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Hook, line and anchor — what suffices for a convenient forum? (Public Institution for Social Security v Banque Pictet & Cie SA)

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Dispute Resolution analysis: This recent Court of Appeal decision in the PIFSS v Pictet proceedings focuses on specific elements of jurisdiction and challenges to it under CPR Part 11. The decision considers in particular the rules surrounding proof of agreement to exclusive jurisdiction clauses under Article 23 of the Lugano Convention 2007 and forum non conveniens arguments in the context of a plethora of foreign, variously domiciled individual and corporate defendants. Lady Justice Carr settles the rules for such evidence where the agreement is made by counterpart and by reference to standard terms and conditions. The decision also comments on the procedural limits to appeals and also cautions parties and first-instance judges against overcomplicating proceedings with satellite litigation and extensive judgments respectively. Written by Anastasia Tropsha, associate at PCB Byrne LLP.

Public Institution for Social Security v Banque Pictet & Cie SA and others [2022] EWCA Civ 29

What are the practical implications of this case?

Although Mr Justice Henshaw's judgment at first instance provided a thorough anthology of relevant case law, the Court of Appeal's analysis of the specific requirements for an exclusive jurisdiction agreement under Article 23 of the Lugano Convention 2007 (in light of both EU and domestic law) clarifies the point for practitioners seeking commercially effective ways to limit any litigation to their home courts. The decision of the Court of Appeal also provides a helpful summary of the criteria behind Article 6 of the Lugano Convention 2007 and the domestic rules on jurisdiction, particularly the 'risk of irreconcilable judgments' gateway in a multi-party cross-border dispute with an anchor defendant. Practitioners would do well to keep in mind that even following the decision of the Court of Appeal in the *Kolomoisky* case[1], the fact of an anchor defendant will not necessarily be determinative of the English court's convenience as a forum. Separately, a trend is emerging in 2022, where increasingly senior judiciary are criticising litigants for engaging in resource-consuming satellite litigation on procedural matters, such as jurisdiction and costs (see for example *Crypto Open Patent Alliance v Wright* [2022] EWHC 242 (Ch) (at para [18]).

What was the background?

This appeal arose out of claims brought by the Kuwaiti Public Institution for Social Security (PIFSS) in respect of alleged corruption of its former Director General, the First Defendant Mr Al Rajaan, who is now resident in England and has submitted to the jurisdiction. PIFISS seeks to bring its claims against all the Respondents, most of whom are foreign companies and individuals allegedly involved. The foreign respondents made Part 11 applications disputing the jurisdiction of the court, which was ruled upon by Henshaw J on 6 November 2020, holding that:

- the court's jurisdiction is excluded in relation to some Swiss and Luxembourgish respondents under the Lugano Convention 2007 on the basis of exclusive jurisdiction clauses in favour of courts elsewhere;
- the remainder of claims against Swiss and Luxembourgish respondents ought to be heard in the same forum as those above to avoid the risk of irreconcilable judgments;

[1] *JSC Commercial Bank Privatbank v Kolomoisky [2019] EWCA Civ 1708*

- it was also not expedient for the court to hear and determine claims against certain other defendants in order to avoid the same risk; and
- as a result of the above, England was not the convenient forum for the claims against Bahamian and Asian entities.

PIFSS appealed Henshaw J's ruling on the basis, inter alia, of formal requirements under Article 23 of the Lugano Convention 2007, the scope of exclusive jurisdiction clauses, whether more than just the risk of irreconcilable judgment ought to have been considered as part of an Article 6 analysis and whether the decision on forum non convenience was correct.

What did the court decide?

Lady Justice Carr observed that the appeal was limited to a review of the judgment with only a challenge to the judge's evaluative assessment, which would only be interfered with if the decision is found to be 'wrong by reason of some identifiable flaw in his treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor which undermines the cogency of the conclusion'. Carr LJ continued that 'jurisdiction challenges should be resolved as swiftly and succinctly as possible', given it is a procedural and not a substantive stage of proceedings (para [14]).

The Court of Appeal unanimously dismissed the appeal, holding (at para [145]) that:

- in order to satisfy Article 23 of the Lugano Convention 2007, there is no requirement of actual communication of an exclusive jurisdiction clause where the counterparty has signed a contract that includes express reference to general business conditions that contain the clause
- in circumstances where a claimant is required by Article 23 of the Lugano Convention 2007 to sue a defendant in an overseas jurisdiction but seeks to pursue in this jurisdiction connected claims against the same defendant, the court's consideration is not limited to a consideration of the risk of irreconcilable judgments between the claim against the anchor defendant and the claim(s) against the proposed Article 6 defendant(s). Rather the court can consider the risk of irreconcilable judgments between the claims sought to be made against the proposed defendant and other claims in other member states so as to facilitate the sound administration of justice, minimise the possibility of concurrent proceedings and thus avoid irreconcilable outcomes if cases are decided separately

Case details

- Court: Court of Appeal (Civil Division)
- Judge: Lord Justice Peter Jackson, Lady Justice Simler and Lady Justice Carr
- Date of judgment: 26 January 2022

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