KEY POINTS

- The judgment of Teare J contains helpful guidance on the approach that will be taken by the English courts to the construction of jurisdiction clauses.
- The judgment is a further indication of a general tendency of commercial judges to lean in favour of construing jurisdiction clauses as exclusive.
- The case is an example of how a non-exclusive jurisdiction clause can in some cases be converted into an exclusive clause by the commencement of proceedings in the chosen forum.

Feature

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Jurisdiction clauses in the English courts: is there a presumption of exclusivity?

In this article, Luke Pearce discusses the recent decision of Teare J in *Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S (under konkurs),* on the proper approach to the construction of jurisdiction clauses and considers whether there is (or should be) a presumption that commercial parties intend their jurisdiction clauses to be exclusive in the absence of a contrary indication.

INTRODUCTION

One of the recurring problems encountered by anyone involved in the conduct of international commercial litigation is as to the meaning and effect of jurisdiction clauses in commercial contracts. In theory, of course, the purpose of a jurisdiction clause is to settle, in advance, any questions of jurisdiction so as to avoid any arguments about this at a later date, which can be notoriously costly and time consuming. In practice, though, things are not always that straightforward, and clauses which are designed to prevent jurisdiction battles from taking place have a surprising tendency to create further litigation of their own, with an accompanying body of jurisprudence.

GLOBAL MARITIME INVESTMENTS V OW SUPPLY& TRADING

An interesting recent example of such a case is *Global Maritime Investments Cyprus Limited v OW Supply & Trading A/S (under konkurs)* [2015] EWHC 2690 (Comm), a decision of Teare J in the Commercial Court. The parties entered into a series of cash-settled derivatives transactions relating to energy commodities. The transactions were governed by the terms of a written agreement referred to as the "General Terms", cl 13 of which provided that: '13.1 These general terms and conditions will be governed by and construed in accordance with English law. 13.2 With respect to any suit, action or proceedings relating to these general terms and conditions each party irrevocably submits to the jurisdiction of the English courts.'

The defendant, OWST, went into insolvency in November 2014. That was an Event of Default under the General Terms, entitling the claimant, GMI, either to terminate the transactions if it saw fit, or to affirm the transactions but cease making payments to OWST for so long as the Event of Default was continuing (it being a condition precedent of any obligation to make a payment under the General Terms that the other party was not subject to a continuing Event of Default). Since GMI was out of the money on the transactions, and it was arguable that by terminating the transactions they would expose themselves to a liability to pay OWST a substantial sum by way of "close out", they chose the latter course. The effect of this, as confirmed by the Court of Appeal in *Lomas v Firth Rixson* [2012] EWCA Civ 419, was that their obligations under the transactions would potentially remain suspended forever.

OWST, which was a Danish company, subsequently commenced proceedings in the Danish courts seeking, in effect, to force GMI to terminate the transactions pursuant to certain provisions of Danish insolvency law. The reason for this was that OWST considered that, if the transactions were terminated, a substantial sum would become payable to it under the termination provisions. GMI in turn commenced proceedings in the Commercial Court seeking various declarations of non-liability to OWST, and a declaration that OWST was not entitled to commence any proceedings against GMI relating to the General Terms in any jurisdiction other than England.

GMI did not contend that the Danish proceedings which had *already* been commenced were a breach of the jurisdiction clause, since those proceedings were founded solely on provisions of Danish insolvency law (cf *AWB (Geneva) SA v North America Steamships Ltd* [2007] 2 CLC 117). However, since GMI feared that OWST would, if successful in Denmark, then seek to bring proceedings against GMI for what it calculated to be the close out sum due under the transactions, GMI sought a declaration that any such proceedings must be brought in England. The reason for this was that, as GMI contended, any such proceedings would inevitably fail, because the English courts would not recognise a decision of the Danish courts applying Danish insolvency law in circumstances where the General Terms were expressly governed by English law (*Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399).

GMI argued that, although cl 13.2 of the General Terms did not in terms say that it was an "exclusive" jurisdiction clause, that was nevertheless its effect. It also argued that, if that were wrong, the effect of cl 13.2 was that, if either party in fact commenced proceedings in England, the other party would from that point on be precluded from bringing proceedings elsewhere. In other words, GMI contended that if cl 13.2 was prima facie non-exclusive in effect, it gave the parties the ability to convert it into an exclusive jurisdiction clause by commencing proceedings in England.

Feature

Biog box

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Both of these arguments were accepted by Teare J (at [47]–[55]). As for the first question, the Judge held that it was not necessary for parties to use the word "exclusive" for a jurisdiction clause to be construed as such. In the instant case, particular factors pointing to the intention of the parties that the clause be exclusive were that: (a) the General Terms also provided, in the clause immediately preceding the jurisdiction clause, that English law was to apply; (b) the clause operated mutually, in the sense that *both* parties agreed irrevocably to submit to the jurisdiction of the English courts; and (c) it was difficult to see how the parties could agree "irrevocably" to submit to the jurisdiction of the English courts whilst simultaneously reserving their right to bring proceedings elsewhere. Teare J rejected the suggestion which had been made in previous cases that the fact that the clause was in transitive form rather than intransitive form (ie it was an agreement to submit to the jurisdiction of the English courts in respect of any dispute, rather than an agreement to submit any dispute to the jurisdiction of the English courts) was a pointer in favour of non-exclusivity. As Professor Briggs has pointed out (Briggs & Rees, *Civil Jurisdiciton and Judgments*, 5th ed, 2009, para 4.45), the distinction between the transitive and intransitive form of the verb 'to submit' is such a subtle one that "most graduates of English universities would be hard put to it to see and explain the difference", and the idea that commercial parties, particularly foreign ones, intend important consequences to follow from such subtle differences in language is difficult to accept.

As for the second question, Teare J held that in any event, as soon as GMI had commenced proceedings in England relating to the General Terms, OWST was from that stage on prohibited from commencing parallel proceedings in any other jurisdiction. Further, it was held that that prohibition applied for all times thereafter, including after the English proceedings which had been commenced by GMI had been concluded. According to the judge (at [54]), such a conclusion 'would give rise to the prospect of inconsistent decisions by separate courts on the same matters which prospect … cannot be supposed to be one which the parties would have regarded as acceptable'. In this regard, the Judge relied upon the recent decision of Males J in *BNP Paribas v Anchorage Capital and others* [2013] EWHC 3073 (Comm).

DISCUSSION

What, then, can one take away from this decision? On the one hand, as the Judge emphasised, the meaning of a jurisdiction clause is ultimately in all cases one of construction of the particular words used. For this reason, there is a limit to the assistance one can derive from previous authorities. Nevertheless, as the Judge went on to explain, since the words chosen by the parties for their jurisdiction clauses are not infinite in their variety, and disputes have often arisen on very similar terms, the approach taken by the courts in previous cases is helpful as providing 'signposts which may sometimes assist in determining the intention of the parties'.

It is suggested that there are four principal "signposts" in the decision of Teare J that will be of assistance to practitioners advising clients on the meaning of their jurisdiction clauses (or on the drafting of them). First, it is clear that the inclusion of an English law clause alongside an English jurisdiction clause is a strong factor indicating an intention that the jurisdiction conferred on the English courts shall be exclusive (see also, eg *Sinochem v Mobile Sales* [2000] 1 Lloyd's Rep 670, para 35). That is sensible: if commercial parties agree expressly to both English law and English jurisdiction, the natural inference is that they intend any dispute about the meaning of the contract to be determined by the English court, rather than a foreign court applying English law. Moreover, since the fact that the contract is expressly governed by English law will confer jurisdiction on the English court in any event, a non-exclusive jurisdiction clause will often be superfluous in such circumstances. Second, the fact that a clause is drafted in transitive rather than intransitive form is unlikely in the future to be regarded by English judges as a factor of any importance. As indicated above, that is clearly right, and the decision of Teare J is in this respect welcome. *Third*, the decision of Teare J suggests that if a clause is mutual in its effect, it is more likely to be construed as being exclusive in its effect. Although this is a point made in previous cases, it remains slightly unclear why this should be so, and the decision of Teare J does not shed further light on the rationale for this rule. Fourth, it appears that if a clause contains words to the effect that a party submits to the jurisdiction of the English courts (still more "irrevocably submits"), then at the very least it is likely to provide the parties with, in substance, an option to convert the clause into an exclusive one by commencing proceedings in England.

Finally, the judgment of Teare J is a further indication of a general tendency of commercial judges to lean in favour of construing jurisdiction clauses as exclusive rather than non-exclusive (see also *A/S D/S Svendborg v Wansa* [1997] 2 Lloyd's Rep 183, 186). It is submitted that that is an approach to be encouraged. As indicated above, the reason why commercial parties include jurisdiction clauses in their contracts is generally to settle, in advance, where their disputes are going to be tried. That result is far more likely to be achieved by agreeing to an exclusive clause, rather than a non-exclusive clause. While the courts have to date shied away from saying that there is any presumption in favour of construing jurisdiction clauses as exclusive (but compare Art 25 of the Brussels Regulation Recast), it is arguable that the approach actually taken by the courts is consistent with such a presumption being applied. ■

Further Reading:

- Conflict of laws in light of *Plaza BV* and the new Brussels Regulation [2015] 4 JIBFL 209.
- Ensuring that your jurisdiction clause ensures exclusive jurisdiction [2015] 7 JIBFL 453.
- LexisNexis Dispute Resolution blog: Exclusive jurisdiction clauses and insolvency disputes.