

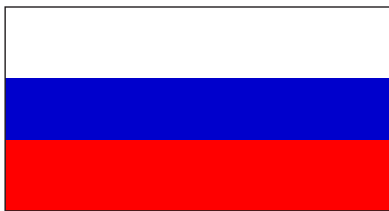
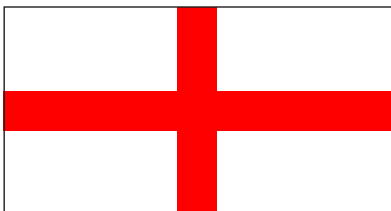
Cross-border issues and disputes: Jurisdiction, forum selection and parallel proceedings; and Governing law

English Commercial Court decision on inter-related issues of governing law and jurisdiction:

Permission to serve English proceedings out of the jurisdiction on a Russian Defendant had been correctly granted to a Cayman Claimant, and the proceedings should continue in the English Courts. That was because:

- applying the Rome Convention, there was a “good arguable case” that English law governed the contract of guarantee between them - so a “jurisdiction gateway” was established under the English Civil Procedure Rules; and
- England was the most appropriate forum (“*forum conveniens*”) for the dispute.

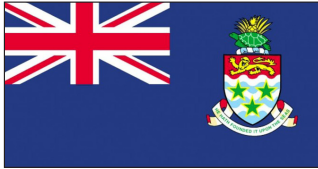
The scenario:

RUSSIAN PROCEEDINGS (1st)	ENGLISH PROCEEDINGS (2nd) CPR 6BPD para 3.1(6)(c) + <i>forum conveniens</i>
	
<p>The parties: JFC Group Ltd (Russian) v. Star Reefers Pool Inc (Cayman)</p>	<p>The parties: Star Reefers Pool Inc (Cayman) v. JFC Group Ltd (Russian)</p>
<p>Nature of both proceedings:</p>	<p>Contractual</p>
<p>Jurisdiction/arbitration clause:</p>	<p>None (despite a London arbitration clause in the underlying charterparty contracts)</p>
<p>Alternative jurisdiction:</p>	<p>Non-EU/Lugano country (Russia)</p>
<p>Parallel proceedings?</p>	<p>Yes (although the English Court granted an anti-suit injunction restraining JFC Group Ltd from continuing the prior Russian proceedings)</p>

CONTRACTS/PARTIES:

Charterparties:

Owner:
Star Reefers Pool Inc
(Cayman)



Charterer:
Kalistad Ltd
(Cypriot)



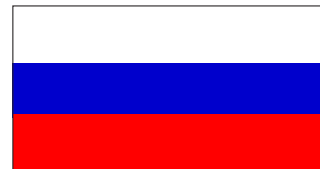
Governing law clause: English law

Guarantees (re: the performance of the obligations of the charterer):

Owner:
Star Reefers Pool Inc
(Cayman)



Guarantor:
JFC Group Ltd
(Russian)



Governing law clause: None

Summary

THE CASE:

The English Commercial Court recently handed down an interesting Judgment in *Star Reefers Pool Inc v JFC Group Ltd* [2011] EWHC 339 (Comm).

That Judgment concerned the jurisdiction of the English Courts under the “common law” rules (since the Brussels I Regulation and Lugano Conventions were inapplicable). One of the issues which arose in that context was the governing law of the agreement which was the subject of the dispute. The case is therefore a good illustration of one of the ways in which the two distinct issues of governing law and jurisdiction can inter-relate.

THE ISSUE:

The dispute before the English Court concerned a contract of guarantee between a Russian entity (the guarantor) and a Cayman entity (the owner of certain reefer vessels). By that contract, the Russian entity had guaranteed the performance of a third party charterer’s obligations which were owed to the Cayman entity under a number of charterparties.

The charterparties contained a clause referring disputes to arbitration in London and an English governing law clause. However, the guarantee contained no forum selection provision nor an express choice of law.

The English Court had to decide whether or not it could, and should, hear the claim in relation to the guarantee. In essence, two issues arose for determination:

- (1) Which country’s law governed the guarantee pursuant to the 1980 Rome Convention on the law applicable to contractual obligations (the “**Rome Convention**”)? If there was a “good arguable case” that it was governed by English law, a “jurisdiction gateway” would be established under the Civil Procedure Rules (“**CPR**”). That would provide a basis on which permission to serve the English proceedings out of the jurisdiction might legitimately have been granted.
- (2) If a CPR “jurisdiction gateway” was established, was England the most appropriate forum (or “*forum conveniens*”) – i.e. the forum where the case may most suitably be tried for the interests of all the parties and the ends of justice? If so, the claim should proceed in the English Courts.

THE DECISION:

The Judge decided that the English Courts could, and should, hear the claim. He gave the following reasons:

- (1) A CPR “jurisdiction gateway” was established since there was a “good arguable case” that the guarantee was governed by English law. The fact that the parties had made a choice of English law, although not express, was “demonstrated with reasonable certainty” - pursuant to Article 3.1 of the Rome Convention. That was because:
 - (a) there was an English governing law clause contained in the underlying charterparties; and
 - (b) the guarantor had considerable involvement with those agreements and their negotiation, and it also had close relationship with the charterer.
- (2) Despite connections with the alternative forum (Russia), England was the *forum conveniens*. That was not only because of the likelihood that English law governed the guarantee (which was a significant, although not determinative, factor), but also because of the following other factors:
 - (a) the documents were in English;
 - (b) as the underlying charterparty dispute was to be determined by arbitration in England, it would make sense for the litigation concerning the guarantee to take place in England too - so as to allow the same lawyers and experts to be deployed; and
 - (c) the connections with Russia were minimal.

The decision is of interest for a number of reasons:

- It highlights the importance of including both a forum selection clause and a governing law clause in all commercial contracts (and indeed in each contract, if there are a number of separate, but related, contracts).
- It explores some of the hurdles which might have to be overcome before English proceedings may be pursued against a non-European Defendant in the absence of a jurisdiction clause.
- It shows that, depending on the circumstances, the existence of a choice of law made by the parties might still be established despite the absence of an express choice.

Further details and analysis

THE PARTIES' RELATIONSHIPS AND CONTRACTS

1. A Cayman Islands company called Star Reefers Pool Inc (“**Star Reefers**”) operated and chartered reefer vessels. By two charterparties (the “**Charterparties**”), it chartered three vessels to a Cypriot company called Kalistad Limited (“**Kalistad**”). The Charterparties contained a clause referring disputes to arbitration in London and an English governing law clause.
2. By a separate contract, JFC Group Ltd, a Russian company, (“**JFC**”) guaranteed Kalistad’s obligations. However, the guarantees (the “**Guarantees**”) contained no forum selection provision nor an express choice of law.
3. There was a close connection between Kalistad and JFC and it appeared that Kalistad was a company through which JFC imported fruit to Russia. Further, JFC was closely involved with the negotiation of the Charterparties, and they were entered into by Kalistad for JFC’s benefit and use and themselves provided that Kalistad’s obligations were to be guaranteed by JFC.

THE LONDON ARBITRATION PROCEEDINGS

4. Disputes arose under the Charterparties. In March 2010 Star Reefers commenced arbitration proceedings in London against Kalistad for unpaid hire and damages for early re-delivery.
5. On the same day, Star Reefers also brought arbitration proceedings in London against JFC. JFC disputed the jurisdiction of the arbitrator appointed by Star Reefers on the basis that JFC was not party to any arbitration agreement.

THE RUSSIAN PROCEEDINGS

6. In June 2010, JFC then commenced proceedings in the Commercial Court in St Petersburg, Russia (the “**Russian Proceedings**”) seeking a declaration that the Guarantees were not binding agreements between the parties.

THE ENGLISH PROCEEDINGS

7. In October 2010, Star Reefers commenced proceedings in the Commercial Court in London (the “**English Proceedings**”) seeking a declaration that JFC was liable to pay such damages as it may be awarded in the arbitration proceedings against Kalistad. It obtained permission to serve the Claim Form on the Russian guarantor out of the jurisdiction.

8. The Claim Form was served later that month and, in November 2010, JFC filed an Acknowledgement of Service indicating an intention to contest the jurisdiction of the English Court to hear the claim.

THE ENGLISH ANTI-SUIT INJUNCTION IN RESPECT OF THE RUSSIAN PROCEEDINGS

9. Star Reefers also sought an anti-suit injunction from the English Court, prohibiting JFC from pursuing the Russian Proceedings.
10. Such an anti-suit injunction was granted by Christopher Clarke J on the basis that the Russian Proceedings were vexatious or oppressive.
11. Teare J subsequently upheld and continued that injunction by a further order in November 2010. He rejected JFC's arguments that the English Court did not have jurisdiction to grant the injunction, and also rejected its arguments that the Russian Proceedings were not vexatious or oppressive.

THE INTER-RELATED ISSUES FOR THE ENGLISH COURT

12. JSC's application to contest the jurisdiction of the English Court to hear JSC's claim then came before the Court.
13. It was not asserted by Star Reefers that Teare J's judgment (as regards the jurisdiction of the English Court to grant the anti-suit injunction) gave rise to any "*res judicata*" or "issue estoppel" so as to bind the Court or the parties as regards any of the decisions he had reached in rendering that judgment. Consequently, the Judge, Andrew Smith J, considered entirely afresh the jurisdiction of the Court to hear the English Proceedings.
14. The Defendant was not domiciled in either the EU nor Iceland, Norway or Switzerland. Further, there was no other factor which otherwise rendered either the Brussels I Regulation (i.e. Council Regulation (EC) No. 44/2001), or one of the Lugano Conventions, applicable. Consequently, the question of jurisdiction was governed by the English "common law" rules.
15. Since the Claim Form had been served out of the jurisdiction, the Claimant had to establish each of the following if the English Courts were to hear the claim:
 - (a) there was a "serious issue to be tried" because the claim in question had a "reasonable prospect of success"; and
 - (b) there was a "good arguable case" that a CPR "jurisdiction gateway" (as set out in CPR 6BPD para 3.1) was established; and

- (c) England was the "*forum conveniens*" – i.e. the forum where the case would most suitably be tried for the interests of all the parties and the ends of justice.

16. Since the first of the three requirements was met, only the other two issues arose for determination. However, the claim would only proceed in England if both of the other two requirements could also be satisfied.
17. The existence of a CPR "jurisdiction gateway" was dependent upon the governing law, or rather the likely governing law, of the Guarantees. In particular, the issue was:

Was there a "good arguable case" that the Guarantees were governed by English law for the purposes of CPR 6BPD para 3.1(6)(c)?

18. The question of whether England was the *forum conveniens* in essence involved a "weighing up" of the various factors connecting the dispute to England as against those connecting the dispute with Russia.

THE GOVERNING LAW QUESTION

19. Although applicable to the question of jurisdiction as a whole, the "common law" was irrelevant to the sub-issue as to the governing law of the Guarantees. That issue would instead be determined pursuant to the Rome Convention.
20. The Rome Convention has now largely been superseded by Regulation 593/2008 (colloquially referred to as "**Rome I**"). Many of the rules in Rome I are similar to those in the Rome Convention, but there are some key differences. However, the Rome Convention still applied in this case since Rome I only concerns contracts concluded after 17 December 2009, and the Guarantees dated back to October 2008.
21. Star Reefers contended that English law governed the Guarantees. It did so on the basis of Article 3.1 of the Rome Convention, or, failing that, under Article 4.
22. Article 3.1 of the Rome Convention provides:

"A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case..."

(Note that the equivalent provision in Article 3.1 of Rome I is slightly different – and perhaps more onerous. It provides that “...*The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case*”.)

23. Star Reefers argued that, although there was no express choice of law contained in the Guarantees, it could be “demonstrated with reasonable certainty” that the parties had chosen English law to govern them, pursuant to Article 3.1 of the Rome Convention. That was on the basis that:

- (a) The Charterparties themselves contained an express choice of English law.
- (b) There was a particularly close connection between the Charterparties and the Guarantees and between the charterer (Kalistad) and the guarantor (JFC). In particular:
 - (i) Kalistad was effectively the nominee company of JFC and that is how JFC chose to describe Kalistad in the Guarantees themselves;
 - (ii) JFC engaged in the negotiations of the Charterparties and agreed their wording;
 - (iii) copies of the Charterparties were sent by Star Reefers to JFC rather than Kalistad in order for them to be signed;
 - (iv) a provision in the Charterparties themselves required that the Guarantees be given; and
 - (v) JFC had previously entered into an agreement with Kalistad which was expressed to be governed by English law, and it was pursuant to that agreement that the vessels chartered were hired.

24. Further and alternatively, Star Reefers contended that English law governed the Guarantees even if there was no such choice of law by the parties. It did so on the basis that England was the country with which the Guarantees were most closely connected under Article 4 of the Rome Convention.

25. For the latter argument to be successful, it would be necessary (by Article 4.5) to rebut the presumption that the Guarantees were most closely connected with Russia. That presumption arose under Article 4.2 - because JFC (as the guarantor) was the party to effect the performance which was characteristic of the Guarantees, and its “principal place of business” was in Russia.

THE DECISION ON THE GOVERNING LAW QUESTION

26. The Judge decided that there was a “good arguable case” that the Guarantees were governed by English law pursuant to Article 3.1 of the Rome Convention. He therefore did not need to consider the alternative argument advanced pursuant to Article 4. His reasoning was as follows:

- (a) There were a number of “common law” authorities on the question of governing law which indicated that it was often to be inferred that a guarantee was to be governed by the same law as the contract giving rise to the primary obligations. However, such authorities were inapplicable when applying the Rome Convention, which envisaged the application of a different test.
- (b) Thus, under Article 3.1 of the Rome Convention, the role of a Court was not to “imply” a choice of law from a close connection with a particular country, but rather to discern whether a choice of law could be “demonstrated with reasonable certainty” in the circumstances of the case. In other words, for Article 3.1 to apply, the parties must have had a clear intention to make such a choice - and, without that clear intention, no choice could be implied.
- (c) One example given in the Giuliano-Lagarde Report (a report on the effect of the Rome Convention) of circumstances in which such a choice of law, not expressly made, might be so demonstrated was where there is an express choice of law in related transactions between the same parties.
- (d) That said, if the parties to the transactions were different (as here), then that would, in some instances, be a persuasive reason for distinguishing the case from the example given in the Giuliano-Lagarde Report.
- (e) However, in this case the charterer (Kalistad) and the guarantor (JFC) were so closely related and JFC’s involvement in the Charterparties was such that there was no sensible basis for distinguishing these circumstances from the exemplar circumstances in the Giuliano-Lagarde Report.
- (f) Consequently, there was a “good arguable case” that a clear intention to make a choice of English law would, in this case, be “demonstrated with reasonable certainty”, and thus that English law governed the Guarantees.

THE DECISION ON JURISDICTION

27. As a result of the Judge's conclusion that there was a "good arguable case" that English law governed the Guarantees, a CPR "jurisdiction gateway" was established.
28. Thus, the question of whether or not the English Court should hear the claim turned on the question of whether or not England was the "*forum conveniens*" – i.e. the most appropriate forum for the dispute.
29. The Judge decided that England was clearly the *forum conveniens*. His reasoning was as follows:
- (a) The likelihood that English law governed the Guarantees was significant, but not determinative in this respect.
 - (b) However, other factors pointed to England too, specifically:
 - (i) The documents were in English and would not need to be translated if the dispute was heard in England.
 - (ii) It made sense for any litigation to take place in England since the underlying dispute (in relation to the Charterparties) was to be arbitrated in England. Thus, any dispute about the Guarantee could deploy the same lawyers and experts as in the arbitration.
 - (c) By contrast, the only connection with Russia was that JFC was Russian and resident in Russia.
 - (d) Although JFC suggested that there might be a question about the capacity of those giving the Guarantees, there was no evidence supporting that suggestion and, on the face of it, it was difficult to understand how such an argument could be advanced. Even if that assertion was made, it would not outweigh the other considerations pointing towards England as the appropriate forum.
30. As a consequence, the Judge decided that JFC's application to contest jurisdiction failed and that thus the claim would proceed in the English Courts.

COMMERCIAL IMPLICATIONS

31. The Judgment is of the following general interest:
- (a) First, it illustrates how the questions of forum and governing law are distinct, and yet provides an illustration of how one may sometimes affect the other.
 - (b) Second, it considers some of the relevant tests, under the Rome Convention, for establishing the governing law of a contract in the absence of an express choice.
 - (c) Third, it explores some of the hurdles to be overcome before English proceedings may be pursued against non-European Defendants in circumstances in which there is no English jurisdiction clause.
32. The decision itself has a number of practical implications:
- (a) It highlights the importance of including both a forum selection clause and a governing law clause in all commercial contracts (and indeed in each contract if there are a number of separate, but related, contracts).
 - (b) It shows that, in some circumstances, the existence of a choice of law by the parties might still be established despite the absence of an express choice.
 - (c) It notes that, in the absence of a choice made by the parties, the question of the governing law is determined by uncertain "closest connection" tests under Article 4 of the Rome Convention or Rome I. These involve the application, and possible rebuttal, of specified presumptions or rules, which might produce unexpected results.

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