Etihad Airways PJSC v Prof Dr Lucas Flöther [2019] EWHC 3107 (Comm)

The Defendant ("the Insolvency Administrator"), acting on behalf of Air Berlin plc ("Air Berlin"), unsuccessfully disputed the jurisdiction of the English court in proceedings relating to arrangements concluded in April 2017, by which Etihad would provide Air Berlin with financial support. Those arrangements included, inter alia, a loan facility (the "Facility Agreement") and a letter which stated Etihad's intention "*to continue to provide the necessary support to Air Berlin to enable it to meet its financial obligations*" (the "Comfort Letter").

The Facility Agreement contained an asymmetric English jurisdiction clause in favour of Etihad (the "Jurisdiction Clause"). Following a refusal by Etihad to meet a draw-down request under the Facility Agreement or provide Air Berlin with further funding, Air Berlin commenced proceedings in Germany advancing claims: (i) for breach of the Comfort Letter; and (ii) if the Comfort Letter was not legally binding, in *culpa in contrahendo* for Etihad's conduct in negotiating the Comfort Letter. Etihad subsequently commenced proceedings in England seeking declaratory relief in reliance on the Jurisdiction Clause.

Jacobs J dismissed Air Berlin's application on the following grounds: (i) Etihad's claims in the English proceedings fell within the scope of the Jurisdiction Clause under English law; (ii) The requirement in Article 25 of Brussels Recast, that the dispute originate in a legal relationship in connection with which the jurisdiction agreement was entered, was met; and (iii) Article 31(2) of Brussels Recast extends to asymmetric jurisdiction agreements and the Court would therefore continue with the proceedings.

(i) The scope of the jurisdiction clause under English law

Ultimately, the key question was whether it was the parties' intention that a dispute under the Comfort Letter would fall within the Jurisdiction Clause. The *Fiona Trust* starting assumption was potentially applicable since the Facility Agreement and Comfort Letter were part of an "*overall agreement package*", which did not contain differently expressed choices of jurisdiction.

The Judge found that it had been the parties' intention that the Jurisdiction Clause would extend to a dispute under the Comfort Letter. In summary, this was because of the width of the Jurisdiction Clause and the very close connections between the Facility Agreement and Comfort Letter. In particular: (i) the Comfort Letter had its origins in the Facility Agreement; (ii) it was arguable that the Comfort Letter was non binding and therefore to be viewed as ancillary to the Facility Agreement; and (iii) it was foreseeable that a dispute under the under the Facility Agreement might require a court to determine the effect of the Comfort Letter and vice versa.

(ii) Article 25 – "particular legal relationship"

Article 25 provides that the courts of a Member State will have jurisdiction where the parties agree that those courts "*are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship*." Applying the analysis of the ECJ in Case C- 214/89 *Powell Duffryn v Petereit* [1992] ECR I-1745, it was necessary to consider the facts of the case as a whole in order to: (i) identify the legal relationship between the parties in connection with which the jurisdiction agreement was concluded; and (ii) determine whether the dispute originated from that legal relationship or a different one.

The Judge held that the relevant legal relationship between Etihad and Air Berlin could be characterised in three different ways:

(i) According to the terms used in the Facility Agreement, with which the Comfort Letter was very closely connected, as being that of lender and borrower;

(ii) By referring to the parties' pre-existing legal relationship, as being that of a major shareholder providing financial support; or

(iii) By focusing only on the rights and obligations created by the package of agreements concluded in April 2017, as being that of a "provider of financial support" and "recipient of financial support".

(iii) Article 31(2) and asymmetric jurisdiction clauses

Article 31(2) permits a second seised court to continue with the proceedings where it is the court designated in an agreement "*[conferring] exclusive jurisdiction*". Air Berlin's contention that the Jurisdiction Clause, as an asymmetric jurisdiction clause, was not within Article 31(2) was rejected for a number of reasons. In particular:

(i) The correct approach was to focus on the obligation which had been breached by the issuing of proceedings in the first seised court. The Jurisdiction Clause obliged Air Berlin not to sue in jurisdictions other than England. There had therefore been a conferral of exclusive jurisdiction in respect of disputes for which Air Berlin wished to commence proceedings.

(ii) The rationale for Article 31(2) was to enhance party autonomy and avoid abusive litigation tactics. In pursuing these aims, there was no logical justification for treating asymmetric and symmetric clauses differently.

(iii) Air Berlin's submissions were contrary to a number of authorities, in particular, the detailed reasoning of Cranston J in *Commerzbank AG v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm).