International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

Annual Subscriptions:
Subscription prices 2011 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

Exclusive Jurisdiction and Arbitration Agreements: Will They be Enforced in Bermuda in the Event of an Insolvency?[1]

Alex Potts, Associate, Conyers, Dill & Pearman, Hamilton, Bermuda

Introduction

The Supreme Court of Bermuda ordinarily upholds and enforces exclusive jurisdiction and arbitration agreements by way of anti-suit injunctions and stays of proceedings that are brought in breach of contract, unless there are 'strong reasons' not to do so.

In this respect, the Bermuda court has expressly confirmed that it will follow and apply the House of Lords decision in *Donohue v Armco* [2002] 1 All ER 749.

Although the Bermuda court ordinarily takes a robust approach to exclusive jurisdiction and arbitration agreements (and remains wholly unaffected by European legislation and case law in this area), there have been a number of recent cases where the Bermuda court has had to consider whether particular circumstances give rise to sufficiently 'strong reasons' not to hold the parties to their contractual choice of jurisdiction.

Of greatest interest to insolvency practitioners, the Bermuda court has recently acknowledged that 'strong reasons' might potentially arise if one of the contracting parties is in an insolvent liquidation in a foreign jurisdiction, and that party's foreign liquidators have requested common law recognition and assistance from the Bermuda court, pursuant to *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508.

There is, as a result, the possibility of a real tension developing in the common law between the public policy of holding parties to their contractual bargains on the one hand, and the public policy of recognising and assisting foreign liquidators on the other.

The public policy in favour of upholding exclusive jurisdiction and arbitration clauses

In a number of recent cases, the Bermuda court has confirmed that there is a strong public policy in favour of upholding and enforcing exclusive jurisdiction and arbitration clauses. For example:

- In *IPOC International Growth Fund Ltd v OAO CT Mobile* [2007] Bda LR 43, the Court of Appeal for Bermuda upheld the Bermuda court's grant of an anti-suit injunction restraining a Bermuda entity from pursuing foreign proceedings in breach of Swedish and Swiss arbitration agreements.
- In *Lenihan v LSF Consolidated Golf Holdings Ltd* [2007] Bda LR 49, the Bermuda court held that 'there is a strong public policy in favour of arbitration', and stayed court proceedings in favour of arbitration pursuant to an arbitration agreement;
- In *ACE Bermuda Insurance Ltd v Continental Casualty Company* [2007] Bda LR 38, the Bermuda court granted an anti-suit injunction restraining a party from pursuing foreign court proceedings which were inconsistent with a Bermuda arbitration clause, even though that party was not itself a direct party to the relevant contract and arbitration agreement, but was seeking relief which would require determination in the foreign proceedings of the rights and liabilities of the parties directly privy to the contract. The Bermuda court held that 'the Court has granted anti-suit injunctions to restrain a party from pursuing foreign court proceedings in breach of an arbitration agreement for many years… the Court has such jurisdiction whether or not the party pursuing the foreign court proceedings is itself a party to the arbitration agreement. It is the breach of the arbitration clause calling for arbitration in Bermuda that the Court has jurisdiction to restrain';
- In *Robinson v Somers Isles Shipping Ltd* [2008] SC (Bda) 8 Civ, the Bermuda Court held that 'this Court has frequently recognised the importance of holding parties to their contractual dispute resolution bargains'; and

Notes

1 This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

– In *Cape Ventures SAC Limited v CC Private Equity Partners Limited* [2009] SC (Bda) 49 Com, the Bermuda court held that 'this Court, when faced with a challenge to the validity of an exclusive jurisdiction clause, should err on the side of supporting its efficacy'.

The public policy in favour of recognising and assisting foreign liquidators

The Bermuda court has also enthusiastically confirmed, following the Privy Council decision in *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508, that: 'As a matter of common law,[2] the [Supreme Court of Bermuda] may (and usually does) recognise Liquidators appointed by the Court of the company's domicile and the effects of a winding-up order made by that Court, and has a discretion pursuant to such recognition to assist the primary liquidation Court "by doing whatever it could have done in the case of a domestic insolvency".'[3]

What are 'strong reasons' for not enforcing exclusive jurisdiction and arbitration agreements?

In *Donohue v Armco* [2002] 1 All ER 749, Lord Bingham suggested at paragraphs 24 to 29 of his opinion that the following circumstances might give rise to 'strong reasons' not to enforce an exclusive jurisdiction or arbitration agreement:

– The risk of parallel proceedings or inconsistent decisions, for example where the interests of third parties, other than the parties bound by the exclusive jurisdiction clause or the arbitration clause, are involved;

– Where grounds of claim not subject to the exclusive jurisdiction clause or the arbitration clause are part of the proceedings;

– Where the party seeking to rely upon the exclusive jurisdiction clause or the arbitration clause is guilty of substantial delay ('dilatoriness'), or has in some way acquiesced to the proceedings being brought in breach of the exclusive jurisdiction clause; or

– Where the party seeking to rely upon the exclusive jurisdiction clause or the arbitration clause is guilty of some 'other unconscionable conduct'.

Lord Bingham also acknowledged the potential relevance of various factors identified by Brandon J in his judgment in *The Eleftheria* [1969 2 All ER 641, at page 645, including:

– the country in which the evidence of fact is situated or more readily available;

– the governing law of the dispute, and the extent to which it differs from English law (or Bermuda law);

– the parties' connections to the different countries;

– whether the party seeking to rely upon the exclusive jurisdiction clause or the arbitration clause genuinely desires the proceedings to take place in that jurisdiction or forum, or whether the party only seeks procedural advantages;

– whether the party seeking to avoid the exclusive jurisdiction clause or the arbitration clause would be prejudiced by having to use the contractually agreed forum, either because they would be deprived of security for their claim, or because they would be unable to enforce any judgment or award, or because they would be faced with a time-bar not applicable in England (or Bermuda), or because they would be unlikely to get a fair trial, whether for political, racial, religious or other reasons.

However, neither the English courts nor the Bermuda courts have attempted to produce an exhaustive list of all the circumstances which might give rise to 'strong reasons' not to enforce an exclusive jurisdiction or an arbitration agreement (nor have they sought to establish a hierarchy as to which factors may be more important than others), since each case turns on its own particular facts.

'Strong reasons' in the solvent context?

There have been a number of reported Bermuda cases that have cast some light on the approach to be taken by the Bermuda courts, where both parties continue to be solvent. For example:

Notes

2 Bermuda has no statutory equivalent of Chapter 15 of the US's Bankruptcy Code, section 426 of the UK's Insolvency Act 1986, or the UK's Cross-Border Insolvency Regulations 2006, by which the UK implemented the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency ('the UNCITRAL Model Law').

3 *Saad Investments Company Limited (in Caymanian Liquidation) v Greenway Special Opportunities Fund Limited and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com, per Mr. Justice Kawaley at paragraph 28. See also *Re Loral Space & Communications Ltd* [2007] Bda LR 26; *Re Dickson Group Holdings Ltd* [2008] Bda LR 34; *Re Founding Partners Global Fund Ltd* [2009] Bda LR 35; and *In the matter of Kingate Global Fund Limited et al* [2011] SC (Bda) 2 Com.

- In *OA'CT' Mobile v IPOC International Growth Fund Ltd* [2006] Bda LR 69, the Bermuda court was asked to consider a range of allegations, including allegations of impropriety and 'unclean hands', as giving rise to 'strong reasons' for not enforcing two arbitration agreements. The Bermuda court rejected these arguments as insufficient to justify avoidance of the arbitration agreements in question;
- In *Robinson v Somers Isles Shipping Ltd* [2008] SC (Bda) 8 Civ, the Bermuda court rejected an argument that there were sufficiently strong reasons to set aside an exclusive jurisdiction clause in favour of proceedings in New York, simply because the parties and their witnesses had strong connections with Bermuda, and there had been an inequality of bargaining power between the parties when negotiating the exclusive jurisdiction agreement (as there often is);
- In *Saad Investments Company Limited (in Liquidation) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com, the Bermuda court noted that it was clearly insufficient to invoke the jurisdiction of the Bermuda court, in breach of a Swiss exclusive jurisdiction clause, simply because assets were located in Bermuda, in circumstances where the parties, the witnesses, and the evidence was not in Bermuda, and the dispute was not governed by Bermuda law;
- However, in the same case, the Bermuda court did suggest that the conduct of the party seeking to enforce the exclusive jurisdiction clause might potentially give rise to 'strong reasons' not to invoke it, if that party had acted in breach or contempt of previous Bermuda court orders made against it on an *ex parte* basis (notwithstanding that party's challenge to the jurisdiction of the court).

These cases tend to suggest that it will ordinarily be very difficult for a solvent party to circumvent an exclusive jurisdiction or arbitration clause in Bermuda, in the absence of very 'strong reasons'.

'Strong reasons' in the insolvent context?

The Bermuda court may, however, be willing to take a more nuanced approach in the event of an insolvency or liquidation of one of the parties to an exclusive jurisdiction or arbitration agreement.

In *Saad Investments Company Limited (in Liquidation) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com, the Bermuda court concluded that circumstances arising out of the Plaintiff's insolvency and foreign liquidation gave rise to sufficiently 'strong reasons' not to enforce an exclusive jurisdiction clause in favour of Switzerland.

The Bermuda court noted that the principles to be applied in jurisdictional disputes, where both parties were solvent, were difficult to reconcile fully with the co-operative approach being taken in international insolvencies as a matter of common law, pursuant to *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508.

In this case, the Plaintiff, Saad Investments Company Limited, was a Cayman Islands company in insolvent liquidation. Its Caymanian liquidators brought civil proceedings in Bermuda against Credit Agricole (Suisse) SA (a Swiss company with no presence in Bermuda), asserting that the Cayman company had a beneficial interest in certain shares of a Bermuda fund company that were registered in the name of Credit Agricole (Suisse) SA pursuant to a nominee agreement. The liquidators demanded a transfer of legal title to those shares into the Cayman company's name, as part of their efforts to gather in the company's assets.

Credit Agricole (Suisse) SA pointed out that they were not subject to the jurisdiction of the Bermuda court, and that any dispute under the nominee agreement was subject to the exclusive jurisdiction of the Swiss courts, with the effect that the Bermuda proceedings should be stayed or set aside in favour of Swiss proceedings (in which Credit Agricole (Suisse) SA might have been able to assert certain defences, counterclaims or rights of set-off).

The Bermuda court accepted that the dispute between the parties as to who was the beneficial owner of the shares was subject to an exclusive jurisdiction clause in the nominee agreement, which conferred exclusive jurisdiction on the Swiss Courts. Had both parties still been solvent, the Bermuda court confirmed that it would have enforced the exclusive jurisdiction clause and required the parties to litigate in Switzerland.

However, the Bermuda court went on to conclude, based on the foreign expert evidence before it, that:

- there was a real risk that the Caymanian liquidators of the company would not be recognised in Switzerland;
- there was a real risk that the Cayman liquidators might not be able to pursue the company's claim effectively in the Swiss courts;
- there was a real risk that any assets in Switzerland (or sent from Bermuda to Switzerland) that were, or were established to be, beneficially owned by the Cayman company might be distributed under a Swiss bankruptcy with priority being given to Swiss creditors, to the potential detriment of the Caymanian liquidation and its non-Swiss creditors.

The Bermuda court therefore concluded that there was a real risk that the Caymanian company, acting by its liquidators, would not receive a 'fair hearing' of its claim in Switzerland (by reference to the Bermuda court's notions of 'fairness'), and that it was appropriate to recognise and assist the Cayman liquidators as a matter of common law in Bermuda (in preference to any Swiss insolvency official that might be appointed pursuant to a Swiss bankruptcy proceeding relating to the Caymanian company).

In particular, the Bermuda court held that the risks and concerns that there would not be a 'fair hearing' in Switzerland 'constitute strong grounds for not enforcing compliance with the exclusive jurisdiction clause; the onset of insolvency has made substantial compliance with the exclusive jurisdiction clause ... impossible'.

Contrast with the English approach

Although the Court's decision in *Saad Investments Company Limited (in Liquidation) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com was heavily influenced by the expert evidence that the Caymanian liquidators would not be recognised in Switzerland such that a 'fair hearing' might not be possible, the Bermuda court's approach does not sit entirely easily with the English High Court's decisions in *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, *AWB Geneva* SA *v North America Steamships Limited* [2007] EWHC 1167 (Comm) (as approved by the English Court of Appeal in *AWB Geneva SA v North America Steamships Ltd* [2007] EWCA Civ 739), and *Jefferies International Limited v Landsbanki Islands HF* [2009] EWHC 894.

None of these English cases were cited to, or considered by, the Bermuda court in *Saad Investments Company Limited (in Liquidation) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com. They would not be binding in Bermuda and it is difficult to assess how much weight would be given to them by a Bermuda court, bearing in mind the fact-sensitive nature of the issues under consideration and the different legislative context.[4] Although the full details of these English judgments are beyond the scope of this article, it may be of interest to note the following points in summary, by way of contrast to the approach taken by the Bermuda court:

– in *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, the English High Court held that its power to stay proceedings should not be used simply because a contractual claim in the English proceedings could also be made in the defendant's German insolvency proceedings. Lawrence Collins J held that it would require 'exceptionally strong grounds' for the English court to exercise its power to stay proceedings, particularly where the parties had conferred exclusive jurisdiction on the English courts. Lawrence Collins J held that this test was not satisfied on the facts of the case, merely because of the defendant's German insolvency;
– in *AWB Geneva SA v North America Steamships Ltd* [2007] EWCA Civ 739, the English Court of Appeal (upholding the English High Court's first instance judgment on this issue) declined to grant an anti-suit injunction against the defendant's Canadian Trustee in Bankruptcy, on the basis that the Trustee in Bankruptcy was not technically making a claim under the contract, and was not a direct party to the exclusive jurisdiction clause. Thomas LJ noted, however, that 'if the proceedings in Canada were proceedings which related to a dispute under the contract, then that would be characterized as a contractual issue and subject to the exclusive jurisdiction clause which I accept is wide in its scope'. It was only because the Canadian proceedings were characterised as proceedings in the company's insolvency, being pursued by the Trustee in Bankruptcy in his own name, that the Court of Appeal concluded that they fell outside the scope of the exclusive jurisdiction clause altogether;
– in *AWB Geneva SA v North America Steamships Ltd* [2007] EWCA Civ 739, the Court of Appeal declined to grant a stay of the English proceedings in favour of the Canadian insolvency proceedings (reversing the English High Court's first instance judgment on this issue), on the grounds that the parties had entered into an exclusive jurisdiction clause conferring jurisdiction on the English High Court, and there were insufficient reasons for the English court to decline jurisdiction (even though the effect of the Court of Appeal's order was that there was a risk of parallel proceedings with potentially inconsistent results). On the contrary, the Court of Appeal concluded that it was important for the English Court to determine the parties' rights under the contract, which was governed by English law, because the issues were of significance to the parties and to the industry generally; and

Notes

4 The English cases were decided in a different statutory context to that which exists in Bermuda, since Bermuda is not a party to Council Regulation (EC) No. 44/2001 ('the Judgments Regulation'), Council Regulation (EC) No. 1346/2000 ('the Insolvency Regulation'), the Brussels Convention, or the Lugano Convention, and Bermuda has no domestic legislation equivalent to the UK's Civil Jurisdiction and Judgments Act 1982 and the UK's Credit Institutions (Reorganisation and Winding Up) Regulations 2004.

– in *Jefferies International Limited v Landsbanki Islands HF* [2009] EWHC 894, the English High Court followed and applied *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966, and declined to grant a stay of English proceedings brought pursuant to an exclusive jurisdiction clause, where one of the parties was in Icelandic insolvency proceedings. Cooke J confirmed that 'any stay which had the effect of depriving [one of the parties] of resort to the courts of the agreed jurisdiction would not only be unjust, but contrary to principle', and that 'exceptionally strong grounds' were required before a party could be deprived of its right to bring proceedings in the chosen exclusive jurisdiction. Cooke J concluded that this test was not satisfied on the facts of the case, merely because of Landsbanki's Icelandic insolvency.

In summary, the English court's judgments requiring 'exceptionally strong grounds' to justify avoidance of an exclusive jurisdiction or arbitration agreement appear to impose a slightly higher threshold than the 'strong grounds' accepted by the Bermuda court in *Saad Investments Company Limited (in Liquidation) v Greenway Special Opportunities Fund Ltd and Credit Agricole (Suisse) SA* [2010] SC (Bda) 67 Com.

Conclusion

It is clear, from the various cases discussed above, that there is considerable scope for argument as to the enforceability of exclusive jurisdiction and arbitration agreements in circumstances where one of the parties subsequently becomes insolvent and is put into liquidation.

In those circumstances, liquidators of a foreign company with assets, claims, or liabilities in Bermuda will certainly want to consider very carefully whether there is an arguable basis for persuading a Bermuda court, in the exercise of its common law powers to recognise and assist foreign liquidators, to allow the liquidators, in the interests of the company's creditors, to pursue the company's claims, or to defend any claims against the company, in a non-contractual forum of the liquidators' choice.

In addition, the draftsmen of these clauses might want to consider the possibility that express terms should be included to clarify whether or not it is intended that they be applied and enforced in the event of an insolvency or a liquidation of either party, in the same way that draftsmen can make clear whether or not the parties intend to waive any arguments based on '*forum non conveniens*' grounds.[5]

Notes

5 See, for example, *Bank of New York Mellon v GV Films* [2009] EWHC 2338, per Field J at paragraph 18.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com