4-6-AB38-4383

THIRD PARTY ARBITRATION UNDER ENGLISH LAW

MR. EHAB QOUTESHAT[1] AND DR MARGARET LIU[2]

Arbitration agreements should be exclusively binding on the parties who enter them. However, there are situations in which third parties, such as the guarantor, successor, consignor or subsidiary company, are usually beyond the status of genuine parties to the agreement, although they can invoke or be bound by the agreement owing to the common rights and liabilities between those parties, as they have an active role concerning the execution of the contract. These situations raise several issues concerning when the third party to an arbitration agreement would be entitled to intervene in the proceedings, and when a party to the proceedings is able to join non-parties to the arbitration proceedings.

This paper examines these matters under English law, demonstrating that it fails to provide legal certainty to third parties. The paper concludes with a recommendation for appropriate regulation to adjust "third parties in arbitration" at national, regional and international levels, owing to the disparity of case judgements in this area of law.

Keywords: third party arbitration; United Kingdom; Article (8), EU Judgements Regulation.

INTRODUCTION

The study assesses legal issues arising from third-party arbitration under English law, enshrined under the EU Judgments Regulation 1215/2012. It first assesses cases of third-party arbitration by English courts under this Regulation. To this end, it examines the development of English courts' jurisdiction in commercial and civil matters with special reference to co-defendants and third parties. It discusses Article 8 of the Regulation by exploring the main issues regarding its application related to courts' jurisdiction of co-defendants and third parties. The discussion starts by identifying the proper "connection" to join two different proceedings, then turns to whether third-party proceedings allow claimants to claim in two proceedings against one defendant based on the contract, for example a sale contract, and against a co-defendant based on tort. Finally, the paper examines whether there is a bad intention by the claimant in using Article 8 as a sole object to remove the third party from the court's jurisdiction.

THIRD-PARTY ARBITRATION UNDER ENGLISH COURTS' JURISDICTION

English courts' jurisdiction over third-party arbitration has developed recently; initially, it was established under the 1968 Brussels Convention by the Civil Jurisdiction and Judgments Act, 1982. This Convention contains provisions regarding the allocation of jurisdiction and the enforcement of judgments between the states of the European Union, which had "the force of law". It came into force on 1 January 1987, and the relevant provisions of jurisdiction relating to third-party arbitration are enshrined under Articles 2, 5(1) and (3) and 6. Article 2 provides the general rule for jurisdiction; Articles 5(1) and 5(3) regulate the jurisdiction for contract and tort, and Article 6 addresses co-defendants and third parties' jurisdiction, which is the main matter of this paper. However, on 1 March 2002, the Brussels Convention was replaced by European Commission Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (hereafter the EC Judgments Regulation). Thereafter, EC Judgments Regulation 44/2001 was amended by EU Regulation 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast) (the Judgments Regulation), which applies to legal proceedings instituted on or after 10 January 2015. According to the EC Judgments Regulation, matters are decided according

[1] Mr. Ehab Qouteshat, Research student, Coventry University.
[2] Dr Margaret Liu, Senior Lecturer in Law, Coventry University

to this Regulation if they fall within its provision; otherwise they will be decided by service of proceedings in accordance with domestic rules. EC Regulation 44/2001 and the amended EC Judgments Regulation 1215/2012 expanded and modified the provisions of the 1968 Brussels Convention among EU Member States (Baughen, 2015).

The general rule relating to arbitration according to Article (4) of Judgments Regulation 1215/2012 (formerly Article 2 of the Brussels Convention) is that the jurisdiction shall be determined based on the domicile of the defendant; however, there are some exceptions to this rule, termed as "special jurisdictions", according to which a defendant domiciled in a contracting state may be sued in another contracting state. Usually these exceptions are related to matters concerning co-defendants and third parties, and the Judgments Regulation provides particular bases to decide the jurisdiction in these matters (Baughen, 2015). Article 8 reads as follows:

This Article allows a person domiciled in a Member State to be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

Article 8(1) plainly acknowledges the risk of conflicts in judgment by stating that it is a connection between claims requirement to join two different proceedings as follows: "it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments"

It is noted that Article 8(1) (formerly Article 6(1) of the Brussels Convention) is only applicable to matters where the defendant is domiciled in the EU; otherwise, Article 6(1) (formerly Article 4(1) of the Brussels Convention) will be the proper provision, since it provides matters governed exhaustively to persons domiciled outside the EU. Land Berlin v Sapir (2013) is a case in point, where a regional authority appealed before the European Federal Court of Justice (ECJ) regarding a claim of overpaid compensation against several defendants, three of whom were domiciled outside the EU. Accordingly, the question was whether Article 6(1) of the Convention is the applicable provision if there is a close connection between the defendants. The Court held that Article 6(1) referred expressly to defendants domiciled in the EU; hence the proper provision is Article 4(1) concerning claims brought against several defendants some of whom reside outside the EU.

Nevertheless, there may be issues regarding the interpretation of the connection pursuant to Article 8, which will be examined in the next section.

Issue of Connection

Before considering the issue of the judicial interpretation of connection of Article 6(1), the study examines the competent authority empowered to interpret the provisions of the 1968 Brussels Convention, which was a controversial matter in terms of who should have the authority to interpret the Convention's provisions. A protocol to the Convention was adopted in 1971 to address the issue by conferring this jurisdiction on the European Court, which came into force in 1975 (Freeman, 1981).

The issue of connection stated in Article 8(1) (formerly Article 6(1) of the Brussels Convention) was addressed by the Bundesgerichtsh in *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst & Co. and others* (1988)[3] (hereinafter '*Athanasios Kalfelis* case'), when it asked the European Court two questions regarding the connection:

> (a) Must Article 6(1) of the EEC Convention be interpreted as meaning that there must be a connection between the actions against the various defendants? (b) whether the connection between the actions should be essentially the same in fact and law, or must a connection be assumed to exist only if it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings i.e., in cases of compulsory joinder.

Consequently, it can be stated that there are three main matters of connection related to Article 8: the interpretation of the connection pursuant to Article 8; the ability to join two claims with two different legal bases in one proceeding; and the assumption of good faith on the part of the claimant in applying Article 8. These matters are discussed below.

What is required to join two different proceedings?

The main issue of Article 8 is whether a connection must exist between the claims made by the same plaintiff against several defendants, and what the nature of that connection is. This issue was best demonstrated in (hereinafter '*Athanasios Kalfelis'* case. Kalfelis brought an action against Bankhaus Schröder, Münchmeyer, Hengst & Co., Frankfurt am Main, and Bankhaus Schröder, Münchmeyer, Hengst International SA, Luxembourg, and Ernst Markgraf, a procuration holder for the first-named bank. The facts of the case are that Mr Kalfelis concluded a number of spot and futures stock-exchange transactions in silver bullion through the bank established in Luxembourg, through the intermediary of the bank established in Frankfurt am Main and with the participation of the latter's joint procuration-holder; as a result, Kalfelis paid DM 344,868.52 to the bank in Luxembourg. The total loss with interest reached DM 463,019.08. Kalfelis alleged that the defendants were jointly and severally liable for the debit based on his claim of contractual liability for breach of the obligation to provide information on tort, since the defendants caused him to suffer loss as a result of their conduct *contra bonos mores*. Bankhaus Schröder, Münchmeyer, Hengst International SA challenged the jurisdiction of the German courts at every stage of the procedure. This raises the two questions above, concerning the European Court for judicial interpretation of Article 6.

Regarding the first question, of whether a connection must exist between the actions brought against the various defendants in order for Article 8(1) to apply, the Court noted that the general rule according to Article 4 of the Judgments Regulation is that the jurisdiction is conferred to the courts of the state of the defendant's domicile. However, the jurisdiction provided for in Article 8(1) is an exception to that principle, according to which the specific feature of the jurisdiction is that the defendant may be sued where he is one of a number of defendants in the courts for the place where any one of them is domiciled. This exception must thus be treated in such a manner that there is no possibility of the very existence of that principle being called into question, and the court must make sure that there is no bad faith for the claimant to prefer one jurisdiction to another or doubt in applying Article 8(1) (the issue of bad faith in choosing jurisdiction is discussed in depth in section 2.2.3). The court must assure that there is a connection between the claims made against each of the defendants, the nature of which must be decided individually in each case, to ensure the equality and uniformity of the rights and obligations under the convention of the contracting states and of the persons concerned. Additionally, the national court has the discretion to assure in every single case whether the nature of that connection is of such a kind that it is expedient to determine those

[3] Case (189/87) [1988] ECR 5565.

actions in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The application of Article (8) in *Athanasios Kalfelis* case is also explained by Magnus and Mankowski (2007): it was implied to have a similar interpretation, whereby the claimant sued different defendants, and the ECJ declared that there must be a connection between the actions of arbitration expedient to determine them together, to avoid the risk of conflicting judgments. The Court stated that according to the four conditions under Article (8), the Court has it is own power and discretion to decide if several claims in each case were connected in such a way as to justify their being heard by a single court.

Therefore, according to the case of the ECJ examined above, there must be a connection and this connection should be interpreted separately by each court based on the court's discretion that there is a proper connection that is efficient to determine all the actions together. This approach is efficient as it helps to raise the equality and fair procedures, and prohibit prejudice of one jurisdiction to another.

The next part will discuss the possibility of joining two different proceedings with different legal bases in contract and tort.

The requirements to join two different claims with two different legal bases

As mentioned above in *Athanasios Kalfelis* case the Court seised a dispute to decide whether a connection between the several claimants brought by the same plaintiff existed in order to apply Article 8(1) of the Convention. If a required connection was found then several actions could be determined together in order to avoid the risk of conflicting judgments resulting from separate proceedings. However, according to the second question regarding the possibility of joining two different proceedings with two different legal bases towards the ECJ, the Court stated that the required connection does not exist where the court is competent in matters of tort on the bases of Article 5(3), since the court jurisdiction will not exceed over the contractual issues arisen from the same context of the claim (Magnus and Mankowski, 2007).

Similarly, in *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV* (1998)[4] (hereinafter '*Réunion Européenne* case'), two claims were commenced, one in France by French consignees of a shipment of peaches in contract against the Australian issuers of the bill of lading under which the goods were carried, and a tort claim against the Dutch carriers and master of the ship in which they were carried. There was no jurisdiction under Article 6(1) because none of the defendants were domiciled in France. The ECJ weakened the power of the national courts to join several actions by referring to *Athanasios Kalfelis* case, stating that there was insufficient connection in respect of the two claims brought respectively in contract and in tort against different defendants (*Réunion Européenne* case).

The ruling was further strengthened in *Watson v First Choice Holidays and Flights Ltd.* (2001)[5], concerning a British holidaymaker, Mr Watson, injured while on a package holiday in Spain. The package was bought from the anchor defendant (First Choice). Mr Watson was resident in an accommodation block of a large resort complex. He was chased by a security guard from a neighbouring resort complex and injured when he reached a low wall some 35 cm in height and jumped over it to flee. On the bases of this injury, the holidaymaker took legal action before the English courts against First Choice, based on the contract under which he bought the holiday, and tried to bring a tort claim against Aparta Hotels Caledonia SA pursuant to Article 6(1) of the Brussels Conventions, which states that a person domiciled in a contracting state may also be sued where he is one of a number of defendants in the court for the place where any one of them is domiciled. Mr Watson claimed that Aparta Hotels Caledonia

[4] Case (C-51/97) [1998] ECR I-6511.
[5] [2001] 2 Lloyd's Rep. 339 [CA].

SA was responsible for the negligence of the Spanish security guard at the same court proceedings, and brought a claim against the manager alleging that there was a lack of lighting, fencing and warning in the complex. Therefore, the claim against First Choice and Aparta was a matter relating to contract and to tort respectively. Aparta argued to have the proceedings set aside on the bases that the English courts had no jurisdiction over the claim against them (Judge, B.L.J., Latham, L.J. and Lloyd, M.J., 1968. Court of Appeal).

The Court of Appeal in England referred to the ECJ for a preliminary ruling designed to clarify the underlying justification of *Réunion Européenne* case and *Athanasios Kalfelis* case. It said that but for that decision, it would have taken the fact that the two claims were framed respectively in contract and in tort as, at most, a factor to be taken into consideration when considering the sufficiency of the connection between them and the expediency of joining them in order to avoid irreconcilable judgments. It was concluded that "jurisdiction against one defendant under art. 6(1) cannot be based on having established jurisdiction against another defendant under art. 5(1) or (3), rather than under art. 2" (Judge, B.L.J., Latham, L.J. and Lloyd, M.J., 1968. Court of Appeal).

However, in *Freeport Plc v Arnoldsson* (2007)[6] (hereinafter *'Freeport Plc* case'), the ECJ had the opportunity to elucidate the judgment in *Réunion Européenne* case. An agreement was signed between Arnoldsson and Freeport Plc, a company incorporated under English law. The agreement provides that once a factory had been opened in Sweden the claimant was entitled to a success fee of £500,000. Arnoldsson had the right under the agreement terms to be paid by the company which was to become the owner of the factory site. Despite the factory being opened on a site owned by Freeport AB, a company incorporated under Swedish law, neither of the companies fulfilled their obligations to pay the required fee. Subsequently, Arnoldsson commenced proceedings against both companies before the Swedish Courts. Furthermore, the bases of the claim against Freeport Plc falls under Article 6(1). Freeport Plc contended that Article 6(1) was irrelevant because there are different bases in both claims. The first claim against it was in terms of contract while the action against Freeport AB, with whom Arnoldsson did not have a contractual relationship, was based on tort, delict or quasi-delict (Hill and Chong, 2010).

The ECJ indicated in its decision in *Freeport* case that Réunion Européenne did not apply Article (6) as the action brought in a Member State's court in which none of both defendants were domiciled in a Member State. Accordingly, this difference certainly makes the judgment in *Réunion Européenne* case irrelevant. The interpretation made by the ECJ in the Freeport case under Article 6(1) was clear, as explained by Hill and Chong (2010):

> Where an action is brought before the court for the place where one of the defendants has its head office, Article 6(1) applies notwithstanding the fact that the claims brought against different defendants have different legal bases. Because, on the facts of the case, the claims against the two defendants were related, Arnoldsson was entitled to bring proceedings in Sweden against Freeport AB on the bases of Article (2) (in tort) and Freeport plc on the bases of Article 6(1) (for breach of contract).

Moreover, in *Gascoine v Pyrah* (1994)[7], the Court of Appeal allowed the claimant to join the second defendant in an English proceeding against the first defendant, where the first defendant was domiciled in England and the second in Germany. The joining for the second defendant was permitted despite the fact that the claims were commenced on different legal bases. The subject of the first claim breached the contract terms, while the second defendant sued for negligence, based on tort. Although there was no contractual relationship between the claimant and the second defendant, the Court stated that the joining was permitted because of the closely intertwined relationship between the claimant and the two defendants, and if Article 6(1) did

[6] (2007) All ER (D) 160, (2007) ECR I-8319.
[7] (1994) ILPr. 82.

not apply there was a risk of conflicting findings of law (Hill and Chong, 2010). Furthermore, the judgment in Land Berlin v Sapir (2013) held that the "wording of Article 6(1) did not indicate that the actions brought against different defendants had to have identical legal bases". In *Réunion Européenne* case the decision was based on case law, referring to the ECJ decision in the Kalfelis case instead of Article 8, as neither defendant was domiciled in a Member State. The Kalfelis case concluded that the court's jurisdiction on contractual bases could not exceed the tort bases, as the two matters have different provisions under Articles 5(1), 5(3). However, in the Freeport Plc case the discussion was expanded and the issue was explained clearly, stating a different point of view whereby Article 6(1) applies, notwithstanding the fact that the claims brought against different defendants have a different legal bases, as the provision did not state that the legal bases should be identical in order for Article 6(1) to apply.

Proponents of joining proceedings arising from different legal bases conclude that this would be more favourable for the court to justify the application of Article 6(1) and join two actions, even when one matter is based in tort (delict or quasi-delict) and another based in contract. The joining of such proceedings could reduce the risk of the possibility of irreconcilable judgments resulting from separate proceedings and inconsistent findings of fact. Article 6(1) was very clear when it stated that multiple defendants can be sued before the court for the place where one of the defendants has its head office.

Opponents of joining rely on *Athanasios Kalfelis* case and on the R*éunion Européenne* case decision, In Réunion the award stated that Article 6(1) was not the proper provision since the claim brought against the first defendant (the person who issued the bill of lading) was based on contract within the meaning of Article 5(1) of the Convention. Article 5(1) states that: "A person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question". However, the claim against the actual maritime carrier falls within the meaning of Article 5(3) of the Convention, which states "A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur". The matter relates to tort, delict or quasi-delict, as the bill of lading in question does not disclose any contractual relationship freely entered into between the consignee and the second defendant. Article 5(3) covers all actions which seek to establish the liability of a defendant, not related to matters of contract within the meaning of Article 5(1).

It can be concluded that the opinion of the opponents is more appropriate, despite the potential to increase the risk of irreconcilable judgments, as according to the opposite opinion, "special jurisdiction" under contract and tort respectively under Articles 5(1) and 5(3) of the Convention would be negated. It is regrettably noted that this is something of an "evidence-free zone", lacking in case studies. In some situations the claimant might bring a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the state where one of the defendants is domiciled, as discussed in detail in the next section.

Intention consideration

The issue of applying the required rule to examine the real intention of the parties stated under Article 6 of the Convention is that it is difficult to provide the court with sufficient evidence related to the existence of bad intention to avoid the jurisdiction of other courts. For example, in *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* (2006)[8], an action for payment brought in 2004 before the Bezirksgericht (District Court) Bezau in Austria against Mr Gisinger, domiciled in Austria, and Kiesel, whose registered office is in Germany, the action

[8] (Case C-103/05) [2006] ECR I-06827-, [2006] All ER (D) 174 (Jul).

was dismissed owing to a bankruptcy proceeding against Mr Gisinger remaining undecided, having been initiated in 2003 regarding his assets. As a result, the claim against Mr Gisinger was considered an inadmissible action. Accordingly, Kiesel challenged the court jurisdiction and alleged that the inadmissible claim was brought for the sole purpose of justifying the Bezirksgericht Bezau's jurisdiction. Bezirksgericht Bezau upheld Kiesel's objection based on the lack of that court's international and territorial jurisdiction. However, in the appeal the Bezirksgericht Bezau decision was dismissed; the Austrian Landesgericht (Regional Court) Feldkirch held that the objection should be set aside. The reason for the objection being dismissed was best demonstrated in the ECJ. Kiesel appealed before the Oberster Gerichtshof (Supreme Court), which referred the question to the ECJ for a preliminary ruling. The ECJ held that Article 8(1) "does not include any express reference to the application of domestic rules or any requirement that an action brought against a number of defendants should be admissible, by the time it is brought, in relation to each of those defendants under national law". Hence, the Court was fully conscious regarding manipulation in the provision of Article 8(1) in order to secure jurisdiction, but in this case it did not observe any fraudulent intent to manipulate Article 8(1).

Furthermore, in *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* (2015)[9], a claim was brought by CDC in the context of cross-border multi-party cartel damages claims before the Dortmund Court in 2006 against six cartel members. Bad faith in extending the jurisdiction of the Court was alleged, citing that the claimant withdrew action against the sole anchor defendant (Degussa) domiciled in Germany before proceedings were started in accordance with a settlement that had been reached. The remaining non-German domiciled defendants challenged the international jurisdiction of the German court, and submitted that in the absence of Degussa, there was no jurisdiction for the claim before the German court. They argued that CDC and Degussa had intended to leave the settlement open for a later stage with the sole object of securing the jurisdiction of the German court. As a result of the other companies' allegation, the Dortmund Court decided to stay the proceedings and refer this matter to the ECJ for a preliminary ruling on 26 June 2013. However, the Court did not uphold the allegations. ECJ concluded that later negotiations for the settlement did not determine the requirements for the potential intention by CDC and Degussa to secure the German court, and the out-of-court settlement did not itself prove collusion to artificially rely on Article 8(1) to avoid the other defendants' court jurisdiction.

It is submitted that inadmissible claims on a flimsy bases raise some doubts regarding bad faith to justify and establish court jurisdiction under Article 8(1), which is different from the non-domiciled co-defendant forum. However, the decisions of both cases in this section justify the need for a clear interpretation of the exact standard regarding situations whereby a claim could be made against a number of defendants with the sole object of ousting the jurisdiction of the courts of the state wherein one of the defendants is domiciled.

CONCLUSION

It can be concluded that there is a need for further interpretation of Article 8 regarding jurisdiction under the Judgments Regulation (EU 1215/2012), as there is widespread misunderstanding in some cases about the exact meaning in several parts of this provision. For instance, Article 8 needs more illustration for the definition of the word "connection", and whether it is permissible to join two different claims with two different legal bases. Additionally, it is unclear when it shall be considered under Article 8 that there is a bad intention by a claimant to remove a third party from the jurisdiction of his court that would otherwise be competent in his case.

[9] [2015] EUECJ 335 C-352/13, ECLI:EU:C:335, [2015] WLR(D) 223.

REFERENCE:

Baughen, S. (2015) *Shipping Law*. 6th ed., London: Taylor & Francis.

Freeman, A. (1981) The EEC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments. *Northwestern Journal of International Law and Business*, 3(2), 497-516.

Hill, J. and Chong, A. (2010) *International Commercial Disputes: Commercial Conflict of Laws in English Courts*. 4th rev. ed., Oxford: Hart Publishing.

Magnus, U. and Mankowski, P. (2007) *European Commentaries on Private International Law: Brussels I Regulation*. Vol. 1, Munich: Sellier European Law Publication.

Judge, B.J., Latham, L.J. and Lloyd, M.J. (1968) *Court of Appeal. Watson v. First Choice Holidays And Flights Ltd. And Another* [2001] EWCA Civ 972.

Reunion Europeenne SA and Others v Spliethoff'sBevrachtingskantoorBv and Another ECJ 27 OCT 1998, (2015) [Online]. Available from: http://swarb.co.uk/reunion-europeenne-sa-and-others-v-spliethoffs-bevrachtingskantoor-bv-and-another-ecj-27-oct-1998/ [Accessed 16 September 2016]