

Following due process – English court considers whether proceedings had been properly served

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The High Court in England and Wales has recently considered whether a company had been correctly served with proceedings in relation to two credit agreements, which allowed the lender to appoint a process agent if the company failed to appoint a process agent itself.

The decision provides useful guidance to parties in Hong Kong and England and Wales as to the court's willingness to enforce clauses based on its strict interpretation of the wording of the clause.

In *Banco San Juan Internacional Inc v. Petróleos De Venezuela SA* [2020] EWHC 2145 (Comm), Banco San Juan Internacional Inc. (BSJI) had entered into two credit agreements with oil company Petróleos De Venezuela SA (PDVSA), one of which was granted in 2016 and the other in 2017 (the agreements).

The agreements both contained a clause that required PDVSA to appoint a process agent in relation to proceedings to be served in England and Wales. The clause also set out that if the process agent ceased to be such an agent, PDVSA had to appoint a new agent and notify BSJI that it had done so. Failure to comply with this obligation meant that BSJI could appoint a process agent itself.

PDVSA had appointed a process agent in relation to the 2016 agreement but that appointment had expired in 2019, and a process agent was not appointed under the 2017 agreement. BSJI subsequently appointed a process agent for PDVSA and served proceedings on the new process agent.

The court held that proceedings had been validly served on PDVSA because the new process agent was the company's authorized agent as the contract expressly permitted BSJI to appoint an agent on PDVSA's behalf following PDVSA's failure to do so.

The court also rejected PDVSA's argument that a term should be implied into the credit agreements allowing for the notification of the appointment to PDVSA of the identity of the process agent, the terms of the appointment, and providing PDVSA with a chance to send recommendations or comments on the appointment, which BSJI would be under an obligation to consider.

The court rejected this argument as it would have produced considerable scope for delay and/or difficulty in the appointment, particularly when such clauses are designed to speed up the service of proceedings.

Finally, the court also rejected PDVSA's argument that the clause allowing BSJI to appoint a process agent would not apply once BSJI had refused to lend PDVSA any more funds. The court described this argument as "wholly uncommercial" as these types of clauses are crucial once there has been a breakdown of relationship between the parties as was in this case.

Hong Kong

Banco San Juan Internacional Inc. builds upon the interpretation of appointment clauses provided in recent case law in Hong Kong.

The most recent Hong Kong decision summarizing how the court will interpret appointment clauses is *Bocom International Holdings Co. Ltd., v. Red Victory Group Ltd.* [2019] HKCFI 1701. As with *Banco San Juan Internacional*, this case demonstrates the court's willingness to interpret the construction of clauses logically and in accordance with the ordinary meaning of the words used in agreements.

In *Bocom International Holdings Co. Ltd.*, the Court of First Instance considered whether the plaintiff had been properly served with proceedings in accordance with the process agent appointment clauses contained in an assignment agreement and a guarantee.

The appointment clauses set out that "Dacheng Law Office (Attention: Mr. Guo JinKai)" was appointed as its agent for service of process in relation to any proceedings before the Hong Kong courts in connection with the assignment agreement and/or the guarantee.

The plaintiff attempted to argue that Mr. Guo, by himself, had been appointed as process agent for the service of proceedings in relation to the assignment agreement and the guarantee, and therefore service had validly been served despite Dacheng Law Office now ceasing to exist and the proceedings being served on Mr. Guo at a different address where he was now practising law.

The court analyzed the construction of the clause and took a literal interpretation of the clause that:

...neither "Dacheng Law Office" on its own nor Mr. Guo on his own was appointed as process agent of the defendants under the Agreement and the Guarantee. The wording of the Appointment Clauses clearly stated that the process agent was "Dacheng Law Office of [address] (Attention Mr. Guo JinKai)". It was not only "Dacheng Law Office" nor only "Guo JinKai". It had to be both, ie., "Dacheng Law Office" with which Mr. Guo was working.

The court also went on to explain that:

...if the process agent appointed under the Agreement or the Guarantee was Mr. Guo, it was not necessary for the Appointment Clauses to refer to "Dacheng Law Office". The appointment could be simply "appoints Mr. Guo JinKai" as agent for the defendants for service of process for Hong Kong proceedings.

The court also analyzed guidance provided in case law to come to its conclusion. In particular, the court looked at *Cargill International Trading Pte. Ltd., v. Uttam Galva Steels Ltd.* [2018] EWHC 974 (Comm), in which The Right Honorable Lord Justice Popplewell pointed out that:

The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The court must consider the language used, and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.

Further, the court placed reliance on *Jumbo King Ltd., v. Faithful Properties Ltd., & Others* [1999] 3 HKLRD 757, where Lord Hoffmann pointed out that:

Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended. In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other.

In this case the court concluded that the structure and the wording of the appointment clauses meant that the defendants had only agreed to appoint a particular law firm with service of a particular lawyer as their process agent, as it was only natural and logical the defendants would like to appoint their legal advisers as their process agent so that any legal disputes in respect of the transaction could be dealt with promptly by the defendants' legal adviser.

The court stated as the appointment clauses allowed for a substitute process agent to be appointed the defendants should have appointed a new process agent when Dacheng Law Office ceased practice or when Mr. Guo left Dacheng Law Office, which they failed to do.

Careful drafting of appointment clauses

The decision in *Banco San Juan Internacional Inc.* serves as a timely reminder to parties to ensure that parties carefully draft appointment clauses in agreements and subsequently ensure that they comply with those appointment clauses by appointing an alternative process agent where necessary.

Mr. Justice Foxton's strict interpretation of the appointment clause makes clear the consequences of a party's failure to appoint a process agent where the other party has the ability to do so under an agreement.

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