The Kaefner Decision: the 'Good Arguable Case' Test for Establishing Jurisdiction

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In *Kaefner Aislamientos SA de CV v AMS Drilling Mexico SA de CV & Others* [2019] EWCA 10 (Civ), 17 January 2019 (Kaefner), the Court of Appeal provided welcome guidance on how the test for deciding whether a claimant has a 'good arguable case' for establishing jurisdiction should be applied where there is a factual dispute between the parties as to jurisdiction.

Background

The dispute in Kaefner arose out of a contract to carry out works for the removal of asbestos from, and refurbishment of, an oil rig in the Gulf of Mexico.

Kaefner Aislamentos (KA) brought proceedings against four defendants, AMS Mexico, AMS, AT1 and Ezion in the English High Court for sums alleged to be owed under a repair contract, which contained an English exclusive jurisdiction clause. The claim form and particulars of claim were served on AT1 and Ezion in Singapore - outside the jurisdiction - although the two entities were not named under the contract.

KA argued that the English courts had jurisdiction to determine the claim against AT1 and Ezion, asserting entitlement to serve proceedings outside the jurisdiction under CPR 6.33(2)(b)(v) - service without permission of the courts. KA argued that the jurisdictional gateway in Article 25 of the Recast Brussels Regulation applied on the basis that:

- the contract had been concluded by AMS Mexico and AMS on behalf of AT1 and Ezion as undisclosed principals, and therefore,
- AT1 and Ezion were bound by the jurisdiction clause in favour of the English courts.

AT1 and Ezion contested jurisdiction on the basis they did not act as undisclosed principals to the contract, and as a result the jurisdiction clause did not bind them.

First Instance Decision

The judge at first instance, Mr Peter MacDonald Eggers QC, decided that the court had no jurisdiction over AT1 and Ezion. He applied a two-part test, asking whether KA had:

1. demonstrated a 'good arguable case' i.e. surmounted a specified evidential threshold for the jurisdictional gateway to apply, and

2. 'the better and more plausible argument', considering the relative merits of the competing arguments submitted by the parties.

The judge held that KA had a 'good arguable case' but AT1 had the better argument that it was not an undisclosed principal and, accordingly, the claim for jurisdiction against AT1 failed. In his view, KA had neither a 'good arguable case' nor 'the better and more plausible argument' that Ezion was an undisclosed party to the contract.

KA appealed, inter alia, on the basis that even if the 'better and more plausible argument' test was applicable in principle, it should not be applied in cases where the evidence is incomplete and contradictory and where crucial evidence is in the hands of the defendants who failed to provide disclosure.

Court of Appeal Decision

The Court of Appeal relied on two recent S*upreme Court authorities : Brownlie v Four Seasons Holding Inc* 1 WLR 1992 [2018] (Brownlie) and *Goldman Sachs International v Novo Banco* SA [2018] UKSC 34 (Goldman Sachs).

In these two decisions, Lord Sumption explained that the starting point was the judgment in *Canada Trust Co v Stolzenberg* (No 2) [1998] 1 WLR 547 which construed the 'good arguable case' test as a broad test, including within it, the concept of who had a 'much better argument' on the material available – because a 'good arguable case' reflects that one side has a 'much better argument' on the material available.

The Court of Appeal confirmed that the three-limb approach formulated by Lord Sumption in Brownlie and Goldman Sachs was correct, and provided guidance on how each limb should be applied in practice.

Limb 1

A claimant must provide a plausible evidential basis for the application of a relevant gateway (for instance in Kaefner, facts supporting the assertion that AT1 and Ezion were party to a contract conferring jurisdiction by virtue of the exclusive jurisdiction clause contained in it).

Limb 2

If there is an issue of fact about the application of the jurisdictional gateway, the court must take a view on the material available, if it can reliably do so.

Limb 3

If no reliable assessment of the relative merits of the arguments can be made due to evidential limitations at the interlocutory stage, in other words if the court is unable to say who has the 'better argument', a claimant must establish a 'good arguable case' for the application of the gateway with a plausible (albeit contested) basis for it.

Application of the three-limb approach to the facts in Kaefener

Whilst the Court of Appeal noted that the judge at first instance erred in part of his assessment, by applying a two-part test starting with 'good arguable case' and then moving on to decide who had "the much better argument", it was acknowledged that the judge applied a test which was consistent overall with that expressed by the Supreme Court in Brownlie and Goldman Sachs. Therefore, the English court did not have jurisdiction over AT1 and Ezion, and the appeal was dismissed.

Significance

The Court of Appeal decision clarifies that, in order to successfully resist a jurisdiction challenge, a claimant now needs to demonstrate that it has the 'better argument' that a 'plausible evidential basis' exists so the relevant jurisdictional gateway can apply.

In addition, the decision clarifies the approach courts should adopt when evidence put before them is incomplete at the interim/jurisdiction challenge stage. An element of pragmatism and common sense is required to overcome evidential gaps which are inevitable at an interim stage, and courts should remain flexible in their approach when deciding which party has 'the better argument".

However, in exercising this flexibility, courts are reminded of the risk of running a 'mini trial' on merits, which is not the purpose of a jurisdiction hearing and it would be unfair for those defending a jurisdictional challenge: overall, a complex and delicate balancing act for the courts.