



## ENGLISH COURT OF APPEAL CONFIRMED TEST FOR DETERMINING JURISDICTIONAL CHALLENGES AND ADDRESSED ISSUES OF PRIVACY OF CONTRACT

### Background

In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others* [2019] EWCA Civ 10, the Court of Appeal confirmed the test for determining jurisdictional challenges comprises of a single test of three limbs, replacing the two-part test of ‘good arguable case’ and ‘better of the argument’. The Court of Appeal also considered issues of privity of contract and entire agreement clauses.

### Facts

The Claimant, Kaefer Aislamientos SA de CV (“**C**”) commenced proceedings against AMS Drilling Mexico SA de CV (“**D1**”), Atlantic Marine Services BV (“**D2**”), Atlantic Triburon 1 Pte Ltd (“**D3**”) and Ezion Holdings Limited (“**D4**”) seeking US\$2,353,794.42 in respect of refurbishment works carried out on an oil rig (“**Rig**”) under a contract dated 16 August 2013 (“**Contract**”).

The Rig was owned by D3, a wholly-owned subsidiary of D4. The Rig had been chartered to D2, and it was D2 who executed the Contract with C. The Contract incorporated D2’s standard terms and conditions and provided that invoices by C were to be addressed to D1. Clause 21 of the Contract’s terms and conditions specified English law as the governing law and that the ‘High Court in London’ had exclusive jurisdiction.

In reliance on CPR 6.33(2)(b)(v) and 6.33(2A), C served the Claim Form and Particulars of Claim out of the jurisdiction on D3 and D4 in Singapore. D3 and D4 applied to challenge the jurisdiction of the English Courts, on the basis that neither were a party to the Contract. C counter-argued that D3 and D4 were undisclosed principals to the Contract and that there was evidence to support this allegation.

### First Instance

Mr Peter Macdonald Eggers QC sitting as deputy Judge of the High Court granted the application.

The judge first considered the issue of undisclosed principals. He stated that the court had to be satisfied D3 authorised D2 to conclude the Contract and that D2 intended, at the time of the Contract, to contract with C on behalf of D3. The court concluded that the terms of the Contract were neutral on this point.

The court went on to consider the applicable test for determining jurisdictional challenges and held that it had two elements to it. Namely, C had the burden to prove it had:

- (i) a ‘good arguable case’; **and**
- (ii) the ‘better of the argument’ (i.e. relative plausibility).

In the circumstances, the first instance judge held that C had ‘a good arguable case’ that D3 was an undisclosed principal, but D3 had ‘the better of the argument’ that it was not. Since C could not fulfil the second limb of the test, the court had no jurisdiction over D3. In relation to D4, the court held that neither limb was fulfilled. C appealed.

## **Court of Appeal**

The Court of Appeal (comprising of Green LJ, Asplin LJ and Davis LJ), dismissed C’s appeal. It held that, although the lower court judge had been right in his overall approach, it had been incorrect in the formulation of the law on the applicable test for jurisdictional challenges.

In relation to the issue of undisclosed principals, the Court of Appeal disagreed with the lower court’s position and found that “*the entire agreement clause [was] evidence that the named contractual parties were to treat each other, and no one else, as the parties with liabilities and rights under the agreement and hence the persons to sue or be sued thereunder*” ([at 112]).

In terms of the jurisdictional test, the Court of Appeal considered the two recent UK Supreme Court authorities of Four Seasons Holdings Incorporated v Brownlie [2017] UKSC 80 and Goldman Sachs International v Novo Banco SA [2018] UKSC 34; and confirmed the correct test to consider was that set out by Lord Sumption, which comprised of a single test with three limbs:

- (i) The burden of proof is on the claimant to establish a ‘plausible evidential basis’ for asserting jurisdiction. Green LJ stated that this meant “*showing that the Claimant has the better argument*” (at [73]).
- (ii) If there is an issue of fact or some other reason for doubt, the court must resort to its “*judicial common sense and pragmatism*” (at [78]) and try to overcome the evidential difficulties inherent in interlocutory proceedings.
- (iii) If, notwithstanding common sense and pragmatism, the court is still unable to conclude who has the better argument, then, provided there is a plausible (albeit contested) basis for asserting that the English court enjoys jurisdiction, the claimant will have established that there is a ‘good arguable case’ that the English court enjoys jurisdiction. This is the “default” limb.

## **Comment**

Parties challenging or being challenged on jurisdictional grounds should be aware of the applicable test confirmed and clarified in the most recent case of Kaefer. Commercial parties should also be mindful of the identification of the parties in a contract, since an entire agreement clause will preclude undisclosed principals from having the rights and obligations therein. This case provides a welcome clarification of the law in the area.

If you would like to discuss these issues further, please contact Oliver Cain or Inês Santos at SCA ONTIER LLP or call us on 0207 183 1701.

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