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English Court Retains Jurisdiction Notwithstanding French Arbitration Clause

Richard Hill (Fulbright & Jaworski LLP) · Monday, June 8th, 2009 · YIAG

In the recent decision in *Youell v La Reunion Aerienne* [2009] EWCA Civ 175 the English Court of Appeal applied the ECJ decision in *West Tankers* and upheld a Commercial Court decision holding that the mere fact that a contract contains an arbitration clause does not deprive the court of jurisdiction under the Brussels Regulation. The appropriate remedy for a party alleging that English court proceedings are brought in breach of an arbitration agreement was therefore not to challenge the court's jurisdiction but rather to seek a stay of the court proceedings under Section 9 of the Arbitration Act.

The claimants, London market insurers, and the defendants, French market insurers, both subscribed to the insurance programme of a French group of companies. The wording of the London insurers' policy was expressed largely to follow that of the French insurers. The policies were governed by French law. The French insurers' policy contained an arbitration clause and there was evidence suggesting that French law would regard that clause as incorporated into the London insurers' policy.

The French insurers settled a claim to which the London insurers refused to contribute, contending that the settlement had been reached without their authority or involvement. The French insurers commenced an arbitration in Paris against the London insurers. The London insurers disputed the existence of an arbitration agreement between the parties and issued proceedings in the English courts seeking a declaration of non-liability. The English insurers relied on Article 5(1)(a) of the Brussels Regulation as the basis for the English court's jurisdiction. Article 5(1)(a) allows proceedings to be brought in the courts of the place of performance of the relevant contractual obligations (in this case the alleged obligation to pay the French insurers in England). The French insurers made an application to the English court for a finding that it had no jurisdiction to hear the claim, arguing that the claim fell within the arbitration exception under Article 1(2)(d) of the Brussels Regulation.

The Commercial Court found that the mere fact that the contract contained an arbitration clause did not mean that the claim fell within the arbitration exclusion. The Commercial Court rejected the challenge to its jurisdiction and held that the London insurer was entitled to rely on Article 5(1) of the Brussels Regulation because the place of performance of the alleged contractual obligation to pay was England.

The Court of Appeal agreed with the Commercial Court's finding. Applying *West Tankers*, the

Court of Appeal held that the nature of the claim before the Court was critical. The subject matter of the London insurers' claim was that it was not liable under an alleged contract. It did not matter that the French insurer sought to establish that liability in an arbitration. The fact that a contract contains an arbitration clause does not mean that all claims on that contract are excluded from the scope of the Brussels Regulation by the arbitration exclusion. It is the nature of the claim that is crucial, meaning the substance of the claim itself. In this case, the nature of the London insurers' claim in the English courts related to a contract. The claim was therefore within the scope of the provisions of the Brussels Regulation relating to jurisdiction in contractual and insurance disputes and was not excluded by the arbitration exclusion. Claims that might be captured by the exclusion would therefore only be those concerned with arbitration itself in a very narrow sense.

The Court of Appeal noted that, notwithstanding the inapplicability of the arbitration exclusion, a party may still apply under section 9 of the Arbitration Act 1996 for a stay of proceedings in the event that proceedings have been brought in breach of an arbitration agreement. Such an application for a stay under the relevant legislation implementing Article II.3 of the New York Convention is the proper remedy within the EU for parties served with court proceedings in breach of an arbitration agreement.

A green paper reviewing the Brussels Regulation was published by the European Commission in late April 2009 with comments invited by 30 June 2009.

In the fact of the English proceedings, the French market had several options. The first and obvious option was to seek a stay under section 9 of the Arbitration Act 1996. The second was to defend the case on the merits. The third was to ignore the proceedings. Each of those options presented it with tactical problems. Instead, it sought to claim that the English court had no jurisdiction. That led to an interesting discussion about the scope of the arbitration exclusion in the judgment of the Court prepared by Collins LJ (the editor of Dicey on Conflicts of Laws). All this however could have been avoided if a straightforward application to stay the English proceedings had been made under section 9.

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