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18 February 2021 | 5pm – 6.30pm

THE SUPREMACY OF THE SUPREME COURT & BREXIT

SPEAKERS

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TOPICS

1. **Brexit and Private International Law in 2021**
2. **Reflective loss: the Supreme limitation**
3. **Business interruption: the Supreme Court has got us covered**
4. ***Enka v Chubb:* Supreme ruling on Arbitration Governing Law**

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FCA v Arch Insurance & others
[2021] UKSC 1

BUSINESS INTERRUPTION: THE SC GOT US COVERED

Daria Gleyze

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How did this come about?

- Declaratory relief claim by the FCA under the Financial Markets Test Case Scheme (PD 63AA) – "*issue of general importance in relation to which immediately relevant authoritative English law guidance is needed*";
- The FCA entered into a framework agreement with the insurers to bring these proceedings
- Insurers wanted to know if cover was triggered under various standard policy wordings for business interruption losses due to the COVID-19 pandemic
- Handy SC-mandated Covid-19 timeline at paras 7 to 35

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That was quick!

- 1st test case under the scheme
- Unprecedented speediness:
  - claim issued in June 2020
  - SC decision on 15 January 2021
  - 2 substantive hearings in-between: 8 days in the Divisional Ct, 4 days in the SC
- SC managed to hear from 13 silks in 4 days
- SC delivered judgment in <2 months, incl. Christmas

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Wordings discussed

4 types of standard insurance policy wordings discussed:

- "disease clauses": for losses resulting from the "occurrence" of a notifiable disease, such as Covid-19, at or within a specified distance of the insured premises (RSA 3 analysed in detail, but Argenta, MSA 1 and 2; QBE 1 and 2 also in issue);

- "prevention of access clauses": for losses resulting from "prevention of access" to, or "inability to use", the insured premises due to "restrictions imposed" by a public authority (Arch);

- "hybrid clauses": combining the main elements of the disease and prevention of access clauses (RSA 1 and Hiscox 1-4);

- "trends clauses": for loss to be quantified by reference to what the performance of the business would have been had the insured peril not occurred (Hiscox 3, MSA, QBE, RSA 3, Arch and Argenta).

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Issues

- Large number of finer sub-issues but mostly a question of contractual interpretation of the wordings mentioned before
- Insurers and reinsurers (most likely their lawyers) will need to compare and contrast the wordings specifically discussed by the SC with their own wordings if different
- The main issues of broader importance were the test for causation and the decision in *Orient Express Hotels*

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A few insurance-specific points…

- each case of illness sustained by an individual resulting from Covid-19 was considered a separate "occurrence" of a notifiable disease (SC overruled Divisional Ct on this)

- an instruction given by a public authority could amount to a "restriction imposed" if, from the terms and context of the instruction, compliance with it was required, and would reasonably be understood to be required, without the need for recourse to legal powers;

- "inability to use" would be satisfied either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities.

- "interruption" to business activities included interference or disruption which did not bring about a complete cessation of the policyholder's business or activities and which might even be slight.

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… and some helpful reminders of general application

"The assumption that the parties intended each of two seemingly inconsistent clauses in their agreement to have effect is a sound starting point where the parties to the contract would reasonably be expected to have had both clauses simultaneously in mind. … But sometimes that is not a reasonable assumption—for example in the case of complex contractual documents which themselves contemplate and provide for the possibility of inconsistency. In any event, the overriding question is how the words of the contract would be understood by a reasonable person. In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis … It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.

The notion that such a policyholder who is presumed to have reached p 93 of the RSA 3 policy wording would understand the general exclusion … on that page to be removing a substantial part of the cover for business interruption loss that was ostensibly conferred on p 38 is as unreasonable as it is unrealistic. The reasonable reader would naturally assume that, if the intention had been to put a further substantive limit on the risk of business interruption specifically insured by the extension for infectious diseases in addition to the geographical and temporal limits stated in the extension itself, this would have been done transparently as part of the wording of the extension and not buried away in the middle of a general exclusion of contamination and pollution risks at the back of the policy."

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Causation

- Insurers relied on the traditional "but for" test
- Given that the Government's measures were taken in consequence of the pandemic as a whole, and not as a result of any single instance of disease or localised cluster of cases, it cannot be said that any particular occurrence or outbreak of disease was either necessary or sufficient to give rise to any insured interruption loss => no cover on the traditional test
- *"We agree with counsel for the insurers that in the vast majority of insurance cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y. The most conspicuous weakness of the "but for" test is not that it wrongly excludes cases in which there is a causal link, but that it fails to exclude a great many cases in which X would not be regarded as an effective or proximate cause of Y... It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event."*

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Causation continued

- Proximate causation test:

"*nothing in principle or in the concept of causation which precludes an insured peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause—indeed as a proximate cause—of the loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself*"

- Where the insured peril and the concurrent uninsured peril both arise from the same underlying event, if the damage proximately caused by the uninsured peril is not excluded, loss resulting from both causes operating concurrently is covered

- It is sufficient to prove that the interruption was a result of governmental action taken in response to cases of disease which included at least one case of COVID-19 within the specified area required by the extension

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The last ride of the Orient Express

- The *Orient Express Hotels* was a claim by an insured for business interruption loss following hurricane damage to a hotel in New Orleans, under an all risks policy including "direct physical loss or destruction".

- The application of the "but for" test meant that the insured could not recover its losses, as the business interruption loss would have occurred anyway because the area was subject to hurricane damage. At that time, the correct approach to the "but for" counterfactual exercise was considered to be to ask what would have happened if the "damage" had not occurred (but the hurricanes had).

- SC overruled the *Orient Express Hotels*, previously decided by 2 of the Law Lords hearing this case (Lord Leggatt (Mr George Leggatt QC) as an arbitrator and Lord Hamblen (Hamblen J) on appeal)

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... who elegantly admitted their earlier error:

"*Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. ...And Story J, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no ground for its being adopted by this court.' United States v Gooding 12 Wheat 460 , 478. Perhaps Dr Johnson really went to the heart of the matter when he explained a blunder in his dictionary—'Ignorance, sir, ignorance.' But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: 'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion*

... We likewise invoke whatever ways by which we may "gracefully and good naturedly" surrender "former views to a better considered position"

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Thank you!

Please e-mail any comments/questions to dariagleyze@threestone.law

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SEVILLEJA V. MAREX FINANCIAL LIMITED

[2020] UKSC 31

Adam Chichester-Clark

MAREX FINANCIAL LTD V. CREATIVE FINANCE LTD & ANOR

- In April 2013, Field J heard the trial of **Mx**'s claim against two **BVIco** in the Commercial Court.
- By its claim, Marex sought damages of c.$5.5m against the **BVIco** for breach of contract.
- On 19 July 2013, Field J circulated draft judgment in **Mx**'s favour, to be handed down on 25 July 2013.
- In the interim, $9.5m transferred from **BVIco** to accounts controlled by **Mr S**, leaving $4,395.00.
- In December 2013, **Mr S** places **BVIco** into CVL in the BVI.
- In the CVL, $30m is owed to **Mr S** and associates. **Mx** is the only external creditor.
- Liquidator takes no steps to recover the missing funds.[1]

[1] N.B. **M** says **S** paid the Liquidator a retainer and agreed to indemnify him in respect of fees and expenses.

SEVILLEJA V. MAREX FINANCIAL LIMITED

- In August 2016, **Mx** issued a claim against **Mr S** in tort[2] which is served in Dubai
- S Ltd disputed jurisdiction *inter alia* using the no-reflective loss rule
- April 2017 Knowles J dismissed **Mr S's** application disputing jurisdiction
- **In June 2018** CoA (Lewison, Lindblom and Flaux LJJ) allowed **Mr S's** appeal;
- In July 2020 S.C. unanimously allowed **Mx's** appeal.
    - A majority of 4[3] found that the no-reflective loss rule was restricted to shareholder's claims. Lord Reed gave the lead judgment
    - The minority of 3[4] would have disposed of it altogether.

[2] (1) the tort of inducing and/or procuring the violation by **BVIco**, of Mx's rights pursuant to Field J's judgment and/or (2) the tort of intentionally causing loss to **Mx** by unlawful means
[3] Lord Reed PSC, Lord Hodge DSPC, Lord Lloyd-Jones JSC and Lady Black
[4] Baroness Hale JSC, Lord Kitchen JSC and Lord Sales JSC

THE NO-REFLECTIVE LOSS PRINCIPLE

- The rule in *Foss & Harbottle* provides that only a company can bring a claim in respect of its loss.

- To prevent its circumvention by shareholders, the court subsequently adopted the rule in *Prudential & Newman*"[5]:

- Having dismissed **P's** derivative claim, the Court found that **P** could not circumvent F&B through a personal claim.

- P's right was limited to participate in **N Ltd** on the terms of its article and had no cause of action in respect of its loss; accordingly

  > "*No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting*"

- The rule arises out of the unique nature of the company as a legal personality, to which it and its shareholders are bound.

[5] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 (Cumming-Bruce, Templeman and Brightman LJJ)

JOHNSON V GORE WOOD & CO [2002] 2 AC 1

- In a first action, **WWH Ltd** sued its former solicitors, **GW & Co**, for negligence. It settled in the 6th week of trial

- In a second action, **Mr J**, **WWH Ltd's** majority shareholder, brought a personal claim against **GW & Co**, which included claims for:

    - diminution in value to his shares in **WWH Ltd**
    - loss of pension contributions

- The HL struck out those heads of claim

- In the lead judgment Lord Bingham distilled 3 principles form the authorities:

    - No-reflective loss principle. Only the Company can sue for its losses.[6] Shareholder cannot sue bring a personal claim for diminution of shareholding or loss of share of his dividend[7].

    - Exception (1): where a company suffers a loss but has no cause of action.[8]

    - Exception (2): where shareholder's loss is separate and distinct from company's loss.

[6] As per the rule in *Foss v Harbottle*
[7] As per the rule in *Prudential v Newman* (1982) Ch. 204
[8] See *Lee v Sheard [1956] 1 QB 192 , George Fischer (Great Britain) Ltd v Multi Construction Ltd [1995] 1 BCLC 260* and *Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443*

JUSTIFICATION FOR THE RULE IN P&N

- Lord Millett explained that the rationale behind the rule in P&N was to prevent double recovery.
- Personal actions by shareholders claiming diminution in share value or loss of distributions would permit:
    - double recovery by a shareholder at the expense of the defendant; or
    - recovery at the expense of the Company, its shareholders and creditors.
- Applying that logic, the no-reflective loss rule would extend to all payments:

    "*The same applies to other payments which the company would have made if it had had the necessary funds even if the plaintiff would have received them qua employee and not qua shareholder and even if he would have had a legal claim to be paid. His loss is still an indirect and reflective loss which is included in the company's claim.*"

- In *Gardner v Parker*,[9] Neuberger LJ said that if it applied to employees receiving pension fund, there was no reason why it should not apply to creditors.

[9] [2004] 2 BCLC 554

LORD REED'S JUDGMENT

Lord Reed identified 3 problems (of which the third is the most important):

- **First.** the risk of double recovery is taken from the law of damages. It recognises the existence of the shareholder's loss whereas the rule in P&N denies its existence

- **Second**. The risk of double recovery does not explain the existence of the rule - the Rule applies even where there is **no** risk of double recovery, e.g.

    - Where the company's loss has no effect on the value of its shares

    - Where both the company and shareholders have suffered losses against the defendant, but the company decides not to pursue a claim

- **Third.** The rationale fails to distinguish between losses suffered by creditor and losses suffered by a shareholder, which in the case of creditors is unjust.

SUMMARY

- A distinction is made between
    - cases where claims are brought by a shareholder against a wrongdoer in respect of loss which he has suffered in the form of a diminution in share value or in distributions
    - cases where claims are brought against a wrongdoer, by a shareholder, creditor or by anyone else, in respect of loss which does not fall within that description
- The former will be barred pursuant to the rule in *Prudential & Newman*. The law will does not recognise a shareholder's right to claim such loss. He must rely on his right to bring an unfair prejudice petition or derivative claim
- The latter will be permitted:
    - The question of how double recovery is avoided will depend on the circumstances; but
    - That does not mean that the company's claim is to be given priority over that of the creditor.

Brexit and Private International Law

James Woolrich

18.02.21

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A. Key Changes (1/2)

- Up to the end of the Implementation Period (for practical purposes, 1 January 2021) European regime(s) rule(s) the roost:
    - Brussels I Regulation Recast (1215/2012) for civil and commercial non-excluded matters, which covers both jurisdiction and R/E of judgments. EU doctrine of effectiveness. (And the Lugano Convention 2007 for Switzerland, Iceland and Norway.)
    - The **residual 'common law' rules** and related statutory provisions for non-MS/CS domiciled defendants (including statutory schemes for R/E of judgments).

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A. Key Changes (2/2)

- From the end of the Implementation Period:
  - European Private International Law no longer applies in the UK (but for savings in EU-UK Withdrawal Agreement – Title VI (Arts 67 - 69) and Part 6 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479 (as amended), Regs 92-93A).
  - Back to the future: the common law rules (and related statutory provisions) are the first port of call - ***residual no longer…*** A fundamentally different regime.
  - The Hague Convention on Choice of Court Agreements 2005 now has greater relevance for post-1/10/15* exclusive jurisdiction clauses.

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B. Specific Issues (1/2)

- Anti-suit injunctions
- Security for costs – amendment of CPR Part 25:
  - Effect of Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 Reg. 8: CPR r.25.13(2)(a) becomes: "the claimant is –(i) resident out of the jurisdiction; but (ii) not resident in ~~a Brussels Contracting State~~, ~~a State bound by the Lugano Convention~~, a State bound by the 2005 Hague Convention ~~or a Regulation State~~, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982"
  - (And see Reg. 20. Where a claim was issued before exit day, r.25.13 applies on and after exit day in relation to the issue of security for costs for that claim as if the amendments to that rule made by these Regulations had not been made.)
- The jurisdiction challenge…

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B. Specific Issues (2/2)

How it started

In 1987 (Lord Templeman in *Spiliada*):

I hope that in future the judge will be allowed to study the evidence and refresh his memory of the speech of […] Lord Goff […] in this case in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days. An appeal should be rare and the appellate court should be slow to interfere.

How it's going

Lungowe v Vedanta Resources plc [2019] UKSC 20 [e-bundles of c.9000 pages; 142 authorities deployed on 'one difficult point of law']

Okpabi v Royal Dutch Shell Plc [2021] UKSC 3 [5 years litigating whether there was an arguable claim; back to the HC for other jurisdictional qs. to be resolved?]

FS Cairo (Nile Plaza) LLC v Brownlie – awaiting judgment from the SC…

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C. And the future?

- Shifting landscape
  - Further CPR amendments to come in 6 April 2021 (https://www.judiciary.uk/announcements/civil-procedure-amendment-rules-2021-the-127th-practice-direction-update/)
  - Lugano Convention? Hague Convention on the R/E of Foreign Judgments in Civil and Commercial Matters 2019?
- Residual uncertainty

Not legal advice

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ENKA V CHUBB
[2020] UKSC 38:

GOVERNING LAW OF THE ARBITRATION AGREEMENT

CHRISTOPHER HOWITT

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Three Systems of Law

Three systems of law may be engaged when an international commercial contract contains an arbitration provision:

- The substantive law of the dispute / contract.
- The law governing the arbitration agreement.
- The law of the seat.

LCIA Recommended Arbitration Clause

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ]."

Enka v Chubb: Background

- Enka was a subcontractor for the construction of a power plant in Russia.
- In 2016, a fire broke out at the power plant. Chubb paid out US$400m to its insured in respect of the damage.
- Chubb was subrogated to the insured's rights and asserted that the fire had been caused by Enka's defective works.
- On 25 May 2019, Chubb filed claims in Moscow against Enka.
- On 16 September 2019, Enka sought an anti-suit injunction in the English Commercial Court.

Enka v Chubb: Issues

- The applicable contract had the following features:
  - Substantive law of the contract – no express choice.
  - Law of the arbitration agreement – no express choice.
  - Seat of the arbitration – London.
- The issues for the English Court:
  - What was the proper law of the arbitration agreement?
  - Was Enka entitled to an anti-suit injunction?

Enka v Chubb: Case History

- On **20 December 2019**, Baker J declined to grant an anti-suit injunction
- On **29 April 2019**, the Court of Appeal overturned the first instance decision and ordered the injunction.
- On **9 October 2019**, the Supreme Court upheld the Court of Appeal decision but disagreed with the reasoning.
  - The SC's decision was reached by a 3:2 majority (Lords Hamblen, Leggatt and Kerr vs. Burrows and Sales)

The Supreme Court's Approach

- The law applicable to the arbitration agreement is to be determined by applying English common law rules:
  - The applicable law will be either (a) the law chosen by the parties or (b) the system of law with which the arbitration agreement is "*most closely connected*".
- In determining whether the parties had chosen a system of law, the Court construes the arbitration agreement and the contract as a whole:
  - General inference that law of the contract = law of the arbitration agreement;
  - The choice of a different country as the seat does not (without more) negate that inference.
- In the absence of a choice of law, the law of the seat will generally be the system of law with which the arbitration agreement is "*most closely connected*".

Exceptions to the General Approach

The Supreme Court identified two exceptions to the general rule (i.e., law of substantive contract = law of the arbitration agreement):

- Contracts where applying the principle would mean that there is a significant risk that the arbitration agreement would be ineffective.
- Any law of the arbitration seat which indicates that the arbitration will also be treated as governed by that country's law.
  - Section 6 of the Arbitration (Scotland) Act 2010.

Anti-Suit Injunction

- In choosing England as the seat of the arbitration, the parties choose to submit to the supervisory jurisdiction of the English court.
- This includes the English court's powers to grant injunctive relief to restrain a party from commencing or pursuing competing court proceedings in breach of obligations under the arbitration agreement.
- The majority of the Supreme Court members said that it is irrelevant whether the arbitration agreement is governed by English law or a "foreign" law.
- Considerations of *forum conveniens* and comity are irrelevant.