

ADJUDICATION AFTER BREXIT: AN ENGLISH AFFAIR

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In the recent case of *Motacus Constructions Limited v Paolo Castelli SpA*¹, the Technology and Construction Court (“TCC”) has handed down a significant judgment on whether an English court has jurisdiction to enforce an adjudicator’s decision where the contract contained an exclusive jurisdiction clause in favour of the courts of Paris, France. This case will be of particular interest to international parties carrying out construction works in the UK.

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The decision is one of the first cases post-Brexit to consider the application of the 2005 Hague Convention on Choice of Court Agreements (the “Hague Convention”), which has replaced the Recast Brussels Regime in the UK as the primary source of law determining the effect of jurisdiction clauses in favour of the courts of EU Member States.

A novel opportunity was presented to the court to clarify the interaction between the enforcement of adjudication awards made pursuant to the Housing Grants, Construction and Regeneration Act 1996 (the “Construction Act”) and a contract for construction works in England that purported to confer exclusive jurisdiction on an overseas court.

BACKGROUND

Paolo Castelli SpA (the “Employer”), an Italian company, entered into a contract with Motacus Constructions Limited (the “Contractor”), a company incorporated in the United Kingdom, to carry out works at One Bishopsgate Plaza Hotel in London (the “Contract”).

The “Governing Law & Dispute Resolution” clause of the Contract (“Clause 19”) stated:

“This Agreement shall be governed by and construed in accordance with the laws of Italy.

All disputes between the parties as to the validity, execution, performance, interpretation or termination of this Agreement will be submitted to the exclusive jurisdiction of the Courts of Paris, France, in accordance with the aforementioned laws.”

Irrespective of the fact that the Contract was governed by Italian law, as the works constituted construction operations in England the Contract was a construction contract pursuant to the Construction Act and was therefore subject to the right to refer a dispute to adjudication. The Construction Act provides that the *“decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration ... or by agreement”*². In contracts where this wording is absent, as in this case, such provisions take effect as implied terms³ in accordance with the Scheme for Construction Contracts.

A dispute arose as to sums due under the Contract and the Contractor commenced an adjudication, leading to an award in its favour. However, the Employer failed to pay. The Contractor filed a claim in the English courts to enforce the award and was given permission to apply for summary judgment, but the Employer challenged the TCC’s jurisdiction on the grounds that the Contract conferred exclusive jurisdiction on the courts of Paris, France.

Since the end of the transition period following the UK’s departure from the European Union, the effect of jurisdiction clauses under English law is determined in accordance with the Hague Convention, an international agreement to which the EU is a signatory and to which the UK has re-acceded in its own right following Brexit.

The Hague Convention provides that, in an *“international case”* (i.e. where the parties are not *“resident in the same contracting state”*⁴), where a contract contains an exclusive jurisdiction clause, the courts designated in the clause have jurisdiction, subject to limited exceptions, and the courts of any other contracting state have an obligation to suspend or dismiss proceedings brought in breach of the agreement. The central question before the court was, therefore, whether the case fell within the limited exceptions.

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JUDGMENT

Notwithstanding the exclusive jurisdiction clause in the Contract, the Contractor argued that two exceptions under the Hague Convention applied, and founded the TCC’s jurisdiction:

- Article 6(c), which provides an exception where *“giving effect to the [exclusive jurisdiction clause] would lead to a manifest injustice or would be contrary to public policy”*; and
- Article 7: which provides an exception in the case of *“interim measures of protection”*.

Article 6(c)

Hodge J dismissed the Contractor’s argument in relation to Article 6(c). He considered each of the tests for *“manifest injustice”* and *“public policy”* and commented that the burden rested on the Employer as claimant to show that one, or both, limbs of the exception applied, noting the *“high threshold required for this exception to be engaged”*.

The Contractor attempted to argue that enforcement of the award by the courts of Paris would run contrary to the purpose of adjudication as a “*speedy mechanism for settling disputes in construction contracts*”. However, it did not adduce any evidence as to the position under French or Italian law. Accordingly, in the “*absence of any evidence as to why enforcement cannot proceed effectively in the courts of Paris, France*”, there was no reason to disregard the “*bargain that [the parties] freely made*”.

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As Hodge J noted, had the UK Parliament considered that the cashflow problems affecting the construction industry, and the consequent need for a speedy mechanism for provisionally settling disputes, warranted a derogation from the Hague Convention in the case of construction contracts, it would need to make a derogation to that effect. It has not done so.

Article 7

Hodge J accepted the second argument of the Contractor, that adjudication proceedings, and the subsequent enforcement of an adjudication award, constitute, “*interim (temporary) measures “to protect” the position of one of the parties*” and thus the Article 7 exemption applied. Citing Dyson J’s passage in *Macob Civil Engineering Ltd v Morrison Construction Ltd*⁵, Hodge J recognised that Parliament’s intention in enacting the Construction Act was to “*introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis [...]*”. As such, he determined that adjudication “*is analogous to the delivery of goods/other property or an interim injunction*” as it “*is not final and binding on the parties*” – its purpose is to protect the position of the successful party, pending final resolution.

Moreover, Hodge J agreed that enforcement of the Award still constituted an interim remedy as even though summary judgment is a “*final, conclusive remedy*”, the reality of this application was that the court was being asked to grant an interim, rather than a final and conclusive, remedy. He considered that the categories of “*interim protective measures*” under Article 7 are “*not closed but are capable of expansion*”: the concept extends to “*any decision that is not a final and conclusive decision on the substantive merits of the case*”.

The Judge drew a comparison in this regard between his analysis and the position under construction contracts containing arbitration clauses, in which ordinarily a paying party under an adjudicator’s award cannot seek to avoid payment by staying the enforcement proceedings for arbitration.

Hodge J therefore held that he was not required to suspend or dismiss the proceedings and the Contractor’s application for summary judgment should succeed. The Employer was ordered to pay the sums due, plus the Contractor’s costs.

LESSONS LEARNED

This decision provides a stark illustration to international contracting parties as to the powers and proclivities of the English courts to resolve disputes concerning domestic construction operations. Even in circumstances where the contract is neither governed by English law nor subject (as a matter of contract) to the jurisdiction of the English courts, the parties may nevertheless find themselves subject to adjudication and to enforcement proceedings before the English courts. The UK adjudication regime provides a means for quick and preliminary resolution of disputes and is intended to alleviate the cashflow difficulties which might otherwise arise from non-payment pending the resolution of lengthy and complex proceedings. This decision makes clear that parties to construction contracts will be held to the “*pay now, argue later*” rationale of the adjudication regime notwithstanding an exclusive jurisdiction clause in favour of foreign courts.

The decision also provides additional certainty to parties that adjudication awards in relation to construction projects in England, Wales and Scotland will be enforceable.

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International contracting parties to construction contracts should therefore ensure that they are familiar with the idiosyncrasies of the adjudication regime and be aware of the circumstances in which the Hague Convention will apply. Owing to the recent developments in the law applicable to jurisdiction clauses following Brexit, it is particularly important for contracting parties to obtain advice on the operation of jurisdiction provisions, whether at the drafting stage or when disputes arise.

HOW CAN WFW HELP?

WFW's leading construction disputes practice has extensive experience in assisting parties to adjudication proceedings, including on the enforcement of adjudication decisions. As an international law firm with a wealth of experience in advising clients globally in complex multi-jurisdictional disputes, WFW is also ideally placed to provide advice in relation to jurisdictional issues arising from complex projects.

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[1] [2021] EWHC 356 (TCC)

[2] s. 108(3), Housing Grants, Construction and Regeneration Act 1996

[3] ss. 108(5) and 114(4), Housing Grants, Construction and Regeneration Act 1996

[4] ss. 1(1) and 1(2), 2005 Hague Convention on Choice of Court Agreements

[5] [1999] 64 Con LR 1

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