



Neutral Citation Number: [2021] EWCA Civ 313

Case No: A2/2020/1376

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
CIRCUIT COMMERCIAL COURT
HH Judge Russen QC
[2020] EWHC 2266 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2021

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HENDERSON
and
LADY JUSTICE CARR

Between:

ADACTIVE MEDIA INC

**Claimant/
Respondent**

- and -

MARK INGROUILLE

**Defendant/
Appellant**

Gerard McMeel QC (instructed by Ashfords LLP) for the Appellant
Hugo Groves (instructed by Lester Aldridge LLP) for the Respondent

Hearing date: 24 February 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Friday 5 March 2021 at 10:30am.

Lord Justice David Richards:

Introduction

1. This is an appeal against an order for summary judgment by way of enforcement of a judgment for US\$11 million given by the United States District Court for the Central District of California (the US Court) on 26 August 2019. By the order, dated 21 July 2020, HH Judge Russen QC, sitting as a judge of the High Court, gave judgment under CPR Part 24 for £8,483,726.67, being the sterling equivalent of \$11 million at the exchange rate ruling at the date of issue of the proceedings in England, together with interest and costs.
2. The proceedings in the US Court (the US proceedings) arose out of a consultancy agreement between the Respondent, AdActive Media Inc (the company), incorporated in Delaware, and the appellant, Mark Ingrouille, a British citizen resident in England. By the consultancy agreement, made in September 2014, Mr Ingrouille was engaged to provide services as part of the expansion of the company's business in South East Asia. The company terminated the agreement in March 2018 and commenced the US proceedings in April 2018, claiming damages for breach of contract, breach of fiduciary duty, fraud, embezzlement, interference with contractual relations and interference with economic advantage.
3. Mr Ingrouille did not participate in the US proceedings and judgment in default for \$11 million in compensatory damages was entered in August 2019, but only after detailed legal submissions and expert evidence as to the quantum of damages, all of which were considered at oral hearings in February and April 2019.
4. The consultancy agreement is by its express terms governed by the law of the State of California. It contains three provisions dealing with jurisdiction, two of which confer jurisdiction on US District and State Courts in California and the other provides for arbitration. The provision for arbitration expressly excludes claims by the company under two clauses, one of which (clause 7) contains covenants against the misuse and unauthorised disclosure of confidential information. Alleged breaches of clause 7 featured prominently in the claims made in the US proceedings. The relationship between these provisions and their effect is one of the issues arising on this appeal. The company argued before the judge that they were irreconcilable, and that the arbitration clause was ineffective. Alternatively, it argued that as the US proceedings included claims in respect of the misuse and unauthorised disclosure of confidential information, they were properly brought in the US Court.
5. If the US proceedings were properly brought in the US Court in accordance with the terms of the consultancy agreement, that court is recognised under English common law principles as having jurisdiction over the claim against Mr Ingrouille and its judgment will *prima facie* be enforceable in England. Whether those proceedings were properly brought in the US Court depends on the application of the jurisdiction provisions of the consultancy agreement and on section 32 of the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act), which so far as relevant provides:

“(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if –

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply, where the agreement referred to in paragraph (a) of that subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).”

6. In an *ex tempore* judgment, Judge Russen held, first, that the proceedings were properly brought in the US Court in accordance with the clauses conferring jurisdiction on that court because, even if the arbitration clause was effective, it did not exclude the US Court’s jurisdiction if the proceedings included claims in respect of the misuse or unauthorised disclosure of confidential information. Second, and in any event, he held that the arbitration clause was unenforceable within the meaning of section 32(2) because it was irreconcilable with the other jurisdiction clauses. Mr Ingrouille appeals with permission granted by Males LJ.

The consultancy agreement

7. The consultancy agreement, entitled “Strategic Consulting Agreement”, provided that Mr Ingrouille was engaged to assist and advise the company with strategic business development. The company was described by its CEO in a witness statement made in support of the application for summary judgment as “a digital media company that specialises in optimising social media influencers’ channels and connecting them to brands for meaningful, engaging media and advertising campaigns”. Under the agreement, Mr Ingrouille’s primary responsibilities were the establishment of its initial business operations throughout South East Asia, including the formation of subsidiaries in countries in the region, hiring and supervising office operations,

introductions to and management of potential advertising clients and media partners and expansion and streamlining of the company's network of content creators. Clearly, Mr Ingrouille had wide-ranging responsibilities under the consultancy agreement for the development and management of the company's business in South East Asia. The engagement was for an initial term of three years and thereafter automatically renewing on a monthly basis.

8. Clause 3.2 provides that during the term of the agreement, Mr Ingrouille "shall act in good faith and to the best of [his] ability...and...shall devote the necessary time, attention, and efforts to the performance of the duties required by or consistent with the engagement."
9. Clause 7.1 contains a definition of confidential information in broad but conventional terms. Clause 7.2 provides that Mr Ingrouille would not without prior written consent use or disclose confidential information and would exercise all due and diligent precautions to protect confidential information. Clause 8 contains elaborate provisions to protect the company's interest in Mr Ingrouille's "work product".
10. Clauses 15 to 17 are as follows:

"15. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of California, without regard to principles of conflicts of laws. Any case, controversy, suit, action, or proceeding arising out of, in connection with, or related to this Agreement shall be brought in any Federal or State court located in Los Angeles County, the State of California.

16. Consent to Suit

Any legal proceeding arising out of or relating to this Agreement shall be instituted in the United States District Court for the District of California, or if such court does not have jurisdiction or will not accept jurisdiction, in any court of general jurisdiction in the State of California, and Consultant hereby consents to the personal and exclusive jurisdiction of such court and hereby waives any objection that Consultant may have as to the venue of any such proceeding and any claim or defense of inconvenient forum.

17. Disputes

17.1 Excepting any claim by the Company against Consultant under Sections 7, and 8 of this Agreement, all claims, disputes, controversies, differences or misunderstandings between the parties arising out of, or by virtue of this Agreement or the interpretation of this Agreement, including the determination of “for Cause” under Section 6 hereof, which cannot be settled or resolved by the parties hereto will be settled or determined by arbitration by a panel of three arbitrators as herein provided. When a party wishes to submit a question or an issue to arbitration it will serve a notice upon the other party, setting forth the matter or matters to be arbitrated and the name and address of its arbitrator and within thirty (30) business days thereafter the other party will name its arbitrator and give written notice to the other party originally invoking arbitration of his name and address. Within ten (10) business days thereafter a third arbitrator will be appointed by the two arbitrators so selected.

17.2 If the party upon whom notice is served should fail to appoint an arbitrator within the time provided, or if the two arbitrators named in accordance with Section 17.1 of this Section should not agree upon a third arbitrator, such second or third arbitrator (or both) shall be appointed by the American Arbitration Association in Washington, D.C.

17.3 Unless all the arbitrators otherwise agree, an arbitration under this Agreement will be conducted in Los Angeles, California under the rules and regulations of the American Arbitration Association not in conflict with the provisions of this Section.

17.4 The parties will abide by and perform in accordance with the decisions, awards or orders of the arbitrators selected at any time, or from time to time pursuant to the provisions of this Section, and the arbitrators may, and are empowered to, grant or direct injunctive relief as well as monetary damages. A judgment of any court having jurisdiction of the parties may be entered upon the decision, award or order of arbitrators under or pursuant to the provisions of this Agreement.”

The US proceedings

11. The company’s case against Mr Ingrouille was set out in the complaint filed at the commencement of the US proceedings in April 2018. Running to 17 pages, its function is similar to particulars of claim in English proceedings. As well as Mr Ingrouille, two former officers of the company’s subsidiary in Vietnam were joined as

defendants. The company is referred to as “TMG”. Paragraphs 1-3 are headed “Summary of Action” and it is alleged in paragraph 1 that:

“After TMG directed and entrusted Defendants to establish and manage the Company’s initial business operations in Thailand and Vietnam, Defendants embarked on a multi-faceted conspiracy to undermine and usurp TMG’s business interests in Thailand and Vietnam which included (i) sharing confidential and proprietary information with third parties with whom Defendants sought to collaborate in direct competition with TMG, (ii) creating fake vendor companies and fake invoices to siphon money out of TMG for their own benefit, (iii) embezzling and converting Company funds, assets, property, relationships, contracts, accounts receivable and good will for their own use and benefit.”

12. Paragraphs 25-27 are headed “Defendants’ Widespread Deception and Malfeasance”. Paragraph 26 states that the defendants collaborated “in a broad, multi-faceted conspiracy to undermine TMG’s business interests, steal TMG’s contracts and assets, and usurp TMG’s clients and relationships for themselves” which included acts detailed in sub-paragraphs (a) to (f) of paragraph 27. It is said in paragraph 27(b) that Mr Ingrouille provided confidential information about the company’s business operations, customers and contracts to a former executive, Mr Chairat, who was working for a competitor. It is further said that Mr Ingrouille sought to disrupt and interfere with merger/collaboration opportunities with third parties in Thailand and Vietnam, by providing false and misleading information about the company to the third parties and continuing to provide confidential information to Mr Chairat. Paragraph 27(c) alleges that Mr Ingrouille and another defendant conspired with Mr Chairat to have the company’s core operations fail, so that they could set up a competing business. It is alleged in paragraph 27(e) that Mr Ingrouille lied to the CEO of the company about the cash flow needs of the Thailand office to induce him to send additional money to that office so that Mr Ingrouille could pay himself a secret, substantial bonus and that he instructed the accountant in the Thailand office to pay him the bonus.
13. Eight causes of action are then pleaded against the defendants, which are largely based on the matters pleaded in the earlier paragraphs, but the following may be noted. Under breach of contract, it is pleaded that Mr Ingrouille breached the consultancy agreement by “wilfully disregarding and/or failing to perform his duties or obligations under the Agreement, engaging in acts of dishonesty, passing Confidential Information of the Company to third parties without authorization, and engaging in actions in direct competition with the Company”. Under interference with contractual relations, it is alleged that the defendants were aware that the company had important and lucrative contracts with consultants, vendors, suppliers and clients in Vietnam, Thailand and throughout South East Asia and that they conspired to hijack the company’s operations in Vietnam and Thailand and to steal those contracts for themselves. This conspiracy included efforts to hire away consultants and employees, to usurp contracts with clients and to interfere with contracts with YouTube and other media platforms. It is alleged that, as a result of the

defendants' actions, contractual relations between the company and third parties have been severed, lost or jeopardised.

14. The jurisdiction of the US Court was claimed in the complaint on the basis of clauses 15 and 16 of the consultancy agreement. Clause 17 was not mentioned in the complaint and it does not appear that it was at any stage drawn to the attention of the US Court.
15. On being satisfied by evidence as to service of the proceedings and that Mr Ingrouille and the other defendants had failed to plead or otherwise defend the proceedings, the clerk to the US Court entered the default of each defendant on 20 December 2018. It appears that its effect was to preclude the defendants from contesting the factual allegations made against them, but the court remained to be satisfied of the legal merits of the claims and of the quantum of any loss suffered by the company. Those matters were addressed at two hearings in February and April 2019, which included written and oral expert accounting evidence as to loss. As earlier stated, judgment for \$11 million in compensatory damages was entered by the US Court in August 2019. The court declined to award punitive damages. The judgment as against Mr Ingrouille is based on breaches of contract and of fiduciary duty, comprising disclosure of the company's confidential information to a competitor and misappropriation of the company's funds by the payment of an unauthorised bonus.
16. The judgment sum is not broken down into amounts referable to particular causes of action or the various allegations of fact constituting those causes of action, but it is rather a global figure representing the loss of profits suffered by the company as a result of the pleaded actions of Mr Ingrouille accepted by the US Court.

The English proceedings

17. The English proceedings were commenced on 20 November 2019 by the issue of a claim form seeking judgment for the sterling equivalent of the debt constituted by the judgment in the US proceedings. The accompanying particulars of claim pleaded clauses 15 and 16 of the consultancy agreement as the basis of the US Court's jurisdiction. It was pleaded that the company had issued the US proceedings against Mr Ingrouille and the two other defendants seeking damages "in relation to several causes of action, including but not limited to breach of contract, breach of fiduciary duty, fraud and embezzlement". The judgment in the US proceedings was pleaded without reference to the claims on which it had been given.
18. A defence dated 6 December 2020 was served. It was pleaded that the US judgment was obtained in breach of the express agreement to arbitrate in clause 17 of the consultancy agreement and that the allegations and claims based on breach of contract, breach of fiduciary duty, and other alleged causes of action in the US proceedings went well beyond claims for breach of clause 7 and therefore fell within the agreement to arbitrate. It was pleaded that Mr Ingrouille would rely on section 32 of the 1982 Act.
19. The defence filed by Mr Ingrouille raised two other defences. First, it was said that clauses 15 and 16 did not form part of the consultancy agreement because he was informed by the company when the agreement was proffered to him that it was "mostly boilerplate stuff" and that clauses 15 and 16 did not apply to him as he was

not resident in the United States. Second, Mr Ingrouille denied that the US proceedings had been served on him and he asserted that he was wholly unaware of them.

20. No reply was served.
21. On 21 February 2020, the company issued its application for summary judgment against Mr Ingrouille, alternatively an order striking out the defence and judgment accordingly.
22. In a witness statement served on 9 July 2020, seven days before the hearing listed for 16 July, Mr Ingrouille for the first time raised a new, and inconsistent, defence that he had not signed the consultancy agreement at all and that an unidentified person had signed it electronically without his authority.
23. Skeleton arguments by the same counsel as appeared before us were exchanged on 14 July 2020. Counsel for the company dealt in detail with the defences summarised in [19] and [22] above. As regards the defence based on the US Court's lack of jurisdiction by reason of the arbitration agreement in clause 17, the principal points briefly taken by counsel for the company were that there was no reason to think that the US Court had not considered the effect of clause 17 and that there were in any event claims under clauses 7 and 8 to which clause 17 expressly did not apply.
24. In his skeleton argument, counsel for Mr Ingrouille relied principally on section 32 of the 1982 Act and the effect of the arbitration agreement in clause 17. The issue raised in the defence as to service of the US proceedings was said to be probably moot, and in any case peripheral to the application. Mention was made of the issue raised by Mr Ingrouille as to his signature on the consultancy agreement but only on the basis that he had no recollection of signing it and he wished to interrogate the documents and see the metadata of the emails relied on.

The judgment

25. Judge Russen first addressed and rejected the various defences other than section 32 and clause 17. They are not the subject of any appeal and it is perhaps unfortunate, given that they were demonstrably hopeless on the evidence, that they were pursued at all, so to an extent distracting the hearing and the judge from the real issue under section 32.
26. The judge went on to consider the defence based on the arbitration clause and the effect of section 32 of the 1982 Act. He rejected the defence on two grounds.
27. The first ground assumed that there was an effective arbitration clause but that claims under clauses 7 and 8 were excluded from it. At [50] to [52] the judge examined the complaint in the US proceedings to determine the bases on which the claims against Mr Ingrouille were made, concluding at [53]:

“When one focuses upon paragraph 27, in particular, which summarises the non-exclusive unlawful acts of betrayal, malfeasance and bad faith, it is clear that those acts, as so described and labelled, do specifically include, alleged

breaches of the rule 7 obligations of confidentiality. I think that it is true of all of the subsequently pleaded causes of action, some of which (para.40 for example in relation to the fraud allegation) again specifically come back to sharing of confidential information in competition with the claimant's interests."

28. This led to his first reason for rejecting the defence based on the arbitration clause and section 32(1)(a), at [55]:

"In my judgment, it cannot be said that by bringing a dispute which included matters that the arbitrators were not competent to decide, by reason of the express carve-out under clause 17 provision, if effective, that the present claimant [was] acting contrary to the arbitration provision. I have to, however, look at the language of the section 32(1)(a). The "dispute in question" was based upon a number of component parts, but as between the present claimant and the present defendant, but there was only one dispute in respect of which the US proceedings were brought. And the causes of action grounded in complaints that the defendant acted in breach of his clause 7 obligations cannot be dismissed as a minor and severable aspect of the dispute. If anything those allegations of breach appear to be the mainstay of the US complaint. Any arbitrators appointed under clause 17 had no jurisdiction to decide those. It follows, in my judgment, that it cannot be said for section 32(1)(a) purposes that "the dispute" should have been settled by arbitration. If only matters pertaining to clause 3.2 had been raised in the US proceedings there may have been a stronger case to say that fell foul of what Rix LJ described as the general rule under that first subsection."

29. The judge's second reason was based on a consideration as to whether clause 17 created an effective provision for arbitration at all. He approached this as an issue under section 32(2), whether clause 17 was "void or unenforceable". He had earlier said at [36] that "[t]here is a clear conflict between that provision and what clauses 15 and 16 say about the law and place of any legal proceedings arising out of the Consultancy Agreement" and at [45] that "clause 17, on my reading of it, is apparently in conflict with the second sentence of clause 15 and the introductory language of clause 16 which, regardless of whether or not it is a clause 7 or clause 8 based dispute, appear to confer upon the US court jurisdiction in "matters arising out of or in connection with or related to this agreement"".
30. This led the judge to say at [57]: "I do consider that, for the purpose of s.32(2) at least, the provision of clause 17 cannot stand in the face of the provisions of clauses 15 and 16, and I would further hold that the provision is unenforceable" and at [60] that "the real conflict is what clause 17 purports to say the arbitrators are competent to decide when (in the two immediate preceding clauses) they have just inconsistently said the same in relation to the California Court". He stated his conclusion at [61]:

“In these circumstances, and evaluating the matter as I am required to do under section 32(2), I am not persuaded that clause 17 can be regarded as enforceable for the purpose of applying the general rule under section 32(1). The expressly conflicting provisions of the Consultancy Agreement indicate to me that the purported agreement is unenforceable, or perhaps void.”

Does clause 17 create an effective provision for arbitration?

31. On this appeal, Mr Ingrouille challenges both reasons given by the judge, but it is the second reason which forms the first ground of appeal. Mr Groves, appearing for the company, agrees that it is logical to deal first with this issue.
32. It is surprising that the judge addressed this issue through the lens of section 32(2) when the issue was not whether there was a void or unenforceable arbitration agreement but whether, on the true construction of the consultancy agreement, there was an effective arbitration clause at all. That, as it appears to me, is an issue that arises under section 32(1)(a). The issue is whether the bringing of the US proceedings was “contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings” in the US Court. If clause 17 has no effect by reason of an irreconcilable inconsistency with clauses 15 and 16, it follows that there was no agreement to which section 32(1)(a) applied, rather than that there was such an agreement but it was void or unenforceable.
33. This, however, is a minor matter, because the judge nonetheless addressed the issue of inconsistency as the only ground on which clause 17 could be said to be unenforceable or void, concluding that the inconsistency deprived clause 17 of any contractual effect. In other words, there was no agreement for arbitration.
34. I should at this stage mention one point. There could be a debate as to whether, in the context of the present proceedings to enforce the US judgment, the effect of clause 17 as a matter of construction of the agreement is to be determined in accordance with English law as the *lex fori* or in accordance with the law of California as the governing law of the contract. It is unnecessary to consider this issue because neither party adduced evidence of the law of California, so that, even if it is the applicable law, it is presumed to be the same as English law.
35. The starting point in considering whether an express term of a contract is ineffective is that the parties are to be presumed to have intended the entire contract to take effect. If a term is ineffective because of an irreconcilable conflict with other express terms of the contract, it can be assumed that the parties did not intend to create this situation. Leaving aside the case where a provision has through administrative error been included, the irreconcilable conflict is likely to have arisen through a drafting error. It is necessary to examine with care the precise drafting of the provisions before determining that a conflict exists and courts will strive to avoid the conclusion that a provision cannot, as a matter of construction, take effect. As it is put in *Chitty on Contracts* (33rd ed.) (2018 and 2nd cumulative supplement 2020) at 13-071:

“To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both

clauses. A term may also be rejected if it is repugnant to the remainder of the contract. However an effort should be made to give effect to every clause of the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement.”

36. The same point, specifically in relation to arbitration clauses, was made by Lord Hamblen and Lord Leggatt in their judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] 1 WLR 4117 (*Enka*) at [106]:

“The principle that contracting parties could not have intended a significant clause in their contract, such as an arbitration clause, to be invalid is a form of purposive interpretation, which seeks to interpret the language of the contract, so far as possible, in a way which will give effect to - rather than defeat - an aim or purpose, which the parties can be taken to have had in view. The strength of the inference that an interpretation of the contract would defeat an aim of the parties is, however, a matter of degree. An interpretation which would without doubt mean that an arbitration clause is void and of no legal effect at all gives rise to a very powerful inference that such a meaning could not rationally have been intended.”

37. Clauses 15 to 17 all deal with governing law and jurisdiction. Given that they are grouped together in this way, the possibility of an inconsistency is objectively more improbable than if they appeared in separate and unrelated parts of the agreement.
38. It is apparent from each clause and their respective headings that they are, at least to a significant extent, dealing with different aspects of jurisdiction. Clause 15, headed “Governing law”, provides in its first sentence that the governing law of the agreement is the law of the State of California. None of the other provisions deals with governing law, and the judge was wrong to suggest at [36] that there was any conflict in this respect between clause 15 and clause 17. Californian law would be applied as much by arbitrators as by courts. The second sentence of clause 15 goes beyond the governing law and clearly does provide for federal and state courts in Los Angeles County to have jurisdiction.
39. Clause 16 is headed “Consent to Suit”. From the company’s point of view, this was an important provision because Mr Ingrouille was not resident in California or elsewhere in the United States but, as recorded in clause 11 dealing with notices, had addresses in Singapore and England. It is by its terms concerned only with “[a]ny legal proceeding arising out of or relating to this Agreement”. In an agreement which contains an arbitration provision, particularly one in the next following clause, “legal proceeding” can sensibly be read as referring only to court proceedings. It is saying no more than that, if any court proceedings are to be commenced, they must be commenced in the federal or state courts there specified, to which Mr Ingrouille expressly consents and waives any objection. There is no arguable inconsistency between clause 16 on the one hand and clause 17 on the other hand, in circumstances where the opening words of clause 17 by necessary implication permit the company to bring claims against Mr Ingrouille under clauses 7 and 8 by way of court proceedings.

40. The issue is whether there is an irreconcilable inconsistency between the second sentence of clause 15 and the provision for arbitration in clause 17. For two reasons, there is in my judgment no inconsistency between them.
41. First, the structure of the two provisions provides consistency, rather than the reverse. The opening words of clause 17 expressly except from the requirement for arbitration “any claim by the Company against Consultant under sections 7, and 8 of this Agreement”. Subject to that exception, all claims, disputes etc between the parties arising out of or by virtue of the agreement must be submitted to arbitration. Thus, claims under clauses 7 and 8 may be brought by court proceedings, and the function of the second sentence of clause 15 is to specify the federal and state courts in Los Angeles County as having jurisdiction in those cases. There is therefore no difficulty in reading the two clauses consistently with each other.
42. Second, a closer examination of the language used in the two clauses also demonstrates the absence of any inconsistency. There is a striking lack of similarity in the language. Clause 15 refers to “[a]ny case, controversy, suit, action, or proceeding”. The words suit, action and (in context) proceeding are apt to describe only court proceedings as a matter of ordinary legal language, especially in an agreement which includes an arbitration clause. By contrast, clause 17 uses much wider language, providing for arbitration (subject to the opening words) for “all claims, disputes, controversies, differences or misunderstandings”. Only one of those words – controversies – appears in both clauses. The thrust of clause 17 is to subject all claims and disputes to arbitration, in contrast to clause 15 which is concerned with the appropriate court as the venue for cases, suits, actions and proceedings where such are permitted, i.e. where the claim is made by the company against Mr Ingrouille under clause 7 or 8. There is no difficulty in reading clauses 15 and 17 consistently with each other.
43. As I mentioned above, the judge several times in his judgment stated his view that clauses 15 and 16 and clause 17 were in conflict, but he did not set out his reasons for that view. It may be that he thought the conflict to be so obvious that it did not need to be spelt out, but preparing a brief statement of his reasons would have given him the opportunity to look more closely at the terms and structure of these provisions. While I fully understand the pressures on judges, it was perhaps ambitious, in view of the issues raised, for the judge to embark on an immediate *ex tempore* judgment after what he recorded in his judgment as a remote hearing that had gone well beyond its four-hour estimate.
44. For these reasons, I consider the judge was wrong to hold that clause 17 was inconsistent with clauses 15 or 16 and that as a consequence clause 17 was not an effective provision for arbitration, capable of falling within section 32(1)(a) of the 1982 Act.

Does clause 17 apply to the dispute raised by the company in the US proceedings?

45. It is therefore necessary to consider whether, as provided by section 32(1)(a), “the bringing of [the US] proceedings in the [US] Court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country”.

46. It follows from what I have said above that the company was entitled to bring proceedings in federal or state courts in Los Angeles County in respect of any claim under clauses 7 or 8.
47. The claims brought by the company in the US proceedings went beyond claims under clause 7 (there were no claims under clause 8). Although the misuse and unauthorised disclosure of confidential information was an important part of the claims, they were by no means limited to a breach of clause 7 but encompassed misappropriation of funds and a conspiracy to undermine the company's business interests and to divert its contracts, clients and relationships to the defendants.
48. The judge considered that, assuming clause 17 to be effective, it was nonetheless open to the company to bring proceedings in the courts identified in clauses 15 and 16 provided only that the proceedings *included* claims under clauses 7 or 8. They did not need to be restricted to claims under clauses 7 or 8. In my judgment, this is not a sustainable interpretation of the provisions. By excepting only claims under clauses 7 and 8, clause 17 is mandating that all other claims under the agreement are to be referred to arbitration and I can see no basis for reading the exception as extending to any other claims provided the court proceedings include claims under clauses 7 and 8.
49. There is undoubtedly an issue as to how clauses 15 to 17 are intended to operate where composite or concurrent claims include alleged breaches of both clauses 7 or 8 and of other terms of the agreement. It might be said that there is a sharp divide between those categories of claims, so that claims under clauses 7 and 8 can be brought only in court proceedings and other claims have to be submitted to arbitration. However, parallel court and arbitration proceedings, dealing with different components of essentially the same claims, would result in all the familiar problems of additional time and expense and the risk of inconsistent decisions. It is not a result that, objectively, parties are likely to have intended. As Lord Hoffmann said in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] Bus LR 1719 at [13]:

“the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.”
50. This was cited with approval in *Enka* at [107] as representing the approach taken not only by the courts of this country but also by other courts, including the United States Supreme Court.
51. Mr McMeel submitted that the exception for claims under clauses 7 and 8 at the start of clause 17 should be read, not as a total exclusion of such claims from clause 17, but as conferring on the company an additional right to bring such claims by way of court proceedings. This might be of particular value if, for example, there was a need for urgent relief, although the right to bring court proceedings would not be restricted to such circumstances.
52. I see considerable force in Mr McMeel's submission but ultimately this is not an issue which this court needs to decide on this appeal, where it is enough to say that it was contrary to the consultancy agreement for the company to advance claims outside

clauses 7 or 8 in court proceedings. In those circumstances, and given that the agreement is governed by the law of California, it is not appropriate that I should express a final view.

53. Mr Groves submitted that it was not the claims advanced by the company that mattered for the purposes of section 32(1) but the claims for which judgment was given. If the judgment was restricted to relief in respect of claims that were properly brought under the terms of clause 15 to 17, i.e. claims under clauses 7 or 8, it was irrelevant that the proceedings as issued had sought relief for a wider set of claims. Section 32(1) should be read as referring to those parts of the claim that result in the judgment sought to be enforced.
54. In my judgment, Mr McMeel is right that this approach does not give effect to the express terms of section 32(1)(a). The section precludes the English court from recognising or enforcing a judgment given by a foreign court in any proceedings “if the *bringing of those proceedings*” was contrary to an agreement under which “*the dispute in question*” was to be settled otherwise than by proceedings in the courts of the foreign country. This recognises a clear distinction between the judgment on the one hand and the bringing of the proceedings and the dispute in question on the other. It is the bringing of the proceedings in breach of the relevant agreement which prevents the English court from recognising or enforcing any judgment obtained in those proceedings. The focus is on the breach of the agreement and it is therefore the claims as formulated by the claimant in the foreign proceedings, not the terms of the judgment, which must be analysed.
55. There is also a practical advantage in choosing the claims as formulated by the claimant as the determining factor, which was well illustrated by the course of Mr Groves’ submissions. He invited us to analyse the terms of the judgment and the claims accepted by the US Court, having regard also to the nature of the damages sought and the expert evidence given to establish the company’s loss. This involved a convoluted and not wholly conclusive exercise. By making the bringing of the proceedings the determining factor, the section produces a clearer and more certain test.
56. Moreover, Mr Groves was not able to make good his submission that the judgment was restricted to damages for breach of clause 7. While that certainly was a significant element, the judge also accepted the claim that Mr Ingrouille had lied to the CEO and misappropriated funds in the payment of an unauthorised bonus. The damages awarded were for loss of profits, but Mr Groves could not demonstrate they were attributable only to breaches of clause 7. Indeed, the expert report demonstrates the contrary. It states:

“Defendants’ actions had a significant impact on TMG’s operations and the overall value of the company. These actions include 1) sharing confidential information with competitors; 2) creating a fake vendor; and 3) converting TMG assets and other property.

These actions have resulted in a significant decrease in the number of contracted ‘influencers’ that account for TMG’s platform revenues. They have also impacted TMG’s

opportunities with advertisers that have regularly impacted premium media revenues.

As a result of these actions TMG has and will suffer lost profits that I have quantified as part of my work.”

57. It follows in my judgment that the judgment entered against Mr Ingrouille in the US proceedings cannot be enforced in England, by reason of the application of section 32(1) of the 1982 Act.

The company’s application to serve a Respondent’s Notice

58. By an application issued in January this year, the company has applied for permission to serve a Respondent’s Notice out of time. By this notice, the company seeks to uphold the judge’s decision on an additional ground, namely that by the issue of two sets of proceedings in Thailand after the issue of the US proceedings, Mr Ingrouille has “abandoned” the arbitration clause and “he is now prevented from invoking or relying” on it.

59. This appears to be a variation of a submission made to the judge and rejected by him in his judgment at [65]:

“I should add, I am not persuaded by Mr Groves’ submission that I should treat the arbitration agreement as unenforceable because of what Mr Ingrouille did in Thai proceedings brought in, I think, 2018, but later than the bringing of the US proceedings, and indeed in January 2020, which indeed was after the entry of the US judgment. I accept Mr McMeel’s submission that one needs to focus under s.32 upon the bringing of proceedings in the US court. Nothing that Mr Ingrouille did thereafter can really, as a matter of logic or legal principle, impact upon the enforceability of the arbitration provision. On the contrary, it would simply go to the question of whether or not he himself, if it was enforceable, was acting thereafter in breach of it.”

60. The reason given for not serving a Respondent’s Notice at the time required by the Rules is that, although obviously the company and those representing it knew all the relevant facts, they did not appreciate that a party could by conduct “abandon” an arbitration clause until they read the judgment of Burton J in *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd* [2015] EWHC 3158 (Comm), [2016] 1 Lloyd’s Rep 239 to which Mr McMeel referred in his supplementary skeleton argument served on 7 December 2020. I am not persuaded that this provides a good ground for raising now an issue that should have been pleaded in a Reply by way of response to Mr Ingrouille’s reliance in his Defence on the arbitration agreement in clause 17. There are, however, more fundamental objections.
61. In *Exmek*, Burton J referred to the judgment of Lord Brandon in *Paul Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854, where at p. 914 Lord Brandon said:

“Where A seeks to prove that he and B have abandoned a contract in this way, there are two ways in which A can put his case. The first way is by showing that the conduct of each party, as evinced to the other party and acted on by him, leads necessarily to the inference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B’s intention to do so, and that A has significantly altered his position in reliance on that belief. The first method involves actual abandonment by both A and B. The second method involves the creation by B of a situation in which he is estopped from asserting, as against A, that he, B has not abandoned the contract.”

62. The relevant facts are as follows. On 19 April 2018, the company issued the US proceedings. Within days, articles referring to the proceedings and quoting statements made by the company and its CEO, Mr Thorman, appeared in media circulating in South East Asia, including media directed at the advertising industry. By any standards the statements were defamatory of Mr Ingrouille, although of course the company says they were true.
63. In June 2018, Mr Ingrouille’s lawyers in Thailand threatened in correspondence to bring defamation proceedings in Thailand. On 28 August 2018, Mr Ingrouille issued proceedings for criminal defamation in the Thai Criminal Court. The defendants were Mr Thorman and Thoughtful (Thailand) Limited, a subsidiary of the company, which was joined as a defendant because it was understood that Mr Thorman had made his statements in his capacity as CEO of that company.
64. Judgment in the US proceedings was entered on 26 August 2019 and on 20 November 2019 the company issued the English proceedings to enforce the US judgment.
65. On 21 January 2020, Mr Ingrouille issued further proceedings in the Thai Criminal Court, this time against Mr Thorman and the company, alleging defamation in respect of the same articles as the earlier proceedings. It is explained in the complaint that the new proceedings were issued because in his deposition in the earlier proceedings Mr Thorman had said that he had made his statements as CEO of the company, not Thoughtful (Thailand) Limited.
66. Mr Groves submitted that the conduct of the company in issuing the US proceedings and of Mr Ingrouille in issuing the Thai proceedings, rather than in either case commencing arbitration proceedings, leads necessarily to the inference of an implied agreement between them to abandon the arbitration agreement. He said that the issue by Mr Ingrouille of the Thai proceedings was in response to the issue of the US proceedings. The factual subject-matter of the defamation proceedings and of the US proceedings was the same. Mr Groves only faintly suggested that clause 17 had been abandoned by the second route identified by Lord Brandon. Given that the US proceedings and the English proceedings were commenced before the first and second Thai proceedings respectively, it is impossible for the company to show that it had

significantly altered its position in reliance on any belief that Mr Ingrouille had abandoned clause 17.

67. There are, as it seems to me, several reasons why the argument of abandonment which the company seeks permission to raise has no prospect of success.
68. First, the initial Thai proceedings were not issued against the company, but against a subsidiary and Mr Thorman, neither of whom were parties to the consultancy agreement and were not therefore parties to the arbitration agreement in clause 17. The fact that it was part of Mr Ingrouille's responsibilities under the consultancy agreement to establish and develop subsidiaries in Thailand and elsewhere is, contrary to Mr Groves' submission, nothing to the point.
69. Second, the Thai proceedings were for criminal defamation and were issued in the Criminal Court. Such claims could not fall within the terms of the arbitration agreement contained in clause 17. It was held by this court in *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231 that, in the particular circumstances of that case, a civil defamation claim fell within an arbitration clause in Mr Tanoh's employment contract. The allegedly defamatory statements were contained in an internal letter from a director of the employer to the chairman of its board, calling for Mr Tanoh's dismissal and giving reasons. However, the commencement by the employer of a criminal complaint in the courts of Togo was held not to be a submission by the employer to the jurisdiction of the civil courts of Togo.
70. Third, although Mr Groves submitted that the issue of the Thai proceedings was a response to the US proceedings, this is not borne out by the evidence. It was the publication of statements by or on behalf of the company in South East Asia which Mr Ingrouille alleges were defamatory that led to the Thai proceedings. Even leaving aside the points made in the paragraphs above, it is difficult to see how in these circumstances the commencement of arbitration proceedings in the United States could be an appropriate response by way of vindication of his reputation. In my judgment, it is impossible to characterise it as conduct necessarily evincing an intention to abandon arbitration under clause 17 as the proper process for resolving claims and disputes arising out of the consultancy agreement.
71. Fourth, as Lord Brandon made clear, Mr Ingrouille's conduct in issuing proceedings in Thailand must have been acted on by the company, but there is no evidence that it did so.
72. For these reasons, I would refuse permission to the company to rely out of time on its Respondent's Notice.

Conclusion

73. Accordingly, I would allow Mr Ingrouille's appeal. Mr McMeel submitted that there is no other basis on which the company can seek to enforce the US judgment and that this court should therefore bring these proceedings to an end by giving summary judgment in favour of Mr Ingrouille and against the company. Mr Groves accepted that if we were against the company on all points argued before us, there was indeed

nothing left in these proceedings. I would therefore make an order for summary judgment in favour of Mr Ingrouille.

Lord Justice Henderson:

74. I agree.

Lady Justice Carr:

75. I also agree.