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Representative Actions in the European Union – A New Dawn for Litigation in Europe

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REPRESENTATIVE ACTIONS IN THE EUROPEAN UNION – A NEW DAWN FOR LITIGATION IN EUROPE

Written by Alfred Siwy

One of the most significant changes to the law of civil procedure in Austria and presumably many EU states since the introduction of the Brussels Regulations nearly two decades ago is now imminent. In 2018, the EU Commission issued a draft proposal for a Directive on representative actions for the protection of the collective interests of consumers as part of its new deal for consumers.

After over two years, considerable negotiations and after three trilogues (hence informal discussion between the European Parliament, the Council of the European Union and the European Commission) finally agreed on a text for a Directive. It can safely be assumed that this draft will become the final version of the Directive.

The Directive is aimed at providing a higher level of consumer protection throughout the Union. This level is supposed to be achieved by allowing so-called qualified entities to pursue claims based on infringements of European law in a number of sectors if it they harm the interests of consumers. Hence, in future companies will no longer face individual claims by consumers for a comparatively low amount of damages but may well have to deal with claims for substantial amounts of damages to be paid for an infringement.

SUBJECT MATTER

The Directive provides that member states shall enact rules allowing representative actions aimed at the protection of the collective interest of consumers (article 1). The Directive is formulated in rather broad terms leaving the member states a wide margin of appreciation when implementing it.

The Directive's Annex I includes a list of 59 Regulations and Directives. Any infringement of the Regulations or of national law implementing the Directives by traders that harm the collective interests of consumers can be pursued by a representative action.

The Directive defines the term trader as a person or entity acting "for purposes relating to that person's trade, business, craft or profession." The term "consumer" is defined negatively as any natural person who is acting for purposes outside that person's trade, business, craft or profession.

QUALIFIED ENTITIES, WHICH CAN ACT AS CLAIMANTS

The Directive provides that representative actions must be brought by qualified entities which are designated by the member states for the purpose of bringing such actions (article 4). The Directive sets out some requirements for such qualified entities, including that

- they need to be legal persons,
- which can show that they have been publicly active in the protection of consumers for 12 months,
- which have a statutory purpose that demonstrates a legitimate interest in protecting consumers,
- which have a non-profit character and
- are not subject to insolvency proceedings.

The entity must also be independent and not influenced by persons other than consumers. The Directive explicitly mentions that this also applies to third-party funders. Article 10 explicitly provides that member states "*shall ensure that, where a representative action for redress is funded by a third party, insofar as allowed in accordance with national law, conflicts of interests are prevented and that the funding by a third party having an economic interest in the bringing or the outcome of the representative action for redress does not divert the action from the protection of the collective interests of consumers*."

Hence, the member states will have to implement the Directive in a way that prevents third-party funders, if their involvement would be permissible at all, from taking any influence in the proceedings. Under article 10(2)(b) of the Directive further restricts the possibility of filing claims by prohibiting that representative actions are filed against competitors of a funder, which ensures at least that such actions will not be abusively financed in order to harm competitors.

THE AVAILABLE REMEDIES

The entity can either request an injunction measure or a redress measure.

The former can either be a provision measure to cease a certain practice which constitutes an infringement or a definitive measure to cease or prohibit an infringement (article 8).

Redress measures include "remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law" (article 9(1)).

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The distinction between the two measures is central for the entire system of representative actions as will be shown in the following.

REPRESENTATIVE ACTIONS

The qualified entities are entitled to bring representative actions. When doing so "the qualified entity shall provide to the court or to the administrative authority sufficient information on the consumers concerned by the action." This provision will be pivotal in the implementation of the Directive. Depending on how it is implemented, the requirement that the qualified entity needs to establish which consumers were actually harmed by an infringement and the extent to which this needs to be shown, will significantly impact the possibility of filing representative actions.

The requirement of whether the entity must actually represent a consumer when filing a claim depends on the remedy sought. The same applies to the question of whether consumers must opt-in or must opt-out of a representative action.

Generally, the Directive does not require that the qualified entity necessarily actually represents individual consumers in order to file a claim. The recitals mention that the entity shall provide a "*description of the group of consumers affected by an infringement and the questions of fact and law to be resolved within the representative action*." (recital 49). However, accordingly the entities "*should not be required to individually identify all consumers concerned by the action in order to initiate it action*." Nevertheless, they should "*at least describe the group of consumers entitled to remedies*" (recital 50). The court is to determine at an early stage whether an individual action is "*suitable for being brought as a representative action given the nature of the infringement and characteristics of the damages suffered by the consumers affected*" (recital 49). Therefore, the member states will have to install a possibility of rejecting claims which do not meet this criterion and the criteria under which an action is suitable. However, under these recitals, the qualified entity need not show that an individual consumer actually is interested in pursuing a claim.

The member states, however, have the possibility of installing the requirement that the qualified entity must show that it is actually representing an individual consumer when the claim is for a redress measure. In such cases, the member states can either provide for an opt-in or an opt-out mechanism (article 9, recital 43). In the former case, consumers must actively state that they wish to participate in the action, in the latter they would actively have to state that they do not wish to do so. Hence, in the former case, the qualified entity would have to show that certain consumers are interested in pursuing a claim.

Which of these two options will be chosen by the members states will have significant impact on the attractiveness of representative actions for qualified entities. A model not requiring the qualified entity to actually show that any consumer is interested in pursuing claims, may be prone to abuse if national law does not set the bar high for the "sufficient information" that the qualified entity needs to produce when filing the claim. Providing an opt-in mechanism would ensure that qualified entities are actually protecting individual consumers but may make representative actions muss more burdensome for the entities to initiate.

For injunction measures (see below) the bar is lower. In such a case, "*individual consumers concerned shall not be required to express their will to be represented by the qualified entity.*" This provision corresponds to the possible action for an injunction under article 2 of Directive 2009/22/EC, which already provided for such actions without the requirement of the participation of consumers. Such injunctions are aimed at ensuring in the public interest that consumer protection law is adhered to and therefore do not necessarily have to show that individual consumers have been affected by an infringement. The traders do not face claims for damages in such cases, which may justify this alleviation for the qualified entity.

In order for the consumers to become aware of ongoing proceedings, the Directive provides that member states shall ensure that qualified entities shall provide information on their website on the actions they have decided to start, the status of the actions already brought and the outcome of any action. Further, member states may set up publicly available national electronic databases on ongoing actions. In Germany, the model declaratory proceedings are heavily based on such databases in which consumers must register if they wish to take part in the action. It will remain to be seen if this model is more widely adopted.

THE AVAILABLE MEASURES

The entity can either request an injunction measure or a redress measure.

The former can either be a provisional measure to cease a certain practice which constitutes an infringement or a definitive measure to cease or prohibit an infringement (article 8). The trader may also be ordered to publish the decision on the measure. The bar for asking for an injunction measure is low. The qualified entity need not show that an individual consumer was affected by an infringement, nor intent or negligence of the trader.

Alternatively, the qualified entity may request so-called redress measures, which include "*remedies such as compensation, repair, replacement, price reduction, contract termination*

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or reimbursement of the price paid, as appropriate and as available under Union or national law" (article 9(1)). As indicated above, with regard to such claims, member states can either implement an opt-in or an opt-out model. In either case, the consumers represented in such an action, shall be prevented from bringing individual claims in the same matter or being represented in another representative action in the same matter.

The member states will ensure both that consumers shall benefit from the outcome of the redress measures, e.g. the damages paid and that the consumers do not benefit twice, e.g. by participating in a representative action and in an individual action. It will remain to be seen now this can be implemented in an opt-out scenario in which an individual consumer who files an individual claim would not need to declare himself with regard to his participation in the representative action.

SETTLEMENT

Under article 11, the qualified entity and the respondent trader may suggest a settlement to the court. The court will then scrutinize the suggested settlement. The Directive leaves it to member states either to limit the scrutiny to determining whether the settlement is contrary to mandatory national law or additionally, whether it is "unfair".

If the settlement is not approved, the proceedings shall continue. If it is, the settlement becomes binding on the qualified entity, the trader and the individual consumers concerned. Member states may, however, install a mechanism according to which consumers can refuse the settlement. In such case, the consumers who opt-out of the settlement would presumably have to initiate new individual proceedings against the trader. The Directive does not provide for a mechanism which requires a certain minimum amount of the consumers to accept a settlement before it can be entered into, as e.g. section 611(5) of the German Civil Code does for settlements of model declarator awards.

SUMMARY

The Directive will bring significant changes to the litigation landscape of the European Union. As its provisions leave the member states leeway on how to implement its provisions, it can safely be assumed that there will be no uniform European representative action, but individual national ones. Which ramifications this has, will be seen in two years once the Directive is implemented.

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IN RE GUO: THE SECOND CIRCUIT REJECTS PRIVATE INTERNATIONAL ARBITRATIONS IN A RECKONING FOR 28 U.S.C. §1782 APPLICABILITY ON THE EAST COAST

Written by Jonas Patzwall

What is shaping up to be another circuit split ripe for U.S. Supreme Court consideration, the Second Circuit Court of Appeals recently ruled against private international arbitrations' bona fides as "tribunals" under 28 U.S.C. §1782 ("Section 1782") discovery applications.

When a case is pending in a foreign jurisdiction outside the United States, discovery will take place pursuant to the local laws applicable in the jurisdiction where that case is litigated. Outside the United States the discovery processes are often non-adversarial and more restrained than their U.S. counterpart, at other times key pieces of evidence may simply be located in the United States or in the possession or control of U.S. persons.

It is in that context that Section 1782 arises, a key statutory provision for cross-border discovery. In short, Section 1782 authorizes U.S. courts to assist a "*foreign or international tribunal*" in gathering evidence from a party "*found in*" the court's district on application of "*any interested person*". An

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applicant may benefit from U.S.-style discovery and access key pieces of evidence in possession or control of persons in the district. One of the many questions arising under Section 1782 is what type of proceeding qualifies as a "foreign or international tribunal".

The positions generally fall into two camps. One side argues that a "tribunal" should be understood broadly, encompassing private arbitration proceedings. The other side finds the term tribunal should be limited and understood exclusive of private proceedings (generally those arising between parties based on a contractual agreement to arbitrate). In a sweeping decision, the important and influential Court of Appeals for the Second Circuit has now doubled down on a prior decision and held that in the Second Circuit, private arbitrations are generally not covered by "tribunal" as used in Section 1782, see *In Re Guo*, No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020).

In Re Guo follows the Second Circuit's decision in *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) where the court held that Section 1782 does not apply to „arbitral bod[ies] established by private parties." *Id*. at 191. However, after *Bear Stearns* the U.S. Supreme Court itself had arguably weighed in on the debate in its 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). Although not directly on point, the Court seemed to take a permissive approach to Section 1782's applicability, generally broadened its utility, and in a footnote referencing writings by Professor Hans Smit arguably supported private arbitration being covered by Section 1782 (The Hans Smit quote states that "the term 'tribunal' … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Intel,* 542 U.S. at 258 (quoting Hans Smit, International Litigation Under the United States Code, 65 Colum. L. Rev. 1015, 1026 n.71 (1965)).

In *In Re Guo*, Petitioner Guo initiated an arbitration against streaming service Tencent under China International Economic and Trade Arbitration Commission rules („CIETAC"), asserting, among others, fraud-based claims related to investments Guo had made. Guo sought Section 1782 discovery from investment banks in the United States in relation to their underwriting in the Tencent IPO in 2018.

The court in *In Re Guo* determined that the Supreme Court's decision in *Intel* did not mandate a different result from the one reached in *Bear Stearns*, holding that "[t]he distinct question resolved by NBC – whether a private international arbitration tribunal qualifies as a 'tribunal' under § 1782 – was not before the Intel Court," and that the only language arguably supporting Guo's interpretation (arguing for applicability) was found in a parenthetical quotation contained in a footnote in that case (the Hans Smit reference). *In Re Guo*, 965 F.3d 104. "[W]hether such a fleeting reference in dicta could ever sufficiently undermine a prior opinion . . . as to deprive it of precedential force," was called into question by the court in *In Re Guo*. Id. at 105. The court also considered legislative history and general principles of statutory construction and found support for limiting the scope of §1782 to only state-sponsored arbitrations. Finally, the court did not find CIETAC to be state-sponsored after about a half-a-century history of being decoupled from the Chinese state, finding, among others, that Chinese courts and the role of the Chinese government in enforcing awards are not enough to render CIETAC a "foreign or international tribunal." *Id*. at 107.

Finding that the CIETAC arbitration was a private arbitration outside Section 1782's scope, the Second Circuit affirmed the district court's denial of Guo's application and doubled down on its holding in *Bear Stearns.*

In the wake of *Intel*, district courts in the Second Circuit (and beyond) as well as other federal circuit courts have come out on both sides of this argument (The Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999) and later in its 2009 decision in *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009) affirmed its position that private arbitrations are not covered by Section 1782 and the Intel decision had not affected the analysis in *Biedermann*. In 2019, the Sixth Circuit took a contrary view in *Abdul Latif Jameel Transportation Co. v. FedEx.*, 939 F.3d 710 (6th Cir. 2019), finding that "tribunal" included a private arbitral tribunal. In the Fourth Circuit, the decision in *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) sets equally permissive precedent arguing that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes […]," thereby making it a "government-conferred authority" under U.S. law and, even under the strict Second Circuit precedent, a tribunal. See *Servotronics*, 954 F.3d at 214. District courts in the Second Circuit itself had taken both sides of the argument prior to *In Re Guo*, see, e.g., *In re Children's Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361 (S.D.N.Y. 2019), *appeal withdrawn sub nom. In re Application of Children's Inv. Fund Found. (UK),* No. 19-397, 2019 WL 2152699 (2d Cir. Mar. 19, 2019); *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517 (S.D.N.Y. 2016), cf., *In re Application of Hanwei Guo*, 18-MC-561, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019).

This has now created an entrenched circuit split between the Fifth and Second Circuit on the one side and the Sixth and the Fourth Circuit on the other. In 2019, the Sixth Circuit took a contrary view in *ALJT*, 939 F.3d 710 (6th Cir. 2019), finding that "tribunal" included a private arbitral tribunal. In the Fourth Circuit, the decision in *Servotronics*, 954 F.3d

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209 (4th Cir. 2020) stands out. Congress' legislative intent seems to indicate that a broad understanding was intended, the Court highlighted this position in *dicta* already, see *Intel*, 542 U.S. at 258. What is more, arbitral awards are final judgments that are subject to confirmation by U.S. courts. A party faced with judgments by foreign courts or international tribunals on the one hand and private arbitral awards on the other are functionally in the same position, see, e.g., *Servotronics*, 954 F.3d 215; *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). The Second Circuit in *In Re Guo* relies on several arguments in opposition, including that they too favor a broad understanding of the term as has Congress, the interpretation of legislative history and the treatment of its decision in *Bear Stearns*, see *In Re Guo*, at 96 et seq.

The resolution of this circuit split will be awaited by many. For the scope of Section 1782, an outcome supporting private arbitration as tribunals covered by the statute would support the ongoing trend and use of Section 1782 applications and further entrench their role in international litigation. For now, the confusion among the district courts in the Second Circuit will likely come to an end and private arbitration will be excluded from Section 1782's purview there. Until the Supreme Court resolves this split, the party litigating globally and looking to Section 1782 for its discovery needs will need to navigate this issue locally on a district-by-district, or at least a circuit-by-circuit basis depending where in the United States its potential respondents can be found.

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Additional Content on this topic:

FREEZING INJUNCTIONS IN ENGLAND AND WALES

Written by Aiden Lerch & Luke Zadkovich

Freezing injunctions are a type of interim injunction that place significant restrictions on a legal person's ability to dispose of, or deal with, its assets. Various types of assets can be frozen, including bank accounts, shares, investments, land, property, loaned funds or "any asset which the Respondents have power, directly or indirectly, to dispose of or deal with as if it were his own" (*JSC BTA Bank v Ablyazov* [2015] UKSC 64). The ultimate purpose of a freezing injunction is to preserve the respondent's assets until a final judgment can be given. Thus, the terms of such an injunction usually provide that the respondent must not dispose of or deal with his assets, wherever they are situated, subject to a cap that is equal to the value of the claim.

Although the name of the order suggests full suspension of the respondent's control over its assets, a standard freezing order will simply put a cap on what activities the respondent can carry out. A respondent will still be entitled to use its assets to pay for living expenses, reasonable legal costs, and the costs of dealing with or disposing of assets in the ordinary course of business (*Michael Wilson & Partners Ltd v John Foster Emmott* [2015] EWCA Civ. 1028).

There are, however, two variations of the freezing injunction, namely:

a. A domestic freezing injunction – one issued within the jurisdiction of England and Wales; and

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b. A worldwide freezing injunction – an order that applies outside of the United Kingdom (In *Derby & Co Ltd & Ors v Weldon & Ors* (No 6), the English Courts' power to order a freezing injunction that applies outside of the territory of England and Wales was found to exist in section 37 of *Senior Courts* Act 1981, and Civil Procedural Rule 25.1 and its corresponding Practice Direction 25A).

PROCEDURE FOR APPLYING FOR A FREEZING INJUNCTION

Pursuant to Civil Procedure Rule 25.1(1)(f) a court may grant an order (referred to as a 'freezing injunction') restraining a party from removing from the jurisdiction assets located there; or restraining a party from dealing with any assets whether located within the jurisdiction.

The order for such an injunction may be made at any time, including before the proceedings are started and after judgment has been given. In order to apply for the remedy, a party must file an application notice. The application may be made without notice if it appears to the court that there are good reasons for not giving notice (CPR 25.3(1)). Unless the court orders otherwise, the application must be supported by evidence, generally in the form of an affidavit (CPR 25.3(2); Practice Direction 25A rule 3.1).

Freezing orders are typically brought ex-parte – without notice being giving to the respondent. However, this places a duty of full and frank disclosure on the applicant, even if this requires it to present evidence to its detriment. This must therefore be borne in mind if the application is made ex-parte.

If the application is not ex-parte, the application notice and evidence must be served on the respondent as soon as practicable after it is filed, and in any event not less than 3 days before the court is due to hear the application (Practice Direction 25A rule 2.2.).

Additionally, upon an application being made, an applicant will be required to provide an undertaking to the court that it will compensate the respondent if it is ultimately decided that the injunction should not have been awarded.

GENERAL STANDARDS FOR OBTAINING A FREEZING INJUNCTION

When deciding to grant a freezing order, the court will weight a number of relevant considerations. However, from the outset, the application must prove that:

a. It has a prima facie valid cause of action, that is, an underlying legal or equitable right;
b. A a good arguable case against the respondent on the evidence;
c. Assets exist which can be frozen;
d. There is a real risk of that the respondent's assets will be dissipated; and
e. It is just and convenient to grant the freezing order, bearing in mind the conduct of the applicant, the rights of any third parties who may be affected and whether such hardship should cause legitimate and disproportionate hardship for the respondent.

In *Ninemia v Tray Schiffahtsesellschaft mbH,* ([1983] 2 Lloyd's Rep 600) the English Court of Appeal held that the case law had repeatedly provided that when arguing these factors, the applicant is not required to show a better than 50% chance of success in their argument. Rather, the application must prove that the case is more than barely capable of a serious argument.

Being an interim injunction, a freezing order is an equitable remedy. Therefore, it is awarded pursuant to the discretion of the court and the usual equitable considerations will apply to limit the circumstances in which such an order can be granted. Relevant equitable considerations include:

- **Unfairness** - If the plaintiff has acted unfairly in any way at the time before or at the time of the cause of action, this will suggest that the discretion to award an equitable remedy should not be used (*Blomley v Ryan* (1956) 99 CLR 362).
- **Hardship** - Equity will not grant an equitable coercive remedy where to do so would constitute an unconscionable hardship in its effect on the defendant that is disproportionate to enforcing the applicant's remedy (*Patel v Ali* [1984] 1 All ER 978.).
- **Clean Hands** - An applicant who comes to equity must come with clean hands (*Shell UK Ltd v Lostock Garages Ltd* [1976] 1 WLR 1187). Therefore, if the applicant's conduct has been improper leading up to, or at the time of, the cause of action, equity may refuse relief.
- **Laches** - A court may refuse to award an equitable remedy if the applicant delayed bringing the suit, and the delay caused the respondent to believe that the applicant has acquiesced or alternatively caused prejudice to the respondent. Mere delay, however, will not be sufficient to refuse the grant of the equitable remedy (*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221). Additionally, any delay in bringing the application could be used against applicant as it is evidence that there is unlikely to be a risk of the assets being dissipated.

BREACH OF A FREEZING INJUNCTIONS

When the court grants a freezing injunction, it is endorsed with a penal notice so that if a respondent fails to comply,

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it will be in contempt of court and can face a fine, imprisonment or seizure of assets. A breach of a freezing is therefore a crime and may lead to serious consequences, including imprisonment. It is for this reason that once granted, freezing injunctions are particularly effective at achieving the particular purpose desired by the applicant.

FREEZING INJUNCTIONS IN SUPPORT OF ARBITRATION PROCEEDINGS

The power to grant a freezing injunction in support of arbitration falls under section 44 of the *Arbitration Act 1996*. In *U&M Mining Zambia Ltd v Konkola Copper Mines plc*, ([2014] EWHC 3250 (Comm)) it was held that if the seat of arbitration is in England and Wales, the court may be prepared to grant a freezing injunction even when the respondent has no assets within the jurisdiction. The English courts will also have the power to grant a freezing injunction to assist with enforcement of an award (*Eastern European Engineering Ltd v Vijay Constructions (Pty) Ltd* [2018] EWHC 1539 (Comm)).

ADVANTAGES & DISADVANTAGES OF FREEZING INJUNCTIONS

Freezing injunctions provide many benefits for an applicant when it comes to enforcing judgments and awards. Although they do preserve assets for enforcement purposes, they do not completely cut a respondent off from using all of its assets, and allow them to continue with their usual business, creating a balanced medium for both parties involved. They also act, in some cases, as a means for prompting early settlement resolving the underlying dispute.

If, after the order is made, it is later discovered that the freezing injunction should not have been granted, then the costs of complying and the court costs will be for the applicant's account. As a result, a party who brings an application for a freezing injunction must be certain that it is necessary.
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Additional Content on this topic:

OUR KEY CASE: ENGLISH COURT OF APPEAL AFFIRMS £53M CASE DISMISSAL

Written by Luke Zadkovich, Aiden Lerch & Shannen Trout

We provide an update on a significant, published English court decision for one of our financial trading clients.

On 29 October 2020, the English Court of Appeal refused the Claimant, Mr Hafez Fakhri Al Farouqi, permission to appeal the High Court's decision in Ikon Finance Limited ("Ikon") and Hantec Markets Limited ("Hantec") (collectively, the "Defendants").

This followed a three-day hearing at first instance in June 2020 in which the Defendants each sought summary judgment against the entire claim of £53.5m made by the Claimant, Mr Hafez Fakhri Al Farouqi. Mrs Justice Tipples in the High Court of Justice, Business and Property Courts of England and Wales, entered judgment in favour of the Defendants in Al Farouqi v Ikon Finance Limited & Anor [2020] EWHC 1730 (QB) after that hearing.

The Court of Appeal has now reinforced that the High Court had adopted a sound approach to the summary dismissal. The case centred on when it is appropriate for a Claimant's case to be dismissed without going to trial. Summary judgment against the whole of a Claimant's case is an unusually difficult application to succeed on, as a Court must be satisfied that on the evidence, the Claimant has no real prospect of succeeding. In such an application, a judge evaluates the

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factual assertions made by the Claimant at face value and will accept them unless they are plainly wrong. The finding that Mr Al Farouqi's entire claim should be dismissed was therefore a great outcome for the Defendants in this case.

BACKGROUND TO THE CASE

In January 2015, Mr Al Farouqi entered into an agreement with Ikon to use its services to trade online via a trading platform known as Meta Trader 4. Pursuant to the terms of the agreement, Ikon provided Mr Al Farouqi an account from which he could make trades. After setting up his account, Mr Al Farouqi made numerous trades using Ikon's service.

In February 2017, Ikon was required to close all of its customers' accounts. As a result, Ikon sent an email to Mr Al Farouqi advising him of this and gave him the option to transfer his account to the second defendant, Hantec. Mr Al Farouqi subsequently gave permission for the transfer to take place, and on 17 March 2017, his account was transferred to Hantec. All the while, Mr Al Farouqi, although an experienced trader, had accumulated over USD $10m in floating loss on his account. This loss was also transferred when his account was opened with Hantec.

In November 2018, Mr Farouqi alleged that Ikon and Hantec had defrauded him and caused his trading losses. Despite this, Mr Al Farouqi continued to operate his account with Hantec on a regular basis until Hantec closed his account on 1 February 2019. Mr Al Farouqi then brought a claim in the English High Court against Ikon and Hantec in the amount of £53.5m. He made allegations of:

1. Breach of contract - It was alleged that Ikon and Hantec had improperly charged an agent's commission fee on all of the trades conducted by Mr Farouqi;
2. Breach of fiduciary duty – It was alleged that Ikon and Hantec had breached a fiduciary duty owed to Mr Farouqi as they purportedly failed to follow certain FCA regulations and transferred his account without his consent; and
3. Conspiracy to injure by unlawful means – It was alleged that Ikon and Hantec had entered into a conspiracy to cause economic loss to Mr Al Farouqi by fraudulently effecting trades on his account of which he had no knowledge.

Ikon and Hantec made two applications in response to the Claimant's claims. First, they argued that summary judgment should be awarded in their favour against the whole of Mr Al Farouqi's claim pursuant to CPR 24.1(a)(i) because on the evidence Mr Farouqi's case had no real prospect of succeeding. Alternatively, it was argued that the whole of Mr Farouqi's claim should be struck out pursuant to CPR 3.4 because the Particulars of Claim disclosed no reasonable grounds for bringing the claim. Second, the Defendants contended that if the Court was not inclined to make the above findings, Mr Al Farouqi should be ordered to pay the Defendants costs of defending the claim in the amount of £970,000.

THE FINDINGS OF THE COURT

On the summary judgment and strike out application, Mrs Justice Tipples made the following findings on each cause of action alleged by the Claimant:

Breach of Contract

In this claim, Mr Farouqi alleged that certain 'journal logs' linked to his account showed agent fees which the Defendants had charged without his authorisation. In response, the Defendants argued that they did not charge Mr Farouqi with any such fee or commission; rather, these expenses were paid by the Defendants themselves as a business overhead. Ikon presented uncontradicted evidence of an invoice showing that the agency fee paid by it.

Mrs Justice Tipples found that Mr Al Farouqi's breach of contract claim lacked credibility and was simply wrong. Her Ladyship was of the view that Mr Farouqi had misinterpreted the relevant journal logs and incorrectly formed the conclusion that he was charged an agent's fee. Moreover, she noted that Mr Al Farouqi never challenged the evidence put forward by Ikon and therefore it was clear on the evidence that he was never charged a broker's fee. Tipples J observed that this conclusion was also reflected in the contract between the parties, which authorised an agent to effect trades where that agent was paid by Ikon.

Breach of Fiduciary Duty

Mr Farouqi argued that when Ikon transferred his trading account to Hantec, this was not done in accordance with the FCA rules. He contended that it necessarily followed that this was a breach of a fiduciary duty owed to him by Ikon and Hantec, as their relationship was one of trust and confidence in circumstances where the Defendants held funds on his behalf. The Defendants stated that this claim was misconceived because there was no legal basis on which they could be said to owe a fiduciary duty.

When analysing this claim, Mrs Justice Tipples firstly identified that the Particulars of Claim did not allege on what basis the Defendants owed a fiduciary duty to Mr Al Farouqi. However, her Ladyship reasoned that even if fiduciary duty was properly particularised, the Defendants were simply providing services as execution brokers and there was no

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evidence whatsoever to suggest that they acted in breach of some unspecified fiduciary duty. Accordingly, the claim had no prospect of succeeding.

Conspiracy to Injure by Unlawful Means

In this claim, Mr Farouqi alleged that Ikon and Hantec had conspired together to defraud him of funds in his trading account. The Defendants retorted that the was no evidence whatsoever indicating such a conspiracy, nor an act of fraud. From the outset, Mrs Justice Tipples found that no allegation of a combination between Ikon and Hantec was made in the Particulars of Claim and therefore the claim was insufficiently particularised. This was despite the inadequacy of the pleading being put squarely in issue in Ikon's application for summary judgment.

In any event, despite the deficient pleading, Tipples J considered the argument advanced at the hearing that a combination between Ikon and Hantec could be inferred from certain factual matters. Remaining cognisant of the need not to conduct a mini-trial, Tipples J concluded that the argument for an inferred combination was "utterly hopeless", finding that "The allegation of combination is purely speculative and is without basis". Thus, her Ladyship was of the view that even if Mr Farouqi was permitted to re-plead his case, his revised claim was found to have "no realistic prospect of succeeding and is bound to fail."

JUDGMENT AND THE DECISION OF THE COURT OF APPEAL

After making the above findings on all three claims, Mrs Justice Tipples awarded summary judgment against Mr Farouqi on the whole of his claim because not one cause of action had reasonable prospects of success. Furthermore, her Ladyship stated that had summary judgment not been awarded, she would have had no hesitation in making an order for the Claimant to provide security for the Defendants' legal costs.

Shortly after Tipples J made her orders, the Claimant made an application to appeal the decision. In an order dated 29 October 2020, the Court of Appeal refused to grant the Claimant permission to Appeal. The Order dealt first with the conspiracy claim in which the Court of Appeal found that Mrs Justice Tipples was "right to characterise this claim as hopeless". Allowing the Claimant to plead a case for the first time whilst on appeal would be unfair. The order then looked to the claim for deceit made against Hantec which was once again categorised as fictitious and fanciful. The dismissal is a great success for both Defendants

CONCLUSION

This case exemplifies that in circumstances where Claimants bring baseless claims against commercial parties, a summary judgment application is an effective procedural tool that can be successfully employed to prevent such claims gaining any traction. Indeed, in having Mr Farouqi's claim dismissed before it went to trial, Ikon and Hantec substantially mitigated the amount of time and legal costs they would have expended in normal circumstances of defending the allegations in a length civil trial. The Defendants strategy to invest time and effort in defending the claims made against them using the laws of civil procedure was therefore an incisive commercial decision. The success of this case is only exemplified further in the Court of Appeal's recent order refusing the Claimant permission to appeal.

A team comprising of Luke Zadkovich, Aiden Lerch and Shannen Trout, of Zeiler Floyd Zadkovich and Matthew McGhee of Twenty Essex, acted for the successful first defendant at the English High Court hearing and in the English Court of Appeal proceedings.

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SHAGANG V. HNA: EVIDENCE OF TORTURE ADMITTED *DE BENE ESSE*

Written by Katherine Georginis

Recently, the U.K. Supreme Court considered the issue over the weight of evidence of torture in an otherwise ordinary commercial case, *Shagang v. HNA* [2020] UKSC 34. The dispute at issue arose out of a 2008 charterparty between Shagang Shipping Company and Grand China Shipping Company Ltd. In September 2010, Grand China defaulted on payments under the charterparty due to financial hardships following the 2008 crisis. HNA, Grand China's parent company, guaranteed the performance of the charterparty at issue. Consequently, Shagang initiated this action against HNA to recover its losses.

TRIAL COURT

HNA based its defense that the charterparty was unenforceable due to evidence showing the charterparty was procured through bribery payments. HNA's theory was that without bribing Grand China, it would have been difficult to charter the vessel quickly. However, this charterparty was formed at the height of the chartering market in the People's Republic of China. HNA relied on confessions made to the Public Security Bureau by two HNA employees and a party working for Shagang as evidence of bribery. In response to HNA's defense, Shagang alleged the confessions were procured through torture making them inadmissible in a legal proceeding.

In 2016, the trial court ruled in favor of Shagang holding that bribery had not been proven on the balance of probabilities. The trial court further held that evidence of torture could not be ruled out reducing the weight of the confessions as evidence of bribery. Since there was no evidence of bribery in this matter, the trial court expressed that it was not necessary to make a determination on the issue of torture.

COURT OF APPEAL

The Court of Appeal disagreed with the trial court's analysis and remanded the case back for redetermination. On appeal, the court took a binary approach to the evidence of torture and decided if an allegation that a statement was made as a result of torture has not been proved on the balance of probabilities, then a court estimating the weight to be given to the statement as hearsay evidence must entirely disregard the possibility that the statement was obtained through torture. The court agreed with HNA when it held that since the trial court did not find on the balance of probabilities that the confessions were procured by torture, then the trial court found there to be no torture in this case. The Court of Appeal laid out the following four issues it had with the trial court's ruling resulting in ordering the case to be reconsidered in a new trial: (1) the trial judge did not follow the logical steps to reach a proper evaluation of admissible evidence; (2) the trial judge failed to weigh the admissibility of the confession evidence; (3) the trial judge failed to take all evidence into account; and (4) the trial judge failed to exclude irrelevant matters, mainly his doubt whether the confessions were obtained by torture.

SUPREME COURT

In its decision, the U.K. Supreme Court attacked each and every criticism made by the Court of Appeal. As an initial matter and addressing the first criticism, the Supreme Court held there is no "one size fits all approach" and the manner and order in which admissibility and weight of evidence are ruled upon is left to the discretion of the trial judge. The trial court's analysis was not only permissible in this case, but also in line with how Shagang presented its case. The evidence of torture was admitted de bene esse, meaning the evidence was taken into account on the assumption, without deciding, that the evidence is admissible. While it was not expressly stated that the evidence of torture was admitted de bene esse, it is clear from the decision the trial judge was aware torture is a sensitive issue, and preferred not to make a determination unless it was absolutely necessary. In agreement with the trial court, the Supreme Court held the determination of torture was not necessitated here.

The Supreme Court did take issue with the brevity of the trial court's analysis and decision, but found this was not enough to warrant overturning the trial court's ruling. Quoting Males LJ in Simetra Global Assets Ltd v. Ikon Finance Ltd [2019] EWCA Civ 1413; [2019] 4 WLR 112 at para 46, the Supreme Court stated, "succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments." The Court cautions that concise decisions like the trial court's only encourage appeals. While the Court agreed that the trial court should have assessed the confession evidence in greater detail, this lack of emphasis is not enough to find error in law.

The brevity by the trial court could also be the reason why the Court of Appeal concluded that the trial court failed to consider material evidence in its ruling. This is incorrect. The only failure of the trial court is to the degree of depth in its

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analysis. While the trial court committed error in providing a concise decision, this is an error in degree not an error in law justifying intervention by the appellate court.

The final criticism by the Court of Appeal created the biggest concern for the Supreme Court especially in cases involving a sensitive issue such as torture. Assessments of relevance and weight should not be treated in a "binary, all or nothing way." Whether the charterparty was procured by bribery was the main issue at the trial court. Torture was not an issue to be determined in assessing Shagang's claim against HNA for breach of repudiatory contract, but the possibility of torture was a factor for the trial court to take into consideration when weighing the evidence of bribery. Just because the issue of torture was not proved on the balance of probabilities does not mean evidence of torture should be completely disregarded in the case. A rule disregarding the evidence of torture unless it has been proved on the balance of probabilities "would not only be irrational; it would also be inconsistent with the moral principles which underpin the exclusionary rule." The Supreme Court feared creating a rule proposed by the Court of Appeal's decision would have the effect of encouraging the use of torture to obtain evidence, provided it is done in a way which is deniable.

CONCLUSION

In this ruling, the U.K. Supreme Court made it clear that allegations of torture should never be taken lightly, and issues involving torture will only be decided upon when absolutely necessary. To affirm the Court of Appeal's binary approach to the weight of evidence of torture in this case would open the possibility of quite literally abuse of torture in the U.K. The Supreme Court's decision also discusses the permissible ways in which a judge can weigh evidence in a civil trial and importantly notes that the judge does not have to do this in a binary manner.

For additional information and queries, please contact katherine.georginis@zeilerfloydzad.com

NEWS & EVENTS

TEAM

|New York

Philip Vagin joined our New York office as an Associate. Philip is a Russia-qualified attorney, due to sit the NY bar exam, specializing in maritime disputes, transnational litigation and advisory work in the transportation sector.
Read more about Philip here.

| New York

We are happy to announce that as of October 2020, Edward Floyd is a qualified England and Wales Solicitor. This admission expands Edward's cross-border practice, adding to his New York and New Jersey bar admissions.

EVENTS

| Disputes for Breakfast | LITIGATION
In our previous Disputes for Breakfast event, we enjoyed an insightful lecture given by Prof. Paul Oberhammer on "Collective legal protection – quo vadis?" alongside a lovely breakfast at the Viennese Cafe Prückel. Read our event report here.

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