Are You Being Served?

by Robert Blackett

A lawyer tasked with negotiating a contract on behalf of a non-English company (let us call it “Beane’s of Boston Inc.”) might well find a clause like the following included in a draft contract it receives from the other party (which we will call “Grace Brothers Limited”):”

“Beane’s of Boston Inc. irrevocably appoints Oldrope LLP of 1 Easymoney Lane, London EC1 XYZ as its agent to receive on its behalf in England or Wales service of any proceedings in connection with this Contract. Such service shall be deemed completed on delivery to such agent (whether or not it is forwarded to and received by Beane’s of Boston Inc.). If for any reason such agent ceases to be able to act as agent or no longer has an address in England or Wales, Grace

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1 “Grace Brothers” was the name of the department store which formed the setting for the BBC television comedy series “Are You Being Served?”. “Beane’s of Boston” was the name of the department store which featured in the pilot episode of an American remake.
Brothers Limited may appoint another agent for this purpose in any such manner as it sees fit in its sole and absolute discretion.”

Agreeing to such a clause would come at a cost for Beane’s. By committing to appoint Oldrope as process agent, Beane’s is committing to pay a substantial fee (typically several thousand pounds a year) for an indefinite period.

Unfortunately, the rules on where, and how, English court proceedings can be served on a foreign defendant are complicated, and different rules apply depending on where the defendant is, and on any relevant treaty which is in place between the UK and that country.

If it is necessary to serve a claim from outside England and Wales, it will often be necessary to apply to the court for permission. In contractual disputes which are subject to a jurisdiction clause this is generally a formality, and is unlikely to involve a substantial hearing. But, if permission is granted, it will then be necessary to effect service. It will often be necessary to obtain a translation of the relevant documents, and service may involve a considerable delay, depending on what arrangements are in place between the UK and the relevant country.

The benefit of a service agent clause is two fold. In the event it needs to bring a claim, Grace Brothers avoids having to apply to the English court for permission to serve outside the jurisdiction, and avoids the delay, uncertainty and expense which can potentially arise when proceedings have to be served outside the jurisdiction. Agreeing a process agent clause also offers a shortcut, and saves the lawyers from having to look up the relevant law, and deciding whether they could do without a process agent in a particular case.

But process agent clauses are not confined to contracts which provide for disputes to be subject to the jurisdiction of the English courts. Parties will frequently insist that they be included, even when the contract provides for disputes to be resolved by way of English-seated arbitration. Is this just a waste of money?

The concept of “service”

“Service” is a creature of statute or contract. A statute or contract will set out that such-and-such is to happen on a party being “served” with a particular document, and will (should) define what is to constitute “service” for this purpose. A contract might permit or require contractual notices for all sorts of purposes. For example, serving a notice might operate to fix a rate of interest or an exchange rate, or a notice might be required as a condition precedent to extra payment under a construction contract. When it comes to those kinds of notices, and what is to constitute “service”, the parties are free to agree what they wish.

This article is concerned with the “service” of documents which are required in order to commence binding dispute resolution procedures – specifically English seated arbitration. What is to constitute “service” and the effect of “service” is defined by statute.

What is the effect of “service” in arbitration?

Where the contract provides for arbitration seated in England, Wales or Northern Ireland, the relevant law is to be found in the Arbitration Act 1996.

On the question of how arbitration proceedings are to be commenced, section 14 provides:

“14 Commencement of arbitral proceedings.

(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.

(2) If there is no such agreement the following provisions apply.

(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.”

Absent a contrary agreement, then, “serving” the notice on the other party (or, as the case may be, the appointing authority) will operate to “commence” the arbitration proceedings “for the purposes of this Part and for the purposes of the Limitation Acts”. “Commencing” proceedings stops limitation running and, absent contrary agreement, it also starts time running for the appointment of arbitrators (sections 16, 17 and 18).

Does the “commencement” of arbitration proceedings have any other effect? To answer that, it is necessary to look through the rest of “this Part” (i.e. Part I of the Act) for any provision where the fact of proceedings being “commenced” is stated to have some effect on the rights or obligations of the parties. As it happens, besides passing references in Articles 49 (regarding the power to award interest) and 84 (regarding arbitration proceedings commenced before the Act came into force) “Commencement” does not seem to have any other effect.

1 Adapted from Practicallaw.com standard form promissory note.
Institutional rules on “commencement”

Section 14 of the Arbitration Act 1996 allows the parties to reach a different agreement as to when proceedings are to be regarded as “commenced”. Examples of such agreements are:

(a) The LCIA rules (Article 1.1) provide that a party wishing to “commence” an arbitration must send a written Request for arbitration in a certain form, together with certain other documents, to the registrar of the LCIA court, must pay a fee, and must confirm that the same documents have been served on the other party. (The arbitration is treated as “commenced” on the date the documents and fee are received by the LCIA Registrar.)

(b) The ICC Rules (Article 4) are similar, in requiring that a party send a number of copies of a Request for arbitration in a certain form to the ICC secretariat, and also pay a fee, though the Rules provide for the ICC secretariat to “transmit” a copy of the documents to the Respondent. The arbitration is treated as “commenced” on the date the documents and fee are received by the ICC.

“Proper notice” for the purposes of the New York Convention

The New York Convention makes reference to “proper notice”. This is relevant if it is envisaged that an award is going to have to be enforced in a state which is a party to that Convention and which is either not the state in which the award was made, or is a state which would consider the award to be a domestic award.

The New York Convention includes the following:

“Article V

1. Recognition or enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that

... 

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;”

The Convention does not contain any definition of what is to constitute “proper notice”.

The UK is party to the New York Convention, and Article V is reproduced in Part III of the Arbitration Act 1996. That Part concerns the enforcement in England, Wales and Northern Ireland of awards made in other Convention states. The definition of what is to constitute “service of any notice” in s.76 of the Act, however, applies only for the purposes of Part I of the Act. It does not, therefore, define what would count as “proper notice” for the purposes of Article V in English enforcement proceedings.

In practice, courts take a common sense approach to what will constitute “proper notice” for the purposes of the New York Convention. Born summarises the position in this way:

“In contrast to the issues that arise with regard to service of process in many national courts, there are virtually never disputes regarding the manner of service in international arbitration (provided that the parties received actual notice, or that reasonable means of modern communication were employed): in particular, arguments that statutory or other means of service employed in domestic litigation contexts were not used in the arbitral proceedings have uniformly been rejected by national courts in recognition contexts.”

What constitutes “service” for the purpose of arbitration?

As to what constitutes “service”, for the purposes of Part I of the Arbitration Act 1996, section 76, provides:

“76 Service of notices, &c.

(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.

2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post—

(a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

(b) where the addressee is a body corporate, to the body’s registered or principal office,

it shall be treated as effectively served.

(5) This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

(6) References in this Part to a notice or other document include any form of communication in writing and references to giving or serving a notice or other document shall be construed accordingly.”

Once again, the parties are free to agree something different. The agreement between Beane’s and Grace Brothers that any notice of arbitration would be effective as against Beane’s upon delivery to Oldrope would be given effect under section 76(1). But it would be equally open to the parties to have agreed a different manner of service, which did not involve the expense of a process agent – sending an email to a particular address, for example.

**Institutional rules: what is to constitute “service”?**

The ICC Rules do not contain any agreement as to when documents are to be treated as served, and so, for an English-seated ICC arbitration, the default rule in s.76 would apply. The LCIA Rules provide:

“**Article 4**

**Notices and Periods of Time**

4.1

Any notice or other communication that may be or is required to be given by a party under these Rules shall be in writing and shall be delivered by registered postal or courier service or transmitted by facsimile, telex, e-mail or any other means of telecommunication that provide a record of its transmission.

4.2

A party’s last-known residence or place of business during the arbitration shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change to such address by that party to the other parties, the Arbitral Tribunal and the Registrar.”

**Service under s.76 absent a contrary agreement**

Absent a contrary agreement, service is permitted under s.76 by “any effective means”. What matters is not (as in court proceedings) whether the documents were sent to a particular place but, rather, whether the defendant actually received the relevant information. There is no requirement that the documents be translated or served through any formal channel, or that a court or tribunal give permission for them to be served in a particular way.

In any event, provided the notice is “addressed, pre-paid and delivered by post” to Beane’s “last known principal business address” or “registered or principal office” in Boston, then it is deemed to have been served, irrespective of who reads it or what is done with it thereafter.

In the vast majority of commercial arbitration cases, service of the notice of arbitration is never going to be in issue. In most such cases, the counterparty will be a company which is trading, there will have been pre-action correspondence about the dispute, it will be easy to identify where documents should be sent, and one can be confident about whether documents have been properly served. The other party will usually take part in the proceedings, and will be unable to argue that any resulting award should not be enforced because of a failure properly to serve proceedings on them. It is only when the other party actively tries to evade service, and takes no part in the proceedings that questions of service are likely to arise.

**Is a service agent clause ever useful in arbitration?**

Does this mean that a “service agent” clause is always a waste of money in any contract which provides for English seated arbitration?

Not necessarily. There might be contracts where one can foresee that, in the event of a dispute, the other party might try and evade service, refuse to take part in proceedings, and resist enforcement on the grounds of not having been validly served. These will tend to be contracts either with individuals or with the entities which they personally control, and where the individuals, the companies, and/or their assets are all situated in questionable jurisdictions where a court might be more likely to accept even an unmeritorious defence of defective service raised by the defendants in question if asked to enforce any eventual arbitration award or freeze the assets in question.

In such cases, a “service agent” clause might offer some security, but when enforcement is sought, a biased local court could just as well hold that service via the service agent was defective. The underlying problem remains – that transactions with such people are inherently risky, and that the assets are in a jurisdiction where you can’t easily get to them.

There will also be some situations where, despite the agreement to arbitrate in England, a party would still want to bring proceedings before the English court, and will need to serve a claim form for this purpose.

One situation where one might, in theory, need to bring court proceedings is if it is necessary to apply to the court to appoint an arbitrator. This scenario can basically be avoided by agreeing that the arbitrator is to be appointed by some other body (as is the case under almost all the institutional rules).

Two other situations where one will want to bring a claim before a court are:

(a) where the tribunal has issued an award, and a party wants to bring enforcement proceedings before the English courts; or

(b) where a party requires some interim relief under s.44 of the Arbitration Act 1996 which the tribunal either lacks the power to grant or is unable for the time being to grant (e.g. a freezing injunction).
In both cases, it will be necessary to serve a claim form on the other party. The first question to ask in any such case is whether there is anywhere in England or Wales where the claim form can be served, thus avoiding the difficulties which can arise when it is necessary to serve proceedings outside the jurisdiction.

When can a claim form be served on an overseas company at an address in England or Wales?

Part 6 of the Civil Procedure Rules provides detailed rules about where and how service is to be affected. The original Part 6 was described in a leading text book as being “among the least successful of the Woolf reforms”\(^1\) and by Dyson LJ as being difficult to apply and understand.\(^1\) Part 6 has since been substantially amended, but it remains a particularly complicated part of the rules. When service is required to be affected at an address outside England or Wales then it may be necessary to apply to the court for permission, and – depending on where service is to take place – follow a lengthy, costly procedure in order to get the proceedings validly served in that country. This, of course, is the mischief which service agent clauses are aimed at.

When considering whether this problem can be avoided, and a claim form instead served at an address in England or Wales, a useful starting point is CPR rule 6.11. This provides:

“Service of the claim form by contractually agreed –method

6.11

(1) Where

(a) a contract contains a term providing that, in the event of a claim being started in relation to the contract, the claim form may be served by a method or at a place specified in the contract; and

(b) a claim solely in respect of that contract is started,

the claim form may, subject to paragraph (2), be served on the defendant by the method or at the place specified in the contract.

(2) Where in accordance with the contract the claim form is to be served out of the jurisdiction, it may be served –

(a) if permission to serve it out of the jurisdiction has been granted under rule 6.36; or

(b) without permission under rule 6.32 or 6.33.”

A service agent clause such as that proposed by Grace Brothers would meet the requirements of CPR 6.11. It provides that “proceedings”\(^2\) (i.e. a claim form) can be served on Beane’s by delivering it to Oldrope at Oldrope’s London address. The form would not be being served outside the jurisdiction, and so there would be no question of permission to serve outside the jurisdiction being required. If Grace Brothers needed to enforce an arbitration award in England, or needed to apply to the English court for an injunction in support of arbitration proceedings, it could send the necessary documents to Oldrope.

There is, however, an exception whereby Beane’s could potentially prevent Grace Brothers effecting service by sending the documents to Oldrope, and instead force it to send the documents elsewhere.

CPR rule 6.7 is a long rule, which we do not propose to set out in full. It is essentially concerned with situations in which a defendant, or a solicitor or EEA lawyer acting on their behalf, has given the claimant written notice to the effect that the proceedings may be served at the solicitor or EEA’s lawyer’s business address in the UK or EEA. In such a case, the proceedings must be served at that address, and this seems to be the case even if there was a prior agreement to the effect that they could be served somewhere else. If the lawyer’s notified address is not in England or Wales then such service will be service outside the jurisdiction, and so subject to the rules for service outside the jurisdiction.

Assume, however, that there is no service agent clause, and no notice has been given under rule 6.7. Grace Brothers’ first priority would be to try and work out whether, even though Beane’s is a Massachusetts company, there is still some place in England or Wales where the proceedings could be served.

An overseas company can potentially be served with proceedings in England, either under the provisions of the Companies Act 2006 or under CPR rule 6.9.

Section 1046 of the Companies Act 2006 provides for the introduction of regulations regarding the registration of overseas companies. In outline these require that overseas companies register with the registrar of companies if they have an “establishment” in the UK, defined to mean a “branch or place of business”. If there is a person in the UK who is authorised to accept service of documents on the company’s behalf, this must also be registered.

Section 1139 of the Companies Act 2006 provides:

“1139 Service of documents on company

...

(2) A document may be served on an overseas company whose particulars are registered under section 1046—

(a) by leaving it at, or sending it by post to, the registered address of any person resident in the United Kingdom who is authorised to accept service of documents on the company’s behalf, or

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\(^1\) Blackstone’s Civil Practice (2013) 15.1.

\(^2\) Collier v Williams [2006] EWCA Civ 20.
(b) if there is no such person, or if any such person refuses service or service cannot for any other reason be effected, by leaving it at or sending by post to any place of business of the company in the United Kingdom.”

(4) Where a company registered in Scotland or Northern Ireland carries on business in England and Wales, the process of any court in England and Wales may be served on the company by leaving it at, or sending it by post to, the company’s principal place of business in England and Wales, addressed to the manager or other head officer in England and Wales of the company.”

The effect is that: If a company: (i) is registered is under s.1046; and has either (ii) registered the address of a person who is authorised to accept service; or (iii) has a place of business in England or Wales (rather than in Scotland or Northern Ireland), then English court proceedings can be served at that address, without any need to serve outside the jurisdiction.

Note that, there is no requirement that the dispute arise out of, or have any connection with, the company’s place of business in England. There is probably still a right to effect service under this s.1139, even when the company has given a notice under CPR r.3.7 that service is to be via its solicitor.⁶

An alternative to serving the company under section 1139 of the Companies Act 2006 is to effect service under CPR rule 6.9(2). This permits service of proceedings on an overseas corporation at “any place in the jurisdiction where the corporation carries on its activities; or at any place of business of the company within the jurisdiction”. Again, there is no requirement that the dispute arise out of, or have any connection with, the company’s business or activities in the jurisdiction.

This provision is the successor to a series of earlier provisions going back to RSC Order IX r.8, and although the CPR constitute a new procedural code, the earlier authorities remain relevant and persuasive.

A very useful summary of the principles established in those authorities (albeit obiter) can be found in a recent judgment of the Court of Appeal (Kitchin LJ) in Actavis Group HF v Eli Lilly and Company:⁷

“A place of business needs to be fixed and definite, and the activity must have been carried on there for a sufficient time for it to be characterised as a business. However, it is not necessary to establish that a substantial part of the business of the corporation is carried on from the place in question, and a corporation may have a place of business even if the activities carried on there are incidental to the main objects of the corporation: South India Shipping Corporation Ltd v Export-Import Bank of Korea [1985] 1 WLR 585 (CA). So, for example, in Aktieselskabet Dampsbib “Hercules” v Grand Trunk Pacific Railway Company [1912] KB 222, the defendant was incorporated in Canada for the purpose of constructing and working a railway there, its main office being in Montreal. Four directors resident in London formed a committee to make contracts on behalf of the company for the purpose of raising loan capital. This constituted the carrying on of business in this country.

As the editors of Dicey, Morris and Collins, The Conflict of Laws (15th edn), say at 111-119, the Companies Act 2006 makes provision for the service of documents on a foreign corporation whose particulars are registered, and this does, as a practical matter, deal with the majority of cases. A real problem is only likely to arise in a case such as this where the corporation’s business is said to be carried on by a representative or agent. In Adams v Cape Industries Plc [1990] 1 Ch 433, this court explained that in such a case the question whether the representative has been carrying on the business of the foreign corporation or merely his own business will necessitate an investigation of the functions the representative has been performing and all aspects of the relationship between them. It provided (at pages 530F – 531B) the following list of questions which are likely to be relevant to such an investigation:

“(a) whether or not the fixed place of business from which the representative operated was originally acquired for the purpose of enabling him to act on behalf of the corporation; (b) whether the corporation had directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contribution, if any, the overseas corporation made to the financing of the business carried on by the representative; (d) whether the representative was remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the corporation exercised over the running of the business conducted by the representative; (f) whether the representative reserved part of his accommodation or part of his staff for conducting business related to the corporation; (g) whether the representative displayed the corporation’s

⁶ See paragraph 6.3.8, White Book, Volume 1, 2012:“In Cranfield v Bridgegrove Ltd (2003) EWCA Civ 656, the Court of Appeal explained (at paras 83 to 85) that service of the claim form on a defendant company, either by leaving it at, or by sending it by post to, the company’s registered office in accordance with s. 725(1) of the 1985 Act (now s. 1139 of the 2006 Act) or in accordance with one of the methods of service permitted by r.6.3(1) are true alternative service routes available to the claimant. Various consequences followed from this. For example (1) if a defendant company or a company’s solicitors act in accordance with r.6.7, a claimant may choose whether to follow the s.1139 route or serve at the business address of the solicitors; and (2) if a defendant company has not given an address for service, a claimant may choose whether to follow the s. 1139 or the r.6.9 route for service. It is possible for the parties to make a binding contract whereby the claimant agrees to serve the claim form by the r.6.3(1) route rather than under s.1139 or vice versa (see r.6.13), in which event the respective routes cease to be true alternatives.”

⁷ [2013] EWCA Civ 517.
name at his premises or on his stationery, and if so, whether he did so in such a way as to indicate that he was a representative of the corporation; (h) what business, if any, the representative transacted as principal exclusively on his own behalf; (i) whether the representative made contracts with customers or other third parties in the name of the corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative required specific authority in advance before binding the corporation to contractual obligations.

The court emphasised that this list of questions is not exhaustive, and the answer to none of the questions is necessarily conclusive. An important factor will, however, be whether the representative has authority to enter into contracts on behalf of the foreign corporation without submitting them to the corporation for approval. So also, if the representative never makes contracts on behalf of the foreign corporation then that will be a powerful factor pointing against it having a presence here.”

Another method by which a claim form might be properly served at an address in England or Wales so as to commence a claim against an overseas company is to be found in CPR r.6.12, which is largely self explanatory:

“(1) The court may, on application, permit a claim form relating to a contract to be served on the defendant’s agent where –

(a) the defendant is out of the jurisdiction;

(b) the contract to which the claim relates was entered into within the jurisdiction with or through the defendant’s agent; and

(c) at the time of the application either the agent’s authority has not been terminated or the agent is still in business relations with the defendant.

(2) An application under this rule –

(a) must be supported by evidence setting out –

(i) details of the contract and that it was entered into within the jurisdiction or through an agent who is within the jurisdiction;

(ii) that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and

(iii) why service out of the jurisdiction cannot be effected; and

(b) may be made without notice.”

Assume that there is no service agent clause, that Beane’s has no branch in England or Wales, and did not enter the contract through an agent within the jurisdiction.

CPR r.62.5 provides:

“(1) The court may give permission to serve an arbitration claim form out of the jurisdiction if –

(a) the claimant seeks to –

(i) challenge; or

(ii) appeal on a question of law arising out of,

an arbitration award made within the jurisdiction;

(The place where an award is treated as made is determined by section 53 of the 1996 Act.)

(b) the claim is for an order under section 44 of the 1996 Act; or

(c) the claimant –

(i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

(ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the 1996 Act are satisfied.”

This does not seem to apply when what is sought is enforcement of the award. If a court claim is being made to enforce an award, a possibility is to apply to the court for an order under CPR rule 6.15:

“(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place”

This provision has been considered in two recent cases - one a pure English court action and the other an arbitration-related claim. Abela and others v Baadarani [2013] UKSC 44 concerned a claim concerning an alleged fraud in respect of a contract which was subject to an English jurisdiction clause against parties domiciled in Lebanon. The UK is not party to any international agreement with Lebanon regarding the service of process. The claimant obtained an order under CPR r.6.15 allowing the claim to be served by personal service at an address in Beirut, which the claimant believed to be the defendant’s home. Having failed to effect service by this route, the Claimant sent the claim to the defendant’s lawyer’s offices in Beirut. Four months later, the lawyer returned the papers, stating that he was not authorised to accept service
and never had been. He provided no information about the Defendant’s whereabouts. The claimant sought an order under CPR r.6.15, that the claim had been validly served by sending it to the lawyer in Lebanon. The order was granted at first instance, but set aside on appeal.

The Supreme Court reinstated the order, confirming that CPR r.6.15 allows service at an alternative location to be validated retrospectively, and allows the court to authorise alternative service at a place either inside or outside the jurisdiction. The alternative method of service need not be expressly permitted under local law, as long as it is not contrary to local law. In holding that there was a “good reason” for alternative service, the court considered it relevant that: (i) there was no service convention; (ii) the claim form had actually come to the defendant’s attention; (iii) the defendant had sought to evade service; and (iv) service through diplomatic channels was likely to prove difficult and expensive, and result in further delay.

In a case like Abela, the effect of the order under CPR 6.15 is to allow a claim to proceed before the English court. Any eventual judgment might well have to be enforced in the other country through the local courts. They might not recognise the alternative service method authorised by the English court.

That problem does not arise where the claim form is, instead, being served in order to be able to enforce an arbitration award in England, or obtain an English freezing injunction.

An example of CPR rule 6.15 being deployed in a piece of arbitration-related litigation was Cruz City I Mauritius Holdings v Unitech Ltd and Others [2013] EWHC 1323 (Comm). That case concerned a claim to enforce an arbitration award which had been issued by an arbitral tribunal seated in England. The judge granted an order under CPR r.6.15 allowing the claim form to be served at the London office of the solicitors who had represented the defendant in the arbitration. He held that it was:

“...the invariable practice in the Commercial Court in relation to arbitration applications relating to arbitrations seated within the jurisdiction to permit service upon a party’s solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed and absent other special circumstances”

The judge quoted with approval an earlier judgment which gave as the reason for this practice:

“It is inherently desirable and in the interests of all parties that if arbitration applications are made in relation to either pending or otherwise completed arbitrations they are determined by the court as soon as reasonably practicable, consistent with their being dealt with justly. Such disposal contributes to the achievement of finality of the arbitral process. Moreover, in the ordinary case where an overseas party to an English arbitration has or has had solicitors in England acting for him in that arbitration, service of the application and associated documents upon the English solicitors is the most reliable method whereby those documents will be brought expeditiously to the attention of the responsible persons within the relevant entity sought to be served. It will also usually be the most economical method of achieving that result.”

This “invariable practice” is of no assistance where the defendant is using a lawyer with no London office, or where the proceedings are brought before any such lawyer has been appointed (as will often be the case where the claim is for interim relief, such as a freezing injunction).

But, if a freezing injunction is required, this is always going to involve a costly and substantial ex parte application (i.e. it will be obtained without serving the defendant). Having a process agent does not avoid the need for an application to the court. The question of how the foreign defendant is to be served with the claim form and the injunction will be dealt with at the same hearing.

In light of the urgency, the court may well be amenable to granting an order for alternative service, if service on a foreign defendant under a service convention is going to prove slow or difficult. It also needs to be borne in mind that, in practical terms, when what is sought is a freezing injunction the first priority is to make sure that the defendant’s bankers are given notice of the injunction. A service agent clause with the defendant will not help to establish how to serve their bankers.

Conclusion

A service agent clause will usually be a waste of money when a contract provides for disputes to be resolved exclusively by way of English seated arbitration. A service agent clause can make sense when dispute resolution is to be by way of English court litigation, when the sums involved are sufficient and/or when the counterparty and its assets are located in a jurisdiction where service and enforcement are likely to be difficult. Rather than inserting boilerplate service agent clauses by default, whether such a clause is really needed should be considered carefully in each case.
A sure way to lose your case? Challenging contract terms for uncertainty

by Markus Esly

One basic principle of contract law is that terms must be certain. Certainty, however, tends to be a slippery beast and is rarely ever achieved in any walk of life. The legal principle that we review in this article can more accurately be summarised as requiring contractual terms to be sufficiently certain, and not too vague or too ambiguous, to be legally enforceable.

As we will see, on balance the courts have applied English law so as to uphold contracts. They are slow to conclude that agreements between commercial parties, who plainly intended to be bound and were ready to incur costs in performing their bargain, are too uncertain to be enforceable. The cases show that it is much better to take the time to spell things out in writing at the outset, otherwise the law may fill in the gaps with potentially undesirable results for one (or the other) party. That is a lesson that bears repeating.

The origins of the principle

The origins of the principle can be found in the reluctance of English law to uphold ‘agreements to agree’. The decision in May and Butcher v The King [1934] 2 KB 17 provides a neat illustration of this. The parties had arranged to sell tentage at prices to be agreed, and to be delivered at times also to be agreed. The court found that, perhaps unsurprisingly, the parties had failed to seal their bargain with a legally binding contract.

English law does, however, recognise that parties do not always record their agreement perfectly. It will seek to uphold a contract wherever this is possible. Hillas v Arcos 1932 147 LT 503, confirmed that:

“... even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.”

The case itself concerned an agreement for the sale of timber over two years, concisely stated as being for:

“22,000 standards softwood goods of fair specification over the season 1930”, with an opportunity “of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931.”

The parties completed a sale during 1930, but fell out in the following year. The High Court found that their agreement for 1931 was in fact enforceable, even though it had been expressed in skeletal terms. The goods to be sold were to be of fair specification (just like the previous year), something that a court would be able to ascertain with the help of expert evidence. The arrangement for 1931 was characterised as an option, which could be exercised immediately. As such, it was not a future bargain, or an agreement to agree. The price, in the absence of agreement, would be a reasonable one. That is, of course, also the position today under the Sale of Goods Act 1979 (Section 8), or the Supply of Goods and Services Act 1982 (Section 15(1)), depending on whether the contract is for goods or services.

The importance of reasonableness and third party determination

By the second half of the 20th century, English law had openly accepted that its role was to assist parties, where the contractual wording that they managed to agree clearly showed that they wanted to be bound. In 1967, Lord Denning considered a contract for the sale of chickens over a five year term. The number of chickens had been agreed for the first year, but was ‘to be agreed’ for the other four years. The contract contained an arbitration clause. It was binding on the parties, because in the absence of agreement, the arbitrator could always decide how many chickens should reasonably be supplied in any given year (F & G Sykes (Wessex) Ltd v. Fine Fare Ltd [1967] 1 Lloyd’s Rep 53).

Lord Denning held that:

“In a commercial agreement, the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say that there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties. In this case there is less difficulty than in others because there is an arbitration clause which, liberally construed, is sufficient to resolve any uncertainties which the parties have left ...”

The reference to the role of the arbitrator, as someone who can fill in the gaps left by the parties, reflects the legal maxim ‘id certum est quod certum reddi potest’, or ‘whatever can be made certain, is certain’, if only by an independent third party deciding the issue.

The operation of that rule is illustrated by Sudbrook Trading Estate Ltd v Eggleton [1983] AC 444. In that case, the contract provided for an option to purchase leases at a price to be agreed on by two valuers, one each to be appointed by the purchasers and...
sellers respectively. The sellers refused to appoint their valuer, so the contractual machinery broke down. The Court of Appeal concluded that this was merely an agreement to agree. The House of Lords disagreed. Their Lordships overruled an earlier authority that had purported to prevent the courts from substituting themselves for the parties’ agreed method of valuation, and construed the agreement as a binding option to purchase the leases for a fair and reasonable price. That price was something the court could decide if the contractual process came to a dead end.

The modern test for certainty of terms

Some 80 years after May and Butcher and Hillas v Arcos, the Court of Appeal considered the issue of certainty again in two appeals, decided one year apart. These judgments set out what is considered to be the modern test of certainty of terms under English law. One formulation of the test has no less than ten constituent parts. That complexity no doubt reflects the fact that commercial contracts have become more sophisticated, including those accused of being ‘too uncertain’.

In Mamidoil-Jetoiil Greek Petroleum Company SA v Okta Crude Oil Refinery AD [2001] EWCA Civ 406, the Court of Appeal reviewed the authorities and distilled a (non-exhaustive) list of principles that should guide any court or arbitrator considering contractual provisions that might appear uncertain or incomplete. The first principle, a hallmark of the law of contract, is that each agreement must be constructed in light of its own terms and surrounding circumstances. Subject always to that, Rix LJ gave the following pointers (as supplemented by us):

- Where the parties have clearly not yet concluded a contract, but have exchanged correspondence in the hope of reaching an agreement, the use of the phrase “to be agreed” in relation to any essential term is likely to preclude from being formed: English law (still) does not allow the parties to ‘agree to agree’. If there is no consensus at all on an essential part of the transaction, there is probably no contract.

- If commercial parties dealing in the same industry, who are familiar with the custom of the trade act in the apparent belief that they have a binding contract, then the court should be willing to imply terms to allow that contract to be performed, where that can be done.

- Where a contract has been created, but the expression “to be agreed” is used in relation to something which has to be done in the future, that is not necessary fatal to the contract being enforceable.

- Especially where the contract envisages performance over a prolonged period, and where the parties may wish to leave certain matters to be adjusted in the future, the court will be willing to support the bargain rather than destroy it. This is where the principle ‘whatever can be made certain, is certain’ may come into play.

- If one party has already had the benefit of performance by the counterparty in what was to be part of a long term relationship, or a party has made an investment premised on that relationship, the courts will be particularly willing to find that there is an agreement.

- The parties are free to agree expressly that they want the price or consideration to be ‘fair and reasonable’. Even if they do not, such a term may be implied, either pursuant to statute (as noted above), or at common law.

- An arbitration clause can be of particular assistance, because:

  “The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.”

In relation to the latter point, Rix L J would have had in mind that the certainty (or lack thereof) of terms in a contract with an arbitration clause would fall to be determined by the arbitrators in the first instance, and only by the court in the exceptional circumstances in which an appeal to the court lies under the Arbitration Act 1996.

The contract before the Court of Appeal in the Mamidoil case was expressed to have a term of ten years, but was extremely brief. The key terms were as follows:

“Today 5.03.1993 in Athens between Skopje Refinery … referred to as “Refinery” and Mamidoil-Jetoiil … referred to as Jetoil, have agreed the following:

1. The Refinery wants and Jetoil accepts to manipulate via its Salonica Installations the quantities of not heated crude oil that the Refinery will buy and process for its own account in Skopje Refinery.

2. Manipulation under this agreement means receiving the Crude Oil from the vessel, storing in tanks and loading on Rail wagons supplied by the Refinery with destination Skopje Refinery.

3. The manipulation fee is fixed to U.S. $4.00 per MT for the period 1.11.1992 until 31.12.1994. If, however, in a particular calendar year i.e. 1993 or 1994 the min quantity of 500,000 MT stipulated in the “Three Parties” contract is covered, then for any quantity over the 500,000 MT manipulated through this agreement a discount of USD 0.50 per MT will be granted.

4. Jetoil will invoice Refinery on the basis of Customs Protocol Quantity …

5. Both parties agree to elaborate all technical and other details and include them in an Annex which will constitute an
integral part of this agreement …

6. Jet2oil wishes and Refinery agrees to give to Jet2oil first refusal for the purchases of the Crude Oil that the Refinery will make for its own account …

7. This agreement is valid for 10 years starting from the date of the Signature.”

The judge at first instance had refused to give effect to the ten year term stipulated by Clause 7. He had thought that the contract in fact came to an end on 31 December 1994, because the parties had not provided for a fee for any of the following years. That was not consistent with the principle that English law will not hesitate to imply a term that any fee or price to be paid is to be a reasonable one, and so it would be for these parties.

The Court of Appeal noted that the rule against ‘agreements to agree’ did not pose any obstacle to upholding the contract, as it would be for these parties. 

The problem with that latter scenario was explained by Chadwick L J in BJ Aviation Ltd v Pool Aviation Ltd [2002] EWCA Civ 163:

“… if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future - on the basis that either will remain free to agree or disagree about that matter - there is no bargain which the courts can enforce.

… in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them - see Walford v Miles [1992] AC 128, at page 138G.”

What if the parties have left open details about their performance?

The examples given above related to situations where the parties had not specified the price or remuneration. What happens if the contract fails to specify precisely what a party should do, in terms of performance? In the first instance, where a party has promised to perform a particular obligation, and the contract is plainly intended to be legally binding, English law will seek to find substance in the obligation, even if it is described in general terms. Durham Tees Valley Airport Ltd v BmiBaby Ltd [2010] EWCA Civ 485 concerned a contract under which an airline had contracted to ‘operate and fly’ two of a particular type of aircraft from an airport, for a period of ten years. All fees and payments for services had been provided for in the contract. Nonetheless, the agreement was found to have been too uncertain by the judge at first instance. In the absence of a term providing a minimum number of flights over any particular period of time, the judge found that the obligations had not been expressed with sufficient precision to be enforceable.

The Court of Appeal disagreed, and upheld the agreement. The use of the word ‘operating’ showed that, as a matter of construction, the airline had agreed to fly the aircraft commercially – providing a passenger service. When read as a whole, the contract also showed that the aircraft had to take off and land at the airport on any day of operation. If it could not do so for technical reasons, that would not put the airline in breach. Beyond that, the frequency of flights or the destination of the flights was a matter for the airline. This case offers another example of the Court of Appeal disagreeing with the trial judge, and finding that the contract was, after all, enforceable.

Best endeavours – an empty promise?

Contracts sometimes contain clauses requiring a party to use its best endeavours either to accomplish something specific, or to do something more general, like promote one party’s business or interests. Do these clauses have teeth, or are they too uncertain to be enforceable? Looking first at a clause that requires a party to use its best endeavours to bring about a particular result, for example obtaining a permit or a licence, it has long been recognised that best endeavours “means what the words say; they do not mean second-best endeavours” (Sheffield District Railway Co v Great Central Railway Co [1911] 27 TLR 451).

This was further explained by the Court of Appeal to require the obligors “to take all those steps in their power which are capable of producing the desired results … being steps which a prudent, determined and reasonable [obligee], acting in his own interests and desiring to achieve that result, would take” (IBM United Kingdom Limited v Rockware Glass Limited [1980] FSR 335). It is generally accepted that someone who promises to use their best endeavours does not guarantee the outcome, but will be prepared to incur some financial expenditure in attempting to bring it about.

‘Best endeavours’ language is also sometimes used for wider obligations, to “promote” or “support” the counterparty, or a joint enterprise. The Court of Appeal has recently held, with one Lord Justice dissenting, that such a clause can operate so as to require a party to take specific steps, and that it is not too uncertain to be enforceable. In Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417, an airport operator and a budget airline had agreed that:

“1. Jet2.com and BAL will co-operate together and use their best endeavours to promote Jet2.com’s low cost services from BA and BAL will use all reasonable endeavours to
provide a cost base that will facilitate Jet2.com’s low cost pricing.”

The airport operator argued that this clause was not enforceable, because it was not sufficiently certain what it would need to do to ‘facilitate low cost pricing’ or provide ‘a cost base’. The majority of the Court of Appeal disagreed, and found that the clause required the airport to allow the budget airline to take off and land outside of the airport’s normal opening hours. The court reached that view even though the contract said nothing about hours of operation, and the airport would in fact make a loss as a result.

The Court of Appeal was prepared to give effect to an obligation to use best endeavours to facilitate the airline’s low cost services (the obligation to provide a ‘cost base’ gave rise to more difficulties, because it was more uncertain). Counsel for the airline submitted that the factual and commercial background to this particular contract showed that operating outside of the airport’s normal operating hours was essential to the airline’s business. This may have influenced the majority. Lewison LJ dissented. He reasoned that:

“If a contract says nothing about a particular topic, then even if that topic is demonstrated by the admissible background to be an important one, the default position must surely be that the topic in question is simply not covered by the contract.”

While a case on the interpretation of a particular contract cannot set any wider precedent, the Jet 2 decision warns against including such general ‘supportive’ or ‘facilitative’ language in contracts: a party that believes that this is just fluff or something akin to a preamble, might face a real impact on its bottom line.

The last word: no cop outs allowed!

The latest decision of the Court of Appeal on certainty of terms is MRI Trading AG v Erdenet Mining Corporation LLC [2013] EWCA Civ 156. EMC, a Mongolian mining company, and MRI, a Swiss trading company, settled an arbitration relating to the supply of copper concentrate. They attached to the settlement agreement three contracts under which copper was to be supplied. The first two supply agreements related to 2009, and were performed. The third one, concerned with deliveries during 2010, led to a further dispute. MRI claimed damages for failure to deliver, seeking more than US$ 10 million. EMC’s defence was that the relevant provisions in the 2010 contract on which MRI’s claim was based were mere agreements to agree. The relevant terms read:

9. Deductions

9.1 Treatment Charge shall be agreed between [MRI] and [EMC] during the negotiation of terms for 2010.

9.2 Refining charge shall be agreed between [MRI] and [EMC] during the negotiation of terms for 2010.”

The dispute under the settlement agreement was remitted to the arbitral tribunal. The arbitrators found that the delivery obligation was ‘non-existent’. Both the High Court and the Court of Appeal disagreed. Although the case makes no new law, it does show how the principles in Mamidoil (described above) ought to be applied.

The first question was whether there was a binding contract in existence – if there is, the use of expressions such as ‘to be agreed’ is less likely to be fatal to enforceability. The Court of Appeal found that the 2010 contract had to be construed as part of the settlement agreement, together with the 2009 contract, and not in isolation as the tribunal had done. The parties had already been performing their bargain for a year – and part performance is one of the foundations that can be used to build an implied term of reasonableness or fairness into an existing legal relationship. Both parties were familiar with the trade or industry, and had performed similar transactions previously.

The Court of Appeal also noted the use of the mandatory “shall” in both Clauses 6 and 9. The parties had not intended to remain free to either agree or disagree on these matters. If they could not agree, then the matter would be referred to the arbitrators who would determine a reasonable processing charge and shipping schedule. In other words, the agreement was sufficiently certain (or capable of being rendered certain), since:

“... it provided a commercial and contractual mechanism, which could be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, could resolve a dispute about reasonable processing charges and the shipping schedule.”

The tribunal had set out to apply Rix LJ’s criteria, but had ultimately reached the wrong conclusion. Unless the contract is truly skeletal, or speaks purely of an intention to agree at some point in the future, it is unlikely to be struck down for uncertainty under English law.
Excalibur remains firmly lodged in the stone

by Melanie Willems

On 10 September 2013, the Commercial Court dismissed the latest ‘mega-claim’. This time, there was not a Russian oligarch in sight. Excalibur Ventures had claimed more than US$1.5 billion for the (alleged) loss of rights relating to petroleum fields in Iraqi Kurdistan. The defendants, including a number of companies owned or controlled by Gulf Keystone Petroleum, were vindicated, albeit with more than £30 million reportedly having been spent on legal costs. Excalibur now faces having to pay the defendants’ costs on an indemnity basis, which usually means reimbursing around 90 per cent of the fees incurred.

Excalibur, much like the mythical sword that is its namesake, appears shrouded in mystery. In July 2011, Gloster J gave a judgment restraining Excalibur from pursuing parallel ICC arbitration proceedings against Gulf Keystone (Excalibur Ventures LLC v Texas Keystone Inc & Ors [2011] EWHC 1624 (Comm)). Excalibur had been founded by Mr. Rex Wempen in around 2000 to offer investment, procurement and public relations services in the energy business. Its website, however, appears to have been blank. Gloster J noted:

“... there was no evidence before me showing that Excalibur had ever participated in any project, or that it possessed the technical know-how, capability or capital required to invest or participate in an oil exploration and production venture. It has not apparently filed accounts, or made any public statement regarding its assets, liabilities, income or expenditure. I had little or no evidence before me of its financial position ... I was told that it was only in late 2010 that Excalibur obtained funding from an unidentified third party to pursue its claim against the Defendants.”

Gulf Keystone was more substantial, with a market capitalisation of just under US$1 billion, listed on the Alternative Investment Market of the London Stock Exchange. It has offices in London, Algeria and Iraqi Kurdistan. Mr Todd Kozel was the chairman and CEO of Gulf Keystone. Mr Kozel, together with other members of his family, was also involved in another energy business, Texas Keystone, of which he was a director. Texas Keystone was a small enterprise, and was not a part of the Gulf Keystone group of companies. It had been set up by the Kozel family to develop oil and gas interests in the United States.

In 2006 and 2007, Mr Wempen of Excalibur provided certain information to Mr Kozel. The background was that Mr Wempen claimed to have had political and commercial contacts in Kurdistan. Under a unification agreement signed in January 2006, Kurdistan became an autonomous region in Northern Iraq, administered by the Kurdistan Regional Government. Excalibur claimed Mr Wempen knew that the regional government wanted to invite bids for development of its hydrocarbon resources, particularly its oil reserves. Mr Wempen set out to seek ‘business partners’ with whom Excalibur could work towards securing an opportunity to develop these resources. In the litigation, Excalibur claimed that Mr Kozel, Gulf Keystone and Texas Keystone had no knowledge of or contacts in the region, and did not know of any intention on the part of the regional government to invite bids.

Excalibur and Texas Keystone (alone) signed a so-called collaboration, evaluation and bidding agreement in February 2006. Gulf Keystone stated that it had not signed this agreement because it had no interest in participating at that point in time, and did not expect to be successful if it had submitted a bid to the regional government (apparently, Gulf Keystone believed that Kurdistan was looking for US-based companies). The collaboration agreement recited Excalibur and Texas Keystone’s wish to collaborate to bid for development rights for petroleum blocks in Kurdistan, and, if the bids proved to be successful, to extract and then sell petroleum. Texas Keystone was to be the operator if any blocks were acquired.

The contract gave Excalibur a 30 per cent share (by way of a participating interest) in any rights to a block that might have been secured through a successful bid. Texas Keystone held the remaining 70 per cent. The collaboration agreement also set out a procedure by which Gulf Keystone could become a party to it, but the process required Excalibur’s consent.

In June 2006, Mr Wempen and Mr Kozel met Kurdistan’s Minister for Natural Resources, Dr Hawrami, to discuss the possibility of securing a production sharing contract (“PSC”) for oil exploration in the region. According to Texas Keystone, Dr Hawrami insisted that any prospective bidder for a petroleum contract would have to satisfy certain criteria, specifically as regards its professional and technical experience, capacity and financial resources. These criteria were subsequently set out in the Kurdistan Oil and Gas Law of August 2007.

Before the Commercial Court, the defendants argued that Excalibur could never have hoped to satisfy the government’s requirements, simply because Excalibur would have been quite unable to carry out any petroleum operations in Kurdistan. The defendants also pointed out that Excalibur never sought to provide any information to the ministry, even though it would have been aware of the great importance placed on inviting only suitably qualified bidders. The defendants explained that the government was not even satisfied by the financial position of Texas Keystone. For this reason, Gulf Keystone also became involved in the
negotiations for a PSC. When Texas Keystone sought to transfer its rights under the collaboration agreement to Gulf Keystone, in April 2007, Excalibur apparently refused to allow Gulf Keystone to establish an interest in any bid for a production sharing contract, or to permit Gulf Keystone to become a party to the Collaboration Agreement.

Eventually, the ministry did accept that Gulf Keystone had shown the necessary technical expertise, but concerns about the financial position of both Texas Keystone and Gulf Keystone remained. A substantial Hungarian enterprise, MOL Hungarian Oil and Gas Company, was competing for licences in respect of other blocks in Kurdistan at that time. The government proposed that MOL be introduced as co-bidder with additional financial strength. Gulf Keystone agreed to introduce MOL into the bid for two blocks (Shaikan and Akri Bijeel). MOL bid via a subsidiary, Kalegran Limited.

On 6 November 2007, Texas Keystone, Gulf Keystone and Kalegran signed a PSC to explore and develop the Shaikan Block. Gulf Keystone was named as the Operator. Excalibur was not a party.

On 24 November 2007, Mr Kozel then wrote to the ministry, on behalf of Gulf Keystone, asking for permission to add Excalibur as a non-operating partner in the Shaikan PSC, and other agreements. No such consent was given.

From November 2007, Gulf Keystone and Texas Keystone invested around US$500 million, in developing and exploring Shaikan. They struck oil in August 2009. At the time, this was hailed as one of the largest discoveries in the region.

In December 2010, Excalibur began Commercial Court litigation and ICC arbitration proceedings on the same day. In court proceedings, Excalibur raised a raft of claims both under New York law and English law.

**Excalibur could not have two bites at the cherry**

Gloster J put a stop to the arbitration proceedings, as Excalibur was suing for virtually the same relief in the Commercial Court. The collaboration agreement, to which only Texas Keystone and Excalibur were parties, provided for ICC arbitration in New York. Excalibur had nonetheless joined the Gulf Keystone defendants to the ICC proceedings, on the basis that they were bound by the arbitration clause. The main argument here appears to have been that Texas Keystone agreed to the arbitration clause on behalf of the Gulf Keystone entities, or was the *alter ego* of Gulf Keystone. All defendants, including Texas Keystone and Gulf Keystone, submitted to the jurisdiction of the Commercial Court. Gloster J noted that Excalibur had submitted to the jurisdiction of the English court, and so was clearly of the view that England was the appropriate forum.

Gloster J’s July 2011 judgment must be considered against the background of the English court’s power to restrain foreign proceedings. The High Court can grant injunctions to restrain arbitrations seated in a foreign jurisdiction, under Section 37 of the *Senior Courts Act 1981*. However, that jurisdiction will only be exercised exceptionally.

The next piece of the legal puzzle is the power of the court to rule on the validity of an arbitration agreement. Despite the so-called ‘kompetenz-kompetenz’ doctrine, under which an arbitral tribunal is competent to decide on its own jurisdiction, the Supreme Court has unequivocally confirmed in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, that the English court retained jurisdiction to determine the issue of whether there was an arbitration agreement. The real issue is whether it is appropriate to do so.

Gloster J also rejected Excalibur’s submission that Section 37 of the *Senior Courts Act* did not envisage injunctions where the seat of an arbitration was outside of England and Wales, so that (if Excalibur had been right) the party objecting to the jurisdiction of the arbitral tribunal would have had to do so in the courts of the seat of the arbitration proceedings (or later resist enforcement of the award).

The judge then went on to hold that there were exceptional circumstances that warranted an injunction restraining the New York arbitration. She took the following into account:

- There was strong *prima facie* evidence that Gulf Keystone had never agreed to become party to the collaboration agreement, and seemed unlikely to have accepted the arbitration clause in that contract.
- The Gulf Keystone defendants had no connection with either New York or the ICC as an arbitral institution. Requiring these companies to participate in an argument over jurisdiction before New York arbitrators would involve determining the issue whether they were party to the arbitration agreement “*by the back door*”.
- Excalibur had brought a substantive claim in the Commercial Court and had pending applications before the court in London. It had not, however, asked for anything in the New York proceedings. Gloster J found that it had been an abuse of process to require the other parties to change course and proceed with the arbitration, when everyone had now submitted to the jurisdiction of the Commercial Court.
- It would be oppressive for Gulf Keystone to have to apply to the New York courts (as Excalibur had) to determine whether they were parties to the arbitration agreement:
“It would be vexatious for TKI and the Gulf Defendants to be forced to defend two sets of proceedings involving the same issues in two jurisdictions at the same time. Excalibur’s suggestion that, so far as the Gulf Defendants are concerned, this is “self-induced”, because they object to the jurisdiction of an arbitral tribunal is not, in my view, well-founded. Apart from the fact that, having been joined as defendants to the Commercial Court Proceedings the Gulf Defendants were prima facie entitled to a judicial determination by this court as to whether they are parties to the arbitration agreement, it would, in my judgment, be oppressive for them (as Excalibur suggests they should) to have to apply to the New York courts, as the putative supervisory court for the ICC arbitration, to determine the question whether they were parties to the Collaboration Agreement. That is because the evidence of New York law shows that, if the Gulf Defendants were forced to apply to the courts in New York for an injunction to restrain Excalibur from pursuing the arbitration against them, there is a risk that they would thereby be taken to have submitted to the jurisdiction of those courts for the purposes of any claim which Excalibur might then make, despite the fact that: a) the Gulf Defendants would otherwise have no connection at all with New York and would not be subject to the jurisdiction of those courts; and b) as Excalibur itself contends, the case has “numerous links with England and Wales”.

That is a stark judicial comment. It shows that the Commercial Court will not shy away from sanctioning a party which, like Excalibur, tries to use parallel proceedings to gain a tactical advantage – always provided that the Commercial Court itself has jurisdiction, as it did here.

Excalibur loses the substantive claims, too

The ICC proceedings in New York having been restrained by the High Court, the litigation continued. It was the defendants’ case that, even though Texas Keystone was prepared to include Excalibur in bids, Excalibur simply could not have participated because it did not meet the legal requirements Iraqi Kurdistan imposed on bidders.

The defendants relied on a clause in the collaboration agreement which expressly required compliance with all relevant local laws governing oil blocks in Iraqi Kurdistan and also on another, which provided that:

“Nothing herein shall be construed so as to require the commission of any act contrary to law in any relevant jurisdiction”.

To make matters worse for Excalibur, the contract also contained a warranty that each party had obtained all licences, permits and other government authorisations required in the conduct of its business. Finally, they relied on a force majeure provision as excusing it from any obligation (if it did exist) to include Excalibur in bids, since force majeure was defined as including governmental actions:

“… compliance with any laws, rules, regulations or orders of national or other governmental agencies or bodies having jurisdiction in or in respect of Iraqi Kurdistan, any Acreage acquired or to be acquired pursuant to this Agreement.”

On 10 September 2013, Clarke J dismissed all of Excalibur’s claims. He found that the collaboration agreement did not create or recognise any entitlement of Excalibur to an indirect interest in the Shaikan or any other PSC. Excalibur had consented not to become a party to the Shaikan PSC, something that would have been impossible in any event. The Commercial Court also dismissed the suggestion that Gulf Keystone somehow acceded to the collaboration agreement after the event. Clarke J went on to make a series of alternative findings, if he were wrong about Excalibur having any entitlement to an interest under the Shaikan PSC. These ranged from Excalibur’s inability or unwillingness to perform in any event to Excalibur having committed repudiatory breaches of the collaboration agreement. Any of those would have discharged Texas Keystone, and Gulf Keystone, from having to transfer any interest to Excalibur. The court also dismissed a raft of further claims, ranging from fraud, to wrongful interference with Excalibur’s ability to raise finance, to even more imaginative causes of action. The final coup de grace was a finding that even if Excalibur was entitled to a 30 per cent interest, it would get 30 per cent of nothing: at the time when damages would fall to be assessed, the interest in the Shaikan field was deemed to (still) be worthless.
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