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## *PH Insight for News and Analysis of the Latest Developments from the Courts of England and Wales*

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PHlit is our London litigation know-how blog, where you will find the latest developments on commercial litigation topics delivered in a monthly round-up of the most important topics addressed by the Courts of England and Wales, as well as key regulatory and legislative updates. You can subscribe to this site if you would like our updates sent to you by email as soon as they are posted.



### *In this edition...*

- We consider a recent [decision](#) of the High Court in which summary judgment in relation to claims made under two credit agreements was granted because the defendant had no real prospect of defending the claims on the basis of US-sanctions that had been imposed on Venezuela after the relevant credit agreements had been entered into;
- We review an interesting High Court [ruling](#) which, in the context of a growing trend in "class-action tourism", reminds claimants that the English courts will not lightly depart from the *lis pendens* principle in the context of parallel proceedings pending in another state;
- We analyse the latest development in the group action against the so-called "Truck Cartelists" – namely a [decision](#) of the Court of Appeal that seeking to contest findings set out in a settlement decision by the European Commission constituted an abuse of process;
- We consider a Court of Appeal [ruling](#) which has given guidance on the use and effect of the "Subject to Contract" label, in the context of correspondence between solicitors which was purported to comprise a binding settlement agreement;
- We note a [decision](#) of the High Court, in which a victim of fraud was allowed to use information obtained through a Norwich Pharmacal order against a third party bank in separate proceedings against the same bank;
- We consider a landmark [decision](#) of the Supreme Court regarding the circumstances in which an arbitrator must disclose an interest which may give rise to a conflict under the Arbitration Act 1996; and
- Finally, we reflect on the recent [changes](#) made to the LCIA Rules, effective from 1 October 2020, and the potential benefits these changes may have for users of LCIA arbitral services.

## No real prospect of defending a claim on the basis of US sanctions imposed after the applicable contract has been entered into

***Banco San Juan Internacional Inc v Petroleos de Venezuela S.A.* [2020] EWHC 2937 (Comm) (judgment available [here](#))**

*4 November 2020*

- The High Court has granted summary judgment in favour of a Puerto Rican bank, finding that a defaulting borrower under two credit agreements had no real prospect of successfully defending claims on the basis of US sanctions that had been imposed on Venezuela.
- The claimant bank brought a debt claim against the Venezuelan state-owned oil and gas company, PDVSA, for default under two credit agreements entered into in 2016 and 2017. PDVSA sought to argue that its obligations to make payment were suspended due to the imposition of certain US sanctions, which it said rendered payment illegal in the place of performance (i.e. in the USA). Accordingly, PDVSA sought to resist the bank's application for summary judgment on the basis that it had a real prospect of successfully defending the claim.
- In interpreting the sanctions clauses in both credit agreements, the Court rejected the suggestion that it was "*perfectly normal and sensible*" to suspend payment obligations in commercial agreements where payment would otherwise be in breach of US sanctions. Each case (and the meaning of each clause) must be decided on its individual facts and, in this case, the wording of the applicable clauses provided no basis for suspension of payment. In any event, it was not clear that making payment would actually have breached the applicable sanctions.
- The Court also found that, even if the US sanctions rendered performance of the payment obligations illegal prima facie, PDVSA nevertheless had an obligation under the agreements to apply for a licence from the US Office of Foreign Assets Control in order to make the payments, which it had failed to discharge. As a point of principle, the obligation was on the debtor to take these steps as the party bound to perform.

### **PH/it comment:**

*This decision will likely be of interest to global lenders with exposure to borrowers with a sanctions risk. It confirms that there is no "normal course" for the suspension of payment by a borrower where sanctions are imposed after the agreement is entered into.*

*Following the imposition of sanctions, whether or not the borrower's payment obligations will be suspended will depend on the precise words used in the contract. Accordingly, contracting parties should seek to agree in clear terms what the appropriate course of action will be in circumstances where a sanctions risk exists.*

*The case is also a warning for borrowers that even where the making of loan repayments may be illegal prima facie due to financial sanctions, they may still be under an obligation to take positive steps, such as applying for a relevant licence, to enable repayments to be made.*

## High Court denies latest case of "class action tourism"

***Município de Mariana v BHP Group Plc and BHP Group Ltd [2020] EWHC 2930 (TCC)***  
(judgment available [here](#))

9 November 2020

- The collapse of the Fundão dam in south-eastern Brazil in November 2015 was a disaster which resulted in thousands of claims being brought before the Brazilian courts against the dam operator, Samarco Mineração SA, a joint venture between Vale SA and BHP Billiton Brasil LTDA ("BHP Brasil").
- Dissatisfied by the Brazilian Court process, some 202,600 claimants brought parallel proceedings in England against BHP Group Ltd (an Australian entity and the ultimate owner of BHP Brasil) and BHP Group PLC. The defendants are connected by virtue of a dual listed company arrangement.
- The defendants sought to strike out and/or stay the English proceedings on the following four grounds, all of which were rooted in the existence of the pre-existing Brazilian proceedings: (i) abuse of court process; (ii) article 34 of the Recast Brussels Regulation (and the "*lis pendens*" rule); (iii) *forum non conveniens*; and/or (iv) appropriate case management considerations and furtherance of the overriding objective.
- The High Court agreed with the defendants and struck out the claims as an abuse of process. However, the judge also held that had he not found for the defendants on the abuse of process ground, he would have nevertheless: (i) stayed the claims on the basis of article 34 of the Recast Brussels Regulation (which grants member states the discretion to stay proceedings to take into account proceedings involving the same cause of action and the same parties or related proceedings pending before the courts of a third state); or (ii) declined jurisdiction on the basis of *forum non conveniens*.
- On the fourth ground, the judge did not perceive any material difference to the abuse argument, but remarked that a stay solely on a case-management ground (i.e. in circumstances where he was wrong in relation to the abuse of process, article 34 Recast Brussels Regulation and *forum non conveniens* arguments) would "*probably be unsustainable*".

### PH/it comment:

*This case marks a continuation of "class action tourism" before the English courts, where allegedly wrongful acts of foreign subsidiaries are prosecuted through a parent entity domiciled in England. Whilst the BHP case possessed a number of idiosyncrasies (including that the defendants had confirmed they would submit to the foreign proceedings), the decision demonstrates that the English courts will not be easily persuaded to allow claims where proceedings involving the same cause of action and the same parties are pending before the courts of another jurisdiction.*

## Court of Appeal rules it may be an abuse of process to contest findings set out in a European Commission settlement decision

***AB Volvo (Publ) & Ors v Ryder Limited and Ors* [2020] EWCA Civ 1475 (judgment available [here](#))**

11 November 2020

- This judgment of the Court of Appeal arises from an infringement decision that was adopted by the European Commission (the “**Commission**”) in accordance with the prescribed settlement procedure in cartel cases, as laid down in Article 10(a) of Regulation (EC) No 773/2004 (the “**Settlement Procedure**”).
- In July 2016, the Commission found that a number of truck manufacturers (the “**Truck Cartelists**”) had participated in a long-running infringement of Article 101 of the Treaty on the Functioning of the European Union, which prohibits agreements that have as their object or effect the restriction, prevention or distortion of competition within the EU and which have an effect on trade between EU member states.
- The decision of the Commission was reached following the Settlement Procedure and each Truck Cartelist received a reduction in its respective fine for settling the case. When the Commission’s decision was published, the Truck Cartelists were faced with a number of “*follow-on*” damages claims, i.e. claims from purchasers that the price they paid for the purchase or lease of their trucks was artificially inflated by the unlawful anti-competitive behaviour which was the subject of the Commission’s decision.
- In defending the follow-on damages claims, the Truck Cartelists put the claimants to proof on facts which were set out in the Commission’s decision and which had been admitted by the Truck Cartelists as part of the Settlement Procedure. The claimants raised, as a preliminary issue, the question of whether it was an abuse of process to contest a finding set out in a decision of the Commission. The Competition Appeal Tribunal held that it was, but granted the Truck Cartelists permission to appeal.
- On appeal, the Truck Cartelists argued that the English common law doctrine of abuse of process had no relevance because the question of whether they were able to contest a fact set out in a Commission decision should be determined in accordance with EU law. In addition, the Truck Cartelists submitted that preventing them from contesting certain facts would breach their fundamental rights of defence and the presumption of innocence.
- The Court of Appeal rejected the Truck Cartelists arguments. The Court held that, even where it is open to a domestic court under the regulatory regime to find that the decision was wrong, EU law did not preclude the application of the abuse of process doctrine in order to prevent the Truck Cartelists from resiling on their prior admissions. In addition, the Court found there would be no breach of presumption of innocence principles in holding the Truck Cartelists to their admissions.
- The Court also considered it would create great unfairness to the claimants to have to prove facts that the Truck Cartelists had already admitted, and that it would be “*an affront to most people’s ideas of justice*” if the Truck Cartelists were entitled to contest admissions that had already been made to the Commission.
- Notably, the Court of Appeal was sufficiently confident in ruling on these issues without making a reference to the European Court of Justice (as the Truck Cartelists had requested).

**PH/it comment:**

*While the Court of Appeal's judgment related to an infringement of EU competition law and a resulting settlement decision reached with the European Commission, its decision may be of wider interest to all organisations who are (or may be) the subject of a process with regulators pursuant to which admissions may be made. Where there is the potential that the regulatory process could lead to follow-on litigation, a party should be wary about the admissions that are made to the regulator and which may be documented in any settlement instrument. They should not expect to be able to resile from those admissions for the purposes of seeking to defend any subsequent litigation.*

*It may be rare for organisations to make, or be required to make, "admissions" to regulators or an enforcement body in the context of a settlement. Indeed, agreements for settlement may expressly state that no admissions are made. However, this decision highlights the need for all organisations who are involved in settlement discussions to carefully consider the facts stated in any public facing decision and be alive to the impact such facts could have in any future follow-on litigation.*

**Impact of the "Subject to Contract" label on terms of a settlement agreement*****Joanne Properties Limited v Moneything Capital Limited* [2020] EWCA Civ 1541 (judgment available [here](#))**

19 November 2020

- The issue on appeal in this case was whether the parties had entered into a binding settlement through written communications passing between their respective solicitors, in circumstances where such communications had been labelled "Subject to Contract". At first instance, the High Court found that a binding settlement had been made.
- The appellant, Joanne Properties, had borrowed money from the respondent, Moneything, which was secured by a legal charge over a property in Wandsworth. The appellant subsequently fell into arrears and challenged the appointment of receivers on the grounds that the loan and the charge had been procured by undue influence. The appellant duly sought to have the loan and charge set aside and sought an injunction against the receivers preventing them from taking any further steps to realise the security.
- In January 2019, the parties compromised the application for an injunction and agreed the property should be sold. A formal written agreement signed by each party stated that a sum of £140,000 was to be ring-fenced pending the eventual resolution of the claim. The issue was whether the parties then reached a further binding agreement about how the sum of £140,000 was to be shared between them.
- The parties' respective solicitors had been corresponding on the matter and that correspondence was labelled "Subject to Contract". A Part 36 offer was also made as part of the negotiations, but was not accepted. In any event, it later transpired that the requirements of Part 36 had not been met.
- The Court of Appeal reviewed the authorities and noted that the use of the phrase "Subject to Contract" is an important feature when determining whether two parties have entered into a legally binding agreement and that it is a well-known phrase in ordinary legal parlance. The Court observed its meaning is expressed simply: "*it means...that (a) neither party intends to be bound either in law or in equity unless and until a formal contract is made; and (b) that each party reserves the right to withdraw until such time as a binding contract is made.*"

- The Court of Appeal also considered that it was trite law that once negotiations have been declared to be "*Subject to Contract*", that condition is carried all the way through negotiations unless both parties expressly agree that it should be expunged. In this case, the fact that an intervening Part 36 offer had been made was insufficient to expunge the express agreement that the negotiations were "*Subject to Contract*", even though the Part 36 offer would have been capable of acceptance regardless of the qualification. Offers and counter-offers made subsequent to the Part 36 offer also bore the heading "*Subject to Contract*" and so "*if the 'subject to contract umbrella' had been lowered, those...communications raised it again.*"
- Accordingly, the Court of Appeal found that the trial judge had "*seriously undervalued*" the force of the "*Subject to Contract*" label on the legal effect of the negotiations. In particular, he had failed to consider the crucial question of whether the parties intended to enter into a legally binding arrangement at all and instead focused on whether the terms that had been agreed were sufficiently complete to amount to an enforceable contract.
- The Court also noted that where negotiations are carried out "*Subject to Contract*" the mere fact that the parties are of one mind is not enough, there must be a formal contract or a clear factual basis for inferring that the parties intended to depart from the qualification. In the present case, the Court found that there was neither.

**PH/it comment:**

*This decision is unlikely to be surprising for experienced legal practitioners who will be well familiar with the impact of negotiating "Subject to Contract". However it remains of interest that, although it is possible to dispense with this proviso expressly or by necessary implication, the making of a Part 36 offer will not ordinarily reset the status of negotiations that are taking place in parallel.*

**Fraud victim permitted to use disclosure obtained from a bank under a Norwich Pharmacal order in separate proceedings against that same bank**

***I.F.T. S.A.L. Offshore v Barclays Bank UK Plc* [2020] EWHC 3125 (Comm) (judgment available [here](#))**

19 November 2020

- The Commercial Court has held that there were "*persuasive reasons*" to discharge the claimant's undertaking not to use disclosure obtained under a Norwich Pharmacal order against the disclosing bank. As a reminder, a Norwich Pharmacal order, or third party disclosure order, is an equitable form of relief which requires a respondent, in this case the bank, to disclose certain documents or information to an applicant.
- The case concerned an "*authorised push payment fraud*" where the claimant had intended to pay a supplier. Instead, fraudsters diverted the claimant's payment to an account held at the defendant bank and from there it was paid out to an accountant in the UAE. To identify the fraudster, the claimant had successfully applied for a Norwich Pharmacal order against the bank, stating in the application that it did not intend to bring proceedings against the bank.
- After reviewing the documents disclosed under the order, the claimant applied for permission to use the documents against the bank as: (i) there was no realistic prospect of recovery from the fraudster or of tracing the monies; and (ii) the documents showed that there might be a case against the bank, which the claimant did not know about when it applied for the Norwich Pharmacal order.

- The bank argued that allowing the application would set a dangerous precedent in allowing Norwich Pharmacal orders to be used to pursue banks, potentially on a speculative basis. It was argued that this would have the effect of encouraging banks to oppose such orders or at least refuse to consent to them. The Court, dismissing these arguments, held that the test for granting the use of documents obtained by a Norwich Pharmacal order was simply whether there were "*cogent and persuasive*" reasons to grant permission. The claimant argued that it was in the public interest for the onus to be placed on banks to prevent and detect fraud. The Court considered this argument to be both cogent and persuasive and granted the order accordingly.

**PH/it comment:**

*This judgment will likely be of some concern to financial institutions, who are often the subject of Norwich Pharmacal orders. It highlights the litigation risk associated with such orders, even in circumstances where the applicant, at least in the first instance, states that it shall not use any documents disclosed for the purposes of pursuing the bank.*

*Conversely, the decision will be welcomed by fraud victims who are unable to effectively pursue the ultimate wrongdoer or trace the stolen monies. In supporting the claimant's reliance on the public interest principle of prevention and detection of fraud, the Court recognised the onus placed on banks to prevent fraud.*

**Supreme Court rules on apparent arbitrator bias: multiple appointments**

***Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48 (judgment available [here](#))***

27 November 2020

- The Supreme Court has considered arbitrator bias and confirmed that arbitrators are under a duty to disclose relevant other appointments to the parties of an arbitration.
- This case arose from the Deepwater Horizon oil spill in the Gulf of Mexico in 2010, following which US Courts had apportioned c. 3% of the liability to Halliburton. Halliburton paid approximately \$1.1 billion in damages and subsequently sought to claim on its insurance policy with Chubb, who denied the claim. Arbitration was commenced between the parties in January 2015 to resolve the matter. Mr Rokison was appointed as the third arbitrator in June 2015 (the "**First Appointment**").
- In addition, in December 2015 he was also appointed as arbitrator on another matter involving Chubb arising out of the same oil spill (the "**Second Appointment**"). However, Mr Rokison failed to inform Halliburton of the Second Appointment. Mr Rokison then also accepted another appointment (the "**Third Appointment**") arising out of the oil spill in August 2016 of which he also did not inform Halliburton. Halliburton learned of the Second and Third Appointments in November 2016 and raised its concerns. Referring to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, Halliburton noted that arbitrators are under a continued duty to disclose potential conflicts of interest.
- Halliburton subsequently commenced litigation in the High Court to seek the removal of Mr Rokison on the grounds that circumstances existed that gave rise to doubts about his impartiality pursuant to section 24(1)(a) of the Arbitration Act 1996. The High Court dismissed the application, as did the Court of Appeal. In its judgment, the Court of Appeal held that: (i) an arbitrator appointed on matters arising out of the same facts could be a legitimate concern, but did not in itself prove apparent bias, which instead required

"something of substance"; and (ii) on the facts, the non-disclosure of his subsequent appointments would not lead a "fair-minded" observer to conclude that there was bias or the possibility of bias.

- The Supreme Court, in upholding both the High Court and Court of Appeal decisions, unanimously dismissed the application. Whilst the Supreme Court noted that arbitrators were under a legal duty to disclose relevant other appointments and Mr Rokison had failed to do so, on the facts the Court did not find him biased. The Court confirmed that the relevant test is whether a "fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", thereby reiterating the importance of context and confirming that there is no material difference between the duty of disclosure under common law and in the context of arbitration. Importantly, the Court disagreed that "something of substance" was required to establish apparent bias and held that, depending on custom and practice, the mere acceptance of appointments in multiple arbitrations was capable of giving rise to an appearance of bias. However, that was not the case here.

#### **PH/it comment:**

*While the Supreme Court ultimately found that there was no reason to doubt Mr Rokison's impartiality, the case is a reminder that arbitrators should remain conscious of their duty of disclosure in circumstances where they are appointed in multiple arbitrations concerning the same or overlapping subject matter. The Supreme Court confirmed that the test is an objective one, which focuses on whether there was a real possibility that the tribunal was biased, and observed that the mere acceptance of multiple appointments, and failing to disclose them, could, in certain circumstances, amount to apparent bias.*

*While there was no finding of bias in this case, the Supreme Court's judgment will be comforting to many arbitration users as it highlights the importance of an arbitrator's duty to act fairly and impartially and the part that an arbitrator's duty of disclosure plays in this.*

*The Supreme Court did note that the duty of disclosure would not override the arbitrator's duty of privacy and confidentiality, but that basic details regarding the existence of the other arbitration may be shared.*

For more information on this case and its implications see our detailed case update [here](#).

## **Update to LCIA rules from 1 October 2020**

### **LCIA Arbitration Rules (2020) available [here](#)**

- The revised London Court of International Arbitration ("**LCIA**") rules (the "**Rules**") came into force on 1 October 2020 and apply to all LCIA arbitrations commenced on or after that date.
- Although the changes have been termed as an "update", as opposed to a full scale "re-write", there are some notable amendments to the Rules. The two most interesting changes relate to the framework for expediting proceedings (including early dismissal) and the broadening of powers to order consolidation and concurrent conduct of arbitrations.
- Under the new Article 22, the tribunal is permitted to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is either: (i) manifestly outside the jurisdiction of the tribunal; or (ii) is inadmissible or manifestly without merit (known as an "**Early Determination**"). It is arguable that the broad powers afforded to arbitrators under the previous form of LCIA rules already allowed for early



determination of claims. However, tribunals were unwilling to test the limits of this broad power in this way for fear of making their awards susceptible to appeal. In this regard, the lack of express "summary" or "early determination" procedures across the rules of various institutions has been lamented for some time, with the wider adoption of such procedures only gaining traction since around 2017. Accordingly, an express statement of the tribunal's powers in respect of Early Determination of cases under LCIA arbitrations is to be welcomed.

- The new Rules also allow for the commencement of multiple arbitrations in a "composite request" and expand the circumstances in which consolidation may be available. The LCIA rules have historically been quite restrictive in this regard, with consolidation generally only permitted where multiple arbitrations were taking place under the same agreement or under compatible agreements with the same parties. Article 22.7 of the Rules now allows the Tribunal to consolidate arbitrations under compatible arbitration agreements between the same disputing parties, arising out of the same transaction or series of related transactions. This small change provides considerably more flexibility for arbitrating parties.
- The Rules also modernise a number of operational aspects of conducting an arbitration providing, for example, for the use of electronic submission and communication as a default, as well as the ability to order a remote hearing or a combination of a remote and "in-person" hearing. Arguably, such changes were long overdue, but in the current COVID-19 climate (and consequent changes in working habits), these changes are more welcome than ever.

**PH/it comment:**

*The new Rules will no doubt be welcomed by the international arbitration community for the enhancements in efficiency and flexibility that they provide. Critics of arbitration often complain of inefficiency, lack of speed and significant costs. This is particularly in the context of more straightforward disputes and those where the merits point to potential early determination but the case nevertheless proceeds on a protracted basis over a lengthy period of time.*

*The changes, although small, clarify the procedural tools available to an arbitral tribunal without adding further complexity. Given that arbitration is often chosen to provide procedural flexibility that would otherwise not be available in litigation, this can only be a positive step for users of the LCIA and enhances the LCIA's standing as a leading institution for international arbitration.*



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