

AVIATION CASE GIVES INSIGHT INTO TREATMENT OF JURISDICTION CLAUSES AFTER BREXIT

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In recent years, lessors and lenders have relied on the dual structures of asymmetric jurisdiction clauses and the Recast Brussels Regulation to protect themselves from the 'Italian torpedo'. As the Court of Appeal's recent decision in *Etihad Airways PJSC v Flöther*¹ indicates, however, after Brexit new thinking (or perhaps the resurrection of old thinking) may now be required.

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THE 'ITALIAN TORPEDO'

EU law under Article 31(2) of the Recast Brussels Regulation² was implemented in part to curb a litigation tactic known as the 'Italian torpedo'. This tactic, often employed or threatened by a lessee or borrower which had no real defence, sought to frustrate a lessor's or lender's claims. The lessee or borrower would issue proceedings in breach of an exclusive jurisdiction clause before a member state court whose procedure only allowed that court to decide on its own jurisdiction as part of the trial, rather than as a preliminary matter. Under the previous EU rule, if that court was first seised, it would need to decide on its own jurisdiction before the court designated in the jurisdiction clause could determine the case. The Recast Brussels Regulation disarmed the torpedo by requiring member state courts to stay

proceedings if a court with exclusive jurisdiction was seised, until such time as that court decided on its own jurisdiction.

THE HAGUE 2005 CONVENTION

Following the UK's departure from the EU, the Recast Brussels Regulation will no longer apply to proceedings commenced in the UK from 1 January 2021. Instead, the 2005 Hague Convention on Choice of Court Agreements (the "Hague 2005 Convention") will apply to exclusive jurisdiction agreements concluded in civil or commercial matters. The Hague 2005 Convention is an international treaty (extending beyond Europe) to which the EU is itself a party. It aims to ensure the effectiveness of exclusive jurisdiction clauses and, like the Recast Brussels Regulation, provides that where parties agree an exclusive choice of court, unless the designated court refuses to uphold the jurisdiction, the courts in other contracting states must stay or dismiss all proceedings relating to the contract. Therefore, where there is an exclusive jurisdiction clause, the 'Italian torpedo' is not available in contracting states.

ASYMMETRIC JURISDICTION CLAUSES

Asymmetric jurisdiction clauses are widely used in international leases and finance. They typically provide that one party, usually the lessee or borrower, must sue in the courts of a specified jurisdiction, while allowing the other party, usually the lessor or lender, to take proceedings in any jurisdiction. The clauses thus seek to protect lessors and lenders from proceedings brought by lessees and borrowers in unpredictable jurisdictions whilst providing flexibility for enforcement of rights and security.

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Arguably, however, an asymmetric jurisdiction clause is not an exclusive jurisdiction clause. The English Court of Appeal considered this point, both in the context of the Recast Brussels Regulation and the Hague 2005 Convention, in *Etihad Airways PJSC v Flöther*.

BACKGROUND

Etihad had provided a €350m facility to Air Berlin. The relevant facility agreement was governed by English law and contained an asymmetric jurisdiction clause requiring Air Berlin to refer disputes to the English courts, but enabling Etihad to bring proceedings in any other court with jurisdiction. Air Berlin went into insolvency and ceased operations with a substantial debt owing to Etihad.

In July 2018, Air Berlin's insolvency administrator began proceedings against Etihad in the Regional Court of Berlin under a comfort letter provided by Etihad to Air Berlin prior to its insolvency. Six months later Etihad brought proceedings in England seeking declaratory relief, including that the claims made in the German proceedings were subject to the exclusive jurisdiction of the English court on the basis that they were within the scope of the exclusive jurisdiction provisions in the facility agreement. Air Berlin challenged the jurisdiction of the English court. Its application was dismissed at first instance and it appealed to the Court of Appeal.

THE DECISION

The main issue to be determined by the Court of Appeal was whether the asymmetric jurisdiction clause in the facility agreement could be construed as conferring exclusive jurisdiction on the English court for claims by Air Berlin for the purposes of Article 31(2) of the Recast Brussels Regulation. The Court of Appeal found that it did. If Air Berlin were not held to its agreement only to bring its claims in the English courts, then the 'Italian torpedo', which the Recast Brussels Regulation was intended to confine to history within the EU, would be available again. Air Berlin should be held to its bargain. In support, the Court of Appeal noted that an asymmetric jurisdiction clause can be read as containing two distinct jurisdiction agreements: (i) an exclusive jurisdiction agreement in which the lessee agrees only to bring claims in the English court and (ii) a distinct non-exclusive jurisdiction agreement by which the lessor is entitled to bring its claims in the English courts or any other court with jurisdiction.

The relevance of the case to future English proceedings lies in the Court's comments on the Hague 2005 Convention. Air Berlin argued that the Hague 2005 Convention was relevant because the Hague 2005 Convention and the Recast Brussels Regulation were designed to be interpreted with the maximum alignment between them and, since the relevant clause did not constitute an exclusive jurisdiction clause under the Hague 2005 Convention, it should not constitute an exclusive jurisdiction clause under the Recast Brussels Regulation. The Court rejected that argument.

The Court of Appeal decided that it could (and would) make its finding on the position under the Recast Brussels Regulation without making a finding on whether the asymmetric jurisdiction clause constituted an exclusive jurisdiction clause for the purposes of the Hague 2005 Convention. Nevertheless, it indicated that the Hague 2005 Convention “*should probably be interpreted as not applying to asymmetric jurisdiction clauses*”. The Court based that view on the notes of the negotiations of the Hague 2005 Convention and the apparent intentions of the drafting committee that the Convention was not intended to cover asymmetric jurisdiction clauses.

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EFFECT OF THE DECISION ON THE AVAILABILITY OF THE 'ITALIAN TORPEDO'

"The possibility remains, therefore, that a lessor or lender could rely on an asymmetric jurisdiction clause in England to prevent an 'Italian torpedo' by a lessee or borrower in another Hague Convention contracting state."

If that is right, it would seem that the provisions of the Hague 2005 Convention aimed at upholding exclusive jurisdiction agreements would not prevent an 'Italian torpedo' in the case of an asymmetric jurisdiction clause, since the court chosen by the lessee or borrower would not be compelled by the Hague 2005 Convention to stay the 'Italian torpedo' proceedings, despite the lessee or borrower agreeing only to bring its claims in (usually) England. Some might say that would seem an odd outcome.

It is important to recognise that the Court of Appeal's comments on the Hague 2005 Convention do not set precedent and that the Court of Appeal went out of its way to make clear that it was not making any findings on the proper interpretation of the Hague 2005 Convention. The English courts have also previously suggested that there are “good arguments” that the Hague 2005 Convention could cover asymmetric jurisdiction clauses. Arguably there is nothing on the face of the Hague

2005 Convention that would prevent an asymmetric jurisdiction clause from being viewed as two distinct jurisdiction agreements and so permitting the exclusive jurisdiction agreement entered into by the lessee/borrower from coming within the Hague 2005 Convention. The possibility remains, therefore, that a lessor or lender could rely on an asymmetric jurisdiction clause in England to prevent an 'Italian torpedo' by a lessee or borrower in another Hague Convention contracting state (which should include all EU member states).

THE RETURN OF THE ANTI-SUIT INJUNCTION

Another possibility for a lessor or lender facing an 'Italian torpedo' would be to consider an anti-suit injunction. The anti-suit injunction was a regularly deployed tactic by parties seeking to enforce rights in jurisdiction clauses, but under EU law it became unavailable to restrain parties from bringing proceedings in other EU member states. It is a serious step. Breach of the injunction would ultimately be a contempt of the English court, which could have severe consequences for the person in breach and those who assist or permit the breach. Now that the English courts are no longer bound by EU law on matters of jurisdiction, lessors and lenders should have greater freedom to enforce their rights in this way.

BALANCING ASYMMETRY

As regards lessors' and lenders' positions, it seems reasonably clear that the non-exclusive jurisdiction agreement within an asymmetric jurisdiction clause, by which a lessor or lender can bring its claims in England or any other court with jurisdiction, would not come within the ambit of the Hague 2005 Convention. Lessors and lenders must decide whether the advantages of an asymmetric jurisdiction clause outweigh potential difficulties in respect of jurisdiction and enforcement now that the Recast Brussels Regulation no longer applies to proceedings commenced in England & Wales.

CONCLUSION

There is no doubt that the English courts (and wider legal community) remain the pre-eminent place for reliable, predictable and commercial resolution of leasing and financial disputes (with costs awards for the successful party) and that the Hague 2005 Convention allows for much wider enforceability of English judgments than, for example, New York judgments. The possibility of anti-suit injunctions should assist in upholding English court jurisdiction clauses. However, the meaning and effect of the terms of a jurisdiction clause may now require more consideration than before.

[1] [2020] EWCA Civ 1707

[2] Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

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