Neutral Citation Number: [2017] EWCA Civ 1131

Case No: A3/2017/0190

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE ANDREW BAKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:31/07/2017

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE BEATSON
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

BAT Caribbean S.A. & Ors	**Appellant**
- and -	
PHP Tobacco Carib SARL & Ors	**Respondents**

Charles Dougherty QC, Stewart Chirnside (instructed by **Penningtons Manches LLP**) for the **Appellant**
John Russell QC, Tom Bird (instructed by **Hill Dickinson LLP**) for the **Respondent**

Hearing date: 18 July 2017

- -

Approved Judgment

Lord Justice Beatson :

I. Overview:

1. This appeal is against the order dated 21 December 2016 of Andrew Baker J that arrangements between the parties made in August 2016 do not constitute an exclusive jurisdiction agreement in favour of the English Court within the meaning of Regulation (EU) No 1215/2012 on jurisdiction and enforcement of judgments in civil and commercial matters ("the Brussels Regulation Recast").

2. The appellant, BAT Caribbean SA ("BATC"), is a Panamanian company in the British American Tobacco Group. It is the defendant in a claim issued on 3 July 2015 by the first respondent, PHP Tobacco Carib SARL ("PHP") in the Commercial Court under a distribution agreement ("the Distribution Agreement") conferring jurisdiction on the English courts, for which the trial has been fixed for March 2018. On 5 August 2016, BATC made a without notice application to join PHP Trading S.A. ("PHP Trading") and SODIPAM SARL ("SODIPAM"), companies related to PHP, and respectively based in Guadeloupe and in Martinique to the proceedings so as to pursue against them a Part 20 claim ("the Additional Claim"). In his order, the judge gave permission for them to be joined as third and fourth parties to the proceedings, but stayed BATC's Part 20 claim because, on 12 October 2016, the Joint Commercial Court of Fort-de-France in Martinique had become seised of proceedings brought by them against BATC. Guadeloupe and Martinique are overseas territories of France and thus, for the purposes of EU law and the Brussels Regulation Recast, are to be considered as part of France.

3. The sole issue before the court is whether an agreement reached between BATC and PHP, PHP Trading and SODIPAM in correspondence in August 2016 is an exclusive jurisdiction agreement in favour of the English court. If it is, then, as a result of Article 31(2) of the Brussels Regulation Recast, the Additional Claim should not have been stayed. This is because, under Article 25, where parties have agreed that the courts of a Member State of the European Union are to have jurisdiction over any disputes, the designated court shall have exclusive jurisdiction unless the parties have agreed otherwise. In such a case, Article 31(2) provides that, where the designated court is seised, the courts of other Member States shall, even if they were first seised, stay any proceedings until such time as the designated court declares that it has no jurisdiction under the agreement. Absent an exclusive jurisdiction agreement, however, Article 29 provides that any court other than the court first seised shall stay its proceedings until such time as jurisdiction of the court first seised is established. In the case before us, the Joint Commercial Court of Fort-de-France in Martinique was the court first seised. I have set out the relevant provisions of the Brussels Regulation Recast in an Appendix to this judgment.

4. The remainder of this judgment is organised as follows. Part II provides a summary of the factual and procedural background. Part III summarises the decision of the judge on the matters material to the appeal. Part IV contains my analysis of the law and a summary of the submissions made by the parties. It also gives the reasons for my overall conclusion. I have concluded that the

arrangements between the parties made in August 2016 do not constitute an exclusive jurisdiction agreement in favour of the English Court. My reasons are substantially the same as those given by the judge. Accordingly, I would dismiss the appeal.

II. The factual and procedural background:

5. PHP is a French company based in Guadeloupe which was engaged for 50 years or so in business as a distributor of cigarettes and other tobacco products of British American Tobacco in territories including Guadeloupe and Martinique. The final contract was the Distribution Agreement between PHP and BATC to distribute such products for five years between 1 January 2010 and 31 December 2014. PHP subcontracted the importation and distribution of BAT products under the Distribution Agreement to PHP Trading in Guadeloupe and SODIPAM in Martinique. Carisma Marketing Services Ltd ("Carisma"), a company in the BAT Group based in Guadeloupe, was involved in the marketing of BAT products. The parties failed to agree to renew the Distribution Agreement, and the arrangement came to an end on 31 December 2014.

6. On 3 July 2015, PHP issued the proceedings in the English High Court against BATC to which I have referred. It claimed approximately €6.5 million by way of distributor's margin under clause 6.2.1 of the Distribution Agreement, less credit of €1.2 million for outstanding invoices. On 28 October 2015, BATC lodged its defence and a counterclaim on those invoices. BATC also made a counterclaim of around €8.5 million on the basis of a different, oral agreement under which it was alleged that PHP would procure that PHP Trading and SODIPAM would co-operate in bringing claims for the recovery of VAT in Guadeloupe and Martinique on imports of BATC products under the Distribution Agreement ("the VAT Agreement"). BATC claimed that representatives of PHP and Carisma agreed to the VAT Agreement at a meeting in September 2009. PHP denied that any binding contract was concluded in relation to VAT recoveries, but also alleged that, if there was any contract, it had been made between PHP Trading and SODIPAM on the one hand and Carisma on the other, rather than between PHP and BATC.

7. In view of the nature of the dispute as to what was agreed in the exchanges of correspondence between Penningtons Manches LLP, BATC's solicitors, and Hill Dickinson LLP, PHP's solicitors, it is necessary to refer to them in some detail.

8. The relevant correspondence starts with an email dated 10 June 2016 from Penningtons Manches to Hill Dickinson. In this, Penningtons Manches informed Hill Dickinson that BATC intended to apply to join PHP Trading and SODIPAM as parties to its counterclaim based on the VAT Agreement. Hill Dickinson replied on 13 June asking on what basis BATC considered the English court had jurisdiction to hear claims against PHP Trading and SODIPAM.

9. Penningtons Manches's next email, dated 13 June, did not answer the question about the basis of the jurisdiction claimed for the proposed Additional Claim. Penningtons Manches stated that they thought it was "clearly in the best interests of all parties to have all the relevant disputes resolved together, rather than having

piecemeal related litigation in separate jurisdictions and thereby substantially increasing costs". They reiterated this (including the reference to litigating in separate jurisdictions) in an email dated 29 June. Hill Dickinson replied stating they were still awaiting a response to their question about the basis of the English court's jurisdiction to hear these claims.

10. Jumping back in the chronology, on 17 June 2016 there was a CMC before Blair J. Notwithstanding the recent exchanges about the Part 20 claims against PHP Trading and SODIPAM, neither party mentioned them at the CMC. The only Part 20 claim mentioned was BATC's existing counterclaim against PHP. Blair J gave full directions, including that a twelve-day trial be fixed for not before June 2017.

11. It was not until 1 July 2016 that Penningtons Manches responded to Hill Dickinson's question about the basis upon which BATC considered the English court has jurisdiction to hear the proposed Additional Claim against PHP Trading and SODIPAM. As well as explaining why they considered there was jurisdiction, they stated if Hill Dickinson did not agree to the joinder of PHP Trading and SODIPAM, BATC would bring a contested joinder application in England or bring proceedings in France. On 5 July, Hill Dickinson replied giving the reasons they did not consider that the English court has jurisdiction, and stating that any application to join PHP Trading and SODIPAM would be strongly resisted.

12. On 5 August 2016 BATC issued a without notice application for the joinder of PHP Trading and SODIPAM to its existing counterclaim against PHP, with a request that the application be dealt with on paper. It came before Knowles J who directed that, in the light of the implications for the case between the existing parties, the CMC should be restored for a two-hour hearing on notice to PHP. In a letter dated 10 August 2016, Penningtons Manches sought to persuade Knowles J to deal with the question of joinder on paper and without notice. They did so on the ground that PHP Trading and SODIPAM would have the right to challenge jurisdiction if they were joined and then served with the proposed proceedings. Knowles J rejected their request, and the CMC directed by him was listed for 14 October 2016.

13. In the light of Knowles J's directions, in a letter dated 17 August 2016, Penningtons Manches wrote to Hill Dickinson enclosing a copy of their application and informing Hill Dickinson of their exchanges with the court. The letter stated that the previous correspondence showed that it was clear that jurisdiction in relation to the proposed Additional Claim was the key issue, and that was a point that could only be taken by PHP Trading and SODIPAM once they had been joined and served as parties. The letter also stated that:

> "an order permitting joinder could make it clear that an application to dispute the court's jurisdiction could be made within 28 days … is without prejudice to the right to vary or set aside the order, and … is without prejudice to the right of [PHP, PHP Trading or SODIPAM] to seek an order … for the claims against [PHP Trading and/or SODIPAM] to proceed separately".

In the penultimate paragraph of the letter, Penningtons Manches asked if Hill Dickinson would be prepared to accept service within the jurisdiction on behalf of PHP Trading or SODIPAM "*without prejudice* to their position on jurisdiction, so that all parties could be represented at the CMC and all issues (including jurisdiction)" could be dealt with at that hearing. The letter stated that this appeared to be the most sensible route, to avoid unnecessary further hearings and delay, and to be cost effective.

14. Following further correspondence between the parties' solicitors on 19 August, in a letter dated 22 August Hill Dickinson stated that they were only prepared to consider accepting service on behalf of SODIPAM and PHP Trading if two conditions were met. The condition relevant to this appeal is that:

> "[BATC] first acknowledges and confirms that such acceptance of service [was not and would not be treated by BATC] as a submission to the jurisdiction of the English courts and that SODIPAM and PHP Trading may still contest the Commercial Court's jurisdiction in precisely the same way as they would have been able to do if [BATC] had, in fact, effected service abroad".

Penningtons Manches gave the required confirmation in a letter dated 24 August. They also asked Hill Dickinson to confirm *inter alia* that they were instructed to accept service of the application on behalf of SODIPAM and PHP Trading and that:

> "in the event that SODIPAM and PHP Trading are joined to the proceedings and their jurisdictional challenge is unsuccessful following the proposed restored CMC, and subject to any appeal either company might bring, [Hill Dickinson] are instructed to accept service of the claim form and particulars of Defendant's Counterclaim … dispensing with the requirement to effect service abroad in order to prevent any unnecessary delay to the Court timetable".

15. Hill Dickinson replied in a letter dated 25 August stating that they would confirm as follows:

> "(a) we are instructed to accept service of [BATC's] application for joinder on behalf of SODIPAM and PHP Trading … but only subject to the acknowledgment in your letter of 24 August 2016 that such acceptance of service will not be treated as a submission to the jurisdiction of the English Courts and will not prejudice SODIPAM and PHP Trading's ability to contest jurisdiction and, in accordance with the wording of the reservation of rights in our letter of 22 August 2016, SODIPAM and PHP Trading may still validly contest the Commercial Court's jurisdiction in precisely the same way as they would have been able to do if [BATC] had, in fact, effected service abroad;
>
> …

> (c) in the event that SODIPAM and PHP Trading are joined to the proceedings and their jurisdictional challenge is unsuccessful following the proposed CMC, and subject to any appeal either company might bring, we are instructed to accept service of the claim form and particulars of Defendant's Counterclaim …"

16. On the same day, Penningtons Manches wrote to the Manager of the Commercial Court (copied to Hill Dickinson) referring to Knowles J's directions and *inter alia* stating:

> "There is a consensus amongst the parties regarding the practical advantages and costs savings of dispensing with the need for multiple hearings and ensuring that all parties are represented at the proposed restored CMC with all issues addressed, including any jurisdiction challenge. Accordingly, Hill Dickinson LLP have confirmed their agreement to accepting service of the Application on behalf of the proposed Third and Fourth Parties, *without prejudice* to their ability to contest jurisdiction, with the proposed restored CMC to take place from 3 October 2016 ..."

17. The next development occurred on 13 October 2016. A witness statement of Toby Miller, a senior associate at Hill Dickinson with conduct of the matter, was served informing the court and BATC that on 12 October 2016 the Joint Commercial Court of Fort-de-France in Martinique had become seised of proceedings involving PHP Trading, SODIPAM and BATC. In essence, the proceedings issued in Martinique seek a declaration of non-liability on the part of PHP Trading and SODIPAM in respect of the VAT Agreement. It is common ground that the French proceedings mirror those in the proposed Part 20 claims made by BATC against PHP Trading and SODIPAM, and that by reason of the relative timings, the Court of Fort-de-France was the first seised court for the purposes of Article 29 of the Brussels Regulation Recast.

18. The CMC ordered by Knowles J that was originally listed for 14 October 2016 had to be stood out due to lack of court time. It was relisted for 19 December 2016 and came before Andrew Baker J on that day.

III. The judgment below:

19. Two of the three questions decided by Andrew Baker J at the CMC hearing on 19 December 2016 do not arise before us. The first was that the English court has jurisdiction to determine the proposed Part 20 claims of BATC against PHP Trading and SODIPAM under Article 8(2) of the Brussels Regulation Recast: [2016] EWHC 3377 (Comm) at [40] – [46]. The second was not to exercise his discretion to refuse joinder of PHP Trading and SODIPAM on the ground of delay notwithstanding his finding that there was jurisdiction to hear the claims: see [2016] EWHC 3377 (Comm) at [67] – [73]. PHP Trading and SODIPAM did not seek permission to appeal against the decision to join them, and although granted

permission by the judge to appeal against the decision that the English court has jurisdiction under Article 8(2), they did not pursue that.

20. Accordingly, as stated at [3] above, the only question before us is whether the agreement reached between BATC and PHP, PHP Trading and SODIPAM in August 2016 is an exclusive jurisdiction agreement in favour of the English court, and whether the judge erred in finding that it was not and, therefore, staying the Additional Claims against them. Before summarising his decision on that, I note that he found that, although the timing of the commencement of the French proceedings in Martinique was a major last-minute development, he did not infer that PHP and its legal team had any motive to disrupt or were guilty of any sharp practice: see [2016] EWHC 3377 (Comm) at [57].

21. At [58] of his judgment, the judge summarised the agreement alleged by BATC as follows:

> "(1) If this court determined that it had jurisdiction to entertain the Part 20 claim against PHP Trading and SODIPAM, then "it would go on to hear the substantive additional claim" (which I take to mean determine it on the merits); and
>
> (2) the PHP companies "would not take any active steps to prevent it [i.e. this court] from doing so"."

BATC relied on the agreement in the letter dated 25 August 2016 by Hill Dickinson on behalf of PHP Trading and SODIPAM to accept service within the jurisdiction and the background to the agreement seen in the exchanges. It submitted that letter meant that PHP Trading and SODIPAM had agreed with BATC that, if at the CMC the court held that the English court had jurisdiction, subject to any appeal, that court would "go on to hear the substantive additional claim". As I have stated, under Article 25 of the Brussels Regulation Recast, such a jurisdiction agreement gives the designated court jurisdiction notwithstanding Article 29 and any prior proceedings commenced elsewhere in breach of the agreement.

22. The judge rejected BATC's submissions for several reasons. It is convenient to summarise his reasons under the four headings identified in Mr Dougherty QC's skeleton argument on behalf of BATC.

23. *No express or implied agreement:* The judge held (at [59]) that the express terms of the agreement between BATC and PHP Trading and SODIPAM did not state that jurisdiction would be exclusively for the English courts. Such a conclusion was also not necessarily implicit in the terms of the agreement, which were explicable and effective without reference to any restriction on the right of PHP Trading and SODIPAM to commence proceedings elsewhere if they could otherwise do so. This was simply not something that PHP Trading and SODIPAM were asked to do by BATC.

24. *Commercial purpose*: The judge (at [60] – [61]) rejected BATC's submission that the agreement would have no commercial purpose if it did not provide for the

exclusive jurisdiction of the English courts. He stated that the purpose of the agreement was to avoid the need for multiple hearings in the English High Court, and that purpose was achieved by the streamlining of the interlocutory process to a single hearing. The process agreed upon led to “an efficiency in court time and costs for the parties”. BATC also obtained a conditional benefit in that if the court in Martinique does not have or declines jurisdiction, the jurisdiction of the English court has already been established.

25. *The agreement did not purport to guarantee that English Court would be first seised*: The judge stated (at [62]) that there were at least three possible jurisdictions to hear the Additional Claim: England, France and Panama. The solicitors’ correspondence simply did not address questions of *lis pendens*. There was nothing in what BATC proposed or in the terms upon which the proposal was accepted and finalised to signal that it was any purpose of the proposal to engineer or guarantee that the English court would be first seised.

26. *The agreement to accept service*: The strand of BATC’s submissions which the judge stated (at [63]) he initially found more troubling was that the parties had agreed that Hill Dickinson would accept service on behalf of PHP Trading and SODIPAM if joinder was allowed, and such acceptance was inconsistent with any possibility of a stay. Accordingly, the agreement must have been to the effect that the court would not stay the claim. BATC argued that acceptance was inconsistent with a stay because if the case is one in which a stay is mandatory under Article 29, there ought to be an instant stay prior even to service. The judge rejected this argument because (see [64]) “everything about the agreement was expressly to be on the basis that the making of the agreement was not to prejudice PHP Trading and SODIPAM in relation to questions going to jurisdiction in any way”. The reservation of their rights in respect to challenging jurisdiction extended to all arguments in relation to proceedings being stayed. There is, he stated, (at [64]), no distinction to be drawn between issues going to jurisdiction under Article 8 and questions of whether a stay is required under Article 29.

IV Discussion:

27. BATC submitted that the judge was wrong to hold that the agreement of 25 August 2016 was not an exclusive jurisdiction agreement in favour of the English court within the meaning of Article 25 of the Brussels Regulation Recast and to stay its Additional Claim against PHP Trading and SODIPAM. Its case is that there was an agreement, the formal requirements of Article 25 were met (the agreement was sufficiently certain and evidenced in writing), and the agreement should be interpreted by reference to English law.

28. There is much common ground as to the principles governing the applicability of Article 25. In my judgment, the principles that are relevant to this appeal are as follows:

    (1) The agreement, or consensus between the parties, as to jurisdiction must be “clearly and precisely” demonstrated: Case 24/76 *Salotti* v *RÜWA Polstereimaschienen* [1976] ECR 1831 at [7]. See also Case C-159/97 *Trasporti Castelletti v Hugo Trumpy SpA* [1999] ECR I-

1597 which stated that the aim of the predecessor of Article 25, Article 17 of the Brussels Regulation, was to ensure there was real consent on the part of the parties by avoiding jurisdiction clauses incorporated in a contract by one party going unnoticed.[1]

(2) Article 25 requires the existence of consensus in fact, rather than a legally binding agreement: *Antonio Gramsci Shipping Corp. v Recoletos Ltd.* [2013] EWCA Civ. 730, [2014] Bus. LR 239 at [39], *Aeroflot* v *Berezovsky* [2013] EWCA Civ. 784, [2013] 2 Lloyd's Rep. 242 at [64].[2] (The caution that is required (see *IMS SA v Capital Oil and Gas Industries Ltd.* [2016] EWHC 1956 (Comm), [2016] 4 WLR 163 at [48] and [49]) where what is relied on is an unsigned version of a contract which requires signature, is not relevant to the facts of this case).

(3) The existence or otherwise of an agreement conferring jurisdiction is to be regarded as an independent concept of EU law: Case C-214/89 *Powell Duffryn* v *Petereit* [1992] ECR 1-1745 at [13] - [14] and [36], and *Aeroflot* v *Berezovsky*, at [54]. In *Powell Duffryn* v *Petereit* at [37] and in Case 313/85 *Iveco* v *Van Hool* [1986] ECR 3337 at [5] it is stated that the duty of examining whether the particular clause was in fact the subject of such a consensus lies on the national court. This (see *Dicey Morris and Collins on the Conflict of Laws* 15th. ed. §12-127) is usually understood to require the national court to determine the scope of an agreement by reference to the rules of construction of the governing law of the agreement. It is not always easy to tell whether a particular question is one of construction or one of validity (see *Dicey Morris and Collins ibid*) but this issue does not arise in this appeal.[3]

(4) The requirement in Article 25(1)(a) that the agreement be in writing or evidenced in writing does not require the agreement to be in a formal written contract or the writing to be in a single document: *7E* v *Vertex* [2007] EWCA Civ. 140, [2007] 1 WLR 2175 *per* Sir Anthony Clarke MR at [36].[4]

29. Mr Dougherty QC submitted that the only issue in dispute in this case was the *scope* of the agreement, a question which is for the national court to determine; in this case by reference to English law. On behalf of the PHP parties, Mr Russell QC submitted that the question is as to the scope of the autonomous concept of jurisdiction agreement in Article 25, and that is logically prior to that of the scope of any agreement, and on the basis of *Powell Duffryn v Petereit* at [13] it must be answered by reference to EU law alone, and not by national law. He invited the court to uphold the order on the additional ground, raised in his Respondents' Notice that there was no clear and precise consensus conferring jurisdiction on the English Court for the purpose of Article 25 and the agreement on service was in

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[1] Appellant's Skeleton, §26(a); Respondents' Skeleton, §§25(2) and (4).
[2] Appellant's Appeal Skeleton, §26(d); Respondents' Skeleton, §25(3).
[3] Appellant's Skeleton, §26(e); Respondents' Skeleton, §25(1).
[4] Appellant's Skeleton, §26(c); Respondents' Skeleton, §25(3).

any event insufficiently certain to amount to an exclusive jurisdiction clause within Article 25. In view of the conclusion I have come to on the interpretation of the agreement as a matter of English law, it is not necessary to consider Mr Russell's autonomous EU law point.

30. Before this court, BATC essentially advanced the argument that it had made to the judge. The words of the agreement were to be construed in the light of the background to it, its overall purpose, and commercial common sense. In the light of those factors, it was either an express or implied term of the agreement that the English court would have exclusive jurisdiction. The overall purpose of the agreement was to have a single hearing at which "all issues" including jurisdiction would be dealt with. Any other construction would be inconsistent with Hill Dickinson's agreement to accept service if PHP Trading and SODIPAM's challenge to jurisdiction was unsuccessful. Moreover, in those circumstances, the agreement would have no sensible commercial purpose unless the English court went on to hear the Additional Claim on the merits. The judge was wrong to conclude that the purpose of the agreement was only to avoid multiple hearings before the English court. The purpose was to avoid multiple hearings in any jurisdiction and that purpose has not been achieved. The effect of the French proceedings and the stay has been to increase the overall number of hearings. Moreover, BATC unnecessarily incurred substantial costs in arguing jurisdiction before the English court because, had it known that the French proceedings would be issued, it would have left jurisdiction to be dealt with by the French court

31. On the question of implied terms, Mr Dougherty submitted that the judge erred to the extent that he focussed on the issue of whether PHP Trading and SODIPAM were asked to refrain from taking active steps to prevent the court from determining the Additional Claim on the merits. The parties' agreement that the English court should have exclusive jurisdiction was enough to satisfy Article 25, and that should have been the focus of the judge's analysis.

32. Mr Dougherty also criticised the judge for giving the fact that the agreement contained no guarantee that the English court would be first seised as another reason for finding that there was no exclusive jurisdiction agreement. It was only necessary for the parties to have agreed that the English court had exclusive jurisdiction to determine the Additional Claim, and it was not necessary for them to have agreed that the English court would be first seised in relation to the Additional Claim.

33. The final limb of Mr Dougherty's submissions was that the judge erred in holding that Hill Dickinson's agreement to accept service did not necessitate a finding that there was an exclusive jurisdiction agreement. He argued that the judge ignored the fundamental distinction between whether jurisdiction was available under the Regulation and the concept of *lis pendens*. The terms of the agreement were only stated to relate to jurisdiction. His findings were also based on an incorrect interpretation of Articles 29 and 32(1)(a) of the Brussels Regulation Recast.

34. Mr Dougherty may be right to say that the distinction drawn by Mr Russell between an agreement as to the substance of the dispute and a procedural agreement neglects the fact that jurisdiction agreements are by their nature about

procedure. But Mr Russell's distinction did capture a practical difference between an agreement about conferring jurisdiction on the courts of a Member State and one about handling interlocutory matters such as those at the proposed CMC. As Mr Russell observed, there was nothing in the correspondence and in particular the exchanges on 24 and 25 August 2016 which looks like a jurisdiction agreement, let alone can be clearly said to be one. I agree.

35. I have concluded that this appeal should be dismissed, essentially for the reasons given by the judge below and by the Respondents in their written and oral submissions as to the interpretation as a matter of English law of the agreement between the parties in the exchange of letters dated 24 and 25 August 2016. I consider that the Respondents are correct to characterise the issue before the judge as going to the existence of an exclusive jurisdiction agreement, rather than to its scope. There was nothing in the correspondence between the parties between 10 June and 25 August 2016 which clearly and precisely conferred jurisdiction in relation to the Additional Claim on the English courts. The correspondence does not show any intention on the part of PHP Trading and SODIPAM to confer substantive jurisdiction on the English court, or even to consent to a suggestion by BATC that they do so. Indeed, Hill Dickinson's letter dated 22 August and that dated 25 August containing their assent expressly stated that "SODIPAM and PHP Trading may still contest the Commercial Court's jurisdiction in precisely the same way as they would have been able to do if [BATC] had, in fact, effected service abroad". That is not language conferring jurisdiction.

36. The reluctance of PHP Trading and SODIPAM to agree to have the issue of jurisdiction determined in the English court makes it difficult to believe that they would have conditionally conferred exclusive jurisdiction on the English court to determine the substantive claim in the way BATC contends. Indeed, any such agreement was contradicted by the express reservation of rights in relation to jurisdiction. PHP Trading and SODIPAM's legitimate tools for contesting jurisdiction included issuing proceedings in a French court. I accept Mr Russell's submission that there is no justification in this context for giving a narrow meaning to the words "contesting jurisdiction".

37. The only references to litigation in other jurisdictions are in the emails dated 13 and 29 June and the indication in Penningtons Manches's letter dated 1 July that, if Hill Dickinson did not agree to the joinder of PHP Trading and SODIPAM, one of BATC's options would be to bring proceedings in France. This was before Penningtons Manches had responded to Hill Dickinson's question as to the basis on which Penningtons Manches asserted there was jurisdiction, and before Hill Dickinson had given any substantive response to any of the suggestions.

38. Save for these exiguous references to litigation in other jurisdictions, the emphasis in the correspondence from BATC was very clearly on the determination of issues of joinder and jurisdiction at the CMC, and not on the substantive determination of the Additional Claim. Those references were made well before the terms of a possible agreement were set out by Penningtons Manches in their letter dated 17 August. Neither that letter nor the subsequent correspondence, in particular Penningtons Manches's letter dated 24 August and the reply dated 25 August by Hill Dickinson which provides the consensus, refer to litigation in other

jurisdictions or to avoiding such litigation. The judge found as a matter of fact that the possibility of issuing proceedings in another jurisdiction was not contemplated by the parties at the time of the agreement: see [2016] EWHC 3377 (Comm) at [57]. It is therefore difficult for BATC to make good the argument that the agreement was to avoid multiple hearings in *all* courts, not just those in England.

39. Although, like the judge, at one stage I considered that Hill Dickinson's agreement to accept service on behalf of PHP Trading and SODIPAM was problematic, I have concluded that it is not inconsistent with the interpretation of the agreement I have given. In the context of the exchanges between the parties, I consider that it is clear that the purpose of the agreement as to service of the Additional Claim was to avoid the delay and cost of having to serve out of the jurisdiction, rather than to abandon all jurisdictional arguments. That claim has been stayed pending the decision of the French court. If that court does decline jurisdiction, BATC can apply for the stay to be lifted and it will not be necessary for service out of the Additional Claim.

40. Accordingly, if my Lords agree, this appeal will be dismissed.

Lord Justice David Richards:

41. I agree.

Lord Justice Longmore:

42. I also agree.

APPENDIX

REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2012

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

"Whereas:

…

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well- defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

…

(19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

…

(22) However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of- court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non- designated court has already decided on the stay of proceedings.

…

Prorogation of jurisdiction

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

….

Lis pendens — related actions

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

…”