Neutral Citation Number: [2017] EWHC 2397 (Comm)

Case No: CL-2017-000398

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane,
London EC4A 1NL

Date: 04/10/2017

Before :

MR. JUSTICE TEARE

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Between :

(1) DELL EMERGING MARKETS (EMEA) LIMITED	**Claimants**
(2) DELL SAS (A BODY CORPORATE)	
- and -	
IB MAROC.COM SA (A BODY CORPORATE)	**Defendant**

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Sara Masters QC and Andrew Feld (instructed by **Osborne Clarke**) for the **Claimants**
Romie Tager QC and Philip Kremen (instructed by **Cubism Law**) for the **Defendant**

Hearing date: 20 July 2017

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Judgment Approved

Mr. Justice Teare :

1. This is the judgment of the court upon the application by the First Claimant (to whom I shall refer as Dell UK) and by the Second Claimant (to whom I shall refer as Dell Maroc) for an order continuing the anti-suit injunction granted by Knowles J. on 30 June 2017. The purpose of the anti-suit injunction is to restrain the Defendant (to whom I shall refer as IB Maroc) from pursuing a claim commenced in the Commercial Court of Casablanca. The continuation of the injunction has been opposed by IB Maroc.

2. Dell UK and IB Maroc entered into a contract on or about 15 February 2010 in the form of the Dell International Distributor Agreement ("the IDA") pursuant to which IB Maroc was granted the right to market and distribute Dell products and services in Morocco. Clause 31 provided as follows:

> "Any dispute arising out of or in connection with this contract, including but not limited to any question regarding its existence formation performance interpretation validity or termination, shall be handled through the English courts……."

3. The IDA refers to affiliates of Dell UK, of whom Dell Maroc is one. However, such affiliates were not described as a party to the IDA and clause 13.4 provided (i) that it was not intended that any third party may enforce the IDA and (ii) that accordingly the terms of the Contracts (Third Parties) Act 1999 did not apply to the IDA.

4. In or about August 2014 IB Maroc entered into a contract with Maroc Telecom SA to provide it with an integrated cloud computing solution. To perform its obligations under that contract IB Maroc needed to utilise the services of Dell UK under the IDA. A "Work Order" was agreed, which incorporated the terms of the IDA.

5. In late 2015 disputes emerged between Maroc Telecom and IB Maroc. In consequence it appears that IB Maroc wished to make a claim against a company described as Dell Morocco. Thus by letter dated 13 November 2015 from a Casablanca advocate on behalf of IB Maroc addressed to Dell Maroc notice of a claim was given. It was stated that IB Maroc had concluded a contract to supply a Public Cloud and to realise this contract IB Maroc had "subcontracted with Dell Morocco". It was further stated that Maroc Telecom had served notice of default on IB Maroc and that unless Dell Maroc remedied the alleged defaults legal action would be taken. On 3 December 2015 Dell Maroc replied to the advocate, commenting upon each of the alleged defaults. It would appear that the letter was written upon the assumption that Dell Maroc was party to the IDA. It has however been stated on behalf of Dell UK that the letter was written on behalf of Dell UK but, due to an administrative error, the letter was sent on Dell Maroc's headed paper. The same letter was sent to IB Maroc on 9 December 2015.

6. On 31 March 2017 IB Maroc issued proceedings before the Commercial Court in Casablanca against "Dell Company" with whom it was said to have entered into an agreement. The agreement enclosed with the claim was the Work Order. It was alleged that Dell Company had breached the contract and compensation was sought.

7. On 2 May 2017 Dell UK wrote pointing out that Dell Maroc was not a party to the IDA or Work Order and that pursuant to clause 31 of the IDA any disputes were subject to the exclusive jurisdiction of the English courts. On 4 May 2017 Dell Maroc filed a Response Memorandum with the court in Casablanca in which it said that the claim was inadmissible because Dell Maroc was not a party to the IDA or Work Order.

8. On 25 May 2017 IB Maroc filed a Rejoinder against Dell UK and Dell Maroc. It was made clear that the "Dell Company" against whom the action was brought was intended to be Dell UK but it was also made clear that IB Maroc intended to bring a claim against Dell Maroc on the grounds that it was "jointly" liable. It was said that Dell Maroc had been "entrusted" by Dell UK "to complete the deal".

9. It is now accepted that Dell UK is entitled to an injunction restraining IB Maroc from pursuing a claim against it other than before the English courts. What is in dispute is whether Dell UK and Dell Maroc are entitled to an injunction restraining IB Maroc from pursuing a claim against Dell Maroc other than before the English courts. It was submitted by Miss Masters QC on behalf of Dell UK and Dell Maroc that they are so entitled. Mr. Tager QC on behalf of IB Maroc submitted that they are not so entitled.

10. Miss Masters relied upon two arguments. One is described as the "quasi-contractual" argument pursuant to which a contractual claim cannot be brought by a person without respecting the exclusive jurisdiction clause contained in the contract, even if those seeking the injunction deny the existence of the contract on which the claim is based. This remedy is said to be available to both Dell UK and Dell Maroc. The other is described as the contractual claim which, as its description suggests, is more straight forward. In essence it is said that the IDA obliged IB Maroc not to bring claims against an affiliate of Dell UK other than before the English courts. This remedy is only available to Dell UK.

11. I shall deal with the contractual claim first. It involves a question of construction of the IDA. The question is whether the agreement in clause 31 that disputes arising out of or in connection with the IDA shall be handled through the English courts extended not only to claims which IB Maroc wished to bring against Dell UK but extended also to claims which IB Maroc wished to bring against affiliates of Dell UK such as Dell Maroc.

12. Miss Masters submitted that it did; the words were wide enough to include such claims and such a construction would encourage "one stop adjudication" which is what the parties as reasonable businessmen must have intended. She relied in particular on the observations of Lord Scott in *Donohue v Armco* [2002] 1 Lloyd's Law Reports 425 at paragraph 61 where he said that an exclusive jurisdiction clause, depending upon its terms, can be broken if any proceedings within the scope of the clause are commenced in a foreign jurisdiction, whether or not the person entitled to the protection of the clause is joined as a defendant to the proceedings. This approach was followed in *Winnetka Trading Corporation v Julius Baer International* [2009] Bus LR 1006 at paragraphs 27-29 by Norris J.

13. Mr. Tager submitted that clause 31 did not extend to claims brought by IB Maroc against affiliates of Dell UK. He pointed out that although several clauses of the IDA referred to affiliates clause 13.4 stated in uncompromising terms that third parties could not enforce the IDA and that the Contracts (Rights of Third Parties) did not apply. Thus he submitted that there was a clear intention that affiliates could not enforce the IDA. That submission appeared to me to be misplaced because the question is not whether an affiliate can enforce the IDA (it was accepted by Miss Masters that it could not) but whether clause 31 contained a promise made by IB Maroc to Dell UK that if it sued an affiliate of Dell UK it would only do so in the English courts. In that regard Mr. Tager relied upon, in particular, *Credit Suisse First Boston v MLC (Bermuda) Limited* [1999] 1 Lloyd's Reports 767 and *Morgan Stanley v China Haisheng Juice Holdings* [2010] 1 Lloyd's Reports 265. In both of those cases it was held that an exclusive jurisdiction did not apply to disputes between persons other than the parties to the contract in which the exclusive jurisdiction clause was found.

14. The question is one of construction and the terms of the IDA are different from the contracts considered in any of the above cases. The court must construe the terms of the IDA.

15. The terms of clause 31 refer to the English courts "any dispute arising out of or in connection with this contract". That phrase could refer to disputes between the contracting parties alone but it is wide enough to refer to disputes between IB Maroc

and an affiliate of Dell UK so long as such disputes arise out of or in connection with the IDA. It is possible to envisage such claims because clause 2.5 contemplates that affiliates of Dell UK may provide products. On the other hand it may be said that the natural construction of an exclusive jurisdiction clause is that it concerns only disputes between the parties to the underlying contract.

16. Clause 27 of the IDA is entitled Limitation of Actions and provides:

> "No claim may be brought by Distributor [IB Maroc] against Dell or any of its Affiliates or licensors pursuant to this Agreement unless such claim is brought within (1) year of the date on which the cause of action accrued ("Limitation Period") and any claim which is made shall, if it has not been previously satisfied, settled or withdrawn, be deemed to have been withdrawn and shall become fully barred and unenforceable on the expiry of the Limitation Period."

17. This clause therefore expressly contemplates claims by IB Maroc against an affiliate of Dell UK and requires that any such claim be brought within the one year limitation period. That being so, the natural construction of clause 31, in the context of the IDA which includes 27, is that the phrase "any dispute arising out of or in connection with this contract" must have been intended by the parties, Dell UK and IB Maroc, to include claims by IB Maroc against an affiliate of Dell UK. As reasonable businessmen the parties cannot have intended that claims against Dell UK arising out of the contract were to be "handled through the English courts" but that clams against an affiliate of Dell UK arising out of the contract were to be handled though other courts.

18. I have therefore concluded that clause 31 on its true construction encompassed disputes between IB Maroc and Dell Maroc which arose in connection with the IDA.

19. The claim brought against Dell Maroc in the Commercial Court of Casablanca is brought on the basis (as stated in the Rejoinder) that Dell Maroc "had an obligation towards the plaintiff to complete the Cloud Public project together with [Dell UK] pursuant to the agreement mentioned in the statement of claim". Dell Maroc is sued "jointly" with Dell UK. That appears to be a clear statement that the liability sought to be enforced against Dell Maroc is contractual in nature. Indeed, Mr. Maddah of the Casablanca Bar has given evidence (see paragraph 14 of his statement) that the action against Dell Maroc is "quasi-contractual in nature and is based on the failure to perform and the delay in the delivery of the services which it was incumbent on it to provide under the Cloud Public Project." He refers to certain sections of the Code of Obligations and Contracts of 1913 which refer to joint liability. Mr. Moustaid, another member of the Casablanca Bar, has exhibited copies of those sections and expressed the opinion that they assume the existence of commercial obligations arising from a contract. He disputes the description of "quasi-contractual" and states his opinion that the claim is inherently connected to the contractual relationship between IB Maroc and Dell UK.

20. This court must determine, for the purposes of the application before it, whether the claim brought by IB Maroc against Dell Maroc "arises out of or in connection with" the IDA. In my judgment it does. I reach that conclusion because of the explanation of

the claim in the Rejoinder and in Mr. Maddah's statement. Mr. Moustaid's opinion supports that conclusion also.

21. It therefore follows that the bringing of the claim by IB Maroc against Dell Maroc in the Commercial Court of Casablanca was a breach of clause 31 of the IDA. It was not suggested that Dell UK did not have a sufficient interest to obtain an injunction to enforce clause 31 of the IDA where the offending claim was brought against Dell Maroc. It plainly has such an interest. The claim against Dell UK is to be brought in England and there is therefore obvious good sense in the claim against Dell Maroc, which arises out of the very same facts, also being brought in England. It would be oppressive and vexatious if it were not. Anti-suit injunctions based upon an exclusive jurisdiction clause are granted unless there are strong reasons not to do so (see *The Angelic Grace* [1995] 1 Lloyd's Reports 87). It was not suggested that there were any such reasons in the present case. It follows that Dell UK is entitled to the continuation of the anti-suit injunction because the proceedings brought against Dell Maroc are in breach of the exclusive jurisdiction clause in the IDA.

22. I shall now consider Miss Masters' alternative "quasi-contractual" basis for continuing the injunction. Since Dell UK has a contractual basis for the injunction this issue needs only to be considered with regard to Dell Maroc. Dell Maroc denies that it was party to the IDA and denies that it has any obligations under the IDA. However, IB Maroc has brought a claim against Dell Maroc seeking damages for breach of what appear to be obligations allegedly owed to IB Maroc under the IDA to complete the Cloud project. The question is whether IB Maroc can bring such a claim whilst ignoring clause 31 of the IDA and whether Dell Maroc can obtain an injunction restraining it from doing so. Since Dell Maroc claims not to be a party to the IDA the injunction cannot be contractual but can be described (as Mr. Rafael has done in his book *The Anti-Suit Injunction* at paragraph 10.23.) as "quasi-contractual".

23. The ability to obtain an injunction of this nature is demonstrated by the judgment of David Steel J. in *Sea Premium v Sea Consortium* 11 April 2001 (unreported). In that case a vessel which had been under charter was purchased by new owners. The charterers said that the new owners were party to or bound to respect the charterparty (pursuant to the law of Dubai where the vessel had been arrested) but that was denied by the new owners. The charterers commenced an action against the new owners in Dubai. The charterparty provided for arbitration in London and the new owners sought an anti-suit injunction restraining the Dubai proceedings. David Steel J. granted the injunction. He said this at p.22:

> "The English court is entitled, using English law concepts, to analyse the nature of the claim being brought by the respondents in Dubai. As I have already indicated, the claim asserted by the respondents is by way of a quasi-contractual claim for damages for failing to abide by the terms of the charterparty. In short, it is a claim made against the owners under the charter, albeit the owners are not a party to the charter either by way of novation or assignment. Because the charterparty is governed by English law, the question whether the charterers are bound by the arbitration clause is also governed by English law. In my judgment, the charterers are bound by the clause vis-à-vis any claim arising between both

> owners and the charterers. The new owners, whom the charterers contend are bound to abide by the terms of the charter, are accordingly entitled to prevent the charterers from pursuing the Dubai proceedings in breach of the arbitration clause. "

24. Thus the new owners, whilst denying any liability to the charterers, were able to obtain an injunction restraining the charterers from bringing what was, in English law terms, a contractual claim whilst ignoring the clause in the charterparty which referred disputes to arbitration in London. The basis of such an injunction must be that it is inequitable or oppressive and vexatious for a charterer to bring a contractual claim without respecting the arbitration clause in the charterparty, notwithstanding that the party seeking the injunction denied that it was bound by the charterparty.

25. In *The Hornbay* [2006] 2 Lloyd's Reports 44 the consignees of a cargo brought proceedings in Columbia against the ship's agents. The claim was founded upon an alleged breach of the contract of carriage. That contract provided for the exclusive jurisdiction of the English courts. The shipowners sought an anti-suit injunction from the English court restraining the proceedings in Columbia. Morison J. granted the injunction. He said as follows:

> "28. The position of Maritrans under Colombian law, as I understand it, is that it is a local "target" for claims in respect of contracts of carriage for the transport of goods into Colombia but that its liability derives from the contract of carriage made with the principal. That contract of carriage is evidenced by the bill of lading, with all its terms and conditions. The relationship between Maritrans and Horn Linie in respect of this contract of carriage is governed by English law, as I see it. It is commercially unreal not to recognise that Maritrans will be entitled to an indemnity from Horn Linie and that an action against the agent is, effectively, an action against Horn Linie. I do not understand the argument that in some way the contract upon which Maritrans is sued does not confer on them the benefit of the jurisdiction clause. If, as a matter of Colombian law Maritrans are liable on the contract that cannot by itself affect the terms of the contract. What is causing the conflict is not the law which permits Maritrans to be sued on the contract but rather the provisions of Colombian law which are said to override the will of the parties to have their relationship governed by English law in proceedings brought in England. In other words, I can see no material distinction between this case and the OT Line case."
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> …….
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> 32. Because ACE are intent on seeking to avoid the parties' contractual bargain by commencing proceedings in Colombia, it seems to me that an anti-suit injunction is an appropriate form of relief. By granting the injunction the interests of justice are best served. The parties would be given back the

> forum of their choice and their choice of law. ACE will suffer no prejudice beyond the fact that their commercial position may be worse as a result of the court giving effect to the parties' bargain. There is no good reason not to hold the parties to the bargain they have made. ACE is readily amenable to this court's jurisdiction."

26. I am not sure that the decision in this case supports the existence of the "quasi-contractual" jurisdiction to grant an injunction because the injunction was obtained by the shipowners against the consignees both of whom were bound by the contract of carriage. The consignees' action against the shipowners' agents was a breach of their obligation to bring proceedings for breach of the contract of carriage in the English courts. The shipowners obtained an injunction restraining that breach of contract.

27. The matter was however the subject of an *obiter dictum* by Popplewell J. in *The MD Gemini* [2012] 2 Lloyd's reports 672. In that case bunker suppliers brought proceedings in Florida and in the Marshall Islands against the shipowners seeking the price of bunkers supplied to the vessel. The shipowners denied that they were liable (they said the charterers were liable) but sought an anti-suit injunction from the English court restraining the proceedings in Florida and the Marshall Islands on the grounds that the contract on which the bunker suppliers sued contained an exclusive jurisdiction clause in favour of the English courts. It was held that it did not but Popplewell J. said this:

> "I should observe at the outset that, of course, the owners say they are not party to any agreement. They are therefore not in a position to assert in these proceedings that any proceedings brought are a breach of a bargain which was made with them. However, I am prepared to assume, although the matter was not fully argued before me, that they are entitled to be put in the same position as if they were parties to the contract containing clause 19.1 notwithstanding their averment that they are not a party. It seems to me that may be so because generally, it would be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contains as exclusive jurisdiction clause in favour of England to seek to enforce their rights under that contract without giving effect to the jurisdiction clause which is part and parcel of that contract notwithstanding that the party being sued maintains that it is a not a party to that contact."

28. Popplewell J.'s opinion is thus to the same effect as that of David Steel J.

29. I was also referred to *The Yusuf Cepnioglu* [2016] 1 Lloyd's Reports 641. In that case charterers of a vessel entered with a P&I Club had the benefit of a "direct action" statute in Turkey which enabled it to sue the P&I Club as the owner's insurers. The owner's entry in the P&I Club contained a London arbitration clause and so the P&I Club sought an anti-suit injunction. Such an injunction was granted. The claim in Turkey was, in English law, a contractual claim and that being so Longmore LJ said at paragraph 21:

> "…it must follow that the charterers are bound to accept that their claim is governed by English law and must be arbitrated in London. The charterers' proposed substantive Turkish proceedings would be a contravention of that obligation."

30. Longmore LJ went on to hold that it is irrelevant that the charterers were not party to the contract containing the arbitration clause; see paragraph 24. The reason was, as had been said in an earlier case, that equity requires the third party to recognise the clause; see paragraph 33.

31. In *The Yusuf Cepnioglu* the injunction claimant was party to the contract (the P&I Club) and the injunction respondent (the charterers) were not. In the present case the injunction claimant (Dell Maroc) is the non-party and the injunction respondent (IB Maroc) is party to the IDA. Thus the circumstances of the two cases are or may be materially different and so one should be cautious before applying the approach of Longmore LJ to the present case.

32. Those were the authorities to which I was referred in support of the "quasi-contractual" basis for granting Dell Maroc an anti-suit injunction. Mr. Tager accepted that the claim being advanced by IB Maroc was to be classified in English law terms as contractual in nature. But he submitted that none of the cases concerned an injunction respondent in the same position as IB Maroc. Thus he said that IB Maroc had not sought to sue the agent of a contracting party as a device to avoid the jurisdiction clause as was the case in *The Hornbay*. Instead the liability of Dell Maroc was a liability which stood alongside that of Dell UK from the beginning.

33. I have accepted, in my review of the authorities, that the facts of *The Hornbay* and also *The Yusuf Cepnioglu* are not, or may not be, comparable to the present case. However, the facts of *Sea Premium* and the (assumed) facts of *The MD Gemini* would appear to be comparable. In *Sea Premium* the injunction claimant was the new shipowner who claimed not to be party to the contract on which the charterer was suing. In *The MD Gemini* the injunction claimant was the shipowner who claimed not to be a party to the bunker contract on which the bunker suppliers were suing. David Steel J. held in *Sea Premium* that the new owners could nevertheless enforce the arbitration clause in the charterparty because the charterers were seeking to bring a contractual claim under the charter. Popplewell J. in *The MD Gemini* considered that if the bunker contract had contained an exclusive jurisdiction the shipowner could enforce it because the bunker suppliers were seeking to bring a claim under that contract. Applying the decision in *Sea Premium* and the *obiter dictum* in *The MD Gemini* to the present case has the result that Dell Maroc, although it denies being party to the IDA, can enforce the exclusive jurisdiction clause in the IDA because IB Maroc is seeking to bring a claim under that contract.

34. I respectfully agree with the approach of David Steel J. in *Sea Premium* and with the *obiter dictum* of Popplewell J. in *The MD Gemini*. The reason why the jurisdiction clause can be enforced by an injunction in those cases and in the present case is that it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in the *Yusuf Cepinioglu* is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept

that its claim must be "handled through the English courts" as required by the contract in question. As with the claim by Dell UK it is accepted that there is no strong reason for not granting the injunction sought.

35. For these reasons I have concluded that the claims of both Dell UK and Dell Maroc for an anti-suit injunction are sound and that the injunction should be continued.