London Litigation Update

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English Court Upholds Forum-Selection Clauses Even When Doing So Results in Proceedings in Multiple Forums: A recent appellate decision further clarifies the extent to which courts in England and Wales will adhere to the parties' forum-selection provisions even when doing so would result in proceedings in multiple jurisdictions pursuant to multiple agreements. In *Sebastian Holdings Inc v. Deutsche Bank AG* (2010) EWCA Civ 998, the parties Sebastian Holdings Inc ("SHI") and Deutsche Bank AG ("DB") entered into a series of agreements for trading in the financial markets. Most of the agreements provided for the jurisdiction of the English courts, although one agreement provided for the jurisdiction of New York courts (the "Brokerage Agreement"). Trading by DB resulted in losses of approximately $750 million to SHI, which consequently commenced proceedings against DB in the Supreme Court of New York to recover damages. DB then commenced proceedings in the Commercial Court in England to recover approximately $250 million in unpaid debts under two agreements from the series, both containing English jurisdiction clauses. SHI challenged the jurisdiction of the English court, arguing that looking at the *series* of agreements, the English court should not have jurisdiction.

At first instance, Mr. Justice Walker (the English trial court) found that DB was entitled to rely on the jurisdiction clauses in the two agreements and thus commence proceedings in England. He looked to the parties' early use of an International Swap Dealers' Association (ISDA) clause that allowed concurrent parallel proceedings in different courts, and found that subsequent agreements between the parties did nothing to change that clause.

The Court of Appeal agreed and dismissed the appeal. In doing so, it rejected SHI's argument that the agreement at the commercial center of the dispute should control, holding that such test would govern only if multiple agreements applicable to the dispute had conflicting jurisdictional provisions. There was no such conflict here.

The court found that SHI's suggested interpretation of the agreements would in fact frustrate the parties' intention: "[T]he wording of the clauses in thepremium because the debtors caused an event of default (i.e., filing for bankruptcy) to access insurance proceeds, not to side-step the no-call provision. The noteholders did, however, prevail on their alternative claim. Specifically, the court recognized a damages claim arising out of the debtors' breach of the no-call provision, notwithstanding that no-call provisions are generally unenforceable in chapter 11 cases. The court approximated damages based upon the difference between the current market interest rate and the contract interest rate. The difference was approximately 75 percent of the prepayment premium. It is unclear to what extent that holding was based on the court's finding that agreements shows that the parties plainly intended the Bank to be able to bring a claim under an agreement under which a debt was due in the jurisdiction provided for in that agreement . . . . The language of the agreements plainly envisages [claims being brought under different agreements in different jurisdictions and] it is entirely rational for businessmen to agree to this."

The court also rejected SHI's argument that the parties should allocate jurisdiction to the contract at the center of the parties' dispute, as opposed to the contract at the center of the DB's claim. The court concluded it was not possible to treat all the claims between DB and SHI and the defenses to those claims as giving rise to a single dispute that should be allocated to a *single* contract. Even if the defenses overlapped, the unambiguous language of the agreements plainly envisaged claims being brought under the different agreements for monies owed under different agreements.

English Court Rejects U.S.-Style Class Actions: A recent decision in the Court of Appeal involving British Airways ("BA") demonstrates once again the difficulty of bringing anything resembling a U.S.-style class action in an English court. The claimants, Emerald Supplies Limited and Southern Glass House Produce ("Emerald"), used air freight services from BA and other airlines to import flowers from Colombia and Kenya. The two companies had wanted to serve as claimants in a U.S.-style class action lawsuit on behalf of 200 companies claiming loss resulting from alleged price-fixing, and formulated their claim as a representative action under the Civil Procedure Rule 19.6. That rule permits a person to bring a claim on behalf of others who have "the same interest in a claim." The Court of Appeal ruled that the group proposed by Emerald was insufficiently defined because BA's liability to members of the representative group was the only feature connecting the claiming parties, and that liability remained to be proved. The court also found that the group did not share suitably common interests because BA might have differing defenses to the claims of differing members of the group. Because only the representative element of the suit was struck, the rest of the claim will proceed as normal, but other claims are now likely to be brought individually against BA.

This case serves to underscore the difficulty that consumers and other large groups face in bringing collective actions in the U.K., especially when the liability is not yet quantified. As Lord Justice Mummery acknowledged in the Court of Appeal, the need to remedy the issue of redress for price-fixing is "so pressing" that it is currently under review by the E.U. Commission, the U.K. Office of Fair Trading and the Civil Justice Council. Until any reforms are actually implemented, however, this decision emphasizes the difficulty in bringing class actions of this kind in the U.K.

U.K. Court Allows Reporters to Tweet Live Reports of Proceedings: On December 20, 2010, following the hearings of Wiki-Leaks founder Julian Assange in the U.K.'s High Court, England and Wales' most senior judge, the Lord Chief Justice, issued a landmark decision generally allowing journalists to "tweet" live reports of judicial proceedings. He concluded that the use of an "unobtrusive, handheld (and) virtually silent piece of modern equipment for the purposes of reporting proceedings to the outside world as they unfold in court is generally unlikely to interfere with the proper administration of justice."

Requests from the media will be made on a case-by-case basis, but the decision was welcomed by journalists, who will likely heed the stipulations that tweets be in the public interest and not impact witnesses or interfere with the process of conducting fair trials. It is widely acknowledged that this small stride into the 21st century will make legal proceedings more accessible and transparent to the public.