

Conflict of Law – Jurisdiction – *Forum non Conveniens* – Service out of jurisdiction – Stay of proceedings – England v US

Cuccolini SRL v Elcan Industries Inc [2013] EWHC 2994 (QB)

Introduction

Elcan, a New York company, applied for an order setting aside the service of proceedings on *forum non-conveniens* grounds and for a declaration that the English courts should not exercise any jurisdiction over Elcan in these proceedings.

The fact

Cuccolini, an Italian company, manufactured vibrating screening machines. It had entered into an agreement with Elcan, appointing Elcan as the sole distributor of its machines in the United States and to be a non-exclusive distributor in Canada. A clause of the agreement provided for termination by either party if the other repeatedly breached any of the terms of the agreement. A governing law clause stated that the agreement and any dispute or claim arising out of it or in connection with it should be governed by and construed in accordance with the laws of England and Wales.

Cuccolini terminated the contract under the clause and issued proceedings alleging multiple and repeated breaches of the agreement and applied for permission to serve the claim form on Elcan outside the jurisdiction. A judge granted permission. Before the proceedings were served on it in the US, Elcan issued proceedings in New York alleging conspiracy between Cuccolini and two third parties to replace Elcan as Cuccolini's distributor.

The issues

They were whether

- (i) the court should grant an order to stay the proceedings when it exercised its discretion;
- (ii) Cuccolini had given full and frank disclosure to the judge, and, if not, whether his order should be set aside and jurisdiction declined for that reason.

Held

Stay of proceeding

In exercise of its discretion, the court was entitled to have regard to all the circumstances of the case, the general rule was that the parties would be held to their contractual choice of English jurisdiction unless there were overwhelming, or at least very strong reasons for departing from that rule. Such overwhelming or very strong reasons did not include factors of convenience that were foreseeable at the time the contract was entered into, save in exceptional circumstances involving the interests of justice.

The court ruled that Elcan was applying the wrong test when referring to what the parties actually foresaw or had in contemplation at the time of making the agreement. The correct test involved asking what was foreseeable, not what was actually foreseen. At the moment when the contract was concluded, it could not be said that disputes were unforeseeable. In the present case an Italian company and a New York company were entering into an agreement for distributorship of the Italian company's products in the US, which made provision for termination on various grounds. It was foreseeable that an acrimonious termination might lead to disputes involving third parties as shown in Elcan's proceedings in New York.

Out of jurisdiction service

An applicant for permission to serve out of the jurisdiction had to make full and fair disclosure of the facts material to the application. However, it was also well-established that the requirements of the duty of full disclosure depended on the context. Facts would only be regarded as material to an application if the effect of their omission was such as to mislead the court in a respect that was material to the application that was being considered.

In the present case, the court concluded that:

- Factors relating to forum non conveniens were immaterial when deciding whether permission was granted to serve out of jurisdiction;
- the fact that the proceedings were "issued for declaratory relief only" did not mean that the proceedings were insubstantial, vexatious or improper;
- the fact that Cuccolini might have contemplated that proceedings might be brought by Elcan in another jurisdiction did not mean there were "pending or prospective" proceedings.

Application refused

Remarks

Parties entering into contract must pay attention to the implications of jurisdiction clause. Once a contract is entered, it is very difficult to depart from the agreement and take disputes arising from the agreement to be resolved elsewhere.

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