***No Business Like Show Business* – jurisdiction not read into choice of governing law**

For the Intellectual Property Enterprise Court, a clause requiring licences to be construed and enforced under the laws of New York could not be read as an exclusive jurisdiction clause.[1] Warner Chappell had applied for an order that the English court did not have jurisdiction to hear a case brought by Mr Berrocal, who sought a declaration that certain licences of the Irving Berlin catalogue had been terminated.

Background

Throughout the period of December 1945 to February 2014, Chappell & Co. and Chappell Inc. entered into seven licence agreements relating to the copyright in the Irving Berlin catalogue. The defendant, Warner Chappell, is the successor in title to Chappell & Co. and Chappell Inc., and the claimant, Mr Berrocal, is the successor in title to all the licensors under the seven agreements.

The claimant brought a claim against the defendant in England in order to seek a declaration that the licence agreements were terminated in December 2015 or, in the alternative, a declaration that the exploitation of digital public performance rights did not fall within the rights granted under the licence agreements. In response, the defendant brought an application challenging the jurisdiction of the English court to hear the case, arguing that the New York court had exclusive jurisdiction.

Proceedings

Whether or not the English court had jurisdiction to hear the case brought by the claimant rested on the court's interpretation of the following clause, which was contained in each of the licence agreements:

"This [contract/agreement] shall be construed and shall always be subject to enforcement pursuant to the laws of the state of New York and the United States of America."

It was common ground between the parties that this wording constituted a New York governing-law clause, and that the licence agreements, including the governing-law clause itself, were to be construed in accordance with New York law. The defendant, however, argued that the clause should also be construed as a New York jurisdiction clause. Both parties filed expert evidence on New York law to support their arguments, with both the defendant's and the claimant's experts filing three witness statements each.

The defendant's main argument was that the use of the word "always" created a requirement that all aspects of enforcement of the licence agreements should be pursuant only to the laws of the state of New York. If the English court were to rule on any aspect of enforcement of the licence agreements, even when applying New York governing law, they would need to adhere to certain English procedural rules, and that would contradict the requirement under the clause. The defendant contended therefore that the requirement under the clause could only be fulfilled if, along with New York governing law, the dispute was also heard in the New York court. So true construction of the clause meant that jurisdiction needed to be awarded exclusively to the New York court.

In contrast, the claimant agreed that the clause required the English court to apply New York law when determining the construction of the clause, but considered it did not follow that the clause also had to be read as conferring exclusive jurisdiction on the New York court. The claimant made reference to Article 12(1) of the Rome I Regulation (593/2008/EC), which sets out how the governing law in question shall be applied to a contract by a country, such as the UK, to which the Regulation applies. Article 12(1) states:

[1] *Berrocal v Warner Chappell Music Limited* (unreported), 3 October 2017 (IPEC).

"The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract."

The claimant argued that the English court would have to apply New York law in relation to the above points at Article 12(1) to the licence agreements, but that not every aspect of the law governing a point of enforcement had to be New York law. On this basis it did not follow that the New York court had to have exclusive jurisdiction.

Decision

His Honour Judge Hacon agreed that the clause in question in the licence agreements was a governing-law clause, and that the choice of law was the law of New York. HHJ Hacon therefore determined that the issue before the court was narrowly confined to the question of whether the provision in the licence agreements, when construed in accordance with New York law, also conferred exclusive jurisdiction on the New York court over any disputes relating to such licence agreements.

Both parties had filed expert evidence on New York law, but HHJ Hacon held that he was "not at all convinced" that such evidence added "anything of substance". Under English law, the court would look at the natural and ordinary meaning of the clause, based on what a reader of the clause would reasonably understand the words to mean. The parties did not put forward any evidence to suggest that the New York court would approach construction of the clause in a different way. The court could therefore look at the clause in the usual manner under the relevant principle in English law, without the need for any expert evidence. Had the parties satisfied the court that differences existed, then the court would have been required to construe the clause with such differences in approach to construction "fully in mind".

HHJ Hacon agreed with the defendant that, in dealing with the declaration sought by the claimant, the English court would need to conduct procedural aspects of the claim in accordance with English law. Yet HHJ Hacon held that the reasonable reader would not interpret the clause as meaning that every conceivable aspect of enforcement should be governed by New York law. Instead, the simpler and more reasonable reading of the clause was that the sorts of issues identified under Article 12(1) of the Rome I Regulation (such as interpretation, performance and assessment of damages) should be governed by New York law, but this did not preclude other law from governing other aspects of the licence agreements. On the basis that the clause did not preclude other law from governing parts of the licence agreements, the clause could not be read as an exclusive jurisdiction clause. Accordingly, the English court had jurisdiction to hear the case brought by the claimant, and the defendant's application was dismissed.

Comment

While HHJ Hacon did accept that it was difficult to draw firm conclusions on the construction of the clause, the decision of the court serves as a reminder that governing law and jurisdiction are two separate and distinct concepts. So care should be taken when drafting contracts to ensure that

exclusive jurisdiction is specifically cited if the parties wish to select a single forum for any potential future disputes. A governing-law clause should clearly identify the law that will be used to interpret the rights and obligations of the parties under the contract. A jurisdiction clause (exclusive or non-exclusive) should refer to the court that the parties wish to hear and resolve any disputes.

Both clauses should also use plain and unambiguous language to avoid any doubt over the intentions of the parties. As demonstrated by this case, by including a clearly worded jurisdiction clause, parties to an agreement can avoid wasting both time and costs by not having to engage in disputes over whether the relevant court is entitled to hear the claim in question in the first place.

Or, as Irving Berlin might have put it, *Let's Face The Music*.

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