

Contradiction over Jurisdiction? English Contract Law v Foreign Insolvency Law

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During contract negotiations parties usually agree what law and which courts will determine any disputes arising from that contract. This brings certainty for the parties. However that certainty can vanish if one party is a foreign registered company and becomes insolvent – the other party may suddenly become exposed to unexpected foreign insolvency law. At this point, the drafting of a jurisdiction clause can be worth millions.

This is the situation in the recent case of ***Global Maritime Investments Cyprus Limited v O.W.***



Supply & Trading A/S [2015] EWHC 2690 (Comm).

Facts

A Cypriote company, Global Maritime Investments Cyprus Limited (“GMI”), entered into derivative

contracts with a Danish company, O.W. Supply & Trading A/S (“OW”). The contracts stated:

“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.”

In November 2014 OW filed for bankruptcy in Denmark. This was an Event of Default in the contracts and allowed GMI to either terminate the contracts or affirm the contracts but stop payments under them. To avoid exposing itself to substantial “close-out” payments under a termination of the contracts, GMI chose to affirm the contracts, but stop payments.

However, the trustee in bankruptcy of OW applied to the Danish courts to have the contracts closed out under Danish insolvency law, potentially making GMI liable to pay approximately US\$1.6 million to OW.

GMI subsequently brought an application in the English High Court which sought among other things a declaration prohibiting OW from starting any proceedings in relation to the contracts against GMI in any jurisdiction except England.

The case pitched English contract law directly against Danish insolvency law.

The Exclusive Decision

GMI argued that the jurisdiction clause was exclusive despite not containing the word ‘exclusive’. The court found in GMI’s favour. The court’s rationale was that the “reasonable commercial man” would understand that the clause was to stop any proceedings being issued in any jurisdiction other than England. Factors which the court took into account were:

- the clause immediately preceding it stated that the general terms were to be governed by English law;
- the clause applied to all proceedings relating to the general terms of the contracts;
- the clause applied mutually to both parties; and
- the submission to the English courts was “irrevocable”.

The result was that any determination with regard to the general terms would be heard in the English courts under English law. Therefore OW’s trustee in bankruptcy would be unable to close out the contracts and make GMI liable for US\$1.6 million.

A “real and present dispute”

GMI also sought a more general declaration that no rule of Danish insolvency law would have any effect, as a matter of English law, to alter or disapply any provision of the general terms.

The court first considered whether there was a “real and present dispute” between the parties in

order to make the declaration. The court decided that a real and present dispute would only arise if OW obtained a judgment from the Danish courts on the interpretation of the general terms. As OW had not obtained this judgment, there was not yet a “real and present dispute”.

Implications

While there are some questions left unanswered by this case it does raise a number of important implications:

- **Context is key** – If parties dispute jurisdiction over an ambiguous clause they must consider the context, not just the words.
- **Courts follow European regulations** – While the High Court did not explicitly refer to the EU regulations on jurisdiction, the effect was to follow Article 25 of the EU Brussels Regulation (Recast) which gives primacy to what the parties agree (although this does not yet cover Denmark). Parties should use principles of the current legislation as a starting point when assessing jurisdiction disputes.
- **Declarations will only be made in real disputes** – Declarations can be attractive as a way for parties to clarify an issue at an early stage. However, this case is clear that the court will only take steps to clarify a legal position where there is a genuine dispute between the parties.

This case raises some questions and provides few concrete answers. However it is clear that parties will continue to dispute jurisdiction, particularly in an ever more globalised world. In cross border insolvency, this is at least one certainty.

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National Law Review, Volume VI, Number 146

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