COMMODITIES CASE UPDATE

FEBRUARY 2024

HFW COMMODITIES CASE UPDATE
FEBRUARY 2024

We are delighted to present the February 2024 edition of the Commodities Case Update, with a summary of 11 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 30 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.

DAMIAN HONEY
Partner, London
T +44 (0)20 7264 8354
M +44 (0)7976 916412
E damian.honey@hfw.com

ANDREW WILLIAMS
Partner, London
T +44 (0)20 7264 8364
M +44 (0)7789 395151
E andrew.williams@hfw.com

INDEX

Addax Energy SA v Petro Trade Inc
[2023] EWHC 1609 Comm

Court: Commercial Court

Date: 4 July 2023

Summary

A dispute arose as to whether certain terms had been incorporated into a contract between the parties via their previous course of dealing. The Court held that the terms had been incorporated and in doing so, identified some of the factors to be taken into account in reaching a decision on this issue.

Facts

Petro Trade Inc ("**Petro**") contracted with Addax Energy SA ("**Addax**") for the purchase of gasoil and mogas. The parties entered into an arrangement whereby Addax would deliver large quantities of product to be stored in Monrovia at a facility operated by a third party. Petro would then enter into separate contracts to purchase smaller quantities of the product from Addax according to demand. In September 2015, Addax delivered a quantity of gasoil to the storage facility. Between December 2016 and May 2017 some of the gasoil was paid for by Petro and released by Addax in 17 tranches. The remaining stock remained unpaid for and unreleased up to December 2020. Addax then issued an invoice for this stock and when it remained unpaid, subsequently commenced proceedings.

In its claim, Addax relied on the standard terms ("**GTCs**") included in a spot contract issued to Petro following an oral agreement. Petro had not affirmed the spot contract and in its defence, claimed that only the orally agreed terms should apply.

Findings

The case was untypical in that Petro was not represented at the trial, forcing the Court to rely on Petro's defence, witness statements, and skeleton argument from a previous hearing regarding jurisdiction.

The Court agreed with Addax that it could rely on the GTCs in the spot contract, which were incorporated into the agreement between the parties by a course of dealing. In reaching its conclusion, the Court identified a number of factors which contributed to a clear acceptance of the GTC terms by course of dealing, namely that in previous dealings, the parties had typically (though not always) used spot contracts to evidence trades; Petro typically had reasonable notice of the GTCs included in such spot contracts; it had on occasion sought to renegotiate the GTCs; the terms had remained largely unchanged across multiple trades; and in most cases, the spot contracts had been acknowledged (if not formally accepted).

HFW Comment

The basis on which the parties contracted is not uncommon in commodity trading. This case demonstrates the sort of factors the Court will consider when assessing whether terms have been incorporated by a course of dealing. Parties trading on this kind of "informal" basis should take particular note - and be aware that terms not formally accepted may nonetheless become binding in certain circumstances.

National Iranian Oil Co v Crescent Petroleum Co International Ltd [2023] EWCA Civ 826

Court: Court of Appeal

Date: 13 July 2023

Summary

This case involved two main findings. First, only the first instance court had jurisdiction to grant permission to appeal against a finding under s.73 of the Arbitration Act 1996 ("**s.73**"). Second, an application under s.67 of the Arbitration Act 1996 ("**s.67**") can be summarily dismissed where it is clear as a matter of law that even if the applicant had succeeded in proving all the facts it relied upon, it would not be entitled to the remedy it sought. The role of an expert on foreign law in the English courts was considered.

Facts

The National Iranian Oil Company ('**NIOC**') entered into a contract with Crescent Petroleum Co International Ltd ('Crescent') for the sale and purchase of gas (the "**Contract**"). Crescent then agreed various gas supply contracts with its subsidiaries, which it planned to fulfil using gas from the Contract (the "**Subsidiary Contracts**"). The Contract was governed by Iranian law and contained an arbitration clause. NIOC failed to perform the Contract and Crescent commenced arbitration proceedings in London. Part of what Crescent claimed from NIOC involved damages for the liabilities it had incurred under the Subsidiary Contracts. The arbitral tribunal found in favour of Crescent.

NIOC applied to the court to dismiss part of the award on the grounds that the tribunal lacked substantive jurisdiction under s.67. NIOC relied on an expert report on Iranian law which stated that the Subsidiary Contracts were separate contracts and not within the scope of the arbitration agreement so that, under Iranian law, the tribunal did not have substantive jurisdiction to award damages against NIOC to compensate Crescent for its alleged liability under the Subsidiary Contracts. Crescent claimed that this was a new challenge and applied for the determination of a preliminary issue under s.73 as to whether NIOC had lost its right to object to the tribunal's jurisdiction because it had not raised this challenge before the tribunal. It also applied for the summary dismissal of NIOC's application under s.67 on the grounds that it had no real prospect of success. The court at first instance found that NIOC had not lost its right to object under s.73 but that the application under s.67 should be summarily dismissed. NIOC appealed the decision to dismiss its s.67 application and Crescent cross-appealed on the ground that pursuant to s.73, NIOC had lost the right to object that the tribunal lacked jurisdiction.

Findings

The Court of Appeal dismissed Crescent's appeal because only the first instance court had jurisdiction to grant permission to Crescent to appeal a decision under s.73. Since Crescent did not ask for permission to appeal at first instance, it followed that the Court of Appeal was not in a position to grant it. The application therefore failed. However, NIOC's appeal also failed. There had been no error in the first instance court's approach in not considering the entirety of the expert report provided. The function of expert evidence of foreign law is to inform the court of the applicable principles of construction under the foreign law. It is then for the court (not the expert) to interpret the contract in accordance with those principles. "*It is not the role of such experts to express opinions as to what the contract means. That is the task of the English court, having regard to the foreign law rules of interpretation*." Although parts of the expert report were inadmissible and irrelevant, the judge had applied the principles of Iranian law which he had identified correctly. Consequently, as a matter of law, NIOC would not be entitled to the remedy it sought even if it had succeeded in proving all the facts it relied upon.

HFW Comment

This case confirms the purpose of expert reports on foreign law, which is to offer an impartial view on the principles of foreign law so that English court can reach an appropriate conclusion. The expert may identify the rules of interpretation under the foreign law, but the English court will then interpret the contract on that basis.

JB Cocoa SDN BHD et al v Maersk Line AS
[2023] EWCH 2203 (Comm)

Court: Commercial Court

Date: 5 September 2023

Summary

This judgment confirmed the period of liability for damages after a vessel has discharged its cargo under the Hague Rules.

Facts

A cargo of bagged cocoa beans, stuffed in large containers, had travelled from Nigeria to Malaysia. On loading, the containers were properly lined with corrugated cardboard along with bags of desiccant to assist in keeping the cocoa beans below the contractual level of moisture content (7.5%). The cargo arrived in Malaysia without issue and was discharged. However, due to a protracted dispute between the parties on payment terms, it was not released to the buyers until six weeks later. Upon opening the containers, the buyers found the cocoa beans were heavily affected by mould.

The buyer claimed against Maersk Line AS ("Maersk") as the carrier, arguing it had failed to care for the beans properly. Maersk denied the claim, arguing that its liability ended on discharge. It relied on the "inherent vice" of the cargo or alternatively, that the damage was caused by the prolonged stay at the container terminal. (The "inherent vice" defence was available to Maersk because the Hague Rules had been incorporated into the bill of lading.)

Findings

The inherent vice defence failed as a result of expert evidence, which found that the damage had occurred due to exposure to sunlight for extended periods of time after discharge.

The Court followed earlier judgments in finding that a carrier's obligation under a bill of lading lies in the period between loading and discharge, determined in accordance with Articles 1-8 of the Hague Rules. The five-week delay after the cargo was discharged (but crucially, not delivered), was not covered by the Hague Rules.

Since the contract did not extend the provisions of the Hague Rules to cover this period, once the cargo was discharged from the vessel, Maersk's responsibility for the cocoa beans ended. Maersk was not liable for damage occurring after discharge and the claim failed.

HFW Comment

This decision reiterates that discharge is not synonymous with delivery and commodities traders should bear in mind where a carrier's liability for cargo ends and whether there will be contractual recourse in the event of damage caused by a delay in delivery, particularly for cargoes which require specific handling to protect them from damage.

Kuvera Resources Pte Ltd v JP Morgan Chase Bank, N.A. [2023] SGCA 28

Court: Singapore Court of Appeal

Date: 28 September 2023

Summary

A bank seeking to refuse payment under a letter of credit ("**LC**") would need to prove on an objective basis that to make payment would, in fact, breach sanctions. Subjective inferences of OFAC's guidance through a bank's own risk assessment are unlikely to meet this objective threshold.

Facts

In 2019, Kuvera Resources Pte Ltd ("**Kuvera**") entered a sale contract with an Indonesian company to purchase and on-sell coal to a Dubai company. Kuvera was to pay for the coal by issuing two LCs to JP Morgan Chase Bank ("**the Bank**"), with Kuvera as beneficiary. The Bank confirmed the LCs issued in favour of Kuvera and the confirmation contained a provision that excused the Bank from not paying if the documents presented under the LC related to a US-sanctioned vessel. It provided that the Bank "*must comply with all sanctions, embargo and other laws and regulations of the U.S. … ("applicable restrictions"). Should documents be presented involving any country, entity, vessel or individual listed in or otherwise subject to any applicable restriction, **we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information***." In November 2019, Kuvera presented documents to the Bank in relation to cargo carried on a vessel named "Omnia", previously named "Lady Mona." Its former ultimate beneficial owners ("**UBOs**") and technical operators had links to Syria. Guidance published by the US Office of Foreign Assets Control ("**OFAC**") highlighted a variety of practices employed by vessel owners seeking to circumvent US sanctions, including the deliberate changing of a vessel's name (particularly by Syrian-linked entities) and the use of ownership structures with multiple party changes. The Bank accepted that the documents were compliant under the terms of the LC but argued that the risk of being found by OFAC to have breached sanctions entitled them not to pay. It relied on expert evidence, which drew links between the red flags referenced in the OFAC guidance and the circumstances surrounding the vessel's name change. The Singapore High Court agreed that the sanctions clause exempted the Bank from paying. Kuvera appealed.

Findings

The Singapore Court of Appeal overturned this decision, on several grounds. First, there were insufficient contractual grounds to withhold payment. For the purposes of construing the clause in the LC, the question of whether a vessel falls within the scope of an applicable restriction should be evaluated objectively, without having to infer or extrapolate the conclusions that an external entity such as OFAC might reach. In particular, the detection of potential issues pertaining to "Omnia" in OFAC's guidance was merely circumstantial (and not determinative) evidence, which only went as far as to flag that "Omnia" might be (or have) engaged in conduct which exposed it to the risk of becoming designated under US sanctions. The absence of knowledge as to "Omnia's" current UBOs (as opposed to positive knowledge actively demonstrating links to Syria) was not, in and of itself, enough to evidence deliberately evasive practices or the masking of beneficial ownership. Second, the Bank had exercised its own commercial judgment deciding, in light of its own risk strategy, that it was willing to accept the risk of being sued by Kuvera in order to avoid the less favourable risk of being found by OFAC to have breached sanctions. The sanctions clause alone could not displace the Bank's requirement to prove that a sanctions breach had in fact occurred.

HFW Comment

There is a growing number of court decisions on the interpretation of sanctions clauses which is providing helpful guidance on their effect. It would seem that the courts are following the normal rules of contractual interpretation in reaching their decisions, unfazed by the powerful reach of sanctions. In this case, the presence of a sanctions clause was not enough for the Bank to avoid its contractual obligations. Rather, definitive, objective evidence was required showing that applicable restrictions existed.

Holman Fenwick Willian Singapore LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.

Mints v PJSC National Bank [2023] EWCA Civ 1132

Court: Court of Appeal

Date: 6 October 2023

Summary

Where an entity is designated under the Russia (Sanctions) (EU Exit) Regulations 2019 (the "**Regulations**"), neither the pursuit of proceedings by that entity, nor the entry of judgment in its favour, shall constitute a breach of the Regulations. The concept of control, in relation to Regulation 7 of the Regulations, is a broad one and not necessarily dependent on ownership.

Facts

This case concerned the effect of the UK sanctions regime on a piece of pending litigation in the Commercial Court, in which the claimant banks claimed against the appellants some USD850 million. After the litigation had commenced, the second Claimant was designated by the UK on the basis that it was "*supporting and obtaining a benefit from the Government of Russia*". The Defendants submitted that the first Claimant was also subject to the same restrictions as if it had been designated, given that it was "*owned or controlled*" within the meaning of Regulation 7 by at least two designated persons, namely, President Putin and Ms Elena Nabiullina, the governor of the Central Bank of Russia. The Defendants sought to stay the proceedings on the grounds that as designated entities, the Claimants could not bring a claim because both the entry of a money judgment in favour of a designated person and other litigation steps such as payment of security for costs are unlawful under the Regulations; there is no basis on which the Office of Sanctions Implementation ("**OFSI**") could license these steps; and this would result in substantial prejudice to the Defendants.

At first instance, this application was dismissed but permission to appeal was granted. The Court of Appeal was faced with three key issues:

1. Can a court lawfully grant judgment on a designated entity's claim and, if it cannot, ought the court to stay proceedings indefinitely until the entity is no longer designated (the **"Entry of Judgment Issue"**)?
2. Does OFSI have authority to issue licences in connection with proceedings brought by a designated person, including an order for security for costs in a defendant's favour (the **"Licensing Issue"**)?
3. Even where a designated person does not own shares in an entity or otherwise have general rights of corporate ownership such as voting or removing directors, can certain designated persons nevertheless control (under the meaning of Regulation 7) an entity through the exercise of that person's political office (the **"Control Issue"**)?

Findings

The Court of Appeal dismissed the appeal. It held that a claim or cause of action was not a "fund" within the meaning of s. 60(1) of the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**"). Therefore, absent any primary legislation in effect to the contrary, designated entities can bring claims. Subsequently obtaining a favourable judgment would not constitute a breach of the Regulations, either by using the cause of action in exchange for funds (Regulation 11(5)(b)), or by making funds available to a designated person (Regulation 12). Further, in relation to the Licensing Issue, OFSI does have such licensing authority.

The Court of Appeal therefore did not need to address the Control Issue. Nonetheless, in what was arguably the most significant portion of the judgment, it did so. It adopted a very broad interpretation of control, concluding that the wording of Regulation 7(2) may encompass the case of a designated person who "*is able to exercise control over another company irrespective of whether the designated person has an ownership interest in the other company."* As a result, *"Mr Putin could be deemed to control everything in Russia*." The Court acknowledged the absurdity of this construction and attributed it to the wording used by the executive and Parliament in drafting the Regulation, emphasising that it was not for a judge to remedy by putting an "*impermissible gloss on the language of the Regulation.*"

On 16 October 2023, the Foreign, Commonwealth and Development Office (the "**FCDO**") issued an alert in response to the judgment, which has been endorsed by OFSI. The alert clarified that "*there is no presumption on the part of the Government that a private entity based in or incorporated in Russia or any jurisdiction in which a public official is* *designated is in itself sufficient evidence to demonstrate that the relevant official exercises control over that entity*."

The decision was considered in ***Litasco SA v Der Mond Oil and Gas Africa SA & Locafrique Holdings SA [2023] EWHC 2866 (Comm),*** a summary of which appears below. It has now gone on appeal to the UK Supreme Court.

HFW Comment

The Court of Appeal's comments have elicited a range of responses. Upon a narrow construction, given that they were not binding, it could be argued that nothing has changed. At the other end of the scale, a wider interpretation could be that any Russian entity is controlled by Putin and at risk of designation.

HFW's sanctions team has been liaising with the UK Government and other sanctions practitioners to expedite further guidance on this matter.

Crédit Agricole Corporate & Investment Bank v PPT Energy Trading Co Ltd [2023] SGCA(I) 7

Court: Singapore Court of Appeal

Date: 26 October 2023

Summary

The decision reiterates that the circumstances in which a bank can withhold payment under a letter of credit (LC) will be construed narrowly and that the fraud exception will be confined to fraud by the beneficiary.

Facts

Zenrock Commodities Pte Ltd ("**Zenrock**") applied for an LC from its bank, Crédit Agricole Corporate & Investment Bank ("**CACIB**"), to finance its purchase of a cargo of crude oil from PPT Energy Trading Co Ltd ("**PPT**"). Zenrock planned to sell the cargo to Total Oil Trading SA ("**TOTSA**"). As part of its application for the LC, Zenrock provided CACIB a fabricated copy of its sale contract with TOTSA showing an inflated price for the cargo. This misled CACIB into believing that Zenrock would make an overall profit from the trade when in fact, it would suffer a net loss. As security, CACIB registered a floating charge over the cargo, whilst Zenrock issued a notice assigning its receivables from TOTSA to CACIB. CACIB was unaware that a notice of assignment had already been executed in favour of another bank. It was also unaware that the PPT-Zenrock contract was part of a series of "round-tripping" contracts.

The LC required payment to be made upon presentation of a signed invoice and letter of indemnity (LOI) from PPT, with a period of five banking days from receipt to verify documentary compliance. The invoice and LOI presented were prima facie compliant. On the day preceding the 5-day deadline, CACIB received notice from TOTSA that it had received two competing notices of assignment, at which point CACIB began to suspect fraud. It was not until the 5-day window had passed, however, that CACIB became aware that the PPT-Zenrock contract was fraudulent. CACIB sought to avoid payment under the LC on the basis that it had been induced by Zenrock's fraud. Further, CACIB argued that in light of PPT's knowledge of the circular trade, PPT had participated in the fraud and thus was not entitled to receive the payment due under the LC.

CACIB obtained an interim injunction from the Singapore High Court prohibiting payment under the LC. This was eventually discharged and CACIB paid PPT in return for a bank guarantee. It then brought a claim before the SICC, arguing that PPT was not entitled to payment under the LC. If it was entitled, CACIB argued that PPT was liable to indemnify them under the LOI for breach of representations and warranties. PPT counterclaimed for a declaration that payment was due and for damages arising from CACIB's non-payment. Although the SICC found there had been a fraud by Zenrock, it dismissed CACIB's claim for reimbursement and indemnity. In relation to the LC, it held that although hardly an "innocent bystander", PPT was not a participant in the fraud, nor did it have actual knowledge of the fraud nor was it wilfully blind to it. In relation to the indemnity, the SICC held that the LOI did not operate to protect CACIB as CACIB had failed to make payment in time and so could not claim under the LOI. CACIB appealed and there were two main issues to decide:

1. Was CACIB entitled to rely on Zenrock's fraud to avoid liability to pay PPT under the LC?
2. Was CACIB entitled to an indemnity from PPT under the LOI?

Findings

The Singapore Court of Appeal held that CACIB would not be entitled to avoid payment to PPT because of Zenrock's fraud, on the grounds that an LC is a separate contract, unrelated to the underlying commercial relationship between the parties to a trade contract. The common law exception allowing banks to withhold payment in the event of a beneficiary's fraud did not apply, as based on the findings of fact at first instance, PPT did not itself act fraudulently. To allow otherwise would be "*to significantly undermine the whole system of documentary credits*."

In relation to the LOI, the Singapore Court of Appeal disagreed with the lower court, finding that it was effective from the date of issue and payment in time was not a condition, so that CACIB's claim was not defeated by its late payment. PPT was in breach of the warranty in the LOI because it lacked marketable title at the time the LOI was given and so CACIB was entitled to an indemnity.

HFW Comment

This judgment firmly underscores the autonomous nature of LCs and further highlights that the common law exception allowing banks to refuse payment under fraudulently induced LCs will only apply if the beneficiary was party to the fraud.

Holman Fenwick Willian Singapore LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.

Litasco SA v Der Mond Oil and Gas Africa SA & Locafrique Holdings SA [2023] EWHC 2866 (Comm)

Court: Commercial Court

Date: 15 November 2023

Summary

This is the first binding decision in relation to the interpretation of the "control" test within the UK sanctions regime, following non-binding comments made by the Court of Appeal in *Mints v PJSC National Bank [2023] EWCA Civ 1132* ("Mints") (see above).

Facts

Litasco SA ("Litasco"), an oil trading entity under the ownership of Lukoil PJSC, applied for summary judgment against Der Mond Oil and Gas Africa SA and its parent company, Locafrique Holdings SA (together, "Der Mond"). The parties had entered a contractual arrangement for the supply of Nigerian crude oil by Litasco to Der Mond. The contract was later modified by an addendum, in part to restructure Der Mond's payment obligations. Litasco subsequently initiated proceedings against Der Mond on the grounds of non-payment. In its defence, Der Mond invoked a number of clauses, including some from the addendum pertaining to sanctions and force majeure ("FM"). In particular, Der Mond contended that despite the absence of UK sanctions designations for Litasco or Lukoil, it was restrained from fulfilling payment obligations to Litasco under Regulation 12 of the Russia (Sanctions) (EU Exit) (Amendment) Regulations 2019 (the "Regulations"). Der Mond argued that Litasco should be treated as a designated person because, based on Regulation 7, it was controlled by one or more designated persons, including both Mr Alekperov, the founder and CEO of Lukoil until April 2022 and President Putin. Der Mond also argued that its failure to secure processing of funds from any of the European banks it approached constituted an event of FM.

Findings

The Court found in favour of Litasco. In particular, Litasco was not a designated entity because it was not controlled by either Mr. Alekperov or President Putin. In respect of Mr Alekperov, he had resigned from Lukoil's board after being sanctioned, his 8.5% shareholding did not constitute a controlling stake and there was a lack of evidence as to any ongoing control. In respect of President Putin, the Court distinguished the facts in *Mints v PJSC National Bank [2023] EWCA Civ 1132* from those in this case because unlike the bank in *Mints*, Lukoil is not state-owned. The focus was therefore on whether providing funds to Litasco indirectly benefited President Putin. The Court deemed it "wholly improbable" that Der Mond's payment would be used in accordance with President Putin's wishes, as there was no evidence supporting his current control over Litasco. Additionally, it clarified that Regulation 7 is concerned with an existing influence of a designated person over a relevant affair of the company. In the absence of any existing influence exercised by President Putin over Litasco's affairs, any potential influence by him in the future did not trigger Regulation 7.

Regarding Der Mond's FM defence, the Court found that even in cases where, as here, hindering performance is enough to constitute FM, a substantial level of difficulty, bordering on but not necessarily reaching impossibility, would be necessary. Here, the contract did not require a particular method of performance and crucially, the obligation to pay had already accrued before the alleged FM event occurred. The FM defence failed.

HFW Comment

The Court's approach in this case underpins the importance of determining de facto control on a case-by-case basis when applying Regulation 7. The Court's narrow approach to the interpretation of the FM clause, being particularly mindful that the seller had fully performed its obligations and the buyer's obligation to pay had accrued, is in line with the typically strict approach adopted by the Court to FM claims.

Churchill v. Merthyr Tydfil County Borough Council
[2023] EWCA Civ 1416

Court: Court of Appeal

Date: 29 November 2023

Summary

The Court of Appeal has held that the courts have authority to stay proceedings in favour of alternative dispute resolution ("ADR") or non-court-based dispute resolution methods where it is proportionate to do so and where doing so preserves the essence of the parties' right to a judicial hearing.

Facts

Mr Churchill made a claim against Merthyr Tydfil County Borough Council (the "Council"), which owned land adjoining his property, for damage caused by Japanese knotweed encroachment. His solicitors sent a letter before action, to which the Council responded, querying why Mr Churchill had not made use of its complaints procedure. Mr Churchill refused to engage in the non-court-based dispute resolution and proceeded to issue a claim. The Council applied for a stay of proceedings.

The stay application was dismissed by the court at first instance which held that it was required to follow the Court of Appeal judgment in *Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002* ("Halsey"), namely that "*to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court*". However, the court also held that Mr Churchill and his lawyers had acted unreasonably by failing to engage with the Council's complaints procedure, which was contrary to the relevant pre-action protocol. The Council was later granted permission to appeal on the ground that it raised an important point of principle and practice, which would impact many other similar cases. The significance of the appeal was evidenced by those allowed to participate as intervenors, including the Civil Mediation Council (CMC), the Centre for Effective Dispute Resolution (CEDR) and the Chartered Institute of Arbitrators (CIArb) The following issues were considered by the Court of Appeal:

1. Was the judge right to conclude that Halsey was binding and required the Council's application for a stay of the proceedings to be dismissed?
2. Can the court lawfully stay proceedings for, or order, parties to engage in a non-court-based dispute resolution process?
3. How should the court decide whether to stay the proceedings, or order the parties to engage in a non-court-based dispute resolution process?

Findings

The Court of Appeal concluded that:

1. The comments in Halsey were not binding and consequently, the court of first instance in Churchill was not required to follow them.
2. The court has the power lawfully to stay proceedings or to order parties to engage in a non-court-based dispute resolution process provided that: (a) it does not impair the claimant's rights to a fair trial (per Article 6 of the European Convention on Human Rights); (b) it is in pursuit of a legitimate aim; and (c) it is proportionate to achieving that legitimate aim.
3. Each case should be assessed on its merits rather than setting out principles on what will be relevant to determining the stay of proceedings or ordering the parties to engage in a non-court-based dispute resolution process.

HFW Comment

Whilst a departure from the long-standing Court of Appeal decision in Halsey, this case confirms the now well-established judicial approach of placing emphasis on the "resolution" rather than the "dispute" in dispute resolution.

Banca Intesa Sanpaolo SpA v Comune di Venezia [2023] EWCA Civ 1482

Court: Court of Appeal

Date: 13 December 2023

Summary

In part of the long-running "Italian swaps" litigation, the Court of Appeal looked at the circumstances in which decisions based on foreign law can be reviewed upon appeal. Findings of foreign law are considered findings of fact and should not be reviewed unless plainly wrong. However, conclusions based on the application of foreign law to the facts can be reviewed, if the first instance judge has erred in principle.

Facts

Comune di Venezia ("**Venice**"), the local authority for the Italian city of Venice, issued a bond in 2002 and entered into a swap with Bear Stearns in order to hedge its interest rate exposure. The bond was restructured in 2007 such that the swap no longer aligned with Venice's exposure. Bear Sterns was unwilling to amend the swap, so Venice and Bear Stearns agreed to novate the original swap to Banca Intesa Sanpaolo SpA and Dexia Credit Local SA (together, the "**Banks**"). The Banks paid novation fees to Bear Stearns and the swap was restructured in alignment with the restructured bond. This was all subject to English law and jurisdiction.

The global financial crisis affected the sums payable under the swap. Many Italian communes therefore sought to escape their swap positions through litigation in both English and Italian courts, with little success. In 2019, the Banks sought declarations in the English court that the swap transactions were valid. In 2020, the Italian Supreme Court handed down a decision known as "Cattolica", which held that Italian local authorities did not have the power to enter into speculative derivative contracts which constituted indebtedness and were forbidden to do so under the Italian constitution. Venice therefore argued that the swap transactions were void for lack of authority and counterclaimed in the English courts for restitution of sums paid to date.

At first instance, the court held that the transactions could be characterised as speculative (rather than purely for hedging purposes), and therefore constituted indebtedness under Italian law, following Cattolica. The Banks appealed.

On appeal, the Banks argued that the first instance court had incorrectly:

1. applied Italian law to conclude that the swap transactions were speculative.
2. held that the novation fees paid constituted indebtedness, which was forbidden under the Italian constitution.

Findings

The Court of Appeal unanimously allowed the Banks' appeal. It applied the rule in *Perry v Lopag Trust Reg [2023] UKPC 16*, namely that findings of foreign law are findings of fact, which will only be interfered with on appeal if plainly wrong. However, where conclusions are based on applying foreign law, particularly where this is not based on any expert evidence, there is greater scope for an appeal court to review this, although only where the first instance court has erred in principle.

Here, the first instance judge had applied Italian law to conclude that the swap transactions were speculative, based on his own evaluation of what an Italian court would conclude. The expert evidence in the case did not address this. The judge had erred in principle, as he had failed to factor in that the swap genuinely had a hedging effect under Italian law. In doing so, he had also considered decisions of lower Italian courts, whereas he should have considered what the Italian Supreme Court would have concluded. The judge's conclusion that the novation fees constituted indebtedness was also incorrect, as it was based on his own application of Cattolica. The fees did not constitute indebtedness and the swaps were not void for Venice's lack of authority under the Italian constitution. This decision has since been followed in *Banca Nazionale del Lavoro, Commerzbank and Dexia Credit Local v Provincia di Catanzaro [2023] EWHC 3309 (Comm)*.

HFW Comment

This decision has brought some clarity about what constitutes "speculation" under Italian law, which will be helpful for other Italian swaps cases going through the English courts. It is also a helpful reminder about how the English Courts should approach the interpretation of foreign law.

AMS Ameropa Marketing Sales AG v Ocean Unity Navigation Inc [2023] EWHC 3264 (Comm)

Court: Commercial Court

Date: 19 December 2023

Summary

The holder of a bill of lading may recover full damages for a carrier's breach under the contract of carriage, despite making recovery from a seller by way of a settlement under the sale contract. In addition, the court sets a high burden of proof when evaluating whether decisions taken to mitigate loss were unreasonable.

Facts

Part of a cargo of yellow soybeans was damaged during a voyage from the USA to Egypt. The part that was rejected (the "Rejected Cargo") was separated from the rest, even though it contained both sound and damaged cargo, and was sold under a salvage sale at a discount. The Seller provided to the Buyer both the proceeds of the salvage sale and a credit note to make good the loss it had suffered. The Buyer assigned to the Seller all rights under the shipment, particularly the right to recover the loss suffered because of the carrier's breach. The Seller claimed against the carrier (the "Owners"). The Owners accepted that they had breached their contractual duty to take reasonable care of the cargo. However, they argued that when the Buyer assigned the rights to sue to the Seller, it had already been made whole via the salvage sale and the credit note. Therefore, there was no cause of action against Owners which could be assigned to the Seller. They also argued that the Seller had failed to mitigate their loss by i) refusing to allow manual segregation of the damaged cargo from the undamaged cargo; ii) failing to carry out further segregation by grab; iii) failing to carry out a proper segregation exercise after discharge; and iv) failing to obtain proper bids when seeking alternative buyers for the salvage sale. The issues before the Court, among other things, were:

1. Did the Seller have title to sue for the damages claimed?
2. Did the Owners have a defence of unreasonable failure to mitigate?

Findings

On the first point, the Court disagreed with the Owners, applying the rule in *The Baltic Strait [2018] 2 Lloyd's Rep 33 'that a bill of lading holder who has purchased goods may recover full damages for breach from the carrier under the contract of carriage despite making recovery from the seller by way of a settlement under its sale contract'* [44]. Therefore, a cause of action existed which could be assigned.

On the second point, the Court rejected Owners' arguments, finding that the Claimants had acted reasonably in their mitigation of loss. In particular, the decision to conduct a salvage sale of the Rejected Cargo was reasonable, even though subsequent sampling showed that, while damaged, it remained within contractual specification. The salvage sale was reasonable because, among other things, i) the Rejected Cargo was accepted as damaged; ii) the parties did not know whether it would deteriorate further; iii) surveyors present at the inspection agreed that a salvage sale was the best solution; and iv) a local broker inspected the Rejected Cargo, put out a tender and achieved a sale at 82% of the original invoice value.

HFW Comment

Firstly, this case is a helpful reminder that trading parties can agree independent settlements regarding loss under their sales contracts without losing the right to claim against the carrier, whose breach caused the loss, under the contract of carriage. Secondly, it demonstrates that the standard of proof applied when assessing whether a party has acted unreasonably when mitigating is loss is a high one as *'the defendant is the wrongdoer and its breach may have placed the innocent party in a difficult situation'* [51]. In particular, the Court will not assess the decisions taken with the benefit of hindsight. This should assure parties that acting to mitigate loss in a manner that is sensible, based on the facts known at the time, is likely to be supported by the Court.

ABFA Commodities Trading Ltd (formerly VTB Commodities Trading Ltd) v Petraco Oil Co SA
[2024] EWHC 147 (Comm)

Court: Commercial Court

Date: 30 January 2024

Summary

A third party had the right to intervene in proceedings and enforce a cross-undertaking in damages where it had suffered loss as a result of a worldwide freezing order (WFO).

Facts

ABFA Commodities Trading Limited ("**ABFA**") had obtained a WFO against its contractual counterparty, a Russian refinery. The WFO had the effect of preventing Petraco Oil Company SA ("**Petraco**") from taking delivery of a cargo of gasoil from a floating storage facility. Petraco applied to intervene in the proceedings between ABFA and the refinery, arguing that it was entitled to delivery of the cargo of gasoil. It then brought proceedings to enforce the cross-undertaking in damages given by ABFA when it obtained the WFO. ABFA brought a Part 20 counterclaim against Petraco, seeking damages under Russian law. ABFA argued that under Russian law, Petraco would not have acquired title to the cargo and/or that Petraco was liable to ABFA for its conduct in relation to this and two other cargoes. ABFA also alleged that both Petraco's behaviour at the time and the manner in which it had pursued the litigation amounted to "unclean hands," so that the Court should refuse to enforce the undertaking.

Findings

The Court found largely in Petraco's favour. It held that Petraco had no liability to ABFA in damages. It also held that although ABFA had largely made out its factual case, this did not have the effect it contended for under Russian law. But for the injunction, Petraco would have acquired title to the cargo. Although it was possible that Petraco could have brought a claim against another party in order to recover this loss, that did not prevent Petraco from recovering as against ABFA: "*Under English law…a party with alternate claims against different parties in respect of the same loss is generally permitted to choose who to sue, and in what order*." Petraco was also entitled to claim for loss of profit in relation to the on-sale of the cargo, based on the ordinary measure of damages.

The Court held that although Petraco may have engaged in "*commercially reprehensible conduct*" at the time of the transaction, this was not a sufficient basis for refusing to enforce the undertaking and compensate it for loss suffered as a result of interference with its contractual rights. However, Petraco had put forward a misleading case in relation to its application, with two witnesses found to have given untruthful evidence. After considering the nature of the remedy offered by a cross-undertaking, the Court held it could and should have regard to Petraco's behaviour in the application when considering whether to enforce the undertaking. It held that there was not sufficient reason to deprive Petraco of its right to claim for the value of the cargo and loss of profit. To do otherwise would come close to forfeiting Petraco's rights and giving ABFA a windfall. However, the Court denied the additional sums claimed by Petraco.

HFW Comment

This case is an interesting illustration of the operation of and purpose behind the requirement to give a cross-undertaking in damages when applying for a WFO. It is also another case in which the English Court was required to apply foreign law. Finally, it acts as a warning that it is possible to lose the benefit of an available relief as a result of inequitable behaviour, where the Court has power to exercise its discretion.

HFW COMMODITIES CONTACTS

MATTHEW COX
Partner, London
T +44 (0)20 7264 8455
M +44 (0)7817 135330
E matthew.cox@hfw.com

DAMIAN HONEY
Partner, London
T +44 (0)20 7264 8354
M +44 (0)7976 916412
E damian.honey@hfw.com

JUDITH PRIOR
Partner, London
T +44 (0)20 7264 8531
M +44 (0)7785 700229
E judith.prior@hfw.com

ADAM TOPPING
Partner, London
T +44 (0)20 7264 8087
M +44 (0)7768 553882
E adam.topping@hfw.com

VINCENT BÉNÉZECH
Partner, Paris
T +33 (0)1 44 94 40 50
E vincent.benezech@hfw.com

OLIVIER BAZIN
Partner, Geneva
T +41 (0)22 322 4814
M +41 (0)79 582 66 48
E olivier.bazin@hfw.com

WILLIAM HOLD
Partner, Geneva
T +41 (0)22 322 4811
M +41 (0)79 903 9388
E william.hold@hfw.com

ALISTAIR FEENEY
Partner, London
T +44 (0)20 7264 8424
M +44 (0)7989 437397
E alistair.feeney@hfw.com

BRIAN PERROTT
Partner, London
T +44 (0)20 7264 8184
M +44 (0)7876 764032
E brian.perrott@hfw.com

SARAH TAYLOR
Partner, London
T +44 (0)20 7264 8102
M +44 (0)7909 917705
E sarah.taylor@hfw.com

ANDREW WILLIAMS
Partner, London
T +44 (0)20 7264 8364
M +44 (0)7789 395151
E andrew.williams@hfw.com

TIMOTHY CLEMENS-JONES
Partner, Paris
T +33 1 44 94 31 60
M +33 (0)6 80 10 32 54
E timothy.clemens- jones@hfw.com

MICHAEL BUISSET
Partner, Geneva
T +41 (0)22 322 4801
M +41 (0)79 138 3043
E michael.buisset@hfw.com

SARAH HUNT
Partner, Geneva
T +41 (0)22 322 4816
M +41 (0)79 281 5875
E sarah.hunt@hfw.com

HFW COMMODITIES CONTACTS

GEORGES RACINE
Partner, Geneva
T +41 (0)22 322 4812
M +41 (0)78 644 4819
E georges.racine@hfw.com

RICHARD STRUB
Partner, Dubai
T +971 4 423 6554
M +971 (0)50 625 1284
E richard.strub@hfw.com

PETER MURPHY
Partner, Hong Kong
T +852 3983 7700
M +852 9359 4696
E peter.murphy@hfw.com

ADAM RICHARDSON
Partner, Singapore
T +65 6411 5327
M +65 9686 0528
E adam.richardson@hfw.com

RANJANI SUNDAR
Partner, Sydney
T +61 (0)2 9320 4609
M +61 (0)403 145 846
E ranjani.sundar@hfw.com

MICHAEL BUFFHAM
Partner, London
T +44 (0)20 7264 8429
M +44 (0)7823 532974
E michael.buffham@hfw.com

IAN CRANSTON
Partner, Monaco
T +377 92 00 13 21
M +377 (0) 6 40 62 88 81
E ian.cranston@hfw.com

GEORGE LAMPLOUGH
Partner, Hong Kong
T +852 3983 7766
M +852 9194 6581
E george.lamplough@hfw.com

DAN PERERA
Partner, Singapore
T +65 6411 6347
M +65 9635 6824
E dan.perera@hfw.com

PETER ZAMAN
Partner, Singapore
T +65 6411 5305
M +65 8511 0250
E peter.zaman@hfw.com

STEPHEN THOMPSON
Partner, Sydney
T +61 (0)2 9320 4646
M +61 (0)404 494 030
E stephen.thompson@hfw.com

hfw.com

Americas | Europe | Middle East | Asia Pacific