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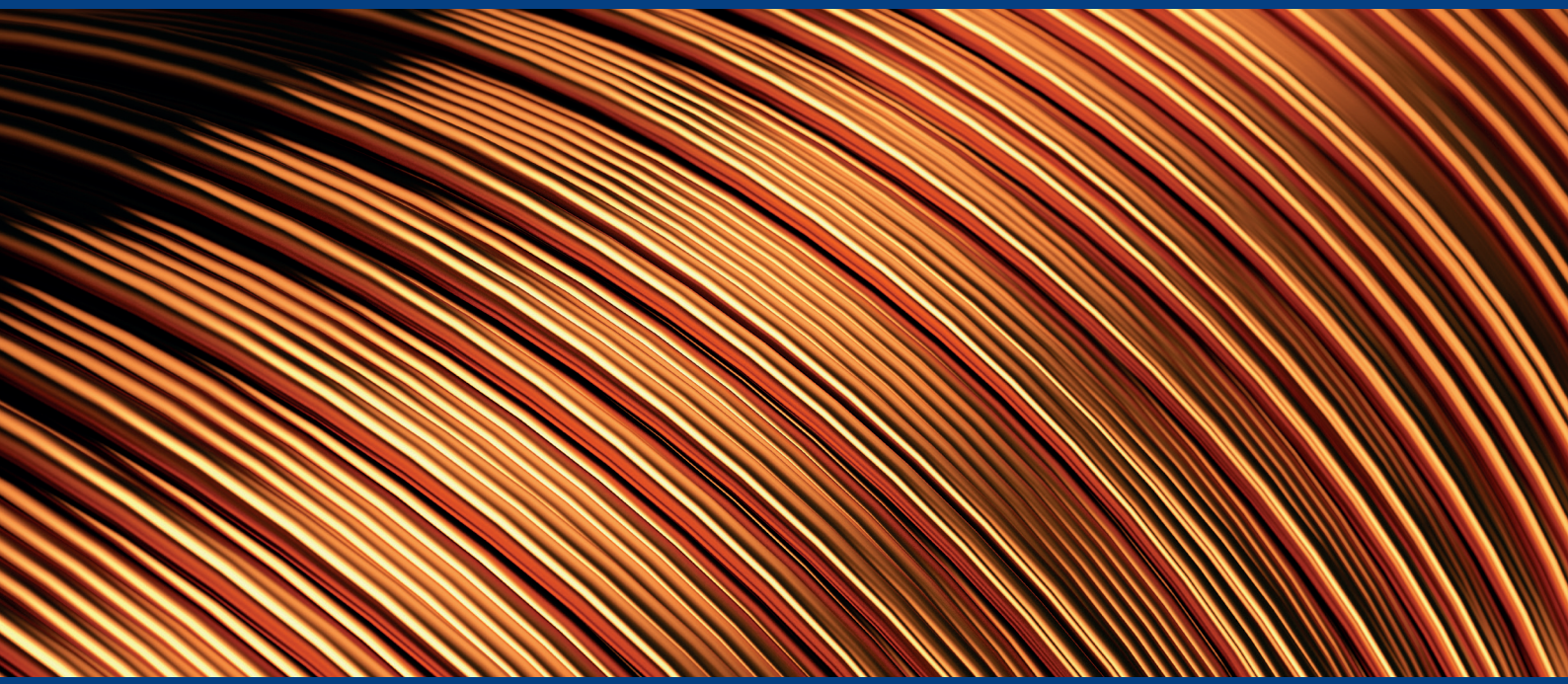

COMMODITIES CASE UPDATE

MAY 2022

HFW COMMODITIES CASE UPDATE
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We are delighted to present the May 2022 edition of the Commodities Case Update, the thirteenth in the series. The update provides a summary of ten of the key recent cases relevant to the commodities sector. With a market leading commodities team, we have over 100 lawyers who provide a full service internationally. The group is led by a team of over 25 partners, who are based in all our offices around the world, including in the major trading hubs of London, Paris, Geneva, Dubai, Singapore, Hong Kong, and Sydney. If you would be interested in receiving a bespoke training session and presentation about the cases referred to in this update or any other cases of interest, please contact your usual contact at HFW, or the authors of this update Andrew Williams and Damian Honey. As well as being of general interest for those working in commodities, our intention is that for lawyers working in-house, a bespoke training session tailored to your specific needs will allow you to meet the change in CPD requirements introduced by the SRA. It will allow you to demonstrate that you have reflected on and identified your L&D needs and met these. Please do contact us if this would be of interest.

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TRW Ltd v Panasonic Industry Europe GMBH [2021] EWCA Civ 1558

Court: Court of Appeal

Date: 28 October 2021

Summary

The Court of Appeal found that a seller's carefully drafted "first shot" in a battle of the forms protected it from the "last shot" doctrine. This is because, critically, the buyer accepted the proposed terms at the outset with a legally binding signature.

Facts

TRW Ltd ("**TRW**") makes products which include resistors as a component. The resistors were made and supplied by Panasonic Industry Europe GMBH ("**Panasonic**"). In 2011, at the request of Panasonic, TRW signed a "Customer File" which incorporated Panasonic's General Conditions. These stipulated among other terms that:

> [The] *following terms and conditions shall apply exclusively to the entire business relation with us,* [...] *unless different conditions,* [...] *have expressly been confirmed by us in writing.*
>
> *Conditions of the buyer diverging from our terms and conditions shall not be valid even if we effected delivery or rendered services without reservation.*

Underneath the signature of TRW's representative were the words "*legally binding signature of the Customer*".

In 2015 and 2016 TRW placed an order with Panasonic to be delivered "*in accordance with* [TRW's conditions of] *purchase*" which were incorporated via a website link. Those terms stated among other things that "*Commencement of any work or delivery of any goods or services under this order or delivery schedules or releases shall constitute your confirmation* [that you] *are aware of and accept such terms, conditions and requirements.*" Panasonic were not asked to confirm their agreement to TRW's conditions and in due course Panasonic supplied the goods to TRW. TRW alleged the product supplied by Panasonic to be faulty and brought a claim to the English High Court under its own conditions of purchase. Panasonic claimed that the Panasonic General Conditions applied and that on those terms, the proper forum for the dispute was therefore in the Hamburg courts.

At first instance, the Court found in favour of Panasonic, noting that its General Conditions were "*clear and in no way ambiguous*", and that by signing them "[it] *placed the parties under an obligation, if they later chose to enter into supply contracts, to do so on* [Panasonic's] *General Conditions unless* [Panasonic] *should agree otherwise in writing*". TRW appealed, principally on the ground that Panasonic's "Customer File" had no contractual effect. It submitted that TRW's signature served only in "*recording the receipt and acknowledging the existence*" of Panasonic's General Conditions and that the contractual arrangement relied upon by Panasonic was not supported by consideration.

Findings

The Court of Appeal rejected all the grounds of appeal and upheld the first instance decision. It found in particular that it was open to the first instance court to conclude that TRW's signature had the effect of making the Panasonic General Conditions "*a binding element of the individual supply contracts,*" that TRW's submission that its signature was for acknowledgement purposes only was "*wholly unrealistic*" and that in the commercial world, parties did not sign documents simply "*to acknowledge their existence* [...] *The court therefore has to give some meaning and legal effect to the express acknowledgement of Panasonic's General Conditions*".

TRW's argument on consideration was rejected because it had not been raised as an issue at first instance and was therefore not a proper subject for an appeal. The Court of Appeal did comment *obiter* that it was not persuaded by the argument in any event and that there was actually good consideration.

HFW Comment

Because Panasonic drafted its General Conditions very carefully and ensured that its customer counter-signed them, the Court of Appeal found that "[...] *inexorably, the Panasonic General Conditions applied*". This case highlights the importance of reading carefully all terms and conditions entered into and shows that is possible to circumvent the "last shot" doctrine. It also shows the importance of ensuring that you have properly drafted Terms and Conditions which will afford you proper protection if problems arise.

LLC Agronefteprodukt v Ameropa AG [2021] EWHC 3474 (Comm)

Court: Commercial Court (QBD)

Date: 21 December 2021

Summary

In a challenge to a GAFTA arbitration award under s67 of the Arbitration Act 1996 (the "**Act**"), the Court found that the Buyer had served an effective notice of arbitration.

Facts

The Seller entered into two separate contracts to sell Russian Milling Wheat to the Buyer. Each contained a London arbitration clause in accordance with GAFTA Rules No.125. Disputes arose under both contracts and the Buyer sent a notice to the Seller (the "**Notice**"), nominating an arbitrator for the "disputes related to the two Contracts" and "on a separate note, we wonder if, for efficiency and economy, you would accept the two contracts/disputes be adjudicated under a single arbitration and by the same Tribunal." The Seller did not respond.

The parties then negotiated a "Washout Agreement" (the "**Washout**") under which if the Seller failed to pay an agreed sum, the Buyer would be entitled to terminate the Washout and continue the arbitration claim. The Washout referred to both contracts, but to "claim" and "arbitration" in the singular. The Seller failed to make payment so the Buyer terminated and continued the arbitration.

The Seller challenged the jurisdiction of the GAFTA Tribunal, arguing that the Buyer had failed to commence arbitration under each contract properly and had instead wrongfully purported to commence a single consolidated arbitration. The First Tier Tribunal rejected the Seller's objections on the grounds that it had waived the right to object by its silence following the Buyer's suggestion that the two disputes be heard in one arbitration. The Board of Appeal upheld this decision, but for different reasons. It held that by entering the Washout, the Seller had accepted that there would be a consolidated arbitration and had waived its right to object. The Seller appealed to the English Commercial Court. It challenged the jurisdiction of the GAFTA Tribunal, arguing that the Notice was ineffective. In the alternative, it argued that there should be rectification of the Notice. Lastly, both parties argued that the other should be estopped from bringing its case.

Findings

In deciding whether the Notice was effective, the Court held that the starting point was s.14(4) of the Act:

"Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."

Based on previous authorities, the Court referred to guidance to be applied in deciding whether the requirements of s14 had been met:

(1) one should interpret s14 'broadly and flexibly'. A strict approach should be avoided, especially when the notice was drafted by non-lawyers.

(2) the requirements will generally be satisfied if the notice sufficiently identifies the dispute to which it relates and makes clear that the person giving notice is intending to refer the dispute to arbitration.

(3) one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood it given its terms and the context in which it was written.

Based on this, the Court held that the Buyer had complied with s14. The final paragraph of the Notice, where the Buyer had suggested having both contractual disputes under one arbitration, was the deciding factor in this.

The Court rejected the Seller's request for rectification. Rectification is available where there has been a common or unilateral mistake. Neither existed here as the Buyer denied there was any mistake at all. It is also an equitable remedy and it would be inequitable to rectify the Notice and declare the Tribunal had no jurisdiction when the Washout, signed by both parties, clearly stated that the Buyer would be entitled to continue with the arbitration if the Seller did not pay.

The Court found it difficult to see how there could be estoppel against the Buyer in circumstances where an appeal under s67 would involve a full rehearing, in which there was no restriction on the arguments raised. Further, the Seller had not relied on any representations to its detriment, for example by incurring wasted costs. Conversely, there would have been an estoppel by convention against the Seller. There was an implied understanding between the parties when the Washout was signed that the Notice was valid and that the arbitration had been properly commenced. If the Seller had challenged this at the time, the Buyer would never have signed the Washout.

HFW Comment

Even where there are relatively few requirements as to validity, notices should be drafted and served correctly and in accordance with the terms of the contract to which they relate. Although the Notice was ultimately held to be effective, the time and cost involved in dealing with the jurisdictional challenge could have been avoided.

Addax Energy SA v Petro Trade Inc [2022] EWHC 237 (Comm)

Court: Commercial Court (QBD)

Date: 14 January 2022

Summary

In the context of an alleged oral contract for the supply of petroleum, the Court held that a jurisdictional challenge failed because there was a course of dealing between the parties which was sufficiently consistent to indicate that an English jurisdiction clause had been incorporated into their contract.

Facts

The parties entered into a tri-partite Secured Distribution Agreement ("**SDA**"), under which Addax Energy SA ("**Addax**") would deliver petroleum into tanks in Liberia (managed by a third party) and from which Petro Trade Inc ("**Petro Trade**") would take the petroleum. Since Addax retained ownership of the petroleum in the tanks under the SDA, the parties entered into a separate spot contract each time Petro Trade took product from the tanks. These were agreed informally by telephone. What happened after that varied: sometimes Addax sent a recap email after the telephone call. These emails did not make any reference to jurisdiction. Sometimes, Addax sent a written spot contract with more extensive written terms, including an English governing law clause and an English jurisdiction clause.

In January 2018 the parties entered into a long-term supply contract by an oral agreement ("**the Term Agreement**"). A spot contract containing an English jurisdiction clause was sent by Addax in November 2018 but no written response was received. The parties continued to trade but no further spot contracts were produced. A dispute arose and Addax brought a claim against Petro Trade in the English Court under the Term Agreement. Addax served the claim out of the jurisdiction without permission under CPR Part 6.33(2B)(b), on the basis that its claims were in respect of a contract with an English jurisdiction clause. Petro Trade challenged the Court's jurisdiction under CPR Part 11, claiming that no discussion had taken place concerning jurisdiction under the Term Agreement and Addax had no good arguable case that a contract incorporating an English jurisdiction clause had been concluded in January 2018. Addax argued that the terms in its written spot contract had, by 2018, *"become the standard terms on which Addax and Petro Trade traded."*

Findings

The issue before the Court was whether an English jurisdiction clause was incorporated into the Term Agreement by a previous course of dealing. The Court emphasised that in order to determine whether there is a course of dealing, as well as evidence of consistent and unequivocal conduct, each case should turn on its own facts. Here, there was a sufficiently plausible evidential basis that the Term Agreement, incorporating a jurisdiction clause, had been agreed. There were numerous contracts on terms which contained an English jurisdiction clause *before* the alleged Term Agreement and the terms of the spot contract, which were crucial as they included the jurisdiction clause, would have been contemplated by the parties when they entered into the SDA. The Court also found that the course of dealing does not need to be extensive or entirely consistent. Whether there is sufficient consistency will depend on the background of each case. The type of relationship between the parties as well as the nature of the transaction concerned are also critical. The fact that in the petroleum industry, supply contracts are often concluded informally was an important factor. It is also customary in this context for parties to discuss commercial terms only, which can be followed by written recaps as confirmation and which are sometimes accompanied by spot contracts.

HFW Comment

The best way to avoid uncertainty about your contract – and lengthy and costly disputes – is to agree key terms expressly in writing. Parties should also be reminded that in an ongoing trading relationship including a series of agreements, consistency in previous transactions may amount to a course of dealing. However, each case will depend on its own facts and context. The recent change in CPR Part 6.33(2B)(b) is also important, as in certain circumstances permission from the Court to serve outside the jurisdiction is no longer required.

Provimi France S.A.S. & Ors v Stour Bay Company Ltd [2022] EWHC 218 (Comm)

Court: Commercial Court (QBD)

Date: 4 February 2022

Summary

A supplier of Vitamin D3 to poultry feed manufacturers was not in breach of contract when the Vitamin D3 content degraded and led to a deficiency in affected poultry. The supplier's terms and conditions ("**T&Cs**") were found to have been incorporated into the contract between the parties because of the number of previous contracts between them, how recent they were, the similarity of subject matter and the manner in which they were concluded.

Facts

The claimant, Provimi France S.A.S. ("**Provimi**") manufactured poultry feed and the defendant, Stour Bay Company Limited ("**Stour Bay**") specialised in the supply and distribution of vitamins, minerals and amino acids for the animal feed, food and beverage industries. Provimi had been purchasing "Vitamin D3 500 Feed Grade" from Stour Bay since 2009, to use as an ingredient in their poultry feed. In late 2015, Provimi started receiving customer complaints and reports of poultry problems caused by vitamin D3 deficiency. It was subsequently established that the vitamin D3 content in the feed had dropped in 2015. Provimi brought a claim against Stour Bay for breach of contract, arguing that it was an express term of the contracts that the vitamin D3 would meet its specification requirements, which included supplying the vitamin with a coating of gelatine which would have prevented the degradation of the Vitamin D3. They also relied on the implied terms of satisfactory quality and fitness for purpose in s.14(2) and 14 (3) of the Sale of Goods Act 1979 (the "**Act**")). Stour Bay raised a number of defences, including a denial that Provimi's specification formed part of the contract because they had only received it after the first order was agreed. They also argued that their T&Cs, which excluded the Act's implied terms, had been incorporated into the contract: they were routinely included on the back of its invoices and had therefore become part of the parties' dealings with each other.

Findings

The first main issue was whether Provimi's specification was included in the contract. The contracts of sale had been made partly orally, partly in writing and partly by conduct. In these circumstances, the Court held that one should look at the whole of the parties' dealings. In that context, the specification did not form part of the contract. It had been provided to Stour Bay after the first order had been agreed by email. At no stage in the emails or before then had Stour Bay seen the specification or been told that the product must comply with it. It had been attached to a parent agreement between the parties and Stour Bay ignored it.

The second issue was whether the T&Cs were incorporated into the contract as the result of a course of dealing between the parties. The Court held that this was ultimately a question of fact and degree which depended, amongst other things, on the number of previous contracts, how recent they were, the similarity of subject matter and the manner in which they were concluded. It held that the parties must have intended that the contracts would be made on the T&Cs for several reasons. These included a significant course of dealing, consistent practice by Stour Bay to which Provimi had not objected, the wording of the T&Cs and their similarity to terms and conditions routinely used in the same industry.

HFW Comment

This case is another reminder of the benefit of agreeing the terms of a contract clearly, even between parties which have a long commercial relationship, and of the potential cost involved in failing to do so. It is also a helpful reminder of the factors that the Court will take into account when assessing whether a course of dealing has been established.

ED&F Man Capital Markets Limited v Come Harvest Limited [2022] EWHC 229 (Comm)

Court: Commercial Court (QBD)

Date: 16 February 2022

Summary

This case involved forged warehouse receipts used in contracts for the sale and repurchase of nickel. It is unusual because having rescinded the contracts, the claimant broker sought to recover its losses from a large number of defendants by means of claims in tort, rather than contract.

Facts

ED & F Man Capital Markets Limited (the "**Claimant**") entered into 28 purchase contracts with two defendants (the "**sellers**") for the purchase of nickel (together, the **"Purchase Contracts**"). These were intended to constitute the first leg of a repo transaction, to be performed by delivery of original warehouse receipts. The warehouse receipts handed to the Claimant were fraudulent copies of the originals, which had in fact been issued to the rightful owner. Unaware of the fraud, the Claimant sold on the warehouse receipts it received to a sub-buyer. Following discovery that the receipts were forged, the Claimant served notice of rescission of the Purchase Contracts on the sellers on grounds of fraudulent misrepresentation. It then claimed losses of more than USD 284m from ten defendants. Several of these claims settled along the way.

Since the Claimant had rescinded the Purchase Contracts, it could not bring its primary claims in contract because the effect of rescission is to render a contract void from the outset. Its primary claims were therefore in tort and were made not just against the sellers but also against agents and individuals and the rightful owner of the nickel. They included claims in deceit, unlawful means conspiracy to injure, procuring breach of contract, knowing receipt and equitable proprietary claims. The Claimant brought an alternative claim for breach of contract, in the event that the Court found the Purchase Contracts had not been rescinded validly.

Findings

The Court held that the warehouse receipts were frauds, created by someone who had access to scanned colour copies of the originals. It also found that the rightful owner of the nickel had actual knowledge of the fraud and that the sellers' agent and one of its directors were both centrally involved in and had actual knowledge of it. The Court also held that the Claimant had validly rescinded the Purchase Contracts so that its claim for breach of contract must fail. Had the rescission been invalid, the Court indicated it would have found the sellers in breach of contract.

The Court dealt with the claims in tort as follows:

- The sellers were liable in the tort of deceit. They had made false express representations to the Claimant within the Purchase Contracts, knowing them to be false and intending the Claimant to rely on them. The Claimant did so and suffered loss as a result. By sending the forged receipts to the Claimant, the sellers and those acting on their behalf had made false implied representations which caused the Claimant to enter into the Purchase Contracts. They were also liable in deceit.
- There was a conspiracy to injure by unlawful means involving the rightful owner of the metal and a party acting on behalf of the sellers and their agent. This conspiracy allowed the sellers and their agent to purport to sell the nickel to third party financiers, including the Claimant, using the colour scanned copies. The owner of the nickel argued that it had no knowledge of the fraud, either actual or "blind eye," and so could not be acting in combination, understanding or agreement with the others. The Court rejected this, holding that the owner had actual knowledge. However, any liability incurred would run only from the date when it acquired such knowledge. In order to succeed in its claim, the Claimant had to show that the owner of the nickel intended it harm. There was considerable argument during the hearing as to what "intent to harm" meant and whether it must be directed at the Claimant specifically. The Court concluded that if harm to the claimant was the necessary consequence of the defendant's actions and the defendant knew this, it had the necessary intent, even though the purpose of its action was not to harm the claimant. There was no requirement that harm be directed at a specific claimant. This analysis was strengthened by the fact that "blind eye" knowledge was sufficient to establish liability.
- All the elements of the tort of inducing or procuring breach of contract were met, given that both the sellers' agent and its director exercised "effective practical control" over the sellers.

- As the Purchase Contracts had been rescinded, the monies held by the sellers, agents and original owners of the nickel were held on constructive trust for the Claimant. The Claimant argued that if the sums held by the sellers were held on constructive trust then when the sellers transferred those sums to the other defendants, they were in breach of their obligations under the trust and the defendants knew this, giving rise to the tort of knowing receipt in breach of trust. However, since the Claimant had not actually rescinded the Purchase Contracts when the transfer to the other defendants took place, the Court was not persuaded to impose liability on them retroactively. It found that it is a precondition to the imposition of liability for knowing receipt in breach of trust that there has been a breach of trust. At the time the monies were transferred by the sellers, the Purchase Contracts remained in place and so the trust had not been established. Had the monies been transferred *after* the Purchase Contracts were rescinded, the claim may have succeeded.

HFW Comment

The need to be able to verify the authenticity of documents before entering a transaction is both obvious and challenging. The burden of proof for establishing fraud is a heavy one and the Court was at pains to emphasise that "cogent evidence" was required to do so.

By bringing claims in tort, the Claimant was able to seek recovery from a wider group of defendants. This can be useful in circumstances where a contractual counterparty has already transferred the monies to its agents or other third parties. The findings of liability against the sellers' agent and the original owner of the warehouse receipts, although based on the facts peculiar to this case, are perhaps therefore of particular significance.

Sharp Corp Ltd v Viterra BV [2022] EWHC 354 (Comm)

Court: Commercial Court (QBD)

Date: 18 February 2022

Summary

In an appeal to the High Court concerning a decision by the GAFTA Board of Appeal on the quantum of damages payable under the Default Clause in GAFTA Contract No.24 (the "**Default Clause**"), it was held that the *"actual or estimated value of the goods, on the date of default"* was to be assessed on the basis of a notional substitute contract on the same terms, rather than the value of the relevant goods in the market at the discharge port.

Facts

Viterra BV ("**Viterra**") and Sharp Corp Ltd ("**Sharp**") entered into two contracts for the sale and purchase of lentils and peas (the "**Goods**") on C&F Free Out terms. The Goods were shipped from Vancouver to India and following discharge at the port of Mundra, cleared customs and were placed into storage pending payment. Sharp failed to make payment and Viterra claimed damages for non-acceptance under the Default Clause. In the meantime, the Goods had risen in value due to customs tariffs imposed on them by the Indian Government. The GAFTA Board of Appeal found that Sharp was in default due to its failure to pay for the Goods and liable to pay damages to Viterra in accordance with the Default Clause.

Given Sharp's default, the key point for consideration by the GAFTA Board of Appeal was how the Goods should be valued under the Default Clause and therefore the quantum of damages due to Viterra. The increased value of the Goods due to the tariffs imposed meant that depending on the approach taken, either party stood to benefit from the increased value of the Goods. This was because "*if valued on the contract terms damages are therefore considerably higher than if they are valued on the basis of the value which they actually had by the time they were sold*". Viterra argued that the market value of the Goods at the date of default under the Default Clause should be based on an assumed purchase and carriage of identical goods on the same delivery terms as the original sale. Sharp argued that the actual or estimated value of the Goods, on the date of default under sub-clause (c) of the Default Clause, should be determined based on their realisable value in the domestic market. The GAFTA Board of Appeal found in favour of Viterra. Sharp appealed to the High Court under section 69 of the Arbitration Act 1996, arguing that the GAFTA Board of Appeal had erred in its approach to valuation of the Goods under the Default Clause.

Findings

The Court dismissed Sharp's appeal. Again, the key point for consideration was how the Goods should be valued under the Default Clause and therefore the quantum of damages due to Viterra. The Court held that the value of the Goods should be determined based on a notional substitute contract with the same terms and conditions as the breached contract under which the dispute had arisen i.e. the cost of purchasing the Goods and shipping between the same ports.

In doing so, the Court concluded that the authorities supported Viterra's argument that the correct approach to interpreting sub-clause (c) of the Default Clause “is to value the goods based on the same terms and conditions” as the sale contract breached and that using the prices in the domestic market in India (for which Sharp contended) was “on any analysis not a like for like sale" especially given that the Goods had benefitted from customs clearance at the port of Mundra and therefore were not subject to the tariff which would have resulted in an increased price.

HFW Comment

This case is a useful reminder of the importance of both correctly analysing the value of goods based on the contract delivery terms and pricing and of providing evidence of a price calculated on the same basis. The GAFTA Board of Appeal was not provided such evidence but rather what the Court described as "*two imperfect alternatives*." As the Court commented, "*had such evidence been provided, there is no reason to think they would not have accepted it rather than choose between two different proxies*". The outcome of this case is therefore somewhat controversial, in particular because of the departure from what might be considered a more usual approach to the assessment of damages, based on the available market for the actual goods rather than on a notional sale. Sharp has sought permission to appeal.

MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm)

Court: Commercial Court (QBD)

Judgment: 3 March 2022

Summary

A contractual requirement to use reasonable endeavours to overcome a force majeure event did not oblige the affected party to agree either to vary the terms of the contract or to non-contractual performance.

Facts

In 2018, under a contract of affreightment ("**COA**") between MUR Shipping BV ("**MUR**") and RTI Ltd ("**RTI**"), RTI agreed to ship and MUR agreed to carry consignments of bauxite from Guinea to Ukraine. The COA provided for freight to be paid in US dollars to MUR's Amsterdam bank. The US Government then imposed sanctions on RTI's parent company. MUR invoked a force majeure ("**FM**") clause in the COA because they said it would be a breach of sanctions to continue performance under the COA as the sanctions prevented RTI from making payments in US dollars and MUR could not be expected to load and discharge cargo without the payment required under the COA. RTI argued that they could make payments in euros, offering to bear any additional costs incurred by MUR as a result, and that in any event, MUR were not subject to the sanctions because they were a Dutch company and not a "US person".

The FM clause provided that an FM event was an event which (a) was outside the immediate control of the party giving the notice; (b) prevented or delayed the loading and/or discharge of the cargo; (c) was caused by one or more of a list of matters; (d) could not be overcome by reasonable endeavours from the party affected.

MUR did not provide ships to RTI until the sanctions were lifted in 2019, during which time RTI made alternative arrangements and brought a claim in arbitration for the additional costs incurred as a result. The Tribunal accepted the drastic effects of US Sanctions (both primary and secondary) on commercial transactions and that commercial counterparties would be discouraged from trading with a sanctioned party. It held that the sanctions did prevent US dollar payments by RTI but that MUR should have accepted payments in euros because of their obligation to make reasonable endeavours to overcome the FM event. MUR appealed to the English Commercial Court under s69 Arbitration Act 1996, arguing that the requirement to make reasonable endeavours did not include agreeing either to vary the terms of the COA or to accept non-contractual performance. RTI argued that there was no commercial difference between accepting payment in US dollars or euros and that the COA did not specifically require payment in US dollars. They also argued that the parties' contractual obligations were only one factor to be considered when assessing what was reasonable. In addition, there was no sufficient causal link between non-payment of the freight and the prevention/delay of the loading/discharge of cargo.

Findings

The Court agreed with MUR that the COA required RTI to make payments in US dollars. The COA expressly set out the parties' agreement in relation to the freight payment, as to "currency and method of payment...". It also agreed with MUR that under the requirement to exercise reasonable endeavours, they were not obliged to accept non-contractual performance to overcome the FM event. The exercise of reasonable endeavours "*required endeavours towards the performance of the bargain; not towards the performance directed towards achieving a different result which formed no part of the parties' agreement*."

In relation to RTI's argument that there was no sufficient causal link between non-payment and prevention or delay, the issue was one of causation, not of identifying which specific contractual provisions were directly relevant to loading and discharge. There was no error of law in the Tribunal's assessment of causation. The FM clause was not limited to matters which physically prevented loading or discharge: when negotiating the COA, the parties had contemplated that restrictions such as sanctions could prevent or delay loading or discharge while it remained physically possible.

HFW Comment

This judgment provides helpful guidance on the extent of a reasonable endeavours obligation in an FM clause. The approach to the impact of sanctions on contracting parties is also informative and particularly relevant given the extent of sanctions imposed by various countries as a result of the war in Ukraine.

Quadra Commodities SA. v XL Insurance Company SE and Others [2022] EWHC 431 (Comm)

Court: Commercial Court (QBD)

Date: 4 March 2022

Summary:

The underwriters (the "**Insurers**") of a marine cargo insurance policy (the "**Policy**") refused to indemnify the policyholder ("**Quadra**") for losses arising out of a fraud, on the basis that the losses were not covered by the Policy. The Court found that the losses were covered but that the Insurers had not unreasonably delayed payment of the claim under s.13A Insurance Act 2015 ("**IA 2015**").

Facts:

Quadra entered into various contracts with entities in the Agroinvestgroup for the purchase of grain. Warehouse receipts were provided to Quadra, confirming that the relevant quantities of grain were held in common bulk in stipulated warehouses, or "**Elevators**". It transpired that many of those receipts were fraudulent as they were issued with respect to the same grain that had been sold to multiple buyers. The fraud unravelled when buyers sought to execute physical deliveries against the fraudulent warehouse receipts and it became apparent that there was insufficient grain to go around. Quadra sought to recover its losses under the Policy. The Insurers denied the claim on the basis that (i) Quadra did not have an insurable interest in the lost property; and (ii) some of the property did not exist at the time it was said to be delivered. They argued Quadra's loss was purely financial, based on the fraudulent warehouse receipts. Quadra claimed for an indemnity and for damages under s.13A IA 2015, which implies a term into contracts of insurance to the effect that an insurer must pay sums due in respect of the claim within a "reasonable time".

Findings:

The Court held that Quadra should be indemnified under the Policy, because:

(1) The subject matter of the Policy was not the success of the adventure. It was proprietary in nature. Goods corresponding with the goods specified under the contract were present in the Elevators and so fell within the subject matter of the Policy. Among other things, the physical presence of the goods was demonstrated by the warehouse receipts, inspection reports and the fact that physical collections of grain had been made by Quadra during the relevant period.

(2) Although the goods were not sufficiently identified to meet the conditions of s. 20A(1) Sale of Goods Act 1979 and so Quadra could not establish title to the goods in that way, nevertheless an insurable interest could be established in goods of the relevant description in the Elevators. This was because Quadra had paid for them and the warehouse receipts gave them the right to take possession under local law. It was irrelevant that there were competing claims to the grain and the goods were unascertained.

(3) The loss was an insured peril as it was caused by misappropriation.

The Court held that the Insurers were not liable for damages under s. 13A IA 2015. In the circumstances, a "reasonable time" was not more than around a year's delay from the notice of loss to the claim being paid. Whilst the delay was in excess of a year and the Insurers were ultimately incorrect in their assertions, there were reasonable grounds for disputing the claim.

HFW Comment:

This is the first reported judgments on s.13A IA 2015 and provides some clarity as to what constitutes a "reasonable time." It is of particular interest to commodities traders that Quadra were able to establish an insurable interest in goods held in bulk and make a recovery under the Policy.

BP Oil International Ltd v. Glencore Energy UK Ltd [2022] EWHC 499 (Comm)

Court: Commercial Court (QBD)

Date: 9 March 2022

Summary

In a dispute arising from a contaminated cargo of Russian crude oil, the Court had to ascertain what terms had been agreed by the parties during contractual negotiations. It also considered the appropriate measure of damages and in doing so, two time bars in the BP GTCs for Sales and Purchases of Crude Oil and Petroleum Products 2015 (the "**GTCs**").

Facts

In April 2019, Glencore Energy UK ("**Glencore**") agreed to supply BP Oil International Ltd ("**BPOI**") with a cargo of Russian crude oil. BPOI on-sold the cargo to BP Europa ("**BPESE**"). After delivery, the cargo was found to be contaminated with organic chlorides. In May 2020, BPOI took action against Glencore for breach of contract, bringing several claims, including one under s.53(3) Sale of Goods Act 1979 for the difference in value between the contaminated cargo and the cargo that should have been delivered under the contract.

Glencore disputed both liability and quantum. It sought to rely on the alleged final and binding effect of a loadport quality certificate. The final and binding provision had been included in a draft contract sent by Glencore after the recap had been sent. BPOI had rejected the proposed amendment, in the face of several requests by Glencore. Glencore ran a number of arguments as to why the final and binding provision was incorporated, including that the 'last shot' principle of contract negotiation applied, whereby the last set of terms sent apply, if unanswered. Glencore also argued that the losses claimed by BPOI in fact sat with BPESE and any claims by BPESE against BPOI were time barred. It alleged that BPESE had failed properly to notify BPOI of its complaints within a contractual time limit. Glencore also claimed an agreement waiving a one-year time-limit within which proceedings must be commenced was made too late - and that this time-limit had also expired.

Findings

The Court found in favour of BPOI on liability and awarded BPOI a substantial part of the quantum sought.

It held that the negotiations did not give rise to a 'battle of the forms' and so the last-shot doctrine did not apply. Even if there was a battle of the forms, BPOI had excluded the operation of the last-shot doctrine during negotiations, specifically by the following message: "*We hereby reject any proposed amendments unless expressly agreed by us in writing. Neither failure or delay in responding, nor performance of the agreement, shall constitute acceptance to any terms which have not been expressly agreed between the parties.*"

The Court found that the sub-sale to BPESE was not relevant but even if it was, any claim by BPESE against BPOI was not time barred. The BP GTCs state, "*Any complaint of deficiency of quantity or of variation of quality shall be admissible only if notified in writing to the Seller within 45 days of the completion of discharge date and accompanied by evidence fully supporting the complaint…*" An email from BPESE notifying BPOI about the contaminated oil satisfied this time limit. The Court held that while the notification was not written as a formal complaint, it left BPOI in no doubt that BPESE was complaining about the quality of the cargo and rejecting it due to contamination. The Court also found that the notification was accompanied by evidence, even though it was not in the same email.

The BP GTCs include the following clause regarding modifications, "*The terms of the Agreement as agreed between the parties shall not be modified unless mutually agreed by the parties, which agreement must be evidenced in writing*." The Court found that a 'phone conversation between BPESE and BPOI, waiving the one year time-bar clause, was effective because this oral waiver was recorded in a subsequent written agreement. There was no requirement for the written aspect of a verbal agreement to waive time-bars to be 'reasonably contemporaneous'.

HFW Comment

The Court accepted that carefully worded reservations during contract negotiations can prevent unwanted terms being included. The judgment also reaffirmed the English courts' tendency to put substance above form and take a pragmatic approach to requirements for notifying claims. HFW (Alistair Feeney and Rosie Harrison) acted for BPOI.

Laysun Service Co Ltd v Del Monte International GmbH [2022] EWHC 699 (Comm)

Court: Commercial Court

Date: 28 March 2022

Summary

An appeal under s69 of the Arbitration Act 1996 ("**s69**") failed because the alleged errors of law on which the appellant relied were in fact questions of fact which could not be appealed.

Facts

A contract of affreightment ("**COA**") was agreed between Laysun Service Co Ltd ("**Owners**") and Del Monte International GmbH ("**Charterers**"), to carry refrigerated bananas from the Philippines to Iran from 1 January to 31 December 2018. The bananas were sold by the Charterers' sister company and the Charterers had no involvement in receiving payment or arranging import permits; however, under the COA they bore the cost and risks of loading and discharge. The sister company's buyers in the UAE sold the bananas on to Iranian buyers, who performed the unloading. Part of the way through the COA, the Charterers stopped providing cargoes and gave two declarations of force majeure ("**FM**") under clause 8 of the COA. The first was because, following the tightening of sanctions by the US Government, payment for the bananas could not be made and so there would be no receiver able to present the bills of lading required for the cargo to be customs cleared before discharge. The second was because the Iranian Government had stopped issuing import permits. No alternative buyers could be found in time and so Charterers could not perform. The Owners brought a claim in arbitration for losses arising out of their alleged wrongful failure to perform. The Tribunal found that the Charterers were entitled to rely on the FM clause. It found as facts that the buyers were unable to make payments and that the sister company was unable to receive payments; and that the Iranian government stopped issuing new import permits. The Owners appealed under s69 on various questions of law.

Findings

The Court categorically rejected the appeal. It held that the alleged questions of law identified by the Owners did not arise in the light of the Tribunal's factual findings, but in any event the Owners had not identified any error of law of the Tribunal. It then dealt with each alleged error in turn. They included the following:

(1) The first suggested question of law was whether the Charterers were entitled to invoke the FM clause "*because payment difficulties in related sale and purchase contracts (to which neither the Charterers nor the Owners were party) meant that bills of lading might not arrive at the discharge port so that the Owners would then have the right to decline to permit delivery of the goods carried until surrender of the Bills of Lading.*" This was based upon an "entirely false" factual premise. The Tribunal did not find that the Charterers could invoke FM because the Owners could withhold delivery of the goods. It held that the goods could not be discharged because without the bills of lading, the goods could not clear customs.

(2) The next suggested question of law was whether the Charterers were entitled to invoke the FM clause because the receivers did not have import permits. Did the Charterers need also to prove that the receivers did not have existing import permits and could not acquire import permits under the import permit trading arrangements? This was an issue of fact already determined by the Tribunal and Owners could not seek to re-open it.

(3) It was not now open to the Owners to argue that the Charterers had a non-delegable duty to secure an import permit and customs clearance to enable discharge, and that there was no distinction between the loading and discharge in this respect. The Charterers' obligation to provide cargo did not equate to a duty to remove cargo from the vessel. If there was such a duty, it was subject to the FM clause.

(4) The Court also agreed with the Tribunal that effect of an FM event may be felt even after the FM event was over and could continue to prevent the resumption of performance.

HFW Comment

Aside from the warning that an appeal under s69 must comprise genuine questions of law or face dismissal, the Court's observations about the continuing effect of an FM, although obiter, are interesting.

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