



Racing yacht claim not for Gibraltar Courts says Privy Council.

In a recent decision, the Privy Council has clarified what test should be applied in determining whether an agreement to confer jurisdiction on the courts of a Member State exists within the meaning of Article 23 of the EC Regulation on Jurisdiction and Judgments.

Introduction

On 11th October 2006 the Privy Council delivered its decision in an appeal brought by Bols Distilleries (trad-

ing as Bols Royal Distilleries) and Unicom Bols Group Spz.o.o ("Bols") against Superior Yacht Services Limited ("SYS"). The firm acted for Bols since proceedings were brought against them by SYS in the Supreme Court of Gibraltar in 2004.

Bols' challenge to the jurisdiction of the Gibraltar courts in this case raised important issues under Council Regulation (EC) 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and

Commercial Matters (the "Regulation").

In a decision that overturned the decision of the Court of Appeal for Gibraltar, which had affirmed the earlier decision of the Gibraltar Supreme Court, the Judicial Committee of the Privy Council held that the courts of Gibraltar did not have jurisdiction to hear the claim brought by SYS for breach of an alleged contract which, according to SYS, was subject to Gibraltar jurisdiction. The Privy Council held that for the court of one EC





Member State to accept jurisdiction in a claim brought against a defendant domiciled in another Member State on the basis that "there was a good arguable case" that such jurisdiction had been conferred by an agreement in writing or evidenced in writing within the meaning of Article 23(1)(a) of the Regulation, the claimant had to show that on the material available he had a much better argument than the defendant that it could be established clearly and precisely that the clause conferring jurisdiction was the subject of consensus between the parties.

This decision has therefore further elucidated the test to be applied as to whether there is an agreement to confer jurisdiction on the courts of a Member State within Article 23 of the Regulation.

The Factual Background

The claim concerned an alleged contract relating to the construction and operation of an ocean going racing yacht. The First and Second

Appellants were companies domiciled in the Netherlands and Poland respectively and under the alleged contract were to sponsor the construction and running of the yacht. By contrast SYS were domiciled in Gibraltar and were to sail and manage the day-to-day running of the yacht. No formal agreement was ever signed. SYS sued for *inter alia*, damages for breach of contract claiming wrongful and early termination of the alleged contract and sought a declaration that they were the owners of the yacht.

Bols contended that by virtue of Article 2(1) of the Regulation they should be sued in the courts of the Member States in which they were domiciled. By contrast SYS relied on clause 15 of a draft contract they had prepared which stated: "*This agreement shall be governed by the laws of Gibraltar and the parties hereby submit to the jurisdiction of the courts of Gibraltar*". This, SYS argued, complied with the requirements of Article 23(1)(a)

of the Regulation which provides: "*If the parties, one of whom is domiciled in a Member State, 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. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing....*"

Both Schofield CJ, sitting in the Supreme Court and subsequently the Court of Appeal for Gibraltar held that although the draft contract containing the Gibraltar jurisdiction clause was never signed, it was apparent from the surrounding material and actions of the parties that there was a sufficient case that SYS had agreed to clause 15, that there was such an agreement, "*in writing or evidenced in writing*" and that Article 23 therefore applied so as to confer jurisdiction on the Supreme Court of Gibraltar. Bols then appealed to the Privy Council with Special Leave.

The Privy Council Decision

The judgment of the Privy Council was delivered by Lord Rodger on



behalf of himself and Lords Hoffman, Hope, Scott and Walker. The Privy Council referred to the decisions of the European Court of Justice as to the formal requirements as to "writing" such as *Estasis Salotti di Colzani Aimo et Gianmario Colzani v RUWA Polstereimaschinen GmbH* Case 24/76, [1976] ECR 1831 where the Court held that it had to be 'clearly and precisely demonstrated' that the parties had agreed to any clause which conferred jurisdiction on a nominated court. In essence the purpose of the formal requirements as to writing under Article 23 was to ensure that the consensus between the parties as to jurisdiction was established as a matter of fact.

The Privy Council also directed its attention to the standard of proof that should be applied in deciding if the formal requirements of Article 23 had been made out on the material available. The Gibraltar Supreme Court and Court of Appeal both considered whether there was "a good arguable case" that the Gibraltar court had jurisdiction. The Gibraltar Court of Appeal referred to the judgment of Waller LJ in the English Court of Appeal in *Canada Trust Co v Stolzenburg (No 2)* [1998] 1 WLR 547, with whose approach Lord Steyn agreed in the House of



Lords, rejecting the contention that the standard of proof was the higher one of a balance of probabilities. The Privy Council endorsed the view of Waller LJ.

Essentially, therefore, the rule to be applied was that the court had to be satisfied, or as satisfied as it could be, having regard to the limitations which an interlocutory process imposed, that factors existed which allowed the court to take jurisdiction under Article 23. In practice, what amounted to a 'good arguable case' depended on what had to be shown in any particular situation in order to establish jurisdiction. In the present case SYS had to establish it had a much better argument than Bols in proving clearly and precisely that the clause conferring jurisdiction on the Gibraltar courts was the subject of consensus between the parties.

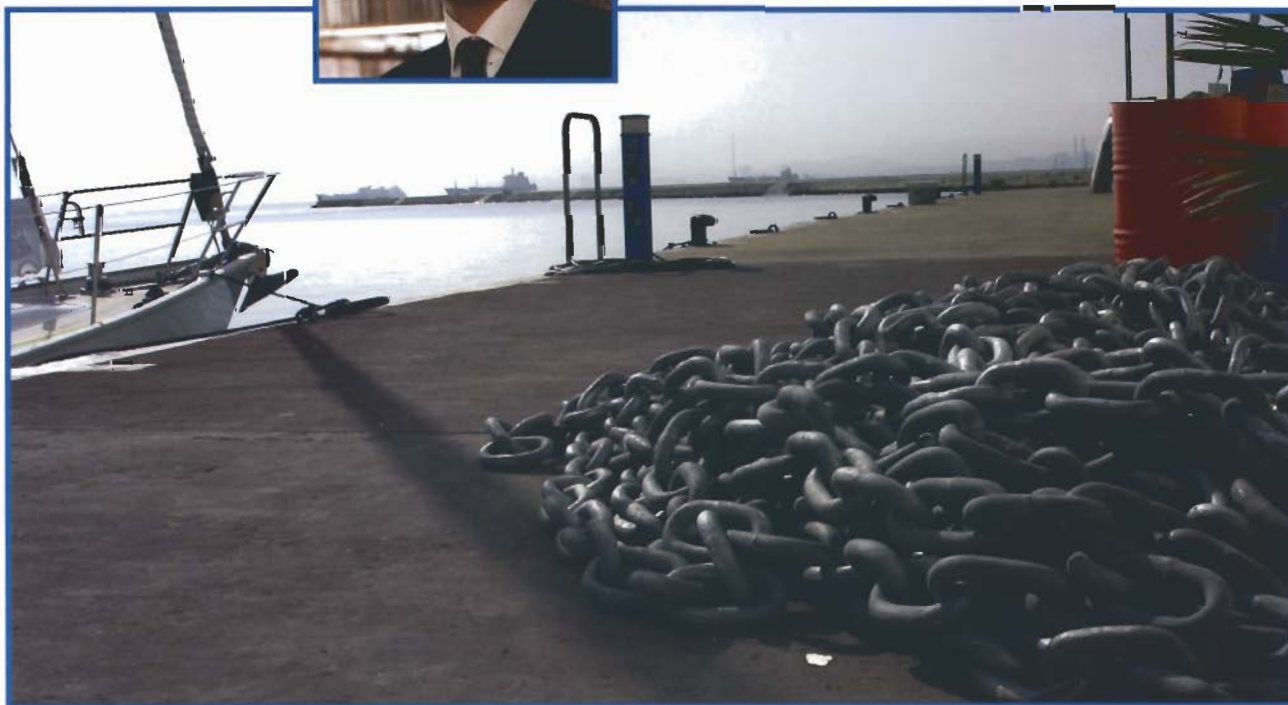
When analysing the emails the Judicial Committee decided that, although there was a good arguable case that the parties concluded an agreement covering some significant matters relating to the construction of the Yacht, there were still many fundamental matters to be resolved. Furthermore, although the Judicial Committee was satisfied that the various drafts of an agreement sent by SYS to Bols contained a Gibraltar jurisdiction clause, there was nothing in the material before the court to show that the jurisdiction clause was itself discussed and agreed in meetings, emails or telephone exchanges.

In those circumstances and applying the relevant test, the Privy Council held that SYS had failed to show that they had a much better argument than Bols that there existed an agreement conferring jurisdiction on the Gibraltar Courts within Article 23(1)(a) of the Regulation.

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SYS relied on an exchange of emails between the parties to prove that a contract had been con-





Cashing in your Judgment across Borders

Happily for those who have won cases, enforcing their judgments and securing payment under those judgments across borders is now easier and simpler than it ever has been.

Looking at the European Union itself, the latest landmark is the conversion of the "Brussels Convention" into an EC Regulation, which by definition constitutes in each member-state a law as from its publication.

Gibraltar and the United Kingdom are to be treated as separate member-states, thus facilitating the enforcement of Gibraltar judgments in the United Kingdom and vice versa.

Briefly, the framework allows for judgments of one country to be taken as read subject to certain requirements and qualifications. That recognition for the purposes of enforcement can be challenged by the judgment debtor but only on limited grounds and, ultimately, the judgment so registered can be executed by using the process of

the receiving country.

There is also provision for interest and costs and, most importantly, there remains provision for obtaining freezing orders (the old Mareva injunction) pending registration and enforcement. This is a well established way in which you make sure that a judgement will not go unsatisfied, i.e. that you have been able to secure and freeze monies of the debtor, in the meantime.

This framework in its original form expressed in the Brussels Convention, was not applicable to Gibraltar thanks to Spanish objections. First the objections were overcome, very belatedly, and then came the Regulation itself, with its binding nature.

Gibraltar's Courts will no doubt become active in these areas and by the same token, Gibraltar traders and consumers will be able to seek redress, whether from their clients or suppliers across European borders.

Landmark ruling on insurance insolvency

In a landmark ruling on 7 February 2007 the Supreme Court has confirmed that the appointment of Provisional Liquidators of an insurance undertaking based and regulated in Gibraltar constitutes the opening of winding up proceedings for the purposes of Directive 2001/17/EC of 19 March 2001 on the Reorganisation & Winding Up of Insurance Undertakings which is implemented in Gibraltar by the Insurers (Reorganisation & Winding Up) Act 2004.

The Chief Justice, the Hon. Mr Justice Schofield, has also given directions which will have the effect of adopting relevant provisions of the United



Kingdom's Insurers (Winding Up) Rules 2001. This is the first time that the Supreme Court has had to consider the provisions of the European regime affecting the insolvency of an insurer and is believed to be the first time that the courts of any EC Member State have considered whether the appointment of a Provisional Liquidator constitutes the opening of winding up proceedings.

The Chief Justice expressly followed the findings of the European Court of Justice in the case of *Re Eurofood IFC Limited*, a case concerning the EC Regulation on Insolvency Proceedings. He also commended as "practical and pragmatic" the proposal to apply elements of the statutory rules which would govern the liquidation of an insurer in England, as Gibraltar has no such rules.

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Why do I need a mediator?

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Parties to legal proceedings are regularly advised that litigation is the last resort for the resolution of disputes and that alternative forms of dispute resolution should be entertained. The Civil Procedure Rules provide a number of options for ADR. It suggests that parties may seek to resolve their disputes through negotiation and discussion, early evaluation by an independent third party or by mediation.

The courts have given their endorsement to mediation as a form of ADR (*Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576). Further, the courts have ruled on the costs consequences on failing to mediate. Despite the court's stamp of approval for the mediation process, many lawyers remain sceptical. The instinctive response of a lawyer when mediation is suggested is:

"Why do we need a mediator? I am perfectly capable of negotiating with the other side myself!"

There are a number of answers to this common reaction:

1. Not all lawyers are good negotiators, contrary to most lawyers' belief.

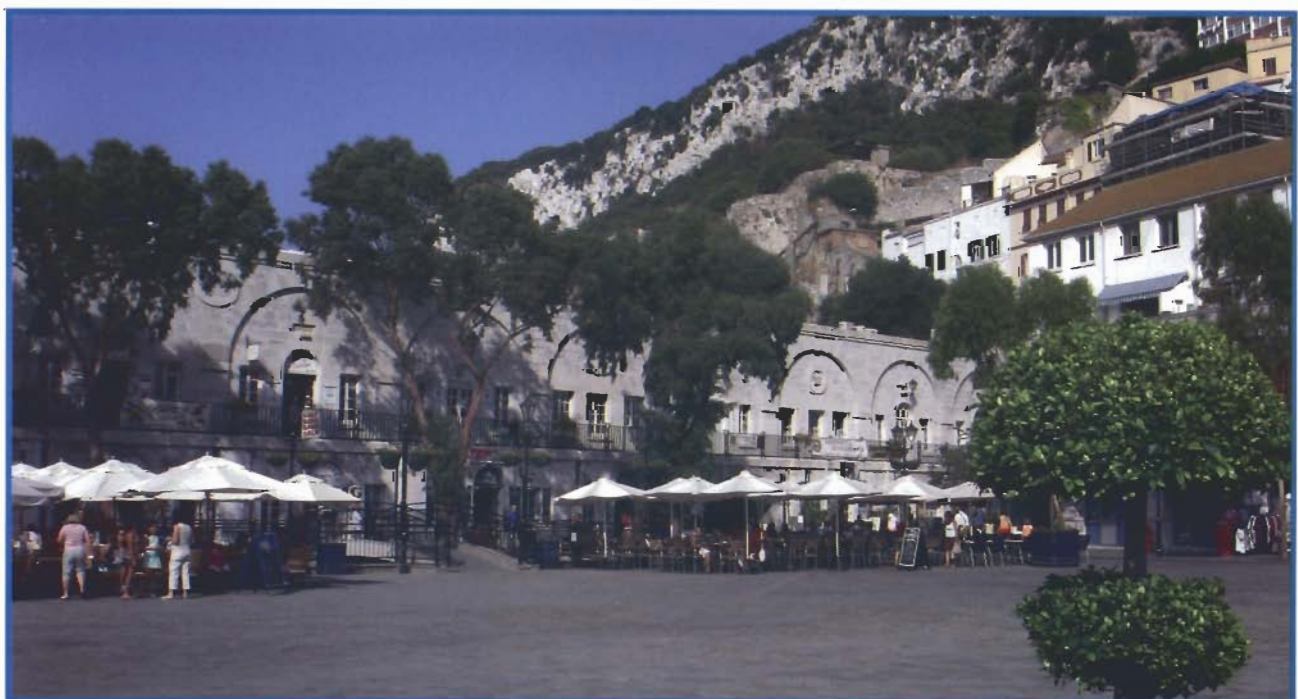


2. The mediation process is quite different to the negotiation process. The former is often termed as "principled" whereas latter is usually "positional". A principled approach will involve separating the people from the problem and focusing on interests rather than positions. The latter usually involves lawyers grandstanding on behalf of their clients and taking extreme and often unreasonable positions. This approach often detracts from the possibility of a settlement.
3. Lawyers are often under pressure not to try and find a sensible outcome to a problem but to secure an outright conquest. Most lawyers will be familiar with clients accusing them of being weak if they objectively consider ways in which a dispute can be resolved or proceedings avoided. The tenor of negotiations between lawyers often involves taking extreme positions, posturing and bluff. It is therefore no surprise that negotiations are often the first casualty of ADR with the differences between the

clients being highlighted rather than common interests being identified.

4. As soon as lawyers get instructed, parties to a dispute will usually only contact each other through their lawyers. Lack of contact between clients directly will often result in a matters being aggravated rather than resolved. One of main benefits of mediation process is that clients are fully involved in the process.
5. Litigators have a tendency to lose their objectivity.
6. Negotiations often involve a "splitting the difference" approach. This does not usually result in the best settlement for the disputants.

Despite lawyers' misgivings about the mediation process, the fact is that mediation works with most mediations resulting in settlements. Lord Justice Dyson remarked in the *Halsey* case that "all members of the legal profession who conduct litigation should now routinely consider with their clients whether their dispute is suitable for ADR."



Acts, not Ordinances

On 14th December 2006 a new Gibraltar Constitution Order was passed (available of www.gibraltar.gov.gi). This provides, amongst many other things, that laws made by the Legislature of Gibraltar will now be styled as "Acts", rather than "Ordinances".

Judiciary 2007

Supreme Court

Chief Justice
Additional Judge

The Hon. Mr Justice Schofield
The Hon. Mr Justice Dudley

Court of Appeal

President (Acting)
Justices of Appeal

Sir Murray Stuart Smith
Sir Philip Otton
Sir William Aldous
Sir Paul Kennedy, JJA

Magistrates Court

Stipendiary Magistrate & Coroner Mr Charles Pitto

Litigation Department

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