

ENGLISH COURT CONSIDERS JURISDICTION AGREEMENTS

Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor [2013] EWHC 1328 (Comm)

Introduction

In a decision handed down in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor* [2013] EWHC 1328 (Comm) on 24 May 2013, the English High Court considered the governing law applicable to jurisdiction agreements and the validity of asymmetrical jurisdiction clauses.

Background

On 9 November 2010, the Claimant and Hestia Holdings Limited (“Hestia”) entered into a facility agreement, which was expressed to be governed by Mauritian law. Hestia’s obligations were guaranteed by Sujana, Hestia’s parent company and the second defendant in these proceedings.

Following various defaults by Hestia, the Claimant and Hestia entered into an Amendment and Restatement Agreement (“the ARA”), which proposed a revised repayment schedule and interest amounts. The ARA was expressed as being intended “to amend, replace and restate the terms of the Original Facility Agreement”, and attached a revised facility agreement. In contrast to the original facility arrangement, the revised facility agreement was to be governed by English law and subject to the exclusive jurisdiction of the English courts, save that the Claimant, as lender, had the right to commence proceedings in any other jurisdiction if it so chose.

Hestia defaulted under the revised facility agreement, and the Claimant commenced proceedings in England. The Defendants challenged jurisdiction on the grounds that the jurisdiction clause of the revised facility agreement (reproduced below) was invalid.

24.1 Jurisdiction

(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and the most convenient courts to settle Disputes and accordingly no Party will [argue] to the contrary.

(c) This Clause 24.1 is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions.

The Defendants' challenge was based on two alternative grounds:

1. The jurisdiction agreement contained in clause 24.1 of the revised facility agreement remained subject to Mauritian law, notwithstanding clause 23; and that under Mauritian law the jurisdiction agreement was ineffective, as a result of the decision of the French Cour de cassation in *Banque Privee Edmond de Rothschild Europe v X* (26 September 2012), because it was one sided: it allowed MCB to sue, or insist on being sued, in any jurisdiction in the world, but bound Hestia and Sujana to litigate in England if MCB so choose.
2. Alternatively, even if clause 24.1 was governed by English law, it was too one sided to be compatible with fundamental principles regarding equal access to justice and should not be upheld under English law.

Judgment

The Court dismissed the Defendants' challenges to the jurisdiction clause.

Choice of law

Whether parties were permitted to change the governing law of a jurisdiction agreement is governed by English rules of private international law (as this was specifically excluded from the scope of the Rome 1 Regulation).

Justice Popplewell rejected the Defendants' argument that the parties could not amend governing law of the jurisdiction agreement but would instead have to discharge the original agreement and replace it with a new agreement, particularly given that it was common ground that the parties could change both the jurisdiction agreement and the governing law of the substantive rights by amendment.

The governing law of a jurisdiction agreement was, like any other contractual provision, to be determined by the parties' express choice, and in general the parties' intention would be taken to be that it is to be governed by the law applicable to the contract of which it forms part.

There was no rationale or policy reason why a prospective change in governing law should be objectionable.

In any event, on the facts, the ARA replaced the original facility agreement with the revised facility agreement as a new agreement, which constituted discharge of an old agreement and replacement with a new one.

Asymmetrical jurisdiction clause

Justice Popplewell stated that the effect of the jurisdiction clause was that it did not prevent the Claimant from taking proceedings other than in England, but merely preserved its right to sue in any court which would regard itself as of competent jurisdiction.

The clause was not an agreement to confer jurisdiction on a foreign court where none would otherwise exist.

Accordingly, such clauses were enforceable under English law. Even if it were to be construed as conferring jurisdiction where none otherwise existed, this would be upheld as a contractual bargain to which the court should give effect.

4th June 2013