

Separability and ostensible authority

Rimpacific Navigation Inc provides welcome clarity in the international trade arena, writes Sandra Healy

Rimpacific Navigation Inc v Daehan Shipping Co Ltd, Wonder Enterprises Ltd v Daehan Shipping Co Ltd [2009] EWHC 2941 (Comm)

This case concerned linked jurisdiction challenge and anti-suit injunction applications before the Commercial Court. The underlying claim concerned an action by Rimpacific Navigation Inc and Wonder Enterprises Ltd (the claimants) to recover sums owing under two letters of guarantee issued by the Daehan Shipping Co Ltd (the defendant). The defendant sought to challenge jurisdiction principally on the ground that the letters of guarantee containing a jurisdiction clause upon which the claimants relied were not binding on them. The claimants argued that the letters of guarantee were binding on the defendant and applied for an anti-suit injunction on grounds that the guarantees contained a valid jurisdiction clause in favour of the English courts and that the defendant had breached this clause by commencing proceedings in South Korea for a declaration of non-liability under the guarantees.

The applications raised two novel issues for decision by Mr Justice Steel: (i) whether a law and jurisdiction clause is separable for the purpose of satisfying the court that the claim falls within one of the heads of jurisdiction in CPR 6, Practice Direction 6B, para 3.1(6); and (ii) whether the general rule that the rights and liabilities of a principal as regards third parties are governed by the law applicable to the contract between the agent and the third party is applicable to companies.

The facts

In both of the actions the claimants were disponent owners of a vessel chartered to a company within the same group as the defendant. The charterparties were dated 21 September 2007 and were on largely identical terms.

Pursuant to each charterparty

the defendant provided two written guarantees dated 20 December 2007 in respect of all amounts due by the charterers under the respective charterparties. Each of the guarantees contained an express choice of English law and an exclusive jurisdiction clause in favour of the English courts. Each of the guarantees was signed by Mr Oh, who was identified as the “CEO/President” of the defendant and each guarantee bore what appeared to be an official stamp.

As from about November 2008, in the wake of the collapse in the dry cargo freight market, the charterers failed to pay hire due under the charterparties. In due course the claimants referred their claims for outstanding hire to London arbitration in early 2009. Then in March 2009 the claimants issued claims against the defendant under the guarantees. They were granted permission to serve the claim forms on the defendant in South Korea.

On 27 March 2009 the amounts owing by the charterers for outstanding hire were determined in London arbitration. The claimants were awarded outstanding hire plus interest and costs. Shortly before the issuance of those awards the claimant purported to accept the charterers’ repudiatory breach of the charterparties and terminated them. Two further arbitration awards were made dated 29 June 2009 by virtue of which the claimants were awarded sums in respect of damages for repudiatory breach. The claimants re-amended the claim forms in September 2009 to reflect the outcome of the arbitrations awards and obtained permission to serve them on the defendant in South Korea.

In the meantime, on 17 June 2009 the claimants were served with the defendant’s complaint before the Seoul District Court for a declaration of non-liability under the guarantees. The claimants disputed the jurisdiction of the Korean court.



The issues

In the applications for permission to serve out of the jurisdiction the claimants had relied on the guarantees and the choice of law and exclusive jurisdiction clauses contained therein as establishing a good arguable case that the claimants’ claims fell within grounds (6)(c) and (6)(d) in para 3.1 of Practice Direction B supplementing Part 6, which provide as follows: “Claims in relation to contracts (6) A claim is made in relation to contract where the contract—... (c) is governed by English law; or (d) contains a term to the effect that the English court shall have jurisdiction to determine any claim in respect of the contract.”

The defendant’s jurisdiction challenge was premised on its contention that the letters of guarantee on which the claimants’ claims were based were not binding and that therefore the claims did not fall within grounds (6)(c) or (6)(d). This gave rise to a threshold point raised by the claimants, namely whether the issue was to be determined by reference to the existence and validity of the guarantees or to the existence and validity of the law and jurisdiction clauses. The next question was whether the claimants had a good arguable case that the guarantees were binding on the defendant. It was accepted solely for the purpose of the jurisdiction challenge that as a matter of Korean law Mr Oh had no actual authority to execute the guarantees. The claimants contended that Mr Oh had acted within his ostensible authority as a matter of English law and that in accordance with the statement of principle at r 228 of *Dicey & Morris, The Conflict of Laws* (14th ed) English law governed this issue, as the putative proper law of the guarantees. The defendant argued that the general rule relied on by the claimants did not apply to companies by virtue of s 36 of the Companies Act 1985, as modified by regs 3 and 4 of the Foreign Companies (Execution of Documents) Regulations 1994. Alternatively the defendant

submitted that the general rule was “questionable”.

The separability issue

The claimants contended that the law and jurisdiction clause was separable and that the reasoning of the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 in the context of arbitration agreements was equally applicable to jurisdiction agreements. It was submitted that the defendant’s ground of attack, ie that Mr Oh exceeded his authority in that he failed to obtain Board approval before signing the guarantees, clearly fell within the situation envisaged by Lord Hoffman (paragraph 18): “*On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement.*” The claimants further relied on the fact that the reasoning in *Fiona Trust* had been applied in the context of jurisdiction agreements in *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091.

The defendant referred to *Seaconsar (Far East) Ltd v Bank Markazi* [1994] 1 AC 438 which was said to provide the underlying principles applying in CPR Part 6 jurisdiction cases. The defendant contended that the cases relied on by the claimants were distinguishable as the requirements of CPR Part 6 are quite distinct from the provisions of s 7 of the Arbitration Act 1996 and arts 17 and 23 of reg 44/2001. In particular, the emphasis is not so much on the existence of a jurisdiction or arbitration clause but on whether there is a sufficient nexus with the jurisdiction of the court to justify service out.

The defendant relied on recent cases involving issues of a similar kind containing no trace of an argument that the concept of separability had any application, namely *Marubeni Hong Kong and South China Ltd v Mongolia* [2002] 2 All ER (Comm) 873, *Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm).

The ostensible authority issue

The claimants contended that although the question of actual authority was governed by Korean law, English law governed rights and liabilities of the defendant (the principal) and each

claimant (the third party) *inter se*. The claimants relied on r 228 of *Dicey* and the case law supporting that statement of principle (*Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd’s Rep 159; *SEB Trygg Holding Aktiefobolas v Manches* [2005] 2 Lloyd’s Rep 129 and *Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial & Investment Bank* [2008] 1 Lloyd’s Rep 96).

Primarily, the defendant argued that the general principle at r 228 in *Dicey* did not apply in circumstances where an agent executes a document on behalf of a company as in this instance s 36 of the Companies Act 1985 applies and provides as follows:

“*Under the law of England and Wales a contract may be made—*
...
(b) on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company;”

The defendant contended that the expressions “express or implied” refers to all concepts of authority inclusive of ostensible authority and that accordingly, Mr Oh’s authority was governed by Korean law.

Alternatively the defendant contended that the general rule specified in r 228 of *Dicey* was “questionable” on the basis that it was based on a rationalisation of authorities rather than a well established rule of law.

The judgment

On the separability issue, Steel J preferred the defendant’s case. He held that it followed from the wording of grounds (6)(c) and (6)(d) in para 3.1 of Practice Direction B that a good arguable case must be made out that the contract exists and that, “*It is not enough to show that, if there is (or a serious issue that there is), it would arguably contain a law and jurisdiction clause.*” In reaching his decision, the judge applied *Marubeni Hong Kong and South China Ltd v Mongolia* [2002] 2 All ER (Comm) 873, *Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm).

Steel J decided that the 1994 regulations introduced no change as regards the governing law for the purposes of ostensible authority. He applied those cases that had been relied on by the claimants. The judge also

rejected the defendant’s submission that the general rule at r 228 of *Dicey* was “questionable” on the basis that it is both consistent with authority and business sense.

Accordingly, the defendant’s jurisdiction challenge was dismissed.

Comment

Steel J’s decision on the separability issue entails that divergent decisions could be reached as to whether or not the English court will exercise jurisdiction based on an exclusive jurisdiction clause depending on whether reg 44/2001 or CPR Part 6 applies. In the former context the concept of separability will apply, in the latter it will not. On the one hand it could be argued that this is appropriate in circumstances where reg 44/2001 amounts to a mutual agreement between states to allocate jurisdiction amongst themselves, whereas when the English court exercises jurisdiction under CPR Part 6 it is not pursuant to any such agreement and therefore before it extends its long arm there is a greater need to establish a sufficient nexus with the jurisdiction of England and Wales.

On the other hand, it is arguable that what is really providing the basis for the English court’s jurisdiction is the particular feature of the contract that links it with England rather than the existence of the contract itself. When viewed from this angle, surely there is a case for applying the concept of separability in the situation where the particular feature relied on is an exclusive jurisdiction clause because the basis of the English court’s jurisdiction is the agreement to litigate in England rather than any other aspect of the contract.

Steel J found that this approach was inconsistent with the wording of Part 6, but if this is the only limiting factor, then perhaps it is time for a review of the wording of the heads of jurisdiction in order to ensure that there is not an unnecessary divergence of approach for cases regulated by reg 44/2001 versus cases regulated by CPR Part 6.

The decision on the ostensible authority issue provides welcome clarity in the international trade arena, where it is usual for contractual documents to be executed by managers and directors that are held out as having authority to execute such documents.

Vasanti Selvaratnam QC and Sandra Healy of Stone Chambers acted for the claimant