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UK High Court Revisits Issue of Where a Contract Is Formed

Court confirms that, in certain circumstances, a contract can be made in two jurisdictions.

On 7 October 2013, in *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc*, [2013] EWHC 2968 (Ch), the High Court of England and Wales—applying the decision in an earlier English case on a similar issue—held that a contract can, in principle, be made in two different jurisdictions. The *Conductive Inkjet Technology* dispute concerned an agreement between parties based in England and the United States that was signed in those two countries following negotiations conducted by email. For the purposes of establishing whether the English court had jurisdiction, the High Court considered, among other issues, the question of where the contract was formed.

Background

The claimant, Conductive Inkjet Technology Ltd (CIT), was an English technology company involved in the development of touch screens for mobile phones. The defendant, UniPixel Displays, Inc. (UPD), was a Texas-based company that designed and manufactured films incorporated into touch screens. CIT and UPD entered into a non-disclosure agreement (NDA) in relation to a proposed use of CIT's technology in UPD's manufacturing processes. The NDA contained customary restrictions on the use of CIT's technologies outside the agreed scope of the project. The contract was agreed to by the parties through emails, and the physical counterparts were then signed in England and Texas respectively. There was no governing law and jurisdiction clause in the NDA due to the parties' inability to agree on one.

UPD subsequently made a number of applications for a European patent. CIT submitted a claim to stop the patent applications, stating that the inventive concepts and subject matter of UPD's patent applications were disclosed by CIT to UPD in the course of their cooperation and that UPD had used CIT's proprietary information in breach of its obligations under the NDA. CIT claimed damages and sought a number of injunctions to prevent UPD from acting in breach of confidence.

In its turn, UPD issued proceedings against CIT in Texas, seeking a declaration that it had not breached any obligation of confidence. UPD also applied in England to set aside the permission granted to CIT by the English court to serve its claim on UPD outside of England.

Issues for the Court

The High Court considered a number of issues in determining whether it had and should exercise jurisdiction over UPD. Due to the absence of a governing law and jurisdiction clause in the NDA, one issue that had to be resolved was the question of where the NDA was formed.

As a general rule, under English law, a contract is made at the time when and place where the acceptance of the relevant offer is communicated to the offeror. With regard to instantaneous communications, such as email, this means that the contract is usually made where acceptance of the offer is received.

However, in *Apple Corps Ltd v Apple Computer Inc*, [2004] EWHC 768 (Ch), the court commented that it is possible, as a matter of principle, for a contract to be made in two places at once. In *Apple*, the parties also decided to omit a governing law and jurisdiction clause from their agreement. They concluded their contract by telephone while one party was located in England and the other in California. The court commented, *obiter*, that

holding a contract as being concluded in two places simultaneously may help to avoid the introduction of a random element in the traditional analysis of offer and acceptance, for example, by trying to determine who spoke first and who spoke last during a telephone conversation.

The Court's Decision

Applying the reasoning advanced in the *Apple* case, the High Court held that it would be arbitrary to determine the place in which the contract was made on the basis of the order in which a document was signed and which party happened to send the fully executed document. Keeping in mind that the parties had expressly agreed not to incorporate a governing law and jurisdiction clause, the court ruled that the NDA was made in both England and Texas. This was sufficient to satisfy one of the relevant tests for the service of CIT's claim out of the jurisdiction.

However, in the absence of an express choice of governing law and jurisdiction, the place in which the contract is made is not the only factor that English courts take into account when determining jurisdiction for the purposes of service of a claim outside of England and Wales. Courts will consider whether there is a serious issue to be tried on the merits of the claim, whether the claim fits into one of the various permissible grounds of jurisdiction specified by the Civil Procedure Rules, and whether England is clearly the appropriate forum for the trial of the claim.

On the facts of the case, most of the claims brought by CIT against UPD were allowed to proceed in England.

Conclusion

Disagreements over governing law and jurisdiction clauses are not uncommon in international transactions, but omission of such clauses will lead to uncertainty in the event of subsequent contractual disputes. Additionally, concluding contracts by telephone and email introduces another level of uncertainty as to the time and place of the formation of contracts. In circumstances where it is inappropriate to apply the conventional analysis of offer and acceptance in determining the issue of a contract's formation, English courts are likely to hold that the contract was made in both jurisdictions.

However, in view of the inherent uncertainty of jurisdictional disputes, which are always decided on the facts, it is advisable to always include a governing law and jurisdiction clause, particularly when contracts are concluded by email or during telephone and video conferences. The failure to do so can lead to unwanted and expensive litigation.

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