

Dispute  
Resolution

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# DISPUTE RESOLUTION BULLETIN



## Welcome to the September edition of our Dispute Resolution Bulletin.

This month's edition includes articles on enforcing arbitration awards, endeavours clauses and jurisdictional gateways.

In *Diag Human SE v Czech Republic* (22 May 2014), the English High Court applied the doctrine of issue estoppel in relation to the enforcement of an arbitration award for the first time. Andrew Williams looks at the decision and considers the implications.

Next, Kimarie Cheang reviews an important decision by the Singapore Court of Appeal, *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* (26 February 2014), involving a large-scale comparative study of the law relating to endeavours provisions in various common law jurisdictions, including England, Singapore and Australia.

In our final article, Luke Zadkovich considers the decision in *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* (29 August 2014), in which the English High Court had to grapple with a conflict under English law between procedural jurisdiction rules and substantive mandatory provisions.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

[Damian Honey](mailto:damian.honey@hfw.com), Partner, [damian.honey@hfw.com](mailto:damian.honey@hfw.com)

[Amanda Rathbone](mailto:amanda.rathbone@hfw.com), Professional Support Lawyer, [amanda.rathbone@hfw.com](mailto:amanda.rathbone@hfw.com)



## **hfw** A new development in enforcing arbitration awards

**The main consideration when seeking to enforce an arbitration award is often the location of assets against which to enforce. A recent decision has now raised another important issue to consider. In *Diag Human SE v Czech Republic* (22 May 2014), the English Court applied the doctrine of issue estoppel in relation to the enforcement of an award for the first time. Its decision has wider significance, both since it provides a further ground for an award debtor to resist enforcement of an arbitration award in England and since it may be followed in other common law jurisdictions.**

After a lengthy arbitral dispute, Diag Human SE (Diag) obtained an award in its favour against the Czech Republic. However, under the arbitration agreement between the parties, an additional review process was available for a limited time following the award.

Both parties apparently triggered the additional review process but Diag subsequently withdrew from it and alleged that the Czech Republic's attempts to trigger it were defective. The Czech Republic denied this and

argued that while the review process was pending, the award was not binding.

Diag began enforcement proceedings in several jurisdictions, including Austria and England.

The Austrian Supreme Court refused to enforce the award, finding that an arbitral award could neither be enforced nor rejected by a national court as long as it could be challenged by a higher court of arbitration.

In the English enforcement proceedings, an order was made giving Diag permission to enforce the award. However, the Czech Republic appealed, arguing that the award was not binding within the meaning of section 103(2)(f) of the 1996 Arbitration Act (the Act) or alternatively that the Austrian judgment ruling that the award was not binding created an issue estoppel.

Diag argued that no issue estoppel arose because the issue determined by the Austrian Court was different from the issue before the English Court. In particular, the Austrian Court had failed to consider whether there was in fact a valid review in process under the arbitration agreement. As a matter of English law, this was an essential consideration to determine whether the award was binding under s103(2)(f) of the Act.

The English Court found that an issue estoppel did arise out of the Austrian proceedings, ruling that where a foreign court decides an award is not binding, there is no reason in principle why that decision should not give rise to an issue estoppel provided that:

- The judgment must be given by a foreign court of competent jurisdiction.
- The judgment must be final and conclusive and on the merits.
- The issue decided by the foreign court must be the same as that arising in English proceedings.

The English Court held that the issue actually determined by the Austrian Supreme Court was that the award was not binding. The fact that its decision was reached in the context of enforcement proceedings brought under the New York Convention, rather than under s.103 of the Act, made no difference. This was especially so given that the purpose of s103 was to give statutory effect in England to the New York Convention.

The Court accepted that questions of arbitrability or public policy might be different in different states and that a decision in another jurisdiction on those grounds will not ordinarily give rise to an issue estoppel in England. However, the Court found that the question as to whether the award was binding was not in the same category. The Austrian decision that the final award was not yet binding was a decision on the merits on the same issue as was raised before the English Court. This is perhaps a surprising conclusion, since the Austrian decision was not as to the meaning of "binding" under s.103 of the Act.

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ANDREW WILLIAMS, SENIOR ASSOCIATE

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For further information, please contact [Andrew Williams](#), Senior Associate, on +44 (0)20 7264 8364, or [andrew.williams@hfw.com](mailto:andrew.williams@hfw.com), or your usual contact at HFW. Research by Philip Kelleher, Trainee.

## **hfw** All reasonable endeavours: what are you obliged to do?

**“Endeavours” provisions impose an obligation on contracting parties to endeavour to achieve a certain result, commonly in the form of an undertaking to use either ‘best’, ‘reasonable’ or ‘all reasonable’ endeavours to pursue the agreed goal, which may remain outside the control of one or more of the parties. The use of these provisions in the commercial context has become increasingly widespread. Despite this, uncertainty remains as to their legal effect.**

In the July 2013 edition of the Dispute Resolution Bulletin, Associate Adam Richardson reviewed the Singapore High Court’s decision in *BR Energy (M) Sdn Bhd v KS Energy Services Ltd* (20 March 2013). Earlier this year, the High Court decision was appealed to the Singapore Court of Appeal (*KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16), and the Court of Appeal took the opportunity to undertake a large-scale comparative study of the law relating to endeavours provisions in various common law jurisdictions, including England, Singapore and Australia, making its decision an important one. The judgment does not set out precise standards and duties, but it does provide valuable guidance and clarification.

### **Background**

In an agreement between the parties, KS Energy (KSE) was obliged to use ‘all reasonable endeavours’ to ensure that an oil rig was constructed and ready for delivery within six months. To fulfill that obligation, KSE contracted with a third party, Oderco, to construct the rig. Delays ensued and a completed rig was never delivered to BRE. BRE sued KSE for breach of its obligations.

### **Decision**

The Singapore Court of Appeal held that the test for determining whether an ‘all reasonable endeavours’ obligation has been satisfied should ordinarily be the same as the test for a ‘best endeavours’ obligation. A party must do all it reasonably can, or go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. However, a party need only do what has a significant or real prospect of success in procuring the desired outcome.

A party need not always sacrifice its financial interests in fulfilling its obligations. The test is whether the nature and terms of the contract in question indicate that it is in the parties’ contemplation that it should make such a sacrifice.

The party alleging breach bears the burden of proof at the outset of a claim, but once it has identified steps which the other party could have taken to procure the contractually-stipulated outcome, the burden usually shifts to that party to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

The Singapore Court endorsed the view that it may well be part of an ‘all reasonable endeavours’ obligation for the relevant party to inform its counterparty of any difficulties it encounters, so as to ascertain whether the counterparty has a possible solution. This is not an ironclad rule but the court may take it into consideration in determining whether the relevant party has satisfied its ‘all reasonable endeavours’ obligation.





Applying the above principles and overturning the lower court's ruling, the Singapore Court of Appeal found that KSE was not in breach of its 'all reasonable endeavours' obligations. KSE's behaviour bore all the hallmarks of a prudent and determined company acting in BRE's interests and anxious to procure the construction and delivery of the oil rig within the time allowed.

The approach taken by the Singapore Court of Appeal is that endeavours clauses will be construed as placing a meaningful requirement on the relevant party, which may be required to sacrifice its own financial interests, but which will be relieved from completing performance of the obligation where it has done what it may reasonably be expected to do in the circumstances.

The Singapore approach contrasted vcan be with the Australian approach. In *Electricity Generation Corporation v Woodside Energy Ltd* (5 March 2014), the High Court of Australia was called upon to decide whether a clause

requiring sellers to use 'reasonable endeavours' to supply a supplemental amount of gas was breached. The sellers were found to have required the buyers to accept gas at higher prices and reduced quantities to that set out in the contract because of a disruption caused by another gas supplier's plant explosion which had decreased supply and increased the market price. The sellers' obligation to supply the supplemental gas at the original price and quantities was qualified in the contract by allowing it to take into account "all relevant commercial, economic and operational matters". The Australian High Court decided that sellers had not breached their endeavours obligation, in part because of the qualification set out in the contract.

### Conclusion

Written agreements should give certainty to what parties have agreed and endeavours obligations inevitably involve an element of uncertainty. The Singapore Court of Appeal's decision gives helpful guidance on how to understand the obligations imposed by these clauses. A degree of certainty may be injected by including in the contract clear steps to demonstrate what the parties agree constitutes 'reasonable' or 'best' endeavours.

For further information, please contact [Kimarie Cheang](#), Associate, on +65 6411 5305, or [kimarie.cheang@hfw.com](mailto:kimarie.cheang@hfw.com), or your usual contact at HFW.



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KIMARIE CHEANG, ASSOCIATE

## **hfw** Jurisdiction gateways

**Establishing jurisdiction can be complex. A recent decision has emphasised this by demonstrating the potential tensions between governing law and jurisdiction clauses and mandatory provisions of EU law, in this case the Commercial Agents (Council Directive) Regulations 1993 (the Regulations).**

In *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* (29 August 2014), the English High Court held that a claim under the Regulations did not satisfy the contractual jurisdiction gateways in the Civil Procedure Rules (CPR) Part 6.

English company Fern acted as Texan company Intergraph's agent for selling software products in Europe, under an agreement which contained a Texas governing law and jurisdiction clause.

Fern commenced a claim in England for compensation under the Regulations and for unpaid commission under the agreement, obtaining permission to serve proceedings on Intergraph outside the jurisdiction.

Intergraph challenged the jurisdiction of the English Court. It argued that Fern had not met the necessary procedural requirements and that the parties had clearly chosen Texas for the governing law and jurisdiction of the contract.

Fern's position was that parties cannot contract out of relief provided by mandatory provisions of English law.

The Court was therefore required to resolve a conflict under English law between the procedural jurisdiction rules and the substantive mandatory provisions.



In order to found jurisdiction in England and serve out, Fern had to establish that:

- Its case fell within one of the jurisdiction gateways in CPR Part 6.
- It had a good arguable case on the merits.
- England was clearly the appropriate forum.



Fern argued that two gateways were open to it because it had a claim:

1. “made in respect of a contract where the contract ... is governed by English law”; and
2. “made in respect of a breach of contract committed within the jurisdiction”.

In respect of the first gateway, despite the governing law provision in the contract, Fern argued that because the claim was brought under mandatory provisions of the Regulations, English law governed. It relied on *Accentuate Ltd v As Intergraphra Inc*<sup>1</sup>. Intergraph argued *Accentuate* was wrong and should not be followed.

The Court decided against Fern, ruling that although a claim under the Regulations is governed by English law, in order to cross the threshold of the gateway, Fern had to show that the *contract* was governed by English law, not the claim. The Regulations did not form part of the contract. The contract was governed by Texan law.

In respect of the second gateway, the Court held that the sums claimed were not due “in respect of a breach of contract,” but under the Regulations. A failure to pay in England would be a breach committed in England but did not involve a breach of contract. Fern failed because its claim was under the Regulations.

**The Court admitted these conclusions were not reached comfortably. It meant that an English Court had to turn away a claim brought by an English agent under mandatory provisions of English law, designed to protect agents from contracts that derogate from mandatory provisions.**

LUKE ZADKOVICH, ASSOCIATE

The Court admitted these conclusions were not reached comfortably. It meant that an English Court had to turn away a claim brought by an English agent under mandatory provisions of English law, designed to protect agents from contracts that derogate from mandatory provisions.

This perhaps explains why the Court threw Fern a lifeline, giving it the opportunity to amend its case to include the tort jurisdiction gateway (because a breach of statutory duty can sometimes constitute a tort), before setting aside the order giving permission to serve out.

Further, the Court decided in Fern’s favour on the remaining procedural hurdles for service out, namely that Fern had a good arguable case on the merits and that England was clearly the appropriate forum.

However, the Court held that Fern could not establish that England was

the appropriate forum in which to bring its claim for unpaid commission because that was a claim under the agreement and fell within the contractual exclusive jurisdiction clause.

The Court’s unenviable task was to reconcile mandatory provisions of English law with the jurisdiction procedural rules which recognise parties’ choice of governing law and jurisdiction. It seems that although English courts will give effect to mandatory provisions of EU law, even if this requires departing from jurisdiction and choice of law agreements, claimants will need to prove that their claim falls squarely within one or more of the jurisdiction gateways in CPR Part 6.

For further information, please contact [Luke Zadkovich](#), Associate, on +44 (0) 207 264 8157, or [luke.zadkovich@hfw.com](mailto:luke.zadkovich@hfw.com), or your usual contact at HFW.

1 [2010] 2 All ER (Comm) 738



## **hfw** Conferences and events

### **C5 Fraud, Asset Tracing and Recovery Conference**

Florida

28–30 September 2014

Attending: Rick Brown

### **IBA Annual Conference**

Tokyo

19–24 October 2014

Presenting: Elinor Dautlich

Attending: Alexis Kyriakoulis

### **International Sanctions – practical advice on how to deal with EU, US and Swiss sanctions**

Lausanne

21 October 2014

Presenting: Daniel Martin and Sarah Hunt

### **ACICA and the Business Law Section of the Law Council of Australia: International Arbitration Conference**

Sydney

13 November 2014

Presenting: Damian Honey

### **HFW International Arbitration Seminar**

London

19 November 2014

### **Third Annual Kluwer Law – MENA International Arbitration Summit**

Dubai

4 February 2015

Attending: Damian Honey

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