Parties' choice of exclusive jurisdiction clauses and stay applications (Lopesan v Apollo)

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Dispute Resolution analysis: This case concerned two applications, one for a stay, and one for an expedited hearing of the trial. The stay was sought pursuant to separate proceedings commenced in Spain in respect of a Sale Purchase Agreement (SPA) containing an exclusive jurisdiction clause in favour of the Spanish courts. The proceedings in England were commenced pursuant to an Equity Commitment Letter (ECL) which contained an exclusive jurisdiction clause in favour of the English courts. There were a number of linked issues pursuant to the two claims issued. The application for a stay was dismissed, the judge considering that a practical inability to achieve an outcome where both cases are heard and determined together was a factor which weighed against the granting of a stay. There was no strong countervailing factor in the instant case which justified a departure from this position, and the fact that two well-resourced parties had expressly drafted two related documents but with differing jurisdictional clauses, was material. The application for an expedited trial was also dismissed, the judge considering that a hearing to determine all issues between the parties before 1 January 2021 would mean that a fair trial would not likely be possible. The merits of the underlying argument purportedly necessitating the need for a speedy trial was relevant, and the discretion to grant an expedited trial was considered as against this background. Written by Georgia Whiting, barrister, at 4 King's Bench Walk.

Lopesan Touristik SA v Apollo European Principal Finance Fund III (Dollar A) LP and others [2020] EWHC 2642 (Comm)

What are the practical implications of this case?

It is clear that there remains some debate as to whether actions are related for the purposes of Article 30 of Regulation (EU) 1215/2012, Brussels I (recast) only when the actions can in fact be heard and determined together, or whether such actions are related where they would be heard and determined together but for some external factor (such as exclusive jurisdiction clauses). The debate was thought to have been settled, so far as the English courts are concerned, by the Court of Appeal in *JSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708. However, as this case shows, there is still some residual debate as a result of certain passages in the Court of Appeal judgment in *Euro Eco Fuels (Poland) Ltd and others v Szczecin and Swinoujscie Seaports Authority and others* [2019] EWCA Civ 1932, [2020] 3 All ER 233.

The judge in the instant case, to the extent that there were inconsistencies, followed the decision in *Privatbank* for the reasons given by Mr Justice Butcher in *Federal Republic of Nigeria v Royal Dutch Shell and Others* [2020] EWHC 1315 (Comm).

It is clear that a practical inability to achieve an outcome where both cases are heard and determined together will be a factor which weighs against the granting of a stay, as a matter of discretion. Absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay. In the instant case, the court was faced with well-resourced parties who had made a commercial decision to require that two linked transactions were subject to differing exclusive jurisdictional clauses. The dispute which subsequently arose ought to have been within the parties' contemplation at the time of drafting these clauses.

When considering an application to expedite a trial, parties will need to overcome a number of hurdles but, the key hurdle upon which this application fell, was the need for any expedited trial to proceed fairly. There were a number of unknown issues in the instant case and added factors in terms of the translation of documents. Where such an application is to be made, a detailed consideration of how to overcome any practical difficulties and potential prejudice must be undertaken.

What was the background?

The dispute arose out of a SPA between the claimant, Lopesan, as a seller, and a Spanish company called Oldavia ITG SLU (Oldavia) as buyer, for Lopesan's interest in a hotel located in Spain (the hotel). The SPA was governed by Spanish law and contained an exclusive jurisdiction clause in favour of the Spanish courts.

Oldavia was a special purchase vehicle through which the defendant, Apollo, acquired the hotel. The funding commitment was reflected in the terms of an ECL under which Apollo promised Oldavia, on the terms and conditions of the ECL, to provide it with the funding required to complete the SPA. The ECL was governed by English law and contained an exclusive jurisdiction clause in favour of the English courts.

A clause contained within the SPA created a condition precedent to the obligation to complete, and it was common ground that this clause was satisfied. However, completion did not take place, and a dispute arose between Lopesan and Oldavia as to whether Oldavia was obliged to complete under the terms of the SPA.

In August 2020, Lopesan commenced proceedings against Oldavia in Madrid, seeking specific performance of Oldavia's obligation to complete under the SPA. Subsequently, in September 2020, Lopesan issued proceedings in the English courts seeking to enforce its rights as a third-party beneficiary under the ECL by way of an order for specific performance of Apollo's obligation to put Oldavia in funds.

Lopesan subsequently issued an application for a speedy trial of that action to ensure that judgment was delivered before 1 January 2021. The reason for application was the potential argument that Apollo's obligations would lapse on 1 January 2021 even if, before that date, Oldavia came under a legal obligation to complete the SPA: the Lapse Argument.

Apollo also made an application for a stay of proceedings under Article 30(1) of Regulation (EU) 1215/2012, Brussels I (recast) which was determined by the High Court at the same time as Lopesan's application.

What did the court decide?

Application to expedite trial

Turning firstly to the application to expedite the trial, the judge considered that it was necessary, without making a determination, to consider the strengths of the Lapse Argument, which seemed to underpin the application. For a number of reasons, the judge formed the impression that it was not a strong argument and approached the expedition application on this basis. Against that background, it fell to the judge to answer the following:

- first, a threshold question of whether, objectively, there was urgency
- second, the state of the court's list and the impact of expedition on other court users
- third, the procedural history including whether there has been any delay
- fourth, whether there would be any irredeemable prejudice to the respondent

The judge considered that the application was urgent in the circumstances, despite his initial view as to the strengths of the Lapse Argument. In terms of the second question, the judge noted that if the trial were to require more than one Commercial Court week, the impact of expedition on the list would be particularly significant. The judge also considered that there had been an element of delay in making the application, which was a factor weighing against expedition. Further, on the information currently before the court, the judge was not satisfied that it would be possible, fairly, to bring the whole dispute on for trial before the end of term, even allowing for the fact that the Commercial Court is entitled to expect well-resourced parties to seek to 'rise to the occasion' when there are strong commercial reasons for the expedited determination of the dispute. Accordingly, the application for an expedited trial was dismissed.

Stay application

When considering the question of a stay, the judge noted that there was some potential inconsistency in the case law pertaining to where actions are considered to be related for the purposes of Article 30 of Regulation (EU) 1215/2012, Brussels I (recast). The debate was thought to have been settled, so far as English courts were concerned, by the case of *JSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708. However, there were passages in the judgment of the Court of Appeal in

Euro Eco Fuels (Poland) Ltd and others v Szczecin and Swinoujscie Seaports Authority and others [2019] EWCA Civ 1932, [2020] 3 All ER 233 which appeared to proceed on the basis that Article 30(1) of Regulation (EU) 1215/2012, Brussels I (recast) does not apply where there is no real possibility of the two actions being heard together. To the extent that the decisions were inconsistent, the judge followed the decision in *Privatbank*.

It was common ground that the Spanish and English proceedings were related and that the Spanish court was first seized. The degree of the relatedness was high, and the Spanish courts had a much closer proximity to the subject matter of the case. However, if proceedings were stayed, it would not be possible to hear and determine the claims in the English and Spanish proceedings together, given the conflicting exclusive jurisdiction clauses in the ECL and the SPA.

Absent the English jurisdictional clause, the judge considered that there would be a powerful case for a stay. However, he concluded that the case was not so powerful as to overcome the significance of the English jurisdiction clause, when taken in conjunction with the fact that it would not be possible to hear and determine the cases together. In particular, the parties had deliberately structured the transaction so that claims under the ECL would be heard in a different jurisdiction to claims under the SPA, despite the material issues being in the contemplation of the parties at the material time. Accordingly, the application for a stay was dismissed.

Case details

- Court: Commercial Court, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Foxton
- Date of judgment: 8 October 2020

Georgia Whiting is a barrister at 4 King's Bench Walk, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.