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COMMODITIES CASE UPDATE

JANUARY 2023

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We are delighted to present the January 2023 edition of the Commodities Case Update which provides a summary of fourteen 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.

We hope that you find this update useful.

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Unicredit Bank A.G. v Euronav N.V. [2022] EWHC 957 (Comm)

Court: Commercial Court

Date: 28 April 2022

Summary

This judgment of the English High Court - currently subject to appeal - will be of concern to the shipping and trading community, particularly financing banks which rely on original bills of lading ("B/Ls") as part of their security package.

Facts

UniCredit Bank AG ("**UniCredit**") issued a letter of credit in March 2020 for approximately USD 29 million to finance the purchase by Gulf Petrochem FZC ("**GP**") of 80,000MT of low sulphur fuel oil (the "**Cargo**") from BP Oil International Limited ("**BP**"). The Cargo was loaded on the MV "Sienna" (the "**Vessel**") owned by Euronav NV ("**Euronav**"). The B/Ls were issued. Euronav initially chartered the Vessel to BP and the charterparty required Euronav to discharge without production of the original B/Ls against an indemnity provided by the charterer. Euronav, BP and GP subsequently entered into a novation agreement by which BP ceased to be the charterer of the Vessel and was replaced by GP. UniCredit and GP intended that the Cargo would be on-sold to six sub-buyers approved by UniCredit. As usual in commodity trade finance, the transaction was intended to be "self-liquidating" so that UniCredit would be reimbursed the financing when the sub-buyers paid into GP's collection account at UniCredit. In late July 2020, the offtakers failed to pay and strong suspicions arose that GP's management had been operating a large-scale fraudulent scheme at the expense of its trade finance banks, with fake contracts and "phantom" offtakers. The company headed towards insolvency. UniCredit received no reimbursement on its financing and was unable to sell the Cargo pursuant to its security rights, because Euronav had discharged it. It subsequently transpired that the Cargo financed by UniCredit had been discharged from the Vessel by ship-to-ship transfer and could no longer be traced. At the time of the discharge, the original B/L was held by BP as the onwards endorsement to UniCredit was delayed by the COVID-19 lockdown affecting BP's operations. The original B/L was eventually endorsed to UniCredit. The bank brought a claim against Euronav, arguing that discharge without production of the original B/L was a breach of the contract of carriage contained in or evidenced by the B/L.

Findings

The Court rejected UniCredit's claims. Firstly, it held that the B/L did not contain a contract of carriage at the time of discharge. UniCredit had acknowledged that a B/L in the hands of the charterer is a mere receipt but argued that when the charterparty was novated, a B/L contract existed between the B/L holder and the shipowner and when the B/L was endorsed to UniCredit by BP, rights of suit vested in UniCredit. The Court rejected this line of argument and held that the B/L did not contain a contract of carriage. Secondly, it held that even if the B/L had contained a contract of carriage, the discharge of the Cargo without production of the B/L did not cause the loss claimed, or such loss would have been suffered by UniCredit in any event as UniCredit would have allowed discharge without production of the original B/L. The Court cited a number of reasons for that conclusion, including the fact that (at that time) UniCredit had no concerns about GP falling into default.

HFW Comment

The finding that the B/L did not contain a contract of carriage is a surprising one. It is well established under English law that a B/L is a contract of carriage in the hands of parties other than the charterer. In this case, UniCredit therefore argued that when BP ceased to be the charterer (by reason of the novation agreement) a B/L contract must exist. However, the Judge declined to follow this line of reasoning. The very surprising result is that it now appears that bills of lading subject to English law in the hands of subsequent endorsees from the former charterer have no contractual status where the underlying charterparty has been novated prior to onwards endorsement. Numerous parties in international commerce, from buyers and sellers of commodities to financing banks, rely on bills of lading as contractual documents. Therefore, a

judgment that substantially undermines the contractual rights of B/L holders will be of concern to the industry as a whole.

The judgment is also notable because the Court found that the loss would have been caused in any event because UniCredit would have allowed discharge without production of the original B/L. Again, this is surprising. In the oil industry, it is very common for cargo to be discharged by a shipowner against a letter of indemnity ("**LOI**") from the charterer and not against production of an original B/L. Prior to this judgment, the orthodox position had been that knowledge that cargo may be discharged against an LOI does not rob the B/L holder of its rights to claim from the shipowner in the event that the shipowner misdelivers cargo without production of the original B/L. This judgment also appears to be at odds with that well-established trade practice. The unfortunate result of this judgment could be that where cargo is discharged against an LOI provided by the charterer, a financing bank could be taken to have "caused its own loss" if a shipowner misdelivers the cargo. This could trigger serious doubt as to the value of the B/L which is often a key part of a bank's security package. There is considerable concern that because this judgment potentially undermines the legal certainty of the security rights relied upon by trade finance banks, it could affect bank risk assessment of B/L financing.

HFW (Michael Buisset and Caroline West) acted for UniCredit. The judgment is currently subject to appeal, with a decision expected in spring/summer 2023.

Blacklion Law LLP v Amira Nature Foods Limited & Anor [2022] EWHC 1500 (Ch)

Court: High Court (Chancery Division)

Date: 20 June 2022

Summary

Where there are two conflicting interpretations of a contractual provision, the Court should apply the interpretation that is most closely aligned with commercial common sense.

Facts

In November 2016, BlackLion Law LLP (the **Claimant**) entered into a general retainer with Amira Nature Foods Limited (the **Defendant**), pursuant to which the Claimant would be paid by reference to specified hourly rates. In January 2017, the Defendant instructed the Claimant to assist with a bond issue. In March 2017 it became apparent to the Claimant that the work was likely to take longer than anticipated and so the parties entered into a second retainer on 3 May 2017. Unlike the first retainer, this time the Claimant was to be paid a fixed fee of £300,000 in cash or shares. One of the provisions in the second retainer stated that the Defendant agreed to pay the Claimant:

"*a fixed fee of £300,000 ("Fixed Fee") for the Services plus disbursements ("Disbursements") in connection with this Matter, **subject to the completion of the Matter by 31 May 2017***"[emphasis added]

The bond issue did not complete by 31 May 2017 and the Claimant continued working throughout June and July. The project never completed. When the Claimant requested payment for the work carried out up to this point, the Defendant withheld the fixed fee, claiming that payment was contingent on completion by 31 May 2017 and so it had no obligation to pay under the second retainer. The Claimant argued that the wording did not qualify the concept of the fee, but rather its fixed nature. As such, if the project had completed by 31 May 2017, the Claimant would *only* have been entitled to the fixed fee; if further work was required after that date, that would be charged separately and in addition to the fixed fee.

Findings

The Court reiterated that in order to interpret the contract, it must consider what a reasonable person having all the background knowledge which would have been available to the parties would have understood the words in the contract to mean. Further, it should also consider the natural and ordinary meaning of the wording in the context of the contract; the purpose of the provision; and commercial common sense; and should disregard the subjective evidence of any party's intentions. If the parties had used clear and unambiguous language, the Court would have to give effect to it. However, where there were conflicting possible constructions of a provision, the Court was entitled to prefer the construction most consistent with commercial common sense.

The Court found the language in the second retainer was ambiguous as the conditionality of the phrase "subject to" made it unclear which part of the provision was qualified. As such, the Court examined the facts and concluded that the Claimant's interpretation was more consistent with commercial common sense. The Court cited the following reasons:

- The Defendant was aware of the Claimant's approximate hourly rates from the general retainer and so would know what the Claimant would expect to charge.
- The second retainer was only signed in early May 2017, by which point (a) over £385,000 of time had been recorded to the matter and (b), it was clear that it would be difficult to complete the bond issue successfully by 31 May 2017.
- Given the cash flow needs of a small law firm such as the Claimant, it would be unlikely to agree to tie up a sizeable proportion of its available staff on a project for which it would only be paid if it completed successfully by 31 May 2017.
- It made no commercial sense for the Claimant to be paid significantly less than the value of the work that it had produced on the project if the bond issue completed by the deadline, whereas

it would make more sense for the fixed fee to be payable irrespective of when completion occurred, with a separate charge for additional work.

HFW Comment

This case is a useful reminder of the English Court's approach to questions of interpretation. It highlights the importance of commercial common sense where provisions are open to conflicting interpretations. Further, the judgment acts as a reminder that the best approach is to avoid ambiguity when drafting.

NKD Maritime Limited v Bart Maritime (No. 2) Inc [2022] EWHC 1615 (Comm)

Court: Commercial Court

Date: 24 June 2022

Summary

Against the backdrop of the global pandemic, the High Court was asked to decide whether the Indian Government's implementation of COVID-19 restrictions constituted a force majeure ("**FM**") event. The Court held that whilst delivery of a vessel was hindered by the restrictions, they did not render delivery an impossibility and thus, no FM event had occurred.

Facts

In March 2020, NKD Maritime (the "**Buyer"**) and Bart Maritime (the "**Seller"**) entered into a contract (the "**MOA**") for the sale of the SHAGANG Giant (the "**Vessel"**), under which the Buyer made an initial payment. The intention was for the Vessel to be scrapped. The onset of Covid-19 restrictions, first in relation to Vessel documents required on arrival and then subsequently, a full lockdown imposed by the Indian Government, caused several delays to the Vessel. First, the Seller could not deliver the Vessel to the delivery location specified in the MOA and second, local port authorities could not fulfil the necessary document review to facilitate the scrapping.

On 14 April 2020, the Buyer tendered a notice of termination pursuant to the FM clause in the MOA, on the basis that the Seller could not transfer title to the Vessel. It claimed the return of the initial payment. The Seller rejected the notice, claiming that it in fact constituted a repudiatory breach of the MOA, which the Seller accepted. The Seller subsequently sold the Vessel for a lower price and claimed losses in excess of the initial payment as a result of the Buyer's repudiatory breach. The Buyer claimed that the lockdown restrictions constituted a FM event which prevented the Seller from being able to transfer title to the Vessel in accordance with the MOA since the Vessel could not be delivered to the correct location with the correct documentation.

Findings

The Court considered the following questions in relation to the FM clause in the MOA:

(1) Whether transfer of title "*in accordance with [the] contract*" required delivery of the Vessel.

(2) Whether such delivery should be to a particular location.

(3) Whether the Seller had been unable to perform its obligations due to the Covid-19 restrictions.

The Court answered 'no' to all three questions and concluded that no FM event had occurred since the delivery of the Vessel was hindered but was not impossible. Accordingly, the Buyer's termination constituted a repudiatory breach of the MOA. The Seller was entitled to damages but was not entitled to interest because it had held the initial payment throughout and so was not out of pocket.

HFW comment

This case is a pertinent illustration of the challenges of bringing a claim under an FM clause. Parties should consider the relevant contractual wording and the specific facts of the case carefully before terminating pursuant to an FM clause, not only as regards whether the particular event they are contemplating is covered by the clause, but also as to whether that particular event has actually prevented performance or caused delay and in what circumstances they are entitled to claim FM as a result.

Kyla Shipping Co Ltd & Another v Freight Trading Ltd & Others [2022] EWHC 1625 (Comm)

Court: Commercial Court

Date: 1 July 2022

Summary

A substantially valid claim for fraudulent breach of fiduciary duty was time barred, as the claimant had failed to carry out reasonable due diligence which would have revealed the fraud significantly earlier than when the claimant in fact discovered it.

Facts

Between 2007 and 2008, the first claimant ("**Kyla**") and the first defendant ("**FTL**", a speculative FFA trading fund) entered into 41 freight forwarding agreements ("**FFAs**"). Kyla claimed that 31 of these FFAs had been concluded by the third defendant ("**CTM**"), purportedly acting for and on behalf of Kyla but in fact acting in breach of the fiduciary duty it owed to Kyla. Kyla made a loss of around USD 32 million on these 31 FFAs, whilst FTL made a profit of around USD 8 million on the same. The claimants claimed that CTM was acting as the agent of Kyla to trade the FFAs by way of an individual who was to trade in the FFA market at its discretion for Kyla and using FTL to "front" the market for Kyla, for a fee of USD 500 per day. If the arrangement had functioned correctly, FTL would have made a profit of USD 1.2 million rather than USD 8 million. The defendants argued that CTM had been trading not for but with Kyla, as well as acting as agent for FTL.

The claims were commenced over ten years after the alleged breaches and so on the face of it were time barred. However, the claimants sought to rely on s.32 Limitation Act 1980, which provides that where a claim is for fraud, mistake or where any fact relevant to the claim was deliberately concealed by the defendant, the limitation period shall start to run from the point where the claimant discovers the fraud, or when they could with reasonable due diligence have discovered it, rather than from the time of the fraud itself. The claimants only discovered the fraud just before commencing proceedings, as a result of an unrelated dispute.

Findings

The Court found in favour of the claimants, holding that CTM had breached its fiduciary duty towards Kyla and the claimants' claims in fraud were sound. The decisive issue therefore became one of limitation. The Court held that the claimants could not benefit from the time bar extension permitted under s.32 Limitation Act 1980 because if they had exercised reasonable due diligence, they could have discovered the fraud before the expiry of the time bar. The substantial losses which Kyla had incurred on its FFA trades should have prompted them to make reasonable enquiries, which would have led to the discovery of the fraud.

The Court confirmed that the relevant principles were as follows:

The claimant is not immediately presumed to be on enquiry as to the need to investigate potential wrongdoing. There must instead be a trigger which objectively puts the claimant on notice as to the need to investigate.

(1) The test is when the claimant could, not would, with reasonable due diligence, have discovered sufficient facts to enable it to properly advance the claims brought. The claimant has the burden of proving that it could not, acting with reasonable diligence, have made the relevant discovery.

(2) Whilst the test is objective, the practical requirements of "reasonable due diligence" must be assessed in the context of the specific circumstances.

(3) Discovery occurs no later than when the claimant is able to properly plead the allegations.

The test therefore effectively comprises two elements: (1) whether there was an objective trigger to put the claimant on notice of a need to make enquiries; and (2) what findings could then have been revealed through reasonably diligent enquiries.

The claimants attested that their only concern following the losses on the FFA trades was finding ways to pay the debts, rather than any investigation into why the losses had occurred and that they had put the heavy losses down to the 2008 financial crash. The Court estimated that even without the crash, their losses would still have amounted to around USD 10 million. This was a level of loss that would have prompted any reasonably interested person to ask why it had happened. The Court deemed it irrelevant that Kyla did not suspect it had been defrauded because of close familial and commercial relationships between the parties. This was because the question to be determined was not whether the claimant should have suspected it had been defrauded, but whether it would have required more than reasonable due diligence for that fraud to be discovered sooner than it was. The claim was dismissed as time barred.

HFW Comment

The case provides additional clarity on what constitutes reasonable due diligence for the purposes of s.32 Limitation Act 1980 in claims involving fraud, concealment or mistake. The claimants appealed the decision, judgment for which was handed down on 3 October 2022. The judgment remains unreported, but HFW continues to monitor the status of the appeal and will report on its outcome when available.

Vitol SA v Genser Energy Ghana Limited [2022] EWHC 1812 (Comm)

Court: Commercial Court

Date: 22 July 2022

Summary

The Court applied interest under the Late Payment of Commercial Debts (Interest) Act 1998 ("**1998 Act"**) where it held that a contractual interest provision was not agreed by the parties.

Facts

By a sale and purchase agreement dated 15 March 2018 (the "**SPA**"), Vitol SA (**"Vitol"**) agreed to supply Genser Energy Ghana Limited ("**Genser"**) with propane at Takoradi, Ghana. Genser was to purchase a minimum of 9,000 MT (+/- 5% at Vitol's option) of propane on a take-or-pay basis. The USD price basis DAP Takoradi was to be "*Opis non TET MB Propane*" plus a premium of USD 54 per m/t. The term of the SPA was extended and the price of propane was later amended by a series of addenda. Importantly, the Third Addendum changed the commercial basis of the SPA from pre-payment to 90-day credit backed by a guarantee. The Third Addendum was agreed in November 2018 as a result of Vitol's concern over Genser's late payment of invoices.

In April 2019, Vitol sought to introduce an interest rate of 8% above LIBOR applicable to late payment in a proposed Seventh Addendum, which was backdated to the date of the Third Addendum. Genser disputed that the Seventh Addendum was agreed.

Following a non-payment of an invoice in the sum of USD 4,174,546.76, Vitol sent Genser a notice of default and subsequently terminated the SPA in early June 2019. It calculated the settlement amount as defined in the Third Addendum to equal USD 17,560,514.02. Genser argued that it was not liable to pay the settlement amount because (a) the due date of the unpaid invoice was later than Vitol alleged, (b) the notice of default was not valid, and (c) it was not validly served.

Findings

The Court disagreed with Genser's arguments concerning the notice of default and found it liable to pay Vitol the sum of the settlement amount. However, the Court did side with Genser on the issue of the Seventh Addendum and it held that the Seventh Addendum had not been agreed by the parties. Consequently, there was no contractual basis for Genser to pay interest at 8% above LIBOR on all outstanding debts from 2019.

The Court proceeded to consider in detail the application of the 1998 Act. Section 12 provides that the 1998 Act does not have effect in relation to contracts governed by law of a part of the UK by choice of the parties if (a) there is no significant connection between the contract and that part of the UK, and (b) but for the parties' choice, a foreign law would apply. The SPA included a choice of English law as the governing law even though Vitol's central administration was in Switzerland and Genser was incorporated in Ghana. The Court therefore considered whether there was a significant connection between the SPA and England. It concluded there was, because the ultimate beneficiary was Vitol in London to which Genser sent payments, Vitol's critical decisions in relation to the SPA were taken in London and its key commercial decision makers were all based in London.

HFW Comment

The 1998 Act can be a useful mechanism for increasing the amount of interest received (the current SI provides for interest at a rate of 8%), but parties to contracts with English choice of law need to be able to establish a significant connection with England. HFW (Damian Honey and Mike Buffham) acted for Vitol.

Fimbank PLC v KCH Shipping Co Ltd [2022] EWHC 2400 (Comm)

Court: Commercial Court

Date: 28 September 2022

Summary

The English Court has clarified that the time bar in Article III rule 6 of the Hague-Visby Rules (the "**Rules**") can apply to claims brought against the carrier in circumstances where goods are misdelivered after discharge.

Facts

FimBank p.l.c. (**"the Bank"**) had financed the purchase of coal in bulk and taken a pledge over both the cargo and the bills of lading as security. When the goods were discharged and subsequently misdelivered under a letter of indemnity, the Bank as the holder of the bills of lading brought a claim against the contractual carrier of the cargo, KCH Shipping Co., Ltd (**"KCH"**) for alleged misdelivery. The bills were on the Congenbill form and subject to the Rules, including the time bar of one year after delivery in Article III r 6 which applies to claims against carriers.

The Bank commenced arbitration after the time bar had expired but argued that its claim was not caught by the time bar for two reasons. First, it argued that the time bar did not apply to claims for misdelivery occurring after discharge. The Rules relate to a 'period of responsibility' which ends with the discharge of cargo and delivery in this case took place after discharge so the Bank argued that KCH was no longer protected by the time bar at that point. Second, it claimed that the parties had agreed in the contract to disapply the Rules in respect of the period after discharge because Clause 2(c) of the Congenbill form provides: *"The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel."*

The tribunal held that whether or not delivery had taken place after discharge, the Bank's claim was time-barred because the time bar in the Rules can apply to claims relating to misdelivery occurring after discharge and because the Rules were not contractually disapplied by Clause 2(c). The Bank appealed.

Findings

After an extensive review of the authorities, the Court upheld the tribunal's decision on both issues. On the first issue, it held that Article III r 6 of the Rules does apply to claims for misdelivery of cargo after discharge. This conclusion avoided the need for fine distinctions as to the point at which discharge ended and was in line with the objective of the time bar in Article III r.6, which was intended to achieve finality and to "*enable the ship owner to clear his books*". Even if its conclusion was wrong, the Court held that the tribunal's decision was in any event justified by its finding that the bills of lading contained an implied term providing that the obligations and immunities in the Rules are to continue after actual discharge and until delivery takes place, in line with a previous decision of the Court of Appeal[1].

On the second issue, the Court held that the Rules were not contractually disapplied to the period after discharge by Clause 2(c). The appeal was dismissed.

HFW Comment

This decision resolves an important question which had not previously been decided by the English courts. Commodity traders and trade finance banks wishing to bring a claim against a contractual carrier for misdelivery should be aware of this time limit for doing so.

1 The MSC Amsterdam [2007] EWCA Civ 794.

BTW 2014 LLC (Appellant) v Sequana SA And Others (Respondents) [2022] UKSC 25

Court: UK Supreme Court

Date: 5 October 2022

Summary

The UK Supreme Court has confirmed the existence of the common law "creditor duty" and considered the nature of the duty and the circumstances in which it arises.

Facts

In 2009 the directors of a company known as Arjo Wiggins Appleton Limited ("**AWA**") paid a dividend to Sequana SA ("**Sequana**"), which was the sole beneficial owner of AWA. Sequana had set up AWA to cover its environmental liabilities arising from the manufacture of paper. The dividend amounted to a large proportion of AWA's assets but conformed to the statutory rules governing the payment of dividends. The directors of AWA knew at the time of authorising the dividend in 2009, that the company faced a large but unquantifiable environmental liability. In 2018, AWA became insolvent as a consequence of that environmental liability. The resulting losses put Sequana into insolvent liquidation and BTI 2014 LLC (BTI), an assignee of AWA's claims, brought a claim against AWA's directors for an amount equivalent to the dividend payment on the basis that their decision to distribute the dividend was in breach of their common law duty to act in the interests of the company's creditors. BTI's claim failed at first instance and on appeal and BTI appealed to the Supreme Court.

Findings

The Supreme Court affirmed that in certain circumstances, company directors have a duty to consider the interests of the company's creditors - a "creditor duty" – as an aspect of their duty to the company. This is a common law duty, affirmed or preserved by s172(3) Companies Act 2006 (the "**Act**)" and operating in tandem with the fiduciary duty to act in a way, considered to be in good faith, that promotes the success of the company for the benefit of its members as a whole under s172(1) of the Act. The Supreme Court addressed two questions in particular:

When does a "creditor duty" arise?

The precise point in a company's life-cycle that a "creditor duty" comes into being was the crux of the appeal. AWA was solvent on both the "cash flow" and "balance sheet" measures at the time the dividend was paid. BTI's case therefore turned on the argument that AWA's *potential* future environmental liabilities – and the likelihood of future insolvency – made the dividend a transaction in breach of the Act. The Supreme Court rejected this, holding that a creditor duty arises when the directors know, or ought to know, that a company is either actually insolvent, bordering on insolvency, or that an insolvent liquidation or adminstration is probable. In AWA's case there was a "real risk, although not a probability" that AWA might become insolvent as a result of paying a dividend. No duty had been breached.

What is the nature of a "creditor duty"?

The Supreme Court emphasised that the nature of the duty is not clear-cut: the legality of directors' decisions depends on the stage of insolvency and the financial circumstances in which the company finds itself at the time of the decision in question. Nevertheless, some general rules apply. The more "*parlous the state of the company, the more the interests of the creditors will predominate*." Further, whether insolvency is probable, imminent or actual will shape the nature of the duty.

When insolvency is imminent or actual, directors must protect the interests of creditors as a whole as creditors become the "main stakeholders" in the company's assets on liquidation. When insolvency is probable, the duty will involve more of a balancing act between shareholders and creditors. Whether there is a probability of insolvency will depend on factors such as the size of the company's debts, or the likelihood of the company returning to solvency.

Lastly, the Supreme Court agreed the duty is objective; ignorance of financial trouble would not normally protect a director from any omission to consider creditors' interests. Directors must, therefore, remain cognisant of the company's financial status, particularly if there are signs of trouble.

HFW Comment

This judgment confirms the existence and scope of the "creditor duty". It will be of particular significance for directors and their advisers facing financial challenges, as well as for insolvency practitioners investigating the legality of directors' decisions after insolvency.

Vitol S.A. v JE Energy LTD [2022] EWHC 2494 (Comm)

Court: Commercial Court

Date: 7 October 2022

Summary

In a dispute in which the buyer had failed to nominate a vessel or issue an acceptable letter of credit ("**LC**"), the Court had to interpret the meaning of "laycan" and whether the LC offered was in accordance with the contract.

Facts

Vitol SA ("**Vitol**"), as sellers, and JE Energy Ltd ("**JE**"), as buyers, entered into an FOB contract for the sale of crude oil (the "**Cargo**"). The recap provided for a laycan of 23-24 December 2019 and payment by a documentary LC. Vitol contended that long-form contract terms were agreed subsequently but this was disputed by JE. The laycan closed and JE had neither nominated a vessel nor opened a LC. Vitol did not exercise the option to cancel as JE assured Vitol that a LC would be issued and a vessel nominated. JE attempted to vary the laycan period agreed in the recap but Vitol refused. However, to ensure the LC was cashable, Vitol requested that the shipment date in the LC be amended to 31 January 2020. When a vessel was eventually provided at the end of January 2020, Vitol refused to load the Cargo as the LC provided was short of the Cargo's value and was not issued or confirmed by a recognised bank approved by Vitol. JE subsequently issued a notice that the contract was null and void which Vitol accepted as a repudiatory breach. Vitol commenced proceedings against JE for damages and JE counterclaimed. The parties disputed:

(1) Whether the long-form contract terms applied in addition to the recap. JE argued that only the recap applied as the long-form terms were not agreed until mid/late January 2020.

(2) The meaning of the term "laycan" in the recap. Vitol argued that "laycan" had its traditional meaning (i.e., the seller can cancel the contract if the vessel does not arrive at the port by the cancellation date) whereas JE argued that it simply meant the shipment or loading period. Even if "laycan" did have its traditional meaning, JE argued that the variation to the shipment date in the LC meant that the laycan dates were similarly amended or, in the alternative, that Vitol were estopped by convention because the parties were working under the assumption that there was an obligation to load by 31 January.

(3) Their respective obligations in respect of the LC. Vitol contended that JE had to provide a LC on Vitol's form whereas JE argued that any LC was acceptable.

Findings

On issue (i), the Court found that this was "*a classic case of the parties sorting out the terms against the background of a concluded contract*" and that both the recap and the long-form contract terms applied. On issue (ii), the Court rejected JE's argument for a different interpretation of the term "laycan". It was contrary to its usual meaning in FOB contracts; and to the long-form terms that were agreed between the parties; and to the 2015 BP GTCs which were incorporated into the contract. JE had provided no evidence to suggest that the parties had agreed a different meaning. The Court did not accept that the variation of the LC varied the laycan dates in the recap. Whilst such a variation could vary the parties' contractual obligations, this is fact dependant. The amendments to the LC were necessary to ensure that it would be cashable; they were not intended to vary the laycan dates. Further, there was no common assumption between the parties that loading would take place by 31 January 2020 and so Vitol were not estopped from relying on the laycan dates in the recap. On issue (iii), JE had failed to put up a LC in satisfactory terms.

HFW Comment

This was a typical commodities trade and the judgment serves as a reminder to buyers of their obligations under FOB contracts – and of the seller's rights should the buyer fail to meet those obligations. It is also clear that good evidence will be needed to show that the meaning of a standard trading term should be varied.

Rasmala Trade Finance Fund v Trafigura PTE Ltd [2022] EWHC 2860 (Ch)

Court: High Court

Date: 12 October 2022

Summary

Allegations of forgery, fraud, actual or constructive knowledge of fraud and participation in a Ponzi scheme arising in the context of a trade finance transaction were struck out from a set of pleadings because they were not supported by the facts of the case.

Facts

The proceedings related to a Murabaha facility agreement ("**MFA**") between Rasmala Trade Finance Fund ("**Rasmala**") and Farlin Energy and Commodities FZE ("**Farlin**"). Rasmala was a finance company based in the UAE and Farlin was Trafigura PTE Ltd's ("**Trafigura's**") former trading partner. Under the terms of the MFA, Farlin was to present Rasmala with documents relating to a proposed purchase of coal; Rasmala would finance the purchase of the commodities by transferring the purchase price directly to the seller, which was Trafigura. Rasmala expected to receive an assignment of the monies due to Farlin from the onward sale of the commodities. However, it did not receive them. Rasmala brought a claim against Trafigura, alleging that it had been tricked into financing fictitious contracts for the sale of non-existent shipments of coal on the basis of forged documents and that Trafigura had actual or constructive knowledge of Farlin's fraudulent practice. In the Particulars of Claim, Rasmala also alleged that Trafigura had been involved in a Ponzi scheme. Trafigura made a cross-application to strike-out these parts of Rasmala's case.

Findings

The Court found in favour of Trafigura and granted its application to strike out the disputed claims. The Court found that the facts of the case did not support allegations of a Ponzi scheme, as Trafigura had provided the original bills of lading as security when asked to do so. Further, the Court held that Rasmala did not have the first-hand knowledge of Trafigura's state of mind necessary to prove it was on notice of the fraud.

HFW comment

Unfortunately, fraud is not uncommon in trade finance transactions. This case is a reminder that an allegation of fraud requires a very high standard of proof to succeed. The courts will not entertain such claims without good supporting evidence.

MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406

Court: Court of Appeal

Date: 27 October 2022

Summary

The Court of Appeal has held that where a force majeure ("**FM**") clause requires that a FM event "*cannot be overcome by reasonable endeavours from the party affected*", those endeavours can extend to accepting performance that is strictly inconsistent with that required under the contract - provided the end result is essentially the same.

Facts

The case involved a long-term contract of affreightment ("**COA**") between MUR Shipping BV ("**MUR**"), as owners, and RTI Ltd ("**RTI**"), as charterers. RTI's parent company became subject to US sanctions and MUR argued that these sanctions prevented payment being made in US Dollars, as expressly required under the terms of the COA. It declined to nominate further vessels in reliance upon what it maintained was a FM event.

RTI argued that payment could instead be made in Euros and furthermore, offered to bear any additional costs or exchange rate losses suffered by MUR in converting the Euros back into US Dollars. In effect, it maintained that any FM event could be overcome by reasonable endeavours by MUR, namely by them accepting payment from RTI in a different currency, Euros, with that different currency then being converted to US Dollars - so that the end result for MUR would be the same as if payment had been made in US Dollars in the first place.

RTI brought a claim in arbitration, seeking damages for MUR's refusal to nominate further vessels. The arbitration tribunal found in RTI's favour, on the basis that the FM event could have been overcome by reasonable endeavours and with no detriment to MUR. (Following consideration of the terms of the relevant sanctions, the tribunal held the FM event would likely have been delay resulting from payment in US Dollars, rather than prevention of payment in that currency.) MUR appealed.

In the High Court, the judge held that the exercise of reasonable endeavours by MUR could not require it to accept performance that was inconsistent with the express terms of the contract (ie. non-contractual performance) which required payment in US Dollars. RTI appealed.

Findings

By a majority of two to one, the Court of Appeal reinstated the decision of the arbitration tribunal. The decision of the majority focussed on whether, as a matter of fact, RTI's proposal would have led to the FM event being overcome by the exercise of reasonable endeavours. That was a matter on which the arbitration tribunal had already made a finding, namely that it would have achieved precisely the same result as payment by RTI in US Dollars. The decision of the majority was that it was not appropriate to interfere with that finding. The decision of the dissenting judge echoed the same concern of the High Court judge, that RTI's proposal involved non-contractual performance.

HFW comment

The law is now that the exercise of reasonable endeavours to overcome a FM event <u>can</u> involve performance that is inconsistent with the express terms of the contract if the end result is essentially the same.

Kuvera Resources PTE LTD v JP Morgan Chase Bank NA [2022] SGHC 213

Court: High Court of Singapore (General Division)

Date: 31 October 2022

Summary

In this case, the General Division of the High Court of Singapore considered the enforceability and validity of a sanctions clause for the first time. The Court upheld JP Morgan's right, as the advising bank for the relevant letters of credit ("**LCs**"), to rely on the sanctions clause contained in its confirmations and refuse payment to the beneficiary of the LCs where doing so would expose them to a sanctions penalty.

Facts

In 2019, an Indonesian company contracted to sell 35,000 metric tonnes of coal to a company in Dubai, in two parcels. Under the sale contract, the buyer was obliged to pay for each parcel by a confirmed letter of credit. Kuvera Resources PTE Ltd ("**Kuvera**") financed the Indonesian seller to enable it to purchase the coal which it was on-selling to the Dubai buyer. Kuvera entered into a tripartite contract with the buyer and the seller to ensure it had security for that financing. Under the tripartite contract, the buyer was obliged to pay for the coal by two LCs in specific terms and confirmed by a major or international bank in Singapore, with Kuvera as the beneficiary.

The buyer procured the LCs from a bank in Dubai with JP Morgan Chase NA ("**JP Morgan**") as advising and confirming bank. Both of JP Morgan's advices and confirmations contained a sanctions clause which provided that it would not be liable for any failure to pay against a complying presentation of documents if the documents involved a vessel which was subject to the sanctions laws and regulations of the US (the "**Sanctions Clause**"). The Sanctions Clause was not present in the draft LCs or UCP600. Upon presentation of the documents, which were in all other respects compliant, JP Morgan's sanctions screening flagged that the ship carrying the goods was beneficially owned by a Syrian entity and therefore subject to US sanctions. JP Morgan informed Kuvera that it could not transfer payment as the transaction did not comply with US sanction laws or regulations. Kuvera alleged that JP Morgan had breached the terms of the LCs and brought proceedings before the Singapore Court claiming US$2.4m. The Court considered the following three issues:

1. Whether the Sanctions Clause was a term of JP Morgan's confirmations.
2. Whether the Sanctions Clause was valid and enforceable.
3. Whether, on the facts, the Sanctions Clause entitled JP Morgan to refuse to pay Kuvera against a complying presentation.

Findings

The Court dismissed Kuvera's claim. It found that the Sanctions Clause was duly incorporated into the terms of JP Morgan's confirmations despite not appearing in the LCs. Further, the Sanctions Clause was valid and enforceable and entitled JP Morgan to refuse payment against a complying presentation because JP Morgan is not a legal entity distinct from its US business and is therefore subject to US sanction laws. Had JP Morgan paid Kuvera, it would have been exposed to a penalty for breaching US sanctions laws. Kuvera has made an application to appeal.

HFW comment

Sanctions clauses are now being tested before the courts and it is informative to see the circumstances in which they are upheld. It seems clear from the decisions in both this Singapore case and the English decision in MUR v RTI above that the courts recognise the reality of the scope and force of sanctions legislation and will uphold sanctions clauses designed to protect against that risk where appropriate. This decision will no doubt lead parties to review and amend standard wording in their contracts - and perhaps subject sanctions clauses to a greater level scrutiny at the negotiation stage. It is also a reminder to trading parties to check the beneficial ownership of vessels as part of their due diligence.

Aiteo Eastern E&P Company Limited v Shell Western Supply and Trading Limited [2022] EWHC 2912 (Comm)

Court: Commercial Court

Date: 17 November 2022

Summary

In this case, the Court set out the requirements to exercise an asymmetric option to arbitrate, confirming that it is not necessary to commence arbitration proceedings in order to do so.

Facts

Aiteo Eastern E&P Company Limited (the "**Claimant**") entered into an English law facility agreement (the "**Offshore Agreement**") with Shell Western Supply and Trading Limited (the "**Defendant**"), pursuant to which the Defendant and other lenders agreed to advance $512m to the Claimant and its shareholders. The Claimant also entered into a Nigerian law facility agreement with another group of lenders (the "**Onshore Agreement**"). Clause 41 of the Offshore Agreement contained a dispute resolution clause which gave the Defendant a unilateral right to elect either to refer disputes to ICC arbitration in London, or to provide notice to the Claimant that any dispute be heard in the English courts or the courts of another jurisdiction. The Onshore Agreement contained a mutual obligation to refer disputes to arbitration, with the lenders having an option to pursue any claim in the Nigerian courts. Following alleged breaches of both agreements by the Claimant, the Defendant and other lenders sought to accelerate repayment of the loan facilities. However, the Claimant brought proceedings in the Nigerian courts and obtained injunctive relief to prevent the lenders from taking any steps to enforce any right in relation to the alleged indebtedness. The Defendant and the majority of the other lenders then entered a memorandum of conditional appearance in the Nigerian Court, filing an application to stay the proceedings and a Notice of Appeal (the "**NOA**") in which they argued that the Claimant's claim arose under contracts containing an ICC arbitration agreement so that any disputes must be settled by ICC arbitration in London and that the Nigerian court was obliged to decline jurisdiction in order to give effect to the intentions of the parties. The Defendant then brought arbitration proceedings against the Claimant (the "**Offshore Arbitration**"), in which the tribunal concluded that it had substantial jurisdiction and subsequently made a partial award to consolidate the arbitration with a second arbitration that had been commenced by the lenders under the Onshore Agreement. In response, the Claimant brought proceedings under section 67 of the Arbitration Act 1996, submitting that the Defendant had not made a valid election to arbitrate and thus the tribunal did not have jurisdiction. It argued that to exercise the election to arbitrate validly, the Defendant would have had to either commence arbitration proceedings, or at least make an unequivocal commitment to arbitrate without delay.

Findings

The Court held in favour of the Defendant. Firstly, the option to arbitrate in clause 41 could be exercised by the Defendant's unequivocal request or insistence upon arbitration in relation to the dispute. There was no requirement to bring arbitral proceedings or seek a stay of court proceedings. Next, a right to elect to arbitrate does not itself constitute an arbitration agreement. It gives the option to refer a dispute to arbitration which, if exercised, would then crystallise into an arbitration agreement, with such agreement containing an implicit negative covenant not to pursue a claim other than by arbitration. The Court held that here, the option was exercised (and the arbitration agreement came into force) when the Defendant filed the NOA in the Nigerian courts. The argument that an option to arbitrate lapses after a reasonable period of time was rejected.

HFW comment

This case has reiterated that a party can exercise an asymmetric contractual option to arbitrate without actually commencing arbitration proceedings. It is also a good example of the need to think carefully about the relationship between dispute resolution clauses when negotiating agreements and the importance of drafting with clear and unambiguous wording.

HFW

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