

## **ENGLISH HIGH COURT DENIES INJUNCTION IN LCIA ARBITRATION**

*AB v CD* [2014] EWHC 1 (3 January 2014)

### **Introduction**

In its first decision of 2014, in *AB v CD* [2014] EWHC 1, the English High Court refused an application for an interim injunction pending the resolution of arbitration proceedings on the grounds that the Claimant was unable to show that damages would not be an adequate remedy, despite the existence of a contractual clause which limited recoverable damages arising from the agreement at issue.

This decision is of key importance to those parties who have both provided for arbitration in their contracts and have included a clause which limits recoverable damages arising either from contractual arrangements generally, or the termination provisions specifically. On the basis of this decision, such a clause will be treated as part of the contractual bargain between the parties, and will not prevent a court from refusing to order an injunction on the grounds that damages would be an adequate remedy in the circumstances.

### **Background**

On 1 October 2005, the Claimant and Defendant entered into a Licensing Agreement which was to continue to 31 December 2010 and then automatically to renew annually subject to the Defendant's entitlement to terminate pursuant to the terms of the agreement. The Licensing Agreement was subject to English law and contained an arbitration clause. The Agreement also contained a clause which restricted the recovery of "*lost profits, ... or any ... indirect, special, consequential or incidental damages*" arising from the contract.

In June 2013, the Defendant gave notice that it would terminate the Licensing Agreement at midnight on 31 December 2013, claiming that the requirements under the Licensing Agreement for termination had been met. The Claimant rejected this, but in a further letter the Defendant repeated its intention to terminate. No other correspondence occurred until December 2013, when the Defendant reminded the Claimant that the agreement would terminate on 31 December 2013.

On 20 December 2013, the Claimant commenced arbitration against the Defendant. In support of that arbitration, the Claimant sought an injunction under section 44 of the Arbitration Act 1996 restraining the Defendant from terminating the Licensing Agreement between the parties on 31 December 2013, pending the resolution of the arbitration.

### **Decision**

Mr Justice Stuart-Smith refused the application, on the grounds that the Claimant was unable to show that damages would not be an adequate remedy (but would, had the Claimant been able to show that, have granted the application on the balance of convenience).

In order to determine whether an injunction should be granted, the Court had to address three questions:

- Was there a serious issue to be tried?
- Were damages an adequate remedy?
- Should an injunction be granted on the balance of convenience?

#### *Adequacy of damages*

In relation to the question of the adequacy of damages, which was the deciding factor in this case, Mr Justice Stuart-Smith cited the case of *American Cyanamid v Ethicon Ltd* [1975] AC 396, 408 (as applied in *Bath and North East Somerset DC v Mowlem PLC* [2004] EWCA Civ 115 and *Ericsson AB v Eads Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC)), in which Lord Diplock stated:

*“... the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.”*

The complicating factor in this case was the contractual limitation on the recovery of damages, which would restrict the ability of the Claimant to claim damages arising from the termination of the Licensing Agreement.

However, Mr Justice Stuart-Smith held that the commercial expectations of the parties were set by the package of rights and obligations that constituted the Licensing Agreement, which included the contractual restriction on damages. Even if that clause was effective to block any claim for loss of profits that would otherwise accrue to the Claimant after 31 December 2013 if the termination was unjustified, that was part of the price that the Claimant agreed to pay when executing the Licensing Agreement, and therefore it was not unjust to the Claimant to exclude the effect of that clause when considering whether damages were adequate. There was no other reason why damages would not be adequate in the present circumstances, and therefore the application for an injunction would be rejected.

While Mr Justice Stuart-Smith expressed “*unease*” at his decision, and said he had a “*nagging doubt*” that the approach he had adopted may be too inflexible in a case such as the

present, he held that he had no choice but to follow the approach in the existing case law and rejected the Claimant's application for an injunction.

Given the lack of authority in this area, and his concerns as to his judgment in the present case, Mr Justice Stuart-Smith has given permission for the Claimant to appeal against his decision.

The full judgment can be found at <http://www.bailii.org/ew/cases/EWHC/QB/2014/1.html>

4<sup>th</sup> March 2014