International Benefit Schemes and European Employees

Summary

The English Court of Appeal has made a ruling which has significant implications for all international employers operating international benefit schemes. It concerns European laws which require employees living in England to be sued in England, no matter where their employer is based in the world and even where the incentive scheme is in a free-standing document governed by a foreign jurisdiction (here, the USA).

We have seen many international benefit schemes containing provisions which are similar to those in this case. We are therefore sending out a more detailed email alert given the importance which we attach to this decision.

Samengo-Turner and Others v J & H Marsh & McLennan (Services) Limited and Others

Three individuals working in England left to join a competitor. At the time they resigned, their employer was Marsh Services Limited (MSL). They worked for Guy Carpenter (GC). The overall holding company for both MSL and GC was Marsh & McLennan Companies Inc (MMC).

MMC had a global incentive scheme in which all three individuals participated, under which awards of stock in MMC were made to key employees. The scheme was governed by New York law with exclusive jurisdiction through the New York courts. Any award under the scheme was subject to cancellation and repayment if a departing individual engaged in detrimental activity. Moreover, there were covenants prohibiting competition and an obligation to provide information about competitive activity.

Proceedings were started in New York by MMC and GC seeking repayment of bonus awards paid to the three individuals on the basis of suspected detrimental activity. The claim also looked to enforce the clause requiring disclosure of information by the individuals. The New York court accepted it had jurisdiction to resolve matters and made orders requiring the deposition of the three individuals.

The English employees brought proceedings in London to stop the New York proceedings. They successfully obtained an "anti-suit" injunction which prohibited the New York court from continuing to hear the case brought by MMC and GC. The Court of Appeal decided that the employees had to be sued in England.

The basis for the decision

The three individuals relied on the Brussels Regulations, which apply to countries in the European Union plus Iceland, Switzerland and Norway. Broadly speaking, under these Regulations an employer can only sue an employee in relation to the employment contract in the country where the employee lives. The three individuals had to establish two separate points: first that the incentive scheme related to their contracts of employment and secondly, that they were being sued by their employer.

On the first point, the Court of Appeal agreed that the US incentive scheme related to their UK employment contract, even though the scheme was in a separate document, administered by MMC in New York and granting stock in MMC, which was not the individual's employer. The Court was influenced by the fact that the scheme expressly stated that it was an incentive for the individual to remain in employment, certain rights under the scheme being dependent on the individual remaining in employment.

The second point was more difficult, namely whether the proceedings in New York (which were brought by MMC and GC, but not MSL, the UK employer) were brought by the employer of the individuals. If this was shown, then the Brussels Regulations would require those proceedings to be in the UK.

Here, the Court of Appeal took an expansive view and decided that MMC and GC were each "an employer" of the individuals for the purpose of the Regulations. The Court took the view that rights to enforce the stock agreement would normally be given to the employer. Since MMC and GC had the right under the rules of the scheme to enforce its rules, this was evidence that they were to be viewed as the employer. The Court was keen to avoid multiple proceedings in both England and New York. Moreover, the English courts had the closest connection with the dispute given that the dispute concerned events which had occurred in England during English employment.

As a result, the English court granted an injunction in favour of the individuals prohibiting the New York court from continuing with the New York proceedings.

Consequences for employers

This case is of considerable importance to all international employers. The provisions in the incentive scheme in this case are not unusual in international groups of companies whose parent is based outside England. There was no suggestion that the Court felt that the scheme itself was unfair or unjust in any way, but it was prepared to uphold the principle that individuals living in England should be sued in England. It was prepared to take an unusually wide approach to the concept of "employer" to reach this conclusion.

Many employers have benefit schemes which are administered to apply in more than one country. This is a standard means of providing shared economic interest amongst senior executives in an international group. Typically, the employer group will want to have the policy administered consistently from one country in accordance with the rules of a scheme

governed by the laws of that country. Most incentive schemes will also impose obligations on the recipients of the benefits, in the way MMC did here.

This decision, in our view, will make it unlikely that an employer can achieve consistency across such a scheme. If the rules of a scheme impose obligations on the individuals, as a condition of participation, then those rules will very probably have to be enforced in the country in which the employee lives, if he or she lives in Europe. This may also have a material effect on the extent of those obligations.

There are three ways in which this may be the case. First, individuals may be given mandatory protection by the rules of the particular European country in which they are to be sued, which will supersede any contractual arrangements. Secondly, the court of one country may not be prepared to approach a clause in the same way, particularly if it is drafted in an unfamiliar manner or a foreign language. Thirdly, procedural rights available in the country familiar to the employer's group may be unavailable in the country where the employee has to be sued.

Restrictive covenants are an obvious example of this impact. Rules relating to post-termination restrictions vary hugely from country to country even within Europe. Some countries permit covenants to be re-written by a court. Others apply a policy striking out entire clauses if part of the clause is too wide. In some European countries, covenants must be paid for during the operative period. In others, payment is unnecessary. Our experience of enforcing foreign law restrictive covenants in the UK tells us that, whilst English courts will respect those covenants, they will not enforce them if they are contrary to public policy in this country. It will therefore be necessary to have a set of covenants applicable for each European country in which individuals are likely to be living and working for any appreciable time. Secondly, clauses granting jurisdiction to one particular country (usually the one in which the parent company is operating) cannot be relied upon and could indeed be counter-productive if the employer tries to disregard the jurisdiction clause.

Conclusion

Any employer with a benefit scheme administered in one country, which applies to individuals in Europe needs to take note of this case. The Brussels Regulations apply throughout Europe. Employers who impose obligations on employees in return for membership of the scheme, will need to amend the scheme, to allow for individuals to be sued in the country where they live and to make sure the obligations will be enforceable in that country. Otherwise, there is the worrying prospect of individuals taking the money from an international benefit scheme without the employer being capable of holding them to the obligations imposed in return.

London Employment Group
Mayer Brown International LLP
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BERLIN
Potsdamer Platz 8
10117 Berlin
Telephone: +49 (0)30 20 67 30 0

BRUSSELS
Avenue des Arts 52
Brussels 1000
Belgium
Telephone: + 32 (0)2 502 5517

CHARLOTTE
Bank of America Corporate Center
214 North Tryon Street
Suite 3800
Charlotte
North Carolina 28202-2137, USA
Telephone: + 1 704 444 3500

CHICAGO
Hyatt Center
71 South Wacker Drive
Chicago
Illinois 60603-3441, USA
Telephone: + 1 312 782 0600

COLOGNE
KölnTurm, Im Mediapark 8
50670 Cologne
Germany
Telephone: + 49 221 5771 100

FRANKFURT
Bockenheimer Landstrasse 98-100
60323 Frankfurt/Main
Germany
Telephone: + 49 69 79410

HONG KONG
7th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Telephone: + 852 3763 7000

HOUSTON
700 Louisiana Street
Suite 3400
Houston
Texas 77002-2730, USA
Telephone: + 1 713 238 3000

LONDON
11 Pilgrim Street,
London EC4V 6RW
United Kingdom
Telephone: + 44 (0)20 7248 4282

31st Floor
30 St Mary Axe
London EC3A 8EP
United Kingdom
Telephone: +44 (0)20 7398 4600

LOS ANGELES
350 South Grand Avenue
25th Floor
Los Angeles
California 90071-1503, USA
Telephone: + 1 213 229 9500

NEW YORK
1675 Broadway
New York
New York 10019-5820, USA
Telephone: + 1 212 506 2500

PALO ALTO
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto
California 94306-2112, USA
Telephone: + 1 650 331 2000

PARIS
20 Avenue Hoche
75008 Paris
France
Telephone: + 33 1 5353 4343

SÃO PAULO
Av. Brigadeiro Faria Lima,
3729-5° andares
Itaim Bibi
São Paulo, SP 04538-905
Brazil
Telephone: +55 11 3443 6200

WASHINGTON DC
1909 K Street N.W.
Washington D.C. 20006-1101, USA
Telephone: + 1 202 263 3000

Representative office

BEIJING
MBP Consulting Limited LLC
Tower W3, Oriental Plaza
Suite 1505, 15/F
1 East Chang An Avenue
Dongcheng District
Beijing 100738
China
Telephone: +86 10 8518 198

Independent alliance law firms

Jauregui, Navarrete y Nader S.C.

MEXICO
Jauregui, Navarrete y Nader S.C.
Abogados Torre Arcos
Paseo de los Tamarindos No. 400-B
Col. Bosques de las Lomas
05120 Mexico D.F.
Telephone: + 5255 5267 4500

Ramón & Cajal - principal offices

MADRID
Ramón & Cajal
Paseo de la Castellana, 4
28046 Madrid
Spain
Telephone: +34 91 576 19 00

BARCELONA
Ramón & Cajal
Avda. Diagonal 613, 4a,
08034 Barcelona
Spain
Telephone: +34 93 494 74 82

Tonucci & Partners - principal offices

ROME
Tonucci & Partners
Via Principessa Clotilde, 7
00196, Roma
Italy
Telephone: +39 06 362 271

MILAN
Tonucci & Partners
20121 Milan
Via dei Bossi, 4
Italy
Telephone: +39 02 859 191

Additional offices:
Padua, Florence, Bucharest, Tirana

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London Office: 11 Pilgrim Street, London EC4V 6RW Tel:+44(0)20 7248 4282 Fax:+44(0)20 7248 2009
BERLIN BRUSSELS CHARLOTTE CHICAGO COLOGNE FRANKFURT HONG KONG HOUSTON LONDON LOS ANGELES NEW YORK PALO ALTO PARIS SÃO PAULO WASHINGTON DC
Independent correspondent: MEXICO CITY Alliance law firm: ITALY Representative office: BEIJING

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