Neutral Citation Number: [2012] IEHC 230

The High Court

Commercial

Record number 2012/309S

Between

Orazio Grosso

plaintiff

and

Marco Samir Lamsouguer and AE Photonics GmbH

defendants

Judgment of Mr Justice Charleton delivered on the 14th day of June 2012

The defendants challenge the jurisdiction of the Irish courts to dispose of an action for damages based upon a share transfer agreement signed in Italy in Italian dated 5 November 2010. The agreement specifies on its face that the courts of Ireland are to have jurisdiction and to apply Italian law.

Law as to choice of jurisdiction

The matter is governed solely by Article 23 of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"). Under the heading of "Prorogation of Jurisdiction" this provides:

> *1. If the parties, one or more 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; or*
>
> *b. in a form which accords with practices which the parties have established between themselves; or*
>
> *c. in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.*

For the sake of completeness, brief reference to a number of other provisions of the Brussels I Regulation is appropriate. Article 2(1) provides the general rule that, in principle and subject to the Regulation, domicile shall dictate jurisdiction:

> *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*

Article 5, which is under the section headed "Special Jurisdiction", deals with the question of jurisdiction in particular situations such as contract and tort and provides the following:

> A person domiciled in a Member State may, in another Member State, be sued:
>
> *1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
>
> *(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
>
> *– in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
>
> *– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*
>
> *(c) if subparagraph (b) does not apply then subparagraph (a) applies;*
>
> *2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;*
>
> *3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;*
>
> *4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;*

> *6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;*
>
> *7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:*
>
> *(a) has been arrested to secure such payment, or*
>
> *(b) could have been so arrested, but bail or other security has been given;*

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Finally, of note is Article 6 which describes situations in which a defendant may be sued in another Member State, for example, where they are one of a number of defendants or a third party in an action taken in a different Member State. However, these provisions are subject to the terms of Article 23, to which reference has been made, and on which the key issues in the present dispute turn.

While contract doctrines such as unilateral mistake, mutual mistake or *non est factum* may be of some assistance in approaching an issue as to agreement on jurisdiction, the sole issue is whether a consensus has been reached between the parties which ousts the usual rule under the Brussels I Regulation that the domicile of the defendant generally determines jurisdiction in such matters. The *non est factum* rule provides that a defence may be available to a party who pleads that an agreement signed by that party is not binding where he proves that there is a radical difference between what that party signed and what he thought he was signing in terms of mistaking the general character of the agreement and where that party took all reasonable precautions in the circumstances to find out what the document was; see *AIB plc v Higgins & Ors* [2010] IEHC 219, *Saunders v Anglia Building Society* [1971] AC 1004 and *Tedcastle McCormack & Company Limited v McCrystal* (High Court, unreported, Morris P, 15 March 1999). Illiteracy and unfamiliarity with the language of a document are not to be equated with disability to enter a contract known to the other party, though in England and Wales such issues may cause equity to intervene to set aside an unconscionable bargain; *Schwartz v Barclays Bank PLC* (Court of Appeal of England and Wales, unreported, 21 June 1995).

Instead, the issue for this court is to determine the facts in order to decide whether the parties have bound themselves into a choice of jurisdiction in accordance with Article 23; *Leo Laboratories Ltd v Crompton BV* [2005] 2 IR 225 and Case C-420/97 *Leathertex v Bodetex* [1999] ECR 16747. Case C-24/76 *Estasis Salotti di Colzani Aimo e Gianmorio Colanzi v RUWA Polstereimaschinen GmbH* concerned a prior but identical statement of Article 23. The alleged agreement to choose a particular jurisdiction in that case was based on general conditions of sale common to all such contracts entered into by the defendant. The European Court of Justice ruled that the existence of a clause conferring jurisdiction on the courts of one member state was not, of itself, enough to determine the issue of jurisdiction. Instead the purpose of the Article is to ensure that the necessary consensus as to jurisdiction is established between the parties. Such must be clearly and precisely demonstrated. The mere fact that a clause conferring jurisdiction is printed among general conditions of one of the parties to a contract on the reverse of terms expressly agreed among the parties does not of itself satisfy the requirements of the Article, since that establishes no guarantee that the other party has really consented to a clause which waives the normal rules of jurisdiction. It would be otherwise where the text of a contract which contains an express reference to such general conditions including a clause conferring jurisdiction is signed by both parties. Indirect references, or references by implication, in pre-contract correspondence are not sufficient to establish a consensus as thereby no certainty is established that the clause conferring jurisdiction became part of the subject matter of the contract. Express reference together with actual communication of the condition as to jurisdiction is required since then such a clause may be checked by a party exercising reasonable care; see also *Dairygold Food Ingredients Limited v Teodoro Garcia SA* (High Court, unreported, MacMenamin J, 15 April 2011). To some extent the requirement of giving business efficacy to a commercial contract may assist in construing a contract with apparently conflicting indications as to the choice of jurisdiction for the resolution of disputes; *UBS AG & UBS Securities LLC v HSH Nordbank AG* [2009] EWCA Civ 585 at paragraph 84. In the neighbouring jurisdiction, a test is established in interlocutory motions where one party, or the other, seeks that the court should decline jurisdiction by requiring the party seeking to succeed on an application as to jurisdiction to show that it had a much better argument than the opposing party that, on the material available, the requirements as to form in Article 23 were met, thus establishing clearly and precisely that the clause conferring jurisdiction on the court was through a consensus of the parties; *Bols Distilleries BV v Superior Yacht Services Ltd (PC)* [2007] 1 WLR 12 at paragraph 28.

In *O'Connor & Anor v Masterwood (UK) Limited & ors* [2009] IESC 49, the issue was a set of general conditions of sale stating that "For any controversy arising from the present contract or connected to the same, the Court of Rimini shall have sole jurisdiction". These conditions were signed by the plaintiff, who contested jurisdiction personally and on behalf of the corporate plaintiff before the Supreme Court. Fennelly J set out the following statement of the law at paragraph 14:

> According to the case law of the Court of Justice, *"the requirements laid down by article 17 of the Convention must be strictly interpreted in so far as that article excludes both jurisdiction as determined by the general principle of the defendant's courts laid down in article 2 and the special jurisdictions provided for in articles 5 and six……"* (Case C-106/95 *MSG v Gravières Rhénanes* [1997] ECR I-911, paragraph 14). The Court was there referring to article 17 of the Brussels Convention, which has been replaced by Brussels I. Article 23 is in the same terms as the former Article 17. The Court explained that, *"by making the validity of any jurisdiction clause subject to the existence of an agreement between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether that clause conferring jurisdiction upon it was in fact the subject of consensus between the parties which must be clearly and precisely demonstrated…"*(ibid. paragraph 15).

Fennelly J also made it clear that a clause in a written contract which is signed by the parties is all that is required to properly establish a choice of jurisdiction in accordance with Article 23. At paragraph 19, he stated:

> It would be to overlook the obvious, if the court were to ignore the admitted signature of the first named plaintiff on a set of printed conditions containing a clear and express jurisdiction clause. It may well be that the first named plaintiff paid little attention to the terms of printed conditions. That is commonplace. However, people engaged in trade, certainly in international trade, must be taken to be aware that printed conditions contain clauses which can affect their rights. They choose to ignore them at their peril. That is why Article 23, section 1, subparagraph (c) refers to practices of which parties *"ought to have been aware."*

With that brief statement of the applicable law, I turn to the facts of this case.

Facts
The plaintiff is an Italian lawyer, by nationality and by training, who is also qualified in this jurisdiction and in the neighbouring kingdom. The first defendant is a German national and is a businessman. The second defendant is a company in which both the plaintiff and the first defendant had shares. From at least April of 2010, the plaintiff acted as a legal advisor in Italy to the two defendants. In order to formalise their relationship, in that month an agreement was drawn up in Italy in the English language appointing the plaintiff as the legal advisor to the defendants. That agreement makes references to such matters as the hourly rate at which fees for legal services will be charged by the plaintiff, how fees will be estimated and specific sums are set out for each category of proposed project in which the defendants were interested. These concerned the development of sites at which photovoltaic solar energy might be sourced. At the very end of this agreement there is a clause is to jurisdiction. That provides:

> The terms of our appointment (including these terms and conditions of engagement) are governed by and construed in accordance with the laws of Ireland and the courts of Italy shall have exclusive jurisdiction to deal with any dispute arising out of this agreement.

A great deal of material has been set out on affidavit as to the disputes between the parties, what languages they spoke and how fluently. I accept that the plaintiff has a perfect command of Italian and a good command of English. I accept that the first named defendant has a perfect command of his native language German and a very good command of English and a good working knowledge of Italian. The first named defendant lives in Germany, thus establishing jurisdiction in the ordinary way in that country, while the plaintiff lives in Italy although he also has a residence in Ireland.

It appears that by late 2010, the first and second named defendants had set up an equivalent undertaking to the second named defendant as a corporate entity within Italy. In consequence of whatever business relationship had developed between the parties, which does not now concern the court, the plaintiff had a shareholding in that Italian company. The parties agreed that this shareholding should be transferred for consideration to the second named defendant. This was apparently taking place against a background of disputes as to the appropriate level and quantum of fees due to the plaintiff. By letter dated 3 November 2010 an invoice was submitted by the plaintiff to the defendants, together with other comments at length. Shortly afterwards on 5 November 2010, the plaintiff and the first named defendant met in order to finalise the share transfer. By this stage it can be argued that relationships had become confused. The plaintiff was not acting as a lawyer giving legal advice to the first named defendant on that occasion. Instead the first named defendant was accompanied by an individual who was an accountant working within an Italian multi-disciplinary firm composing legal and other professionals. That individual had a perfect command of Italian. The plaintiff claims that he had been under the impression that all of the relevant documents would be drafted by the firm acting on behalf of the first and second named defendants. Upon being disabused of that notion he then drafted in Italian an agreement providing for the transfer of the shares. The multidisciplinary practice acting on behalf of the defendants had drafted in Italian for the benefit of all the parties, a notarised share transfer agreement. This latter agreement made no mention as to jurisdiction. This is dated 5 November 2010. The apparent purpose of this agreement is to make the transfer of the shares enforcible in Italian law and for this purpose notarisation is required. The agreement on which it is based is dated the same day and this is the document drafted by the plaintiff. This document was given by the plaintiff to the first named defendant and his adviser in circumstances where there was ample opportunity to read the document, to consider it and to suggest amendments prior to signature. The document is only two pages long and ends with the signatures of the plaintiff on his own behalf and of the first named defendant personally and on behalf of the second named defendant. Any cursory glance at that signature page would have alerted the defendants that a reference had been made to Dublin and Ireland. Clause 6, for which an English translation has been provided to the Court, reads: "Le parti concordano che il presente accordo e' regolato dall legge italiana ed in caso di controversia tra le parti il foro di competenza esclusiva e' quello di Dublino Irlanda." That is not so hard for anyone with any knowledge of Latin to understand, or of any language such as English where the relevant words are similar to those in Italian, much less anyone such as the first named defendant who speaks Italian. It means that in the case of a dispute, the issue is to be tried in accordance with Italian law in the courts of Ireland.

It is impossible to conclude that there was any vitiating factor undermining consent to jurisdiction, such as mistake or unawareness or fraud or concealment. These are not applicable legal rules but are instead a means of approaching the fundamental question as to whether jurisdiction was chosen and that must depend, in turn, on the reality of any notice given and the requirement of ordinary prudence in commerce. It is clear there was a choice of jurisdiction and that the parties concurred on that choice of jurisdiction. The party now complaining that such choice was more apparent than real could with the exercise of any reasonable care have raised the issue at the time. This is a signed contract. It is not a contract containing main terms with a choice of jurisdiction clause incorporated in a standard form to which specific reference was not made. The defendants signed this contract. This Court is obliged to give effect to the choice of jurisdiction.

Result
In the result, the motion for the court to decline jurisdiction must be refused.