



Neutral Citation Number: [2018] EWHC 702 (Comm)

Case No: CL-2018-000100

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 19/04/2018

Before :

MRS JUSTICE MOULDER

Between :

- (1) **DELL EMERGING MARKETS (EMEA)**
- LIMITED**
- (2) **DELL S.A.**
- (3) **DELL TECHNOLOGIES INC.**
- (4) **DELL FZ-LLC**

Claimants

- and -

SYSTEMS EQUIPMENT
TELECOMMUNICATIONS SERVICES S.A.L.

Defendant

Ms Sara Masters QC and Mr Andrew Feld (instructed by Osborne Clarke LLP) for the Claimants

Mr Yash Kulkarni QC (instructed by DWF LLP) for the Defendant

Hearing dates: 23 March 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the reserved judgment on the claimants' application dated 6 March 2018 for an interim anti-suit injunction restraining the defendant ("SETS") from continuing proceedings commenced against the claimants in Lebanon (the "Lebanese proceedings"). Although the application was made formally on a "without notice" basis, SETS was served with the application informally on 7 March 2018 and formal service was effected on 13 March 2018 and both parties were represented at the hearing on 23 March 2018 by leading counsel.
2. Following the hearing on 23 March 2018 an interim injunction was made restraining SETS from pursuing the Lebanese proceedings, and/or commencing any further proceedings in Lebanon against the claimants until this judgment is handed down.
3. In support of the application I have three witness statements from Mr Charles Wedin, a partner at Osborne Clarke LLP, solicitors acting for the claimants.
4. For the respondent I have a witness statement of Mr Anthony Woodhouse, a partner at DWF LLP, solicitors acting for the respondent. Mr Woodhouse's witness statement attaches an expert report from Mr Devot, a French lawyer, and an expert report from Professor Mallat, a lawyer qualified in Lebanese law.

Background

The 1991 IDA

5. In 1991 Dell Computer SA ("Dell France") entered into an international distribution agreement with SETS (the "1991 IDA"). This appointed SETS to distribute products in the Lebanon. Clause 1 of Appendix A provided that:

"the designation of the Distributor as a "Dell-Approved International Distributor" is in no way exclusive."
6. The 1991 IDA took effect for one year and was then renewed:

"tacitly every year unless one of the parties notifies the other of the decision not to renew the Agreement by sending prior written notification to this effect with 90 days notice."
7. The 1991 IDA was governed by French law and the parties agreed to the "exclusive jurisdiction of the "Business Court of Versailles"."

The 2004 IDA

8. In 2004 Dell Emerging Markets (EMEA) Ltd (at that time Dell Distribution (EMEA) Ltd) ("Dell UK") entered into an international distributor agreement with SETS (the "2004 IDA"). It is the claimants' case that SETS was appointed as a non-exclusive distributor and that the 2004 IDA superseded the 1991 IDA.

9. In particular by letter of 23 March 2004, Mr Pim Dale, Managing Director of European Distribution Business, EMEA, wrote to SETS enclosing copies of the “updated Dell Distributor Agreement”.
10. The letter stated:

“it has been some time since this Agreement has been updated and I hope you will find that the enclosed Agreement reflects our continued working relationship.”

“Could you please sign and return both copies of this Agreement... This document supersedes any previous distribution Agreement which you have entered into with Dell...” [Emphasis added]
11. Under clause 2.1 of the 2004 IDA, Dell granted to SETS the “non-exclusive right to market and distribute”, on its own account goods and services supplied by Dell in Lebanon.
12. Pursuant to clause 2.4 of the 2004 IDA, SETS was not entitled to any priority of supply over Dell’s other customers (including other distributors).
13. Clause 14 of the 2004 IDA sets out the rights of termination including at 14.2 (a):

“if the other party commit any material or persistent breach of any term of this Agreement... and (in the case of breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from the other party so to do, to remedy the breach.... ”
14. Clause 14.3 provided that the distributor was not entitled to any compensation as a result of the termination of the 2004 IDA.
15. Clause 27 stated:

“this Agreement shall be governed by and construed in accordance with the laws of England and shall be subject to the exclusive jurisdiction of the High Court of England.”

Termination of the 2004 IDA

16. It is SETS’ case that it was an exclusive distributor of Dell’s products and services in Lebanon and it registered itself as such with the Lebanese Commercial Registry and Ministry of Trade and Economy. SETS also brought proceedings against another distributor, Ingram Micro Levant SAL (“IM”) in Lebanon which SETS said had been supplied with goods falling under the distribution agreement in breach of the distribution agreement. Dell’s lawyers sent a letter on 29 September 2017 setting out the alleged breaches of the 2004 IDA and requiring SETS to withdraw the Lebanese proceedings against IM and to deregister its exclusivity. By letter of 7 November 2017 Dell UK lawyers wrote to SETS, stating that the 2004 IDA was terminated with effect from the date of that letter and subsequently sought damages.

The Lebanese Proceedings

17. SETS rejected the validity of Dell's termination and on 5 December 2017 commenced proceedings in the Lebanon against the claimants based on Decree 34/67. Proceedings were brought against Dell Technologies ("Dell US"), Dell France, Dell Computer FZ- LCC ("Dell Dubai") and Dell UK.
18. The case against the claimants records the facts as asserted by SETS. The claim in the Lebanese Proceedings states that in 1991 SETS obtained an "exclusive agency" to market and sell Dell products in the Lebanon and refers to certain documents in support of that assertion. It further states that in 2004 SETS was asked to sign a contract reflecting the growth and expansion of Dell on the basis that the nature of the relationship continued on the basis of exclusivity. SETS referred to the letter from Mr Dale in this regard. At paragraph 12 SETS stated:

"the exclusive relationship between the plaintiff and the defendant remained in a good state until the end of the year 2016, when the defendant,... started a plan of clear bad will in order to exercise pressure on the defendant to abandon its exclusive agency and cede its contractual and legal rights without anything in return... This plan was exposed when the defendant unilaterally ended the exclusive commercial representation relation with the plaintiff on November 07 2017 in an arbitrary way and without any proven legitimate fault committed by the plaintiff..."
19. Dell US is included in the claim as the first defendant on the basis that it is the "mother company" and the other defendants are "branches and representation offices for the first defendant". As a result SETS asserts that (paragraph 25 of the claim):

"any contract signed by any of these branches or representation offices, or even affiliated companies created by the mother company is considered as a contract with the latter."

"All this makes the defendant, with all its members, and all contracts, documents and appendices signed by all its mentioned members a single commercial relationship and a single contractual mass that complete each other, and this also makes them responsible jointly and severally among all member and without and division for the arbitrary termination of the exclusive agency of the plaintiff" [emphasis added]
20. In its claim SETS agrees that some clauses in the agreement do not conform with exclusive representation but refers to proving the contrary with written evidence or similar. SETS refers to the relationship between the two parties extending for 22 years during which time it had not competed with another agent in its work in Lebanon.
21. Further, SETS asserts that the jurisdiction clauses in the 1991 IDA and in the 2004 IDA are void so far as they exclude the Lebanese courts from considering the issue of the commercial representation.

22. SETS (page 27 of the claim) asks the court:

“to decide on the responsibility of the defendant jointly and severally among its members, for the termination of the commercial representation relationship and the exclusive agency...”

and seeks compensation for damages and lost profits.

23. In seeking that relief, SETS relies on it being proven (page 24 of the claim) that it was the “commercial representative and the exclusive agent” in Lebanon of Dell products from 1991 and that the defendant:

“unilaterally terminated the commercial representation relationship and the exclusive agency with the plaintiff, without any faults committed by the latter”

24. Further SETS asserts that the reasons mentioned in the termination letter dated 7 November 2017 for the justification of the “arbitrary termination” are

“illegitimate and illegal, and do not prove that the plaintiff committed any fault that justifies the termination...”

25. SETS then seeks (page 27) compensation pursuant to article 4 of the Decree 34/67 “resulting from the termination of the relationship in bad faith by the defendant” noting that (page 31) article 4 states that the termination of the commercial representation contract “without fault by the representative agent or without a legitimate reason” allows the agent to claim compensation equal to the incurred damage and the lost profit.

26. No hearing date has yet been listed for the first hearing of the claim in the Lebanese proceedings. According to the third witness statement of Mr Wedin, the first hearing may be listed any time after 6 April 2018 and once listed, notice of the hearing to the defendants (the claimants in these proceedings) can be as short as three days. However in the course of the hearing of this application, counsel for the respondent indicated that given that the claimants are outside the Lebanon, their understanding is that a hearing is unlikely to be listed before May. In any event the matter has now been dealt with on an interim basis pending this judgment as referred to above.

Claimants’ case

27. The claimants seek an interim injunction on the following grounds:

- i) insofar as the Lebanese proceedings are brought against Dell UK, they are brought in breach of clause 27, the exclusive jurisdiction clause, in the 2004 IDA.
- ii) Insofar as the Lebanese proceedings are brought against Dell France, Dell US and Dell Dubai, they are also brought in breach of the contractual duty in the exclusive jurisdiction clause not to sue Dell U.K.’s affiliates.

28. In oral submissions I understood the respondent to accept that if the court finds that the application succeeds in relation to Dell UK, SETS is bound by the exclusive jurisdiction clause in the 2004 IDA in relation to Dell US, Dell Dubai and (subject to the argument in relation to the 1991 IDA discussed below) Dell France. I do not therefore propose to consider this point further.

Relevant Legal Principles

29. I understand it to be common ground that the courts will ordinarily exercise its discretion to restrain proceedings commenced abroad in breach of an exclusive jurisdiction clause unless there are good or strong reasons not to do so: *The Angelic Grace* [1995] 1 Lloyd's Rep 87 at 96. Further it is for the party resisting the grant of the injunction to prove that there are good or strong reasons: *Donoghue v Armco* [2002] 1 Lloyd's Rep 425 at [24]. At the interim stage it is necessary for the claimant to show that there is "a high degree of probability" that there is an exclusive jurisdiction clause and that it has been breached: *Transfield Shipping v Chiping Xinfu* [2009] EWHC 3629 at [51] – [52]. An applicant for an injunction must act "promptly and before the foreign proceedings are too far advanced": *The Angelic Grace* at p96.

Defendant's submissions

30. Counsel for SETS opposed the application, in summary, for the following reasons:
- i) Ralli Bros principle: Counsel for SETS submitted that this is not a case where the court can be satisfied to the required standard, that there is an effective English jurisdiction clause in the 2004 IDA. Counsel submitted that, on the basis of the principle in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2KB287, clause 27 would be regarded as illegal in the place of performance, that is Lebanon, and therefore unenforceable under English law.
 - ii) Characterisation: counsel for SETS submitted that the Lebanese proceedings are not a claim under the 2004 IDA but are a statutory claim under Decree 34/67 which arises independently of and without reference to any contract between the parties.
 - iii) Dell France: So far as there is any agreement between Dell France and SETS, it arises under the 1991 IDA and the appropriate jurisdiction would be France.

Claimants' submissions

31. In response to the defendant's submissions, counsel for the claimants submitted that:
- i) the rule in *Ralli Bros* is only engaged where performance of the obligations necessarily involves the doing of an act which is illegal under the law of the place in which the act is to be done: *Libyan Arab Foreign Bank v Bankers Trust Co.* [1989] 1 QB 728 at 743 – 745; *Abuja International Hotels Ltd v Meridian SAS* [2012] EW 887 (Comm) at [27].
 - ii) The characterisation of the claim in the foreign jurisdiction is a question of English conflict rules and the key question is the substance or content of the right asserted abroad: *Yusuf Cepnioglu* [2016] 1 Lloyd's Rep at [42] and *The*

Prestige [2015] 2 Lloyd's Rep 33 at [14] When determining the substance or content of the foreign right, it is necessary to look at the questions or issues raised, rather than the form of the claim. *Prestige* at [11]

- iii) The 1991 IDA has been terminated: it is a question for the court whether the documents give rise to a sufficiently clear intention on the part of Dell France and SETS to terminate the 1991 IDA.

Discussion: *Ralli Bros* principle

- 32. In *Ralli Bros* Spanish owners of a vessel sought to recover freight from the charterers in England notwithstanding that it exceeded the amount payable under Spanish law. The court held that the charterparty was an English contract but that as that part of the contract dealing with the obligation of the charterers with regard to payment of the freight had to be performed in Spain, that part of the contract which required the payment of freight in excess of the limit imposed by the law of Spain, was invalid and could not be enforced against the charterers.
- 33. In *Libyan Arab Foreign Bank* Staughton J stated that:

“performance of the contract is excused if (i) it has become illegal by the proper law of the contract or (ii) it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done.”
- 34. In the *Abuja* case the defendant, Meridian, managed a hotel in Abuja, Nigeria pursuant to an agreement governed by Nigerian law. The agreement provided for arbitration in the event of a dispute. The defendant began an arbitration against Abuja which had unilaterally taken over the management of the hotel. Abuja appealed the award on the ground that the arbitrators did not possess substantive jurisdiction relying, inter alia, on an argument that an arbitration agreement was unconstitutional under the Nigerian constitution. Hamblen J held that Nigerian law was irrelevant to the validity of the arbitration agreement as it was governed by English law. The principle that the English courts would not enforce a contract if its performance was unlawful under the law of the country where it is to be performed did not apply as the arbitration agreement was to be performed in England.
- 35. Counsel for SETS sought to distinguish *Abuja* as relating to different facts and circumstances and further noting that there was no evidence before that court that it would fall foul of Nigerian law. Counsel submitted that here the “act” to be carried out would be carried out in the place where performance was illegal because the right to supply goods in the Lebanon was saddled with what counsel termed an “equitable obligation” that the right to supply must be litigated in the UK. Counsel accepted that the jurisdiction agreement in clause 27 was severable but submitted that it could not be determined in a vacuum. Counsel submitted that Lebanon was the natural forum for disputes in the absence of a jurisdiction clause and the covenant not to refer disputes to its natural forum amounted to a negative covenant to be performed in Lebanon.
- 36. It seems to me that there was no legal basis demonstrated for the “equitable obligation” which counsel for SETS sought to advance. Counsel for the respondent

sought to rely on an extract from *Gee on Commercial Injunctions (6th edition)* at para 14 – 024. However the relevant paragraph in *Gee* is dealing with the position of enforcing a jurisdiction clause against an assignee of rights under the contract where the assignee cannot claim the benefit of the contract without complying with the clause which forms a part of it. In my view, this is a different and well-established proposition of law in relation to assignment, which provides no support for an analysis of the contract in this case that the right to supply goods and services in Lebanon includes the obligation to submit to the jurisdiction of English courts and thus performance of the contract is unlawful in the place of performance and unenforceable.

37. In his report Professor Mallat states that article 5 of Decree 34/67 states:

“notwithstanding any agreement to the contrary, the courts of the place of business of the commercial representative shall be deemed to be competent to consider any disputes arising from the commercial representation contract.”

38. Professor Mallat states (paragraph 21 of his report) that the effect of article 5 is to make the issue of the effect of such distribution agreements exclusively for the Lebanese courts, no matter what the parties might otherwise purport to agree. Under Lebanese law SETS did not have capacity to agree a jurisdiction clause that ousted the exclusive jurisdiction of the Lebanese courts. He concludes (paragraph 35) that an English exclusive jurisdiction clause will therefore violate Lebanese law and public policy and be treated as unenforceable by the Lebanese courts.

39. Although Professor Mallat stated that the jurisdiction clause will violate Lebanese law, Professor Mallat does not adopt the analysis advanced by counsel for the respondent at the hearing and suggests that in the performance of the supply of goods and services, the 2004 IDA involved the doing of any act in Lebanon that was illegal under Lebanese law. The fact that a foreign court would disregard or refuse to enforce an English jurisdiction clause according to its own law is ordinarily not a strong reason to refuse an injunction where the foreign proceedings are commenced in breach of the jurisdiction clause: *OT Africa Line v Magic Sportswear* [2005] 2 Lloyd’s Rep 170 at [32] to [38]. In that case Canada had introduced provisions on the carriage of goods by sea equivalent to the Hamburg rules. Under section 46 of the Canadian Marine Liability Act 2001 there was provision for a claimant to institute proceedings in Canada notwithstanding the provisions of the contract, where the port of loading or discharge was in Canada or the person against whom the claim was made, resided or had a place of business in Canada or the contract was made in Canada. The Canadian court found that the conditions of section 46 were satisfied and the Act “clearly removes the determining or binding effect of a forum selection clause in the bill of lading”. The Court of Appeal upheld the order for an anti-suit injunction notwithstanding such provision of Canadian law.

40. In this case it is not illegal for Dell to supply goods and services in Lebanon. Performance of the contract does not necessarily involve doing an act which is unlawful by the law of the place where the act has to be done. Accordingly, in my view, the rule in *Ralli Bros* has no application to this case and the exclusive jurisdiction clause in the 2004 IDA is enforceable.

Discussion: Characterisation

41. Counsel for the respondent relies on paragraph 19 of Professor Mallat’s report that under Lebanese law, Decree 34/67 creates:

“rights and obligations as between a foreign supplier and a Lebanese agent/distributor/trader that arise independently of and without reference to any contract between the parties.”
[Emphasis added]

Thus counsel submitted that the Lebanese proceedings are not a claim under the 2004 IDA but are a statutory claim under Decree 34/67 which is independent of the contract between the parties.

42. The characterisation of whether the right which SETS seeks to enforce is in substance contractual in nature or an independent right created by Lebanese statute is a question of English law: *The Yusuf* at [44]. Counsel for the respondent accepted in oral submissions that it was a matter for the English courts but submitted that the court should be “informed” by the Lebanese law evidence.
43. Both parties seek to rely on dicta in *The Prestige* although counsel for the respondent sought to distinguish *Prestige* on the basis that in that case the statutory right replicated the contractual right. The judgment in *Prestige* was concerned with the right of a third party to pursue a direct claim against an insurer and therefore the analysis is different from the present case given that the third party in that case, was seeking to bring a direct statutory claim based on the contractual claim namely to enforce the contract of insurance. Nevertheless it provides guidance on the approach of the English courts. Moore-Bick LJ referred to the first instance judgment that:

“in deciding whether or not the direct action right is “in substance” a claim to enforce the contract or a claim to enforce an independent right of recovery, what is likely to matter most is the content of the right rather than the derivation of that content...”

He then considered the argument that the judge’s analysis was flawed because he concentrated too much on the content of the liability imposed by Spanish law and too little on its source and essential nature, concluding at [25]:

“in my view the critical question is what, in substance, was the nature of the right that the legislation was seeking to confer a third party. Where a wrongdoer is insured against liability of some kind it will be possible to identify an insurer who may be held liable in his place, but, ... it will be necessary to establish that the contract covers the liability in question. That in turn means ascertaining the limits of the insurer’s obligation, which also means that he should be able to raise any defences that would be available to him in an action brought by the insured. If the legislation conferring a direct right of action against the insurer recognises that in substance that is the case, it is difficult to resist the conclusion that its intention and effect is to

enable the third-party to enforce against the insured the same obligations as those that could have been enforced by the insured himself. If, on the other hand, the legislation prevents the insurer from relying in defence of the claim on important provisions which define the scope of his liability, one may be driven to the conclusion that the legislation has created a new right which is not intended to mirror in substance the insurer's liability under the contract." [Emphasis added]

44. Counsel for the respondent relying on the passage above, submitted that here Decree 34/67 creates a freestanding right which even if it starts with a contract, leads to a set of protections. He submitted therefore that it is not essentially a claim in contract.
45. Counsel for the respondent submitted that Decree 34/67 had nothing to do with the contract, that the termination provisions were irrelevant, as was the distinction between exclusive and non-exclusive. Counsel referred to paragraphs 11 and 12 of Professor Mallat's report that "the principal is forced to retain an agent ...even if the agency agreement comes to an end" and "the discontinuation of the commercial representation relationship leading as a matter of principle to compensation for the agent regardless of the terms or length of the contract". Further counsel submitted that Professor Mallat states (paragraph 18) that the law deems the trader who sells on his own behalf to be the same as a commercial representative.
46. In my view the submissions of Counsel for the respondent based on Professor Mallat's report were not borne out by the report itself. Under a heading "The scope of decree-law 34/1967", Professor Mallat made, in summary, the following points:

"The importance of exclusivity in commercial representation and distribution is well anchored in Arab jurisdictions across the Middle East. It is relevant salient traits in Lebanon are three:

The first is the right for a commercial representative benefiting from an exclusive representation contract not to see the principal terminate his representation at will without compensation..." (Paragraph 10)

"In relevant parts, Decree-law 34/67 stipulates:

...in the event of termination of [a commercial representation contract] by the principal without any fault on the part of the agent or without any other lawful cause, the agent shall ...be entitled to claim compensation..." (Paragraph 13)

"Lebanese law assimilates the "commercial agent" and the importer/distributor/trader. A trader who sells on his own behalf what he purchases in accordance with a contract which grants him the capacity of representative or exclusive distributor, shall be deemed to be the same as a commercial representative" (paragraph 18) [emphasis added]

47. For the purposes of this application, it is not necessary for the court to decide whether or not the contract gave SETS an exclusive distributorship. The key points that arise from Professor Mallat's report, as summarised above, are that:
- i) Decree 34/67 is concerned with the circumstances in which a contract is terminated and therefore it is not correct to say that the claim under the statute arises "without reference" to any contract between the parties.
 - ii) compensation will arise under Decree 34/67 where an exclusive distributorship agreement is terminated without any fault on the part of the agent or without any other lawful cause. The court will therefore have to investigate the circumstances of the termination as is evident from the particulars of the claim submitted by SETS in the Lebanese proceedings: SETS seeks compensation (page 27) "resulting from the termination of the relationship in bad faith by the defendant". Accordingly the claim for compensation will not be established under the statute without proof of the circumstances of termination of the contract.
 - iii) The terms of the contract will also be relevant to establish the right to compensation under Decree 34/67 which will only arise if the relationship under the contract is exclusive: paragraph 10 of Professor Mallat's report – the right for a commercial representative benefiting from an exclusive representation contract not to see the principal terminate his representation at will without compensation.
48. Turning then to the submission that even if the claim in the Lebanese proceedings starts with the contract, it is not essentially a contract claim but a freestanding right.
49. In my view the claim under Decree 34/67 is a claim for compensation for breach of contract. The issues which are raised by SETS in the Lebanese proceedings is whether Dell UK had "lawful cause" to terminate the agreement. Accordingly, it is the contract that must be looked at in order to determine whether there is any right to compensation under the statute. In addition to determining the "exclusive" or "non-exclusive" nature of the contract, the circumstances of termination of the contract will have to be determined in the Lebanese Proceedings and the rights to compensation under Lebanese law will only arise upon determination of these matters under the contract. It has not been suggested that Decree 34/67 prescribes provisions which define the scope of liability under the contract, for example the meaning of "lawful cause" such that one might conclude that the legislation had created a new right which was not intended to mirror the circumstances in which Dell was liable under the contract. The right to compensation derives from the law rather than the contract but it does not exist separately from the contract. In my view it is in substance a claim under the contract and thus within the scope of the exclusive jurisdiction clause in the 2004 IDA.

Alternative submissions

50. Alternatively, counsel for the respondent submitted that the contract that created the rights and the relationship was the 1991 IDA and therefore the parties submitted to the

exclusive jurisdiction of the Business Courts of Versailles. Counsel for the respondent referred to the claim and reliance in the claim on the 1991 IDA. He submitted that the 1991 IDA is the “genesis” of the relationship and the rights under the Decree 34/67 therefore arose from the 1991 IDA such that the 2004 IDA is irrelevant.

51. I accept that the claim relies on the entirety of the relationship with Dell from the 1991 IDA. However Professor Mallatt is clear that the right is in respect of a “contract” and relates to entitlement to compensation for termination of a contract. He refers at paragraph 10 to:

“the right for a commercial representative benefiting from an exclusive representation contract not to see the principal terminate his representation at will without compensation.”
[Emphasis added]

Decree 34/67 (reproduced at paragraph 13 of Professor Mallatt’s report) itself refers to the contract:

“a commercial representation contract shall be deemed to be made to the mutual benefit of the contracting parties. Therefore in the event of its termination by the principal without any fault on the part of the agent or without any other lawful cause, the agent shall... be entitled to claim compensation...”[Emphasis added]

52. SETS accepts (paragraph 10 and 11 of its claim) that it signed a contract in 2004 and refers to the letter from Mr Dale in which he refers to the “updated Dell distribution agreement” [emphasis added] as well as their “continued working relationship”. It is therefore in my view implicitly accepted by SETS in the claim that the relationship was governed by the 2004 IDA at the time of termination and it is in reliance on termination of the 2004 IDA that the claim is brought in the Lebanese proceedings.
53. I do not therefore accept the alternative submission that the jurisdiction clause in the 2004 IDA is not the relevant agreement.

Dell France

54. In relation to the anti-suit injunction sought by Dell France, counsel for the claimants submitted that the 1991 IDA was terminated by the letter from Mr Dale in 2004 (referred to above) or by the subsequent letter in November 2017. In the letter of 27 November 2017 Dell France wrote to SETS asserting that the 1991 IDA had been terminated by virtue of the 2004 IDA and in particular clause 24.1 of that agreement which stated that:

“The Agreement, together with Dell’s Terms and Conditions of Sale and Service, supersede all prior agreements, arrangements and understandings between the parties and constitutes the entire agreement between the parties relating to the subject matter hereof.”

However the letter went on to state that, without prejudice to Dell's primary position, the letter constituted notice of termination of the 1991 IDA with immediate effect.

55. Counsel for the claimants submitted that, if, contrary to the claimants' submissions, the court were to find that the 1991 IDA is still valid, then counsel submitted that the claim in the Lebanese proceedings is for unlawful termination of the 2004 IDA and is brought against all the claimants, including Dell France, in breach of clause 27 of the 2004 IDA and the fact that the French contract remains in force is irrelevant.
56. Counsel for the respondent submitted that there could be no injunction in favour of Dell France because Dell France was bound by the 1991 IDA. Counsel submitted that according to the expert evidence of Mr Devot none of the three documents relied on by the claimants was effective to terminate the 1991 IDA. Accordingly the claimants have not established a high degree of probability that there has been a breach of an anti-suit clause.
57. In his report Mr Devot states that under French law a party can terminate a fixed term contract before its term if all the parties agree to the termination (paragraph 15). In his report Mr Devot notes that the 2004 letter contained no indication that Mr Dale was acting on behalf of Dell France. However in his third witness statement, Mr Wedin states that he has been informed by an in-house lawyer with Dell that Mr Dale would have sent the letter with authority to bind Dell France and the decision to cease trade under the 1991 IDA and replace it with the 2004 IDA would have been taken and actioned with the full knowledge and authority of Dell France.
58. Applying the principles of French law (as stated by Mr Devot) to the facts of this case, the issue for the court is whether there is evidence that all the parties agreed to the termination. The letter dated 23 March 2004 referred to an "updated Dell Distributor Agreement" [emphasis added], stated that it was "some time since this Agreement has been updated" and also referred to "our continued working relationship". This language suggests that the 1991 IDA had not been terminated prior to 2004 but was continuing at that point. However the letter is clear that the document being sent to SETS for signature in March 2004:

"supersedes any previous distribution Agreement which you have entered into with Dell..."
59. SETS do not dispute having received the letter (SETS refer to it in their claim) and their response appeared to be to sign the 2004 IDA. For the purposes of this application I do not have to decide whether the 1991 IDA was terminated but whether the claimants have established a high degree of probability that there is an exclusive jurisdiction clause (the 2004 IDA) and that it has been breached.
60. I agree that clause 24 of the 2004 IDA which refers to terminating prior agreements does not assist the claimants as Dell France was not a party to the 2004 IDA. However, the evidence of the letter of Mr Dale, coupled with the witness statement of Mr Wedin lead me to the conclusion that there is a high degree of probability that the 1991 IDA was terminated in 2004. The reference by SETS in the claim in the Lebanese proceedings to the letter of Mr Dale in my view supports that conclusion.

61. Accordingly I am satisfied that the test for an anti-suit injunction has been met in relation to Dell France, namely that there is a high degree of probability of Dell France establishing that there is an exclusive jurisdiction clause and it has been breached by the Lebanese Proceedings being brought against it.

Conclusion

62. For the reasons set out above the claimants' application for an anti-suit injunction succeeds.