TAKING BACK CONTROL:

The Cousins/Swatch case and why the Government and the Courts should reject participation in the Lugano Convention

The Lugano Convention 2007 is an international treaty negotiated by the EU on behalf of its Member states with Iceland, Norway and Switzerland. It seeks to clarify (inter alia) which courts have jurisdiction in cross-border civil and commercial disputes.

The UK ceased to be a Member of the Convention on Brexit and its attempt to rejoin the Convention has so far been rejected by the EU largely on political grounds relating to the ongoing dispute with the UK over the Northern Ireland Protocol.

A recent cross-border dispute relating to alleged breaches of UK and EU competition law currently before the Swiss Federal Supreme Court (FSC) offers a stark lesson on the shortcomings of the Lugano Convention and suggests that the UK Government and the English Courts should think twice before contemplating rejoining the Lugano Convention, at least while these jurisdictional deficiencies remain.

Cousins Material House Limited ("Cousins") is a family-owned business acting as a Business to Business wholesaler of parts, consumables and tools for the watch repair and jewellery trades. It employs 60 staff and has a turnover of £11 million. Cousins has in excess of 12 million items across 130,000 product lines in stock and offers a unique one-stop shop supply service across all watch brands to independent repairers across the UK.

Swatch Group is the largest manufacturer of Swiss-branded watches which it sells all over the world owning dozens of major watch brands including Omega, Tissot and Longines. It employs around 35,000 people worldwide and has an annual turnover in the region of £6 billion.

In 2014, Swatch Group announced that with effect from 31 December 2015, it would no longer supply independent wholesalers or independent watch repairers with watch spare parts or movements in the UK. This included Cousins, a long-standing Swatch customer for many years. The supply of Swatch Group watch spare parts represented a significant proportion of Cousins' turnover and Cousins was the main source of spare parts for independent repairers in the UK. Swatch's stated objective was to improve the quality of the servicing and repairs of its watches. However, the underlying strategy was clearly to extend its market power in the manufacture and sale of its branded watches downstream

into the repair and maintenance of those watches which (self-evidently) could no longer be carried out by independent repairers if they had no access to spare parts for Swatch-branded watches.

It is settled law that it is an abuse of a dominant position for a manufacturer of raw materials to refuse to supply those raw materials to an existing customer for reprocessing into a downstream product where the manufacturer has decided to supply the product itself, thereby extending its dominance into the downstream market.[1]

Cousins took legal advice and a letter before action was submitted to Swatch in March 2016. Swatch's reaction was to request additional time to respond to the claim. Extra time was granted and, instead of using the time to examine the merits of the English proceedings, Swatch, without notifying Cousins in advance, went ahead and launched parallel proceedings in the Berne Commercial Court in Switzerland seeking a Declaration of non-infringement in relation to its decision to refuse supplies of spare parts to Cousins. This litigation "torpedo" was launched to remove the risk of proceedings in the English Courts and to secure a trial of the issue in the Swiss Courts where no doubt Swatch was confident that it would receive a more 'sympathetic' hearing.

The infamous "*Italian torpedo*" tactic exploits the "*Court first seized"* rule under the Lugano Convention which would require any English Court proceedings to be stayed pending the Swiss Court's ruling on the Declaration. Had the UK not been a party to the Lugano Convention by virtue of its EU membership at the time that the Application was made, the English High Court would not have been prevented from proceeding with Cousin's Application.

Cousins' attempts to challenge the admissibility of the case in the Swiss Court and the jurisdiction of the Swiss Courts were unsuccessful and in December 2021 the Berne Court delivered its judgment[2] six years after the Swiss proceedings were first issued. This judgment is currently on appeal to the Swiss Federal Supreme Court.

In essence, the Berne Court found as follows:

(a) That the EU Case Law established that spare parts for each branded product is a market in its own right and that there is no substitutability of parts between brands and consumers require the use of original parts to maintain the value of their

[1] See Commercial Solvents v Commission (1974) ECR 223; also Napier Brown/British Sugar OJ1988 L284/1; Upton Cash Registers/Hugin OJ1978 L22/23.
[2] Decision of the Commercial Court of the Canton of Bern 22 December 2021 (HG 1830)

watches. The relevant market comprised (inter alia) the UK market for the supply of original spare parts for prestige watches of the respective Swatch brands;

(b) Swatch is the sole source for the purchase of these spare parts;

(c) Swatch had eliminated all competitors on the relevant UK market and now enjoys a 100% monopoly for the supply of Swatch spare parts to repairers.

Despite these findings, and notwithstanding this clear breach of EU and UK competition law and the prior case law of the Courts of Justice of the European Union and the English Courts, the Berne Court concluded that this conduct by Swatch was "objectively justified" under EU and UK competition law.

In reaching these findings, the Berne Court made several fundamental errors of EU and UK competition law which are summarised below.

First, in assessing the question of "objective justification," the Berne Court chose to ignore the fact that under the case law an essential legal prerequisite to allow a termination of supply by a dominant undertaking was that it should not, thereby, eliminate effective downstream competition, which was the clear and inevitable result of its actions in this case. This error was all the more glaring given that, as noted above, the Berne Court also accepted that Swatch was a monopolist in the supply of spare parts for its own brands of watches.

Second, the Berne Court failed to carry out any assessment as to the effect which Swatch's decision had had on the UK market. It was for Swatch to prove that its actions did not have a detrimental effect on competition and consumers and yet Swatch produced no evidence in support of its case based on the actual impact of the refusal to supply in the UK. Not a single English witness was called in the proceedings so the Berne Court made a decision with major implications for the UK and its wholesalers, wholesaler customers, and final consumers without any reference to the local market conditions. Indeed, the evidence produced by Cousins showing that the withholding of supplies of watch parts had led directly to a catastrophic reduction in the number of independent watch repairers and a very substantial increase in the cost of repairing Swatch watches through Swatch's approved repairers was simply ignored. The Berne Court could have called for market evidence to establish the facts but failed to do so.

Third, contrary to more than 50 years of EU and UK jurisprudence, the Berne Court reached the untenable conclusion that the degree of Swatch's market power in the supply of spare parts (i.e., its monopoly position) is irrelevant to the assessment of objective justification for the refusal to supply.

In reaching its decision, the Berne Court wrongly claimed that it has not yet been decided under European Competition law whether the reorganisation of a dominant company's distribution arrangements could constitute justification for a refusal to supply. In fact, the ECJ case law has consistently condemned the refusal to supply existing customers by dominant undertakings. The Berne Court argued that the EU Courts had, however, "tentatively" suggested that an internal reorganisation by a dominant supplier of the distribution of goods could constitute a justification for a refusal to supply existing customers and cited the EU Court Judgments in BP v Commission[3] and the Opinion of Advocate General Colomer in Sot. Lélos kai Sia.[4] in support of that contention.

Neither of these cases in fact support the Berne Court's claim. Although it is the case that BP had carried out a reorganisation of its activities in the Netherlands in 1972 when a large part of its production facilities were nationalised, the issue before the Court in that case had nothing to do with the reorganisation. The central question was whether BP was entitled to apply different supply conditions to regular customers as opposed to occasional customers as a result of the 1973 oil crisis. Not surprisingly it held, on the facts, that BP was entitled to offer different conditions of supply to non-regular customers. But here, as noted, Cousins was a long-standing customer of Swatch and was therefore entitled to continuity of supply.

In relation to the Advocate General's Opinion in Lelos, the first point to make is that it was not a Judgment of the ECJ and represents no more than the personal opinion of the Advocate General. The second point to make is that the case was concerned with the special features of the regulated medicines market and the case concerned the extent to which supply restrictions imposed to prevent parallel exports might be justified as a means of preventing shortages in the domestic market. Contrary to the Berne Court's suggestion that the Advocate General was seeking to justify a refusal to supply, he in fact states the opposite at para 115 that it **would be abusive to apply a practice which eliminates competition in distribution within Europe** by suppressing exports from Greece. The contrary interpretation applied by the Berne Court is plainly wrong.

Cousins has appealed the judgment of the Berne Court to the Swiss Federal Supreme Court but Swiss lawyers have advised that the scope for an appeal is in practice limited and the prospects for success are not high. Moreover, as noted, the tendency of all Swiss Courts to favour the interests of local business and particularly businesses as important to

[3] Case 77/77 ECR (1978) 141
[4] Delivered 1/4/2008 ECR (2008) 180

the Swiss economy as watch manufacture – which is presumably why Swatch went behind Cousins' back and launched new proceedings in Switzerland.

What the case illustrates is that it is both unjust and impractical for cases to be heard in a foreign court where they concern an infringement of local law and the foreign court concerned may be subject to political pressure to find in favour of an important local industry. The risks of injustice are increased in such circumstances by the aggrieved party having to cope with a foreign law, a foreign language and the Court having to make a determination on issues of fact and law with which it is not familiar.

In addition, it is both unfair and unjust for prospective defendants in matters properly brought before the English Courts to fall victim to such "torpedo claims" whose sole purpose is to deprive claimants from access to justice in the appropriate forum, to delay proceedings and in some cases secure the wrong decision through the pursuit of national interest in a foreign court. In particular, in the Cousins case, all of the key market effects on Cousins, other wholesalers, wholesalers' customers, and final consumers arose in the UK and, yet, as noted, the Swiss court heard no evidence from UK witnesses. It also bears emphasis that these are not esoteric questions. In practical terms, the effect of Swatch's conduct, if permitted to continue, will be to increase prices to UK consumers, kill off the independent watch repair sector, and reduce service speed and choice. At a time when consumers are being squeezed by high costs of living, and the UK High Street continues to shrink, these are practical issues of considerable importance that simply must be decided in local UK Courts, having heard from UK-based witnesses who can speak to the facts on the ground.

On a wider level, the facts of the Cousins case raise questions as to the apparent enthusiasm of the UK Government to rejoin the Lugano Convention. One may reasonably ask why it is that those advocates of Brexit with their call to arms of "bringing back control" and who are now in control of government should be promoting a cause which will give foreign courts once more the right to rule on matters of English law directly affecting the UK producers and consumers.

If and when the EU agrees to allow the UK to rejoin Lugano – and given the French current opposition it is likely to be a long wait – rejoining must surely be subject to changes in the current Convention which allowed the use of the Swiss torpedo in the Cousins case. The Recast Brussels 1 Regulation, which also covers issues of competing jurisdictional claims, provides at Article 31(2) an attempt to restrict the use of torpedo-tactics. It would be desirable to introduce similar constraints on torpedo-tactics if Lugano is to be acceptable to the U post-Brexit.

Julian Maitland-Walker[5]

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[5] Maitland Walker LLP advises Cousins Material House Limited in these proceedings.