party funders be liable for costs?[12]

Third party funding was once deemed unlawful and contrary to the rules on champerty and maintenance, ancient legal principles which were intended to prevent the support of litigation by parties who had no legitimate interest in the outcome, other than a share of the proceeds. However, the English courts' opposition to such funding arrangements has diminished to the extent that the funding of litigation by third parties now plays an important role in ensuring access to justice and the funding market is buoyant. Nevertheless, as the recent decision in *Excalibur Ventures LLC v Texas Keystone Inc & Ors (Rev 2)* demonstrates, questions about the liabilities faced by funders still remain.

The underlying claim concerned interests in a number of oil fields in Kurdistan. The action could not have been brought without third party funding, which was provided by various different parties at different times. The claim ultimately failed and, in light of the fact that it had been both opportunistic and speculative, the claimant was ordered to pay the defendants' costs on the indemnity rather than the standard basis (which meant that a higher level of costs would be payable). The defendants sought orders that the funders should be held jointly and severally liable for those costs, also on the indemnity scale.

Under the Senior Courts Act 1981 the court has a broad discretion to determine by whom and to what extent costs are to be paid, the ultimate question being whether it is just to make the order sought. Given that in this case the claim could not have been brought without the assistance of the funders, the judge considered there was no doubt but that they should be liable for the defendants' costs. The key question was whether they should be obliged to pay those costs on the indemnity basis. Even though the judge accepted that the funders had not personally behaved in a morally reprehensible manner, that did not preclude an order that they should pay on the indemnity basis. Indeed, the suggestion

[12] *Excalibur Ventures LLC v Texas Keystone Inc & Ors (Rev 2)* [2014] EWHC 3436 (Comm)

that the question of whether they should pay indemnity costs could only be determined on the basis of whether it was the funder's own culpable or unreasonable conduct which took the case out of the norm would unacceptably limit the width of the discretion under the Senior Courts Act. In this case the decision to fund the claim had been rushed into, and the funders did not seek reappraisal of the case's merits as it progressed. It was therefore held that it would be unjust for the funders to be absolved from contributing to the defendants' costs to the same extent as the claimant just because they were not subjectively aware of, or alive to, the features that led to the award of indemnity costs in the first place.

"FUNDERS MAY ALSO TAKE SOME COMFORT FROM THE JUDGE'S DECISION TO LIMIT THE FUNDER'S COSTS LIABILITY TO THE EXTENT OF THE FUNDING THEY HAD PROVIDED, ALTHOUGH THE JUDGE DID WARN THAT THE POSITION MAY BE DIFFERENT IF A FUNDER HAS BEHAVED IMPROPERLY OR IF THE FUNDING AGREEMENT IS CONSIDERED CHAMPERTOUS."

The judge recognised that in reaching this decision there was a risk that funders may decline to provide funding in future cases, or seek to intervene in proceedings to such an extent that their agreement to provide funding may be considered champertous. However, he did not regard these considerations as compelling, noting that indemnity costs are awarded in circumstances outside the norm and that in any event the litigation funding industry seeks to fund strong cases rather than hopeless ones. Funders may also take some comfort from the judge's decision to limit the funder's costs liability to the extent of the funding they had provided (the so-called "Arkin cap"), although the judge did warn that the position may be different if a funder has behaved improperly or if the funding agreement is considered champertous.

INTERNATIONAL

What happens when an exclusive jurisdiction clause is breached?[13]

An exclusive jurisdiction clause is intended to offer parties the certainty of knowing that, in the event of a dispute, they will only face proceedings before one set of national courts. However, depending on the circumstances and the relevant jurisdiction, effect will not always be given to such clauses and bringing proceedings arising out of the breach of such a clause can, itself, lead to complex jurisdictional issues, as demonstrated in the Court of Appeal's decision in *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellscaft mbH v AMT Futures Ltd*.

"AN EXCLUSIVE JURISDICTION CLAUSE IS INTENDED TO OFFER PARTIES THE CERTAINTY OF KNOWING THAT, IN THE EVENT OF A DISPUTE, THEY WILL ONLY FACE PROCEEDINGS BEFORE ONE SET OF NATIONAL COURTS. HOWEVER, DEPENDING ON THE CIRCUMSTANCES AND THE RELEVANT JURISDICTION, EFFECT WILL NOT ALWAYS BE GIVEN TO SUCH CLAUSES..."

In this case the claimant, AMT, was a UK derivatives broker which had been sued by a number of its former clients in Germany, in breach of exclusive jurisdiction clauses which provided for proceedings to be brought only in England. AMT contended that Marzillier, a German law firm, had induced the breach of the exclusive jurisdiction clauses, and brought a claim before the English courts for damages to cover the costs of the German proceedings and for an injunction to stop Marzillier inducing further breaches of the exclusive jurisdiction agreements. Marzillier, however, disputed the English courts' jurisdiction, holding that pursuant to the Brussels I Regulation, which governs the issue of jurisdiction between EU Member States, AMT's claim should have been brought in Germany.

Since AMT's claim was a claim in tort rather than in contract, the Court of Appeal noted that the case did not turn on the question of whether the exclusive

[13] *Marzillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellscaft mbH v AMT Futures Ltd* [2015] EWCA Civ 143

jurisdiction clause was an obligation to litigate in England (or not to litigate in Germany), or whether the essential benefit of the promise was that, if performed, it would ensure that rights under an English law contract were determined in England. Instead the relevant question was whether the "place where the harmful event occurred" was England or somewhere else, and thus where, in reality, AMT suffered the damage which formed the basis of its claim. The answer to this question was Germany, where AMT suffered the cost and expense caused by the litigation. The English court thus had no jurisdiction to hear AMT's claim.

The Court of Appeal expressed little enthusiasm for the decision which it said it was compelled to reach, noting that there was much to be said for the determination of a claim in tort for inducement of breach of contract to be made in the court which the contract breaker agreed should have exclusive jurisdiction in respect of that contract, rather than in the courts of the country where the inducement and breach occurred. However, the decision does not mean that AMT's claim has failed, merely that it must be heard in a jurisdiction which was not its first choice. Further, parties seeking to bring proceedings for breach of an exclusive jurisdiction clause should be reassured that, in agreement with comments made by the Supreme Court in *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* (2014), the Court of Appeal did not consider that EU law was an obstacle to enforcing such causes of action through awards of damages or other relief.

Which law governs the question of whether an agreement is formally valid?[14]

In order to enter into a contract, entities will generally be required to ensure that appropriate formalities are complied with and if they fail to do so, the contract may be rendered invalid and unenforceable. Under English law the requisite formalities for a company to enter into a simple agreement are relatively straightforward. However, as the decision in *Integral Petroleum SA v SCU-Finanz AG* shows, other jurisdictions may impose more onerous requirements which will still need to be complied with, even if the agreement itself is to be governed by English law.

The dispute concerned two Swiss oil traders and a supply agreement which was governed by English law. However, the defendant contended that the agreement was not binding on it as it bore only one of the two authorised signatures required by Swiss law. The claimant contended that this was a question of the formal validity of the agreement, which under the Rome I Regulation would be determined in accordance with English law, whereas the defendant argued it was a question as to the company's capacity, which was governed by Swiss law, being the law of the company's constitution.

The Court of Appeal agreed with the defendant, holding that the issue was one of the authority of a single signatory to bind the company, which was a matter for the company's constitution and governed by common law principles. Application of those principles provided that the issue was to be determined by Swiss law, the place of the defendant's incorporation, and under Swiss law a single signatory could not bind the company. In reaching this decision the judge rejected suggestions that "formal validity" under the Rome I Regulation means "every external manifestation required on the part of a person expressing the will

[14] *Integral Petroleum SA v SCU-Finanz AG* [2015] EWCA Civ 144

to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective". Although this definition could be applied in the case of a natural person, in the case of a corporation it was less easy to imagine what such an expression of will might consist of.

"PARTIES SHOULD NOT SIMPLY ASSUME THAT WHAT WORKS UNDER ENGLISH LAW WILL BE ACCEPTABLE UNDER THE LAW OF THE FOREIGN COMPANY'S PLACE OF INCORPORATION."

At first instance the Commercial Court had held that, on the facts of this case, arguments that there was ostensible authority (which would be governed by the putative proper law of the contract) were hopeless. However, this will be normally be an important question to consider in any case involving issues of authority. Nevertheless, this decision is an important reminder to parties contracting with companies from an unfamiliar jurisdiction to satisfy themselves that their counterparty has the appropriate authority to enter into a binding contract and that all the necessary execution formalities have been complied with. Parties should not simply assume that what works under English law will be acceptable under the law of the foreign company's place of incorporation, and where possible they should instead seek a foreign law legal opinion.

SETTLEMENT

"ALTHOUGH PARTIES TO A DISPUTE MAY SOMETIMES BE DETERMINED TO HAVE THEIR DAY IN COURT, IN FACT THE VAST MAJORITY OF DISPUTES END IN SETTLEMENT OR COMPROMISE."

What words are needed to show a binding settlement agreement has been reached?[15]

Although parties to a dispute may sometimes be determined to have their day in court, in fact the vast majority of disputes end in settlement or compromise, whether as a result of informal negotiation or more formal alternative dispute resolution processes. However, it is vital to remember that negotiating a settlement is a contractual negotiation like any other, and it is therefore important to make clear when offers are intended to be "subject to contract", as the recent decision in *Bieber & Ors v Teathers Ltd* demonstrates.

The underlying claim concerned investments in a series of film and television production partnerships formed by the defendant. About one month before trial, and following an unsuccessful mediation, the parties entered into settlement discussions via their lawyers. Various offers and counter-offers were made, culminating in what the defendants' lawyer described as a "take it or leave it offer". The claimants' lawyer responded by email, accepting the offer and stating that a draft consent order would follow, to which the defendant replied "noted with thanks". However, the parties could not ultimately agree on the terms of the formal settlement agreement and in particular whether the defendant should have an indemnity in the event of third party claims. The claimants contended that the claims had, nevertheless, been settled by the exchange of emails. However, the defendant denied this, contending that what was agreed was no

[15] *Bieber & Ors v Teathers Ltd (in liquidation)* [2014] EWHC 4205 (Ch)

more than the sum that the claimants would accept subject to contract or in principle, subject to the parties agreeing the terms of, and entering into, a detailed settlement agreement to be negotiated as the second stage of a two stage process.

The court took the view that the claimants had clearly established that the parties had reached a concluded agreement. Although it was suggested that a case of this complexity could not be settled other than on the basis of a careful consideration of all the relevant ramifications, the court considered this factor to be of limited weight, noting that while the underlying litigation was complex, the settlement of the dispute was not. The court rejected the suggestion that the settlement negotiations were a two stage process, noting that there was no express wording to the effect that the discussions between the parties were "subject to contract" and held that following the exchange of emails, the parties had reached agreement on all the essential terms. Further, viewed objectively, it was plain that the parties intended by their communications to reach a final and binding agreement.

"MANY SETTLEMENT NEGOTIATIONS TAKE PLACE AGAINST THE BACKDROP OF RAPIDLY APPROACHING DEADLINES … HOWEVER, BIEBER IS AN IMPORTANT REMINDER OF THE NEED, EVEN IN SUCH A PRESSURISED SITUATION, TO ENSURE THAT IMPORTANT MATTERS ARE NOT OVERLOOKED…"

As in this case, many settlement negotiations take place against the backdrop of rapidly approaching deadlines, when the parties are keen to achieve a resolution as quickly as possible. However, *Bieber* is an important reminder of the need, even in such a pressurised situation, to ensure that important matters are not overlooked and to ensure that communications are marked "subject to contract".

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