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Interpreting an applicable law and jurisdiction clause

Al Mana Lifestyle Trading LLC and others (claimant/respondents) v United Fidelity Insurance Company PSC and others (defendant/appellants) (2023) EWCA Civ 61

IN BRIEF

The Court of Appeal held that the wording of an applicable law and jurisdiction clause did not give the English court jurisdiction over claims brought by the respondent claimants under the policies.

The issue on this appeal was whether the "Applicable Law and Jurisdiction" clause in a series of insurance policies issued by the appellant defendants contained an agreement which gave the English court jurisdiction over claims brought by the respondent claimants under the policies.

The clause in question provided as follows:

*"**APPLICABLE LAW AND JURISDICTION**:*

[1] In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued.

[2] Otherwise England and Wales UK Jurisdiction shall be applied,

[3] Under liability jurisdiction will be extended to worldwide excluding USA and Canada."

The numbers in square brackets were not included in the clause, but were added by the parties for ease of exposition. The comma at the end of the second sentence was clearly a typographical error and should be a full stop. Nothing turned on this.

The defendants' case was that, in each policy, the clause provided for the exclusive jurisdiction of the court of the country in which the policy was issued ("the local court"), with a fallback for English or Welsh jurisdiction in the event that the local court did not have or would not accept jurisdiction.

The claimants' primary case, accepted by the judge, was that the clause gave whichever party wished to bring a claim a free choice. It might bring proceedings either in the local court or in England. Alternatively, if that was wrong, the jurisdiction of the English court was available so long as the jurisdiction of the local court was not mandatory under the law of that country

The claim form was served on the defendants out of the jurisdiction in reliance on what the claimants contended was the agreement for English jurisdiction contained in the Applicable Law and Jurisdiction clause. The defendants' challenge to the jurisdiction came before a High Court Judge (the judge) who accepted the claimants' primary case that the clause gave whichever party wished to bring a claim a choice of bringing proceedings either in the local court or in England and Wales. In that sense the jurisdiction for which the clause provides was non-exclusive, although exclusive as against the rest of the world.

Allowing the appeal, a majority of the Court of Appeal held that the judge asked herself the right question, which was how the words of the contract would be understood by a reasonable policyholder. To some extent the answer to that question must depend upon the impression which the clause would convey to such a reader. The strong impression when this clause was first seen was that the first sentence contained the primary jurisdiction selected by the parties, with a fallback for English or Welsh jurisdiction in the second sentence. That impression had been confirmed rather than dispelled by the more analytical approach adopted in the parties' submissions.

The fact that the first sentence dealt not only with jurisdiction, but also with the governing law (i.e., the local law) and the need to apply local practices, while the second sentence was confined to jurisdiction, strongly suggested that the first sentence was intended to contain the primary rule, with the second sentence operating as a fallback. Thus, even when the second sentence applied and English jurisdiction was invoked, the English court would be required to apply the local law and practices. While it was possible, and not uncommon, for the English court to receive evidence of foreign law, and it would be equally possible for the English court to receive evidence about local practices, that was inevitably second best when compared with the application of local law by the local court, which could also be expected to be familiar with local practices. Just as the English courts had consistently held that "England is the best forum for the application of its own law" and that a choice of English law was itself a powerful factor showing that a choice of English jurisdiction was intended to be exclusive, so it must be accepted that a foreign court was the best forum for the application of its law and that a choice of foreign law was a powerful factor showing that a choice of foreign jurisdiction was intended to be mandatory.

The fact that the second sentence dealt only with jurisdiction, so that even in English proceedings local law and practices must be applied, demonstrated also that, in the context of this clause, the words "in accordance with" were intended to be mandatory.

All this was subject to the effect of the second sentence and, in particular, what was meant by the word "Otherwise", with which that sentence began. Obviously, the clause must be considered as a whole. While it might be that in some contexts "otherwise" could be regarded as equivalent to nothing more than "or", the context was important. If the parties had intended to provide for a free choice of jurisdiction for whichever party was to be the claimant (either the local court or England

and Wales), this was an odd way of doing so. In the context of a jurisdiction clause such as this, the word "Otherwise" was more appropriate to introduce a fallback.

The question then arose, in what circumstances was the fallback available – and in particular, did the clause lack any indication of what these circumstances were?

The fallback of England and Wales was available if the local court specified in the primary rule contained in the first sentence was not available – which in practice meant, if the local court did not or would not accept jurisdiction. This did not introduce a condition precedent which did not exist in the clause, or add words which were not there, but rather was the natural meaning of the word "Otherwise" in the context of this jurisdiction clause.

The claimant's argument sought to pose a dilemma: either there were no or very limited circumstances in which the local court would not accept jurisdiction, in which case the second sentence was otiose; or there were likely to be disputes about whether it would accept jurisdiction, leading to uncertainty for the claimant about where it should issue proceedings. In the court's judgment this was a false dilemma.

It might be that the circumstances in which the local court would not accept jurisdiction were very limited or, perhaps, even non-existent, but that was not an objection. There was no reason why parties should not agree to confer jurisdiction on one court, with another as a fallback in case the primary court chosen was not available, without troubling to investigate whether or in what circumstances the primary court would decline jurisdiction. Such an agreement gave the parties the comfort of knowing that if, for any reason, their primary choice was not available, there was an alternative with which they were comfortable, and was a sensible agreement to make.

Nor was it an objection that there might be uncertainty as to where proceedings should be commenced if there was a dispute about whether the local court would accept jurisdiction. In the first place, such a dispute was unlikely to arise. If the proposed defendant, which in most but not all cases would be the insurer, objected to being sued in the local court, which was itself unlikely, it would have no ground for complaint if the proposed claimant then sued in England. If the insurer was faced with a claim and wanted to avoid English jurisdiction, it could commence an action for a declaration of non-liability in its local court. For jurisdiction to be established in one court rather than another depending on the chance (or sometimes the cunning) of whichever party got in first seemed to be most unlikely to have been what the parties intended.

That left the supposed desirability of the English court as a single neutral forum. This was of very limited if any significance in circumstances where (as the judge recorded) neither side had suggested that the claimants would not be able to obtain a fair trial in the UAE, Qatar or Kuwait or that those local courts would not be equipped to handle the claims in an efficient, cost-effective and timely manner, and where the claimants themselves were part of a group of companies operating in those jurisdictions. In those circumstances the need for a neutral venue did not arise: there is no challenge to the independence or neutrality of the local courts and both parties could fairly be taken to have appreciated this when making their contracts.

The judge's construction of the clause was mistaken. The second sentence applied only when the jurisdiction of the local court was not available. In this case it was common ground that each of the local courts would accept jurisdiction over the claimants' claims. Accordingly, the second sentence of the law and jurisdiction clause in the policies did not give the English court jurisdiction over those claims.

The English court had no jurisdiction to try the claimants' claims and service of the Claim Form should be set aside.

The full judgment may be found at: Al Mana Lifestyle Trading LLC & Ors v United Fidelity Insurance Company PSC & Ors [2023] EWCA Civ 61 (31 January 2023) (bailii.org)