COMMODITIES CASE UPDATE

November 2019

HFW COMMODITIES CASE UPDATE

November 2019

We are delighted to present the eighth Commodities Case Update, a publication which is produced quarterly. The update provides a summary of some of the key cases relevant to the commodities sector from the last few months.

With a market leading commodities team we have over 100 lawyers that 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.

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

1. BV Nederlands Industrie Van Eirprodukten v Rembrandt Entreprises Inc. [2019] EWCA Civ 596

Court Court of Appeal

Date 09 April 2019

Summary

This case, relating to the supply of goods, considers the elements required to establish inducement in a claim for fraudulent misrepresentation. It also identifies the risks associated with claiming damages on behalf of a non-party. See the summary of the first instance decision in our November 2018 update, here.

Facts

The Claimant Sellers ("NIVE"), based in the Netherlands, entered into a contract with the Defendant Buyers ("Rembrandt"), based in the US, for the supply of egg-based products from the Netherlands to the US, on condition that NIVE received approval from US regulatory authorities. After NIVE received approval, they informed Rembrandt that they would need to increase their prices due to regulatory costs. The parties agreed a second contract with the increased prices. At that stage, NIVE informed Rembrandt that 50% of the products would come from its sister company, which also had US approval.

Rembrandt subsequently repudiated the contract on the basis that the products supplied by NIVE were not compliant with US regulations. NIVE issued a claim against Rembrandt for its own loss of profit under the contract, and for its sister company's loss of profit. Rembrandt argued that NIVE was in breach of contractual warranties since its products were not compliant, and that it had made a fraudulent misrepresentation because the price increase included an element of profit and was not solely due to increased regulatory costs.

At first instance, the High Court found that NIVE's products did comply with US regulation, but found for Rembrandt regarding the fraudulent misrepresentation. The resulting rescission of the fraudulent contract had the effect of reviving the original contract. NIVE was able to claim against Rembrandt under this contract for its own losses incurred as a result of Rembrandt's repudiation. But NIVE could not claim transferred loss on behalf of its sister company. NIVE appealed.

Findings

The Court of Appeal upheld the High Court's decision and dismissed the appeal. It held that the misrepresentation need not have been the sole inducement to enter the contract; if the innocent party was influenced or affected by it, that is enough. In cases of fraudulent misrepresentation, there is also an evidential presumption that inducement has taken place which is very difficult to rebut, and the burden of showing that there was no inducement is on the representor (here, NIVE).

NIVE was not able to recover the losses incurred by its sister company on the basis of transferred loss. The sister company had no rights under the contract between NIVE and Rembrandt because Rembrandt was not aware of its involvement at the time the contract was made, or that it would benefit from the contract.

HFW Comment

This case adds some clarity as to the elements required for establishing inducement in fraudulent misrepresentation. In addition, it illustrates well that when a third party becomes involved in a contract in a way not contemplated at the time the contract was made, it is advisable to vary the contract to reflect the change, to avoid the risk of the third party being left without remedy in the event of a breach.

2. Pan Ocean Co Ltd v China-Base Group Co Ltd, Beihai Xinan Petrochemical Co., Ltd [2019] EWHC 982 (Comm)

Court Commercial Court

Date 16 April 2019

Summary

The Claimant claimed that it had entered into an implied contract with the Defendant on the terms of a bill of lading and sought to rely on the exclusive jurisdiction clause contained in the bill. The Court found that the formal requirements of Art. 25(1)(a) Regulation 1215/2012 (the Recast Brussels regulation) were not satisfied and the exclusive jurisdiction clause did not apply.

Facts

Pan Ocean Co Ltd (the Claimant) was the bareboat charterer of GRAND ACE 12 ("the Vessel"). It entered into a sub-charter with Clearlake Shipping Pte Ltd ("Clearlake"), on the terms of an amended BPVoy form (the "Charterparty").

Gunvor, a company purportedly associated with Clearlake, entered into a sale contract to sell light cycle oil to China-Base Group Co Ltd (the Defendant) on CIF terms, with delivery at one safe port Nansha, China. The Vessel loaded light cycle oil and gas oil in China and Taiwan and the Claimant issued bills of lading which accurately reflected the loadports and nature of the cargo.

The Vessel then proceeded to Philippines, where she loaded a further 50 MT of gasoil, for which no separate bill of lading was issued. Switch bills of lading (the "Switch BLs") stating (incorrectly) that the whole cargo was loaded in Philippines and that it was entirely made up of light cycle oil were issued, it is said, by an agent of the Claimant under Clearlake's instruction.

When the cargo arrived in China, the Defendant accepted it without presenting bills of lading or issuing a letter of indemnity. The Defendant sought to obtain customs clearance by providing incorrect information as contained in the Switch BLs and the Chinese authorities seized the cargo, alleging the Defendant was trying to avoid paying customs duty.

The Defendant issued a claim against the Claimant in Singapore for loss and damage suffered as a result of false statements in the Switch BLs and arrested the Vessel in Singapore. The Claimant argued that the Singapore High Court had no jurisdiction due to the exclusive jurisdiction clause in favour of the English Courts in the Switch BLs. (The Claimant argued that the parties' conduct at the discharge port had given rise to an implied contract on the terms of the Switch BLs, so that the Defendant was bound by the exclusive English jurisdiction clause in the Switch BLs.) The Claimant applied to the English High Court for an anti-suit injunction to restrain the Defendant from pursuing proceedings in Singapore. The Defendant challenged the jurisdiction of the English High Court.

Findings

The English Court considered whether, if there was an implied contract between the parties, the jurisdiction agreement in that contract satisfied the requirements of Art. 25 of the Recast Brussels Regulation. It found that the requirements of Art. 25 (1)(a) were not satisfied, because there was no consent in writing, or evidenced or confirmed in writing. Even if the exclusive jurisdiction clause had been valid, it would not have granted the Claimants an anti-suit injunction against the Defendants to stop proceedings in Singapore. This was because the Claimant did not bring its application promptly or before the proceedings had advanced too far in Singapore.

HFW Comment

If EU law (the Recast Brussels Regulation) is likely to be relevant to your contract, make sure that any exclusive jurisdiction agreement is made or evidenced in writing. This will avoid the need for lengthy and expensive applications on jurisdiction. This case also highlights the importance of challenging a court's jurisdiction promptly if you want to seek an anti-suit injunction.

3. The State of the Netherlands v Deutsche Bank AG [2019] EWCA Civ 771

Court Court of Appeal (Civil Division)

Date 02 May 2019

Summary

The credit terms to an International Swaps and Derivatives Association ("ISDA") master agreement between the parties was found not to provide for the payment of negative interest on its true interpretation.

Facts

The State of the Netherlands (the "Netherlands") entered into an ISDA master agreement (the "Master Agreement") with Deutsche Bank AG ("DB") as the contractual foundation for its derivative trading. The credit terms under the Master Agreement provided for collateral funds to be provided by both parties to a transaction, but only DB was obliged to provide credit support to the Netherlands. The credit terms provided for the Netherlands to pay interest on collateral to DB. The interest rate fell below zero in June 2014 and the Netherlands argued that negative interest should be paid by DB under the terms of the Master Agreement.

The High Court at first instance found that the terms of the Master Agreement did not cover circumstances where the interest rate was negative and that therefore it was not payable. The Netherlands appealed this decision.

Findings

The Court of Appeal upheld the High Court's decision and dismissed the appeal. The Court looked at what was included in the terms rather than what was missing. It found that the terms on their true interpretation did not provide for the payment of negative interest. Supporting documentation produced in relation to the Master Agreement did not show that negative interest was intended to be payable. The paragraph which referred to the payment of positive interest would have included a reference to negative interest if that had been the intention.

HFW Comment

This decision clarifies the position in relation to the payment of negative interest on collateral under the ISDA Master Agreement.

4. K v A [2019] EWHC 1118 (Comm)

Court Commercial Court

Date 3 May 2019

Summary

A payment obligation in a contract for the sale of goods to make payment in cash to the seller's bank account meant payment to the seller's bank for the account of the seller, and not just to any account at the seller's bank.

Facts

The parties entered into a contract for the sale of sunflower meal which incorporated GAFTA Form 119. The payment provisions required the buyer to pay net cash to the seller's bank upon receipt of the "commercial invoice" within two days of receipt.

The invoice sent by the seller was intercepted by a fraudster and the buyer paid into the wrong bank account. Once this was discovered, the buyer was able to retrieve the funds but due to currency fluctuations recovered less than what was originally sent. The buyer refused to pay the shortfall to the seller on the basis that it had paid the seller's bank as specified under the payment provisions and was not in breach of contract. The seller started arbitration proceedings to recover the shortfall. A GAFTA Board of Appeal tribunal found in the seller's favour on the basis that the invoice received constituted good notice under clause 18 of GAFTA Form 119 and that the buyer bore the risk of a fraudster intercepting that invoice and changing the account details. The buyer was therefore in breach of contract by failing to comply with the notice and paying into the incorrect bank account.

The buyer appealed the tribunal's decision to the High Court on the basis that the tribunal had misinterpreted the payment provisions under the contract and had also based its decision on a point that the buyer was not able to address during arbitration, relating to clause 18 of GAFTA Form 119.

Findings

The Court agreed with the tribunal's findings regarding the interpretation of the payment provisions under the contract. Since these provisions provided for the seller to clarify its account details to the buyer in a subsequent notice, the onus was on the buyer to pay into the seller's account and not just its bank. By failing to pay into the correct account, even at the right bank, the buyer was in breach of contract. The Court noted that:

"It is commercially impossible to transfer funds to a bank which are intended for the benefit of a customer without identifying the beneficiary and the destination account by branch and account name and number. The contract in this case clearly contemplated that in order to enable K to pay the price "in cash" A would not only notify the identity and branch of their bank, which was not identified in the contract itself, but would nominate the destination account details which K would need in order to be able to make a payment which was equivalent to cash. Notification of those details was no doubt contemplated as part of the function of the commercial invoice, presentation of which was a precondition to the right to payment, because commercial invoices commonly contain such details..."

However, the Court agreed with the buyer that the tribunal's consideration of clause 18 of GAFTA Form 119, which the buyer had not been able to address during the arbitration, was a breach of procedure and the parties should return to arbitration to discuss it.

HFW Comment

This case is of interest due to the increasing risk of cyber fraud. The Court agreed that on the terms of the contract, the risk of account details being intercepted by a fraudster was on the buyer, not the seller. Where possible, it is prudent to anticipate and allocate the risk of cyber fraud between the parties in the contract.

5. Times Travel (UK) Limited v Pakistan International Airlines Corporation [2019] EWCA Civ 828

Court Court of Appeal (Civil Division)

Date 14 May 2019

Summary

The Court of Appeal has reviewed and offered some clarity about the test for economic duress, in particular where there is no wrongdoing. In those circumstances, evidence of bad faith is required to establish economic duress.

Facts

The defendant (**"**PIAC**"**) entered into a contract (the **"**First Contract**"**) with the claimant (**"**Times Travel**"**) whereby Times Travel would act as an agent for the sale of PIAC airline tickets in the UK. PIAC failed to pay part of the commission due to Times Travel under the First Contract.

In September 2012, PIAC sent a notice of termination to Times Travel, which terminated the First Contract. PIAC then offered to Times Travel a new contract (the **"**Second Contract**"**) whose terms prohibited Times Travel from claiming commission and remuneration under the First Contract. Times Travel accepted the terms of the Second Contract as failing to do so would have resulted in it running out of business. (The bulk of its business was the sale of flights to Pakistan in the Birmingham area and at that time, PIAC was the only carrier flying direct from the UK to Pakistan.)

In 2014, Times Travel tried to claim commission under the First Contract. PIAC argued that they could not as the Second Contract prohibited them from doing so. Times Travel argued that the Second Contract was not valid as it had agreed to its terms under economic duress. The court at first instance agreed that Times Travel was entitled to avoid the First Contract on grounds of economic duress. PIAC appealed.

Findings

The Court of Appeal upheld the High court's decision that three ingredients are required to establish economic duress. First, there must be illegitimate pressure applied to the claimant. Second, the pressure must be a significant cause inducing the claimant to enter into the contract. Third, the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the claimant. The issue on appeal related to the first ingredient.

The question before the Court of Appeal was whether PIAC had exerted illegitimate pressure on Times Travel in circumstances where it had not done anything unlawful. Its actions had not constituted a tort, or a breach of contract.

Allowing PIAC's appeal, the Court of Appeal held that where a party exerts economic pressure on a counterparty using lawful acts, the Court will not declare the resulting contract invalid, unless that economic pressure was exerted in bad faith. The party exerting the economic pressure must believe that it is acting in good faith, regardless of whether there are reasonable grounds for that belief.

The Court of Appeal found that the economic pressure exerted on Times Travel resulted from PIAC's position as a monopoly supplier. It was reluctant to use one party's position as a monopoly supplier to declare the Second Contract invalid, as control of monopolies should be a matter of statute and not a matter for the courts.

HFW Comment

This judgment offers some clarity on the first limb of the test for economic duress. It sets a very high threshold for parties to declare a contract invalid under lawful act economic duress and is a reminder that monopoly issues are a matter for statute, not the courts.

6. Classic Maritime Inc v Limbungan Makmur SDN BHD [2019] EWCA Civ 1102

Court Court of Appeal (Civil Division)

Date 27 June 2019

Summary

The Court of Appeal held that the Charterer needed to prove but for causation in order to rely on a clause providing that the Charterer would not be liable for a failure to deliver a cargo "resulting from" a specified event which "directly affected" its performance of its contractual obligations. The Court of Appeal also held that since the Exception Clause gave the Charterer no defence to liability, the Charterer had to pay damages for failing to perform.

Facts

Limbungan Makmur SDN BHN (the **"**Charterer**"**) and Classic Maritime Inc (the **"**Shipowner**"**) entered into a contract of affreightment under which the Charterer would provide shipments of iron ore pellets from Tubarao or Ponta Ubu in Brazil to Malaysia (the "COA"). The Charterer failed to provide five shipments between July 2015 and June 2016.

On 5 November 2015, the Fundao dam burst. The Fundao mine was the sole supplier of iron ore pellets for shipment from Ponta Ubu, making it impossible to ship ore pellets from Ponta Ubu between November 2015 and June 2016.

Clause 32 of the COA provided that the Charterer would not be liable for any failure to deliver a cargo "resulting from" specified events which "directly affected" its performance of its contractual obligations (the "Exception Clause").

The Commercial Court held that even if the dam burst had not occurred, the Charterer would not have been able and willing to deliver the cargoes in question and, therefore, the Charterer could not rely on Clause 32. The Court also held that the Shipowner was not entitled to substantial damages because even if the Charterer had been able and willing to perform, the dam burst meant that no cargoes could have been shipped. Consequently, an award of substantial damages would place the Shipowner in a better position than it otherwise would have been.

The Shipowner appealed on the issue of damages, and the Charterer cross-appealed on liability.

Findings

The Court of Appeal agreed with the findings of the Commercial Court on liability. The Exception Clause – which it held was not a force majeure clause – required the Charterer to prove "but for" causation in order to avoid liability for failure to deliver the cargoes. Accordingly, the Charterer could not rely on the Exception Clause as the Charterer would not have been able and willing to deliver the cargoes in question even if the dam burst had not occurred.

The Court of Appeal overturned the Commercial Court's decision on damages. It found that the Commercial Court should have compared the freights the Shipowner would have earned with the actual position it was in as a result of the Charterer's breach. The Court of Appeal distinguished this case from the decisions in the *Golden Victory* and *Bunge v Nidera* on the basis that they both involved the assessment of damages in relation to an anticipatory breach of contract, whereas this case concerned an actual breach. Since the Exception Clause gave the Charterer no defence to liability, the Charterer had to pay damages for failing to perform.

HFW Comment

This judgment establishes that a party wishing to rely on an exclusion clause will have to prove to the Court that it would have performed its contractual obligations but for the event covered by the clause.

It also clarifies that the compensatory principle applies to place the innocent party in a position it would have been had the contract been performed, irrespective of the defaulting party's willingness to perform or the impossibility of performance. It appears to limit the application of the decisions in *Golden Victory* and *Bunge v Nidera* to anticipatory breach of contract.

7. Rubicon Vantage International Pte Ltd v KrisEnergy Limited [2019] EWHC 2012 (Comm)

Court Commercial Court

Date 25 July 2019

Summary

The Commercial Court found that a guarantee was on-demand in spite of the guarantor being a parent company rather than a bank or financial institution. The wording of the guarantee, rather than the nature of the guarantor, was the key consideration. HFW (Paul Aston and Suzie Meiklejohn) acted for the successful claimant.

Facts

The claimant, Rubicon Vantage International Pte Ltd (the "Charterer") chartered a Floating Storage & Offloading Facility ("FSO") to a wholly owned subsidiary of KrisEnergy Limited under a bareboat charter. The defendant, KrisEnergy Limited (the "Guarantor"), provided a parent company guarantee ("the Guarantee") to the Charterer as security for its subsidiary performing its obligations. Under the terms of the charter, the Charterer was to perform certain "life extension works" on the FSO. The subsidiary failed to pay invoices totalling over US$1.8 million for these works and the Charterer made a demand under the Guarantee. The Charterer brought proceedings in the English High Court against the Guarantor for their failure to pay.

The Guarantee was unusual in that it provided that the Guarantor's liability would be both on-demand and orthodox, depending on the amount claimed. The relevant clause read:

"*In the event of dispute(s) between the Company and the Contractor as to the Company's liability in respect of any amount(s) demanded under this Guarantee:*

1) the Guarantor shall be obliged to pay any amount(s) demanded up to a maximum amount of United States Dollars Three Million (US$3,000,000) on demand notwithstanding any dispute between the Company and the Contractor;
2) the Guarantor shall be entitled to withhold and defer payment of the balance of the sum demanded in excess of United States Dollars Three Million (US$3,000,000); and
3) the Guarantor shall be entitled to withhold and defer payment of any other disputed amounts claimed under this Guarantee, *until a final judgment or final non-appealable award is published or agreement is reached between Company and contractor as to the liability for the disputed amount(s)."*

The Charterer argued that the Guarantee wording was sufficiently clear and unambiguous as to be in part an on-demand instrument up to the value of US$3 million, and an orthodox guarantee for sums claimed in excess of that amount. The Guarantor argued that the Clause was ambiguous as to when its on-demand obligations applied, particularly if they applied where either liability or quantum or both were disputed between the beneficiary and the principal. It argued that since there was ambiguity, the Court should turn to the established principle that where a guarantor is not a bank or financial institution, there is a presumption against the guarantee being construed as an on-demand instrument.

Findings

The Commercial Court found that on a proper construction of the Clause, the Guarantee was unambiguously on-demand up to the value of US$3 million. It did not matter whether there was any dispute at all (whether as to liability or quantum) between the beneficiary and the principal. There was no ambiguity and so there was no need to invoke the presumption against on-demand liability where a guarantee has not been given by a bank or financial institution. The on-demand obligations in the Guarantee should be judged first and foremost by considering the wording used by the parties, which the Court found to be sufficiently clear and unambiguous. The Guarantor was therefore obliged to pay the sums demanded under the Guarantee.

HFW Comment

Clear and unambiguous wording is vital when drafting guarantees, and the Court will give effect to the clearly expressed intention of the parties by reference to the wording of guarantees in the first instance, without reference to presumptions or other external tools of construction.

8. Volumatic Ltd v Ideas for Life Ltd [2019] EWHC 2273 (IPEC)

Court Intellectual Property Enterprise Court

Date 29 August 2019

Summary

The Court considered the status of a document which had been signed by two parties and which was intended to capture their understanding of the consensus which they had reached at a meeting on the way forward in a project. There had been no intention to create legal relations and the document had no contractual force.

Facts

On 5 May 2005, Volumatic Limited (Volumatic) and Ideas for Life Limited (IFL) signed a document (the Document) relating to the design and production of a banknote pouch (the Pouch) to fit Volumatic's cash counting machines. In 2018, thirteen years later, Volumatic brought a claim alleging that the Document was a binding contract on the parties, and asking for specific performance of a term that all property rights in the Pouch be assigned to Volumatic.

Findings

The Court found that since the Document was an "express, written, commercial document," IFL had a heavy burden to prove there was no intention to create legal relations. However, it decided that objectively and based on the facts, there had been no such intention. Rather, the Document was designed to record the consensus reached at a meeting between the parties. The Court gave particular weight to the fact that the Document did not contain a sufficient level of commercial detail, was not as detailed as other agreements made between the parties, had not been signed by the company that was to design the Pouch, and the Pouch itself was not sufficiently developed at the time the Document was signed. It was also significant that neither party had raised the issue that the Document might be a binding agreement until 11 years after it was signed. Volumatic's claim therefore failed, although the Court did consider the other aspects of its claim (which we do not cover here).

HFW Comment

This rather surprising outcome is a timely reminder that all the ingredients of a contract must be present for a contract to arise. These are offer, acceptance, consideration and intention to create legal relations. Whilst there is a strong presumption that a written commercial document signed by commercial parties is likely to indicate an intention to create legal relations, it is not a foregone conclusion.

9. Lamesa Investments Ltd v Cynergy Bank Ltd [2019] EWHC 1877 (Comm)

Court Commercial Court

Date 12 September 2019

Summary

The Court ruled that a non-payment clause in a facility agreement that was subject to English law permitted the borrower to avoid making interest payments because to do so risked the borrower being subject to US secondary sanctions.

Facts

Lamesa Investments Ltd (the "Claimant") was a Cypriot company wholly owned by a group company registered under the laws of the British Virgin Islands. The group company was itself owned by an individual who became listed as a specially designated national (SDN) in the US under its sanctions laws. The result was that the Claimant became a "blocked person" under US statute. Cynergy Bank Ltd (the "Defendant") was a retail bank registered in the UK. The two parties had entered into a facility agreement (the "Facility") in 2017, 3 months prior to the ultimate owner becoming an SDN. The Facility was governed by English law and required the Defendant to make interest payments to the Claimant. The Defendant would now be at risk of US secondary sanctions if it made the interest payments.

The Defendant relied on a non-payment clause in the Facility which meant it would not be in breach for failure to pay if "*such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction*."

The Claimant brought a claim for non-payment of interest and the question for the Court was whether the non-payment clause reversed the English common law position, namely that contractual performance is not excused by reference to foreign law unless that law is the law of the contract or of the place of performance.

Findings

The Court looked at the wording of the non-payment clause. It contained no express territorial qualifications. As such, the Court ruled that it would be inconsistent to construe "mandatory provision of law" as being confined only to English law. The word "mandatory" was ruled to mean a provision of law that the parties could not vary or disapply.

The remaining question concerned the interpretation of "in order to comply" and whether this included not paying the sums in order to avoid being liable for the US secondary sanctions. The Court ruled that there were three possible meanings of "in order to comply", any combination of which could apply depending on the factual context of the case. These meanings were: (1) that compliance arises only in relation to a statute that expressly prohibits payment by imposing sanctions/penalties; (2) that compliance occurs where a party acts or refrains from acting in manner that would otherwise attract a sanction/penalty by statute; and (3) that compliance occurs where a party acts or refrains from acting in a manner that would otherwise attract the possible imposition of a sanction/penalty by statute. The facts in this case, as well as the wide definition of "mandatory", meant that none of the three meanings relating to compliance were precluded from applying. A particularly relevant fact was that the parties knew there was a possibility of the ultimate owner becoming an SDN at the time of the contract's execution. The non-payment clause was a means of managing that risk – and in particular the risk of the Defendant becoming subject to secondary sanctions. The Defendant was therefore entitled to rely on the non-payment to avoid payment so long as the SDN remained as an SDN and the Claimant therefore remained a "blocked party".

HFW Comment

While each case will depend on its factual context, this decision offers some helpful guidance in relation to the efficacy of including this type of clause in contracts. In particular, it shows the extent to which clauses may allow parties to refrain from taking actions that would subject them to US secondary sanctions.

10. Natixis v Marex and Access World [2019] EWHC 2549 (Comm)

Court Commercial Court

Date 2 October 2019

Summary

A claim relating to forged warehouse receipts has confirmed that warehouse receipts are not documents of title and emphasised the importance of attornment for buyers of goods held in storage.

Facts

Marex had entered into a number of nickel purchase and repurchase contracts with a Chinese company, CHH, and then onsold to Natixis. The nickel was stored at warehouses operated by Access World and the transactions involved transferable warehouse receipts originally issued by Access World. However, the warehouse receipts Marex received from CHH and provided to Natixis were forged. When it discovered this, Natixis closed out its related futures positions and brought a claim in contract against Marex for US$32 million. Marex then brought claims against Access World both in contract and in tort. Against Natixis, Marex argued that the purchase contracts were voidable for common mistake as both parties had made a fundamental mistake about the authenticity of the warehouse receipts. Against Access World, Marex claimed breach of a contractual obligation to deliver up the nickel. (This was problematic because the warehouse receipts had not been issued to it directly by Access World but instead had been endorsed to it by a third party.) In tort, Marex argued that Access World had been negligent and/or had negligently stated that two of the warehouse receipts were genuine.

Findings

The Court upheld Natixis's claim against Marex, finding that Marex was in breach of its contractual obligation to provide genuine warehouse receipts. It rejected Marex's argument on mistake, finding that Marex carried the risk of the warehouse receipts being forged. Natixis was awarded US$32 million in damages.

In rejecting Marex's contractual claims against Access World, the Court took the opportunity to consider the nature and status of warehouse receipts. It confirmed that they are not documents of title. The relationship between the warehouse operator and the original depositor of the goods is one of contractual bailment and is evidenced by the terms of the warehouse receipt. There is no relationship between a warehouse operator and any subsequent buyer of the goods unless and until the warehouse operator "attorns" to that buyer (that is, acknowledges that he holds the goods on the buyer's behalf), as required by s.29 of the Sale of Goods Act 1979. Presentation of a false warehouse receipt could not give rise to an attornment.

In relation to the claims in tort, Marex fared a little better. The Court found that Access World did owe Marex a duty of care in authenticating the two receipts it had said were genuine and was in breach of that duty. However, the amount due to Marex was reduced as a result of a finding of contributory negligence. Interestingly, the Court held that Access World was entitled to rely on the limitation of liability contained in its standard terms and conditions, even though Marex's claim was in tort and not in contract. This was because Access World had issued thousands of warrants to Marex on the same terms over a 10 year period. The terms were reasonable, in widespread use in the industry and Marex had adequate notice of them. A reasonable person in Marex's position should have realised that those terms applied even to non-contractual services provided by Access World.

HFW Comment

A warehouse receipt is not a document of title. Attornment is key for a buyer of goods held in a warehouse and buyers must ensure they obtain acknowledgement that the goods are held on their behalf from the warehouse operator. The Court's decision on the application of standard terms, even to non-contractual claims, is also of interest.

You can find further commentary on the case here.

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

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

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

Katie Pritchard
Partner, London
T +44 (0)20 7264 8213
M +44 (0)7768 873053
E katie.pritchard@hfw.com

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

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

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

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

Philip Prowse
Partner, London
T +44 (0)20 7264
M +44 (0)7979 708314
E philip.prowse@hfw.com

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

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

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

Vincent Bénézech
Partner, Paris
T +33 (0)1 44 94 40 50
M +33 (0)6 80 10 32 54
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

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

Richard Strub
Partner, Dubai
T +971 4 423 0554
M +971 (0)50 625 1284
E richard.strub@hfw.com

Paul Aston

Partner, Singapore
T +65 6411 5338
M +65 9790 5835
E paul.aston@hfw.com

Christopher Swart

Partner, Singapore
T +65 6411 5315
M +65 9092 1883
E christopher.swart@hfw.com

Peter Murphy

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

Stephen Thompson

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

Adam Richardson

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

Guy Hardaker

Partner, Hong Kong
T +852 3983 7644
M +852 5411 7489
E guy.hardaker@hfw.com

George Lamplough

Partner, Hong Kong
T +852 3983 7776
M +852 9194 6581
E george.lamplough@hfw.com

Americas | Europe | Middle East | Asia Pacific