

Adjudication enforcement in cross-border disputes

By Kathryn Moffett, Aidan Steensma, and Adrian Bell

A TCC judgment last week enforced an adjudication decision issued under a construction contract for a hotel project in London that was subject to Italian law and with an exclusive jurisdiction clause in favour of the French courts. The judgment considers the newly applicable Hague Convention, which replaces the Brussels Recast Regulations post-Brexit, and finds that adjudication enforcement falls within the “interim measures” exception in Article 7 of the Convention. This appears to be the first decision to consider adjudication enforcement in connection with an exclusive jurisdiction clause and is potentially of wider application beyond the Hague Convention.

Cross-border adjudication disputes: the jurisdictional framework

The Housing Grants, Construction and Regeneration Act 1996 (as amended) (the **Construction Act**) provides for a mandatory adjudication scheme in construction contracts. The Act applies to contracts which relate to the carrying out of construction operations in the UK regardless of whether a foreign system of law is otherwise applicable to the contract.

Whilst the right to adjudicate is unaffected by clauses which confer exclusive jurisdiction on the courts of a foreign State, it has previously been unclear whether such clauses would require the enforcement of an adjudication decision in the foreign jurisdiction or whether the UK courts, such as the TCC, would retain a residual jurisdiction in relation to enforcement.

Prior to the UK's departure from the European Union, such questions in relation to other EU countries fell to be resolved by the Brussels Recast Regulation. These regulations no longer apply as

from 1 January 2021 and have been replaced by legislation giving effect to the Hague Convention on Choice of Court Agreements 2005 (the “**Hague Convention**”). The UK has also requested to accede to the Lugano Convention, which is very similar to the Brussels Recast Regulation, but its accession has yet to be agreed by the EU. In the meantime, the Hague Convention rules will apply to cross-border disputes involving EU countries and certain other jurisdictions including Singapore.

Under the Hague Convention, where parties have agreed to confer exclusive jurisdiction on a country which has acceded to the Convention, that choice must be honoured. If proceedings are commenced in a different country, the Convention requires the courts of that country to dismiss the proceedings subject to certain exceptions. One of those exceptions, contained in Article 7, concerns “interim measures” and states that:

“interim measures of protection are not governed by the Convention. This Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures”.

A similar exception is found in the Brussels Recast Regulation and the Lugano Convention. A recent TCC decision has considered whether this exception applies to adjudication enforcement proceedings.

Motacus Constructions Limited v Paolo Castelli SPA

This dispute concerned a supply and installation agreement for fit-out works to a hotel in London. An adjudication decision was obtained by Motacus for the payment of £454,678.65 from Paola Castelli. Payment was not made in accordance with the adjudicator's decision.

Motacus applied to the TCC for summary judgment to enforce the decision. However, the contract was subject to Italian law and gave exclusive jurisdiction to the French courts. Paola Castelli defended enforcement on the basis that the English courts did not have jurisdiction to enforce the decision.

Applying Article 7 of the Hague Convention,



the TCC decided that the enforcement of adjudication decisions was an interim measure of protection:

“In my judgment, the concept of an interim

protective measure extends to a decision of an adjudicator which, by the operation of the 1996 Act and the Scheme, is not final and binding on the parties. The function of the adjudicator’s decision is to protect the position of the successful party on an interim basis pending the final resolution of the parties’ dispute through the normal court processes (or by arbitration).”

The Convention is clear that a court that grants an interim measure does so under its own law. Therefore, the TCC could accept jurisdiction and enforce the adjudicator’s decision by granting summary judgment.

Future Implications

This decision reinforces a key purpose of the Construction Act to allow the quick resolution of construction disputes on an interim basis with a view to improving cash flow. The TCC has applied this “pay now, argue later” principle to bring adjudication within the “interim measures” exception to the enforceability of an exclusive jurisdiction clause. While this decision considers only the Hague Convention, the prevalence of “interim measures” exceptions in other contexts makes it of potentially wider application.

Although not raised by Paola Castelli in this case, a potential challenge to the Court’s reasoning might be made by reference to the Supreme Court’s decision last year in the *Bresco v*

Lonsdale litigation. The Supreme Court overturned the Court of Appeal’s finding that an adjudication by a company in liquidation which could never be enforced would be an exercise in futility and could be stopped by an injunction. The Supreme Court drew attention to the wider purpose of adjudication as a dispute resolution tool in its own right:

“A very important underlying objective, both of adjudication and of other recommendations which were eventually implemented in the 1996 Act, was the improvement of cash flow to fund ongoing works on construction projects. ... But solving the cash flow problem should not be regarded as the sole objective of adjudication. It was designed to be, and more importantly has proved to be, a mainstream dispute resolution mechanism in its own right, producing de facto final resolution of most of the disputes which are referred to an adjudicator. ... There is a chorus of observations, from experienced TCC judges and textbook writers to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final because it is not thereafter challenged.”

The present decision is also notable as the first post-Brexit judgment under the Hague Convention. It is one for legal teams to keep in mind as the protection to jurisdiction clauses given by the Hague Convention is less comprehensive than under the Brussels Recast Regulations.

References:

[*Motacus Constructions Ltd v Paolo Castelli SpA* \[2021\] EWHC 356 \(TCC\).](#)

[*Bresco Electrical Services Ltd v Michael J Lonsdale \(Electrical\) Ltd* \[2020\] UKSC 25.](#)

ABOUT THE AUTHORS



Kathryn Moffett
Associate
London



Aidan Steensma
Of Counsel
London



Adrian Bell
Partner, London
Co-head of the
Infrastructure, Construction
and Energy Disputes Group
| Joint Managing Director
for Asia and the Middle East

