HFW

COMMODITIES CASE UPDATE

DECEMBER 2021

December 2021

Introduction

We are delighted to present the Christmas edition of the Commodities Case Update for 2021, with twelve cases for Christmas. The update provides a summary of twelve of the key cases relevant to the commodities sector in the second half of this year. 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.

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

No.	Case Name	Page
1.	Galtrade Limited v BP Oil International Limited [2021] EWHC 1769 (Comm)	4
2.	Triple Point v PTT [2021] UKSC 29	5
3.	Raja v McMillan [2021] EWCA Civ 1103	6
4.	Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited [2021] EWCA Civ 1147	7
5.	BP Oil International Ltd v Vega Petroleum Ltd and another [2021] EWHC 1364 (Comm)	8
6.	Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant) [2021] UKSC 40	9
7.	Euronav v Repsol [2021] EWHC 2565	10
8.	BP Oil International Ltd v Glencore Energy UK Ltd [2021] EWHC 2876	11
9.	Kabab-Ji SAL v Kout Food Group (Kuwait) [2021] UKSC 48	12
10.	K LINE PTE Limited v Priminds Shipping (HK) Co Limited [2021] EWCA Civ 1712	13
11.	Navig8 Chemicals Pool Inc v Aeturnum Energy International Pte Ltd [2021] EWHC 3132 (Comm)	15
12.	Nord Naphtha Limited v New Stream Trading AG [2021] EWCA Civ 1829	16

Galtrade Limited v BP Oil International Limited [2021] EWHC 1796 (Comm)

Court: Commercial Court (QBD)

Date: 5 July 2021

Summary

In a quality claim under a contract for the sale of goods, the Court found that the buyer ("Galtrade") was not entitled to reject the cargo even though the goods were off spec. The breach of contract by the seller ("BPOI") in delivering goods that did not meet the contractual quality requirement was a breach of an intermediate term.

Facts

BPOI agreed to sell to Galtrade four parcels of low sulphur straight run fuel oil ("SRFO") over the course of four months. The third of these parcels did not comply with the contractual quality specifications. BPOI accepted that it was in breach of contract. The issues in this dispute related to the consequences of that breach. Galtrade purported to reject the third parcel and claimed damages calculated by reference to wasted expenditure. BPOI contended that Galtrade was not entitled to reject and was only entitled to damages in relation to the difference in value of the parcel caused by the breach. BPOI argued that any wasted expenditure came about not because of BPOI's breach but because of Galtrade's wrongful rejection. It counterclaimed for losses it suffered after the rejection in dealing with the goods, blending and selling them elsewhere and in relation to hedging.

Findings

For a number of reasons, the Court agreed with BPOI that the obligation to provide an on-spec cargo was an intermediate term, not a condition. The contract did not expressly describe the obligation regarding quality as a condition and there was a difference between a term as to quality and a term as to description. In the absence of any clear indicators, the Court treated the quality term as an intermediate one. SRFO is an intermediate product of the refining process and if the quality term was treated as a condition, Galtrade would have been entitled to reject the cargo for even a minor deviation in the guaranteed levels in the specification. The Court also concluded that the breach was not sufficiently serious to entitle Galtrade to reject the cargo. Its rejection was therefore a repudiatory breach and it was this, rather than BPOI's breach in providing off-spec cargo, which had caused its loss.

BPOI's counterclaim succeeded as a matter of liability and the Court rejected Galtrade's argument that BPOI's losses were in fact costs incurred in mitigating Galtrade's losses. However, when BPOI's entitlement to damages under s. 50 Sale of Goods Act 1979 was discounted to allow for the off spec nature of the goods, it was entitled only to nominal damages.

HFW Comment

Even where there has been a clear breach of contract accepted by both parties, the consequences of that breach must be analysed with care. This judgment is an example of the need to understand clearly what are your contractual rights and remedies in the event of a breach by your counterparty. In particular, if a buyer wants the right to reject goods and terminate a contract in the event that they are not of contractual quality, this should be expressly agreed by the parties and stated in the contract.

Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29

Court: Supreme Court

Date: 16 July 2021

Summary

In allowing an appeal by PTT Public Company Ltd ("PTT") from the Court of Appeal, the Supreme Court clarified the principles of English law relating to the interpretation of clauses dealing with liquidated damages.

Facts

Triple Point Technology Inc (Triple Point) was engaged to provide software and software implementation services (the "Works") to PTT, a state-owned Thai petrochemicals company, under a Commodity Trading and Risk Management System contract dated 8 February 2013 (the "Contract"). Disputes arose between the parties due to delays to the project. Triple Point demanded payment of certain invoices and PTT refused to pay. Triple Point stopped work and PTT ultimately terminated the Contract. Triple Point commenced proceedings, seeking payment of the invoices. PTT counterclaimed damages for the delays. The relevant clause in the Contract dealing with liquidated damages ("LDs") read as follows (emphasis added):

"*If CONTRACTOR (Triple Point) fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work.*"

The question for the courts was what was the effect of PTT's termination on the sums payable? The Court of Appeal had identified three possible outcomes:

1. LDs accrued on a daily basis up to the date of termination, whether or not the work was complete by then.
2. LDs accrued only in relation to work that was delayed but complete at the date of termination.
3. LDs accrued until completion by the new contractor engaged to replace Triple Point.

Findings

At first instance, the Court ordered that PTT was entitled to recover the costs of procuring an alternative software system, wasted costs and LDs for delay. Triple Point appealed, arguing that the LDs clause only applies when work is delayed but subsequently completed (outcome 2 above). It argued that the LDs clause did not apply in respect of work which was never completed. The Court of Appeal concluded that the question of how and when the LDs clause applies depends on the wording of the clause itself and on that basis, allowed Triple Point's appeal. The clause in question stated that LDs were payable from the contractual completion date up until "*the date PTT accepts such work*". Therefore, the clause had no application at all in a situation where Triple Point never completed the Works due to termination and PTT never accepted them. PTT was still entitled to general damages for Triple Point's breach of contract, but those damages would be assessed on ordinary principles and not by reference to the LDs clause.

Overturning the Court of Appeal's decision, the Supreme Court construed the clause as providing for LDs if Triple Point did not discharge its obligations within the time fixed by the Contract. The reference to "*the date [the employer] accepts the works*" was a reference to an end date for LDs, but it did not follow that there were to be no LDs whatsoever if there was no such acceptance. It is ordinarily to be expected that, unless the LDs clause clearly provides otherwise, an employer will be entitled to recover LDs in respect of any period of delay up to the date when the contract is terminated. After that, the employer will only be entitled to general damages (not LDs) in respect of losses flowing from the termination, including in respect of any further delay.

HFW Comment

In reaching this decision, the Supreme has Court endorsed the orthodox analysis of the application of an LDs clause when a contract has been terminated, namely that it only applies up to termination of the contract.

Raja v McMillan [2021] EWCA Civ 1103

Court: Court of Appeal

Date: 21 July 2021

Summary

The Court of Appeal upheld the dismissal of an application for summary judgment and/or strike out of claims for conspiracy to injure by unlawful means and deceit, holding that whether or not a director can conspire with their corporate alter ego is an arguable point of law.

Facts

The Defendant was a property developer who operated through a number of "one man" companies. He devised a scheme to sell properties free of an affordable housing requirement. This involved granting leases in flats to a housing association, which granted "shared ownership" sub-leases to tenants who then "staircased" their ownership in the flats to 100% using funds provided by the Defendant or one of his corporate alter egos. The flats were then sold on the open market, purportedly free of the affordable housing obligation.

The Claimant purchased one of the flats. Soon after, the London Borough of Southwark pursued her for breaches of the affordable housing obligation. She settled this claim by agreeing to sell the flat to them for considerably less than she had paid for it. She then commenced proceedings against the Defendant for conspiracy to injure by unlawful means and/or for deceit as a joint tortfeasor with his companies, claiming she was misled into buying the flat by being told that it was free of the affordable housing obligation.

The elements of unlawful means conspiracy are: (1) there is a combination between defendants; (2) to use unlawful means; (3) with the intention of injuring the claimant; (4) the conspiracy is carried out; and (5) the claimant suffers damage as a result.

The Defendant issued an application for strike out and/or summary judgment of the claims, which was dismissed by the High Court. The Defendant appealed the dismissal on four grounds:

1. It is not possible for a director to conspire with a company that is his or her alter ego.
2. It is wrong to suggest that an unlawful means conspiracy can occur without an intention to do anything unlawful at the time of entering into the conspiracy.
3. It is not enough, for the purposes of an intention to harm by an unlawful means conspiracy, that the conspirators should have known that injury to the Claimant was likely.
4. The Judge erred in concluding that legal advice obtained and believed by, the Defendant did not give him a defence.

Findings

Dismissing the appeal, the Court of Appeal held that the first ground gave rise to a difficult point of law that should progress to trial. The Court noted that a contract can be made between a company and its sole director, which requires an agreement just as much as a conspiracy does. Even if it was right that no conspiracy happens where a director gets his or her company to do something, it does not follow that the same is true where the director gets two separate corporate entities to do things. The Court dismissed the second ground of appeal on that basis that conspiracy is a continuing state of affairs and whether or not the scheme was intended to involve deceitful statements from the outset was irrelevant. The third ground was dismissed on the basis that the High Court had not misstated the requirement for the Defendant to intend to harm the Claimant in unlawful means conspiracy cases. As to the fourth ground, what the Defendant believed as to the legality or effectiveness of his scheme was a question of fact that should be decided at trial.

HFW Comment

The judgment is an interesting analysis of potential defences to a claim for conspiracy to injure by unlawful means, particularly where a company is alleged to have conspired with its sole director. Depending on the ultimate outcome in the case, a claim of this sort could offer a means to circumvent the separate legal personality of a company and both gain access to a further litigation target (ie the owner/sole director), who may potentially have greater assets than the company itself, and establish the jurisdiction of the English courts over a claim against them.

Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited [2021] EWCA Civ 1147

Court	Court of Appeal
Date	23 July 2021

Summary

Even where issued by a company rather than a bank, the language of a performance guarantee made it a primary, demand guarantee rather a secondary, "see to it" guarantee.

Facts

Shanghai Shipyard Co Ltd ("Shanghai") entered into a shipbuilding contract (the "Contract") with Reignwood International Investment (Group) Company Limited ("Reignwood"). Reignwood separately provided a payment guarantee (the "Guarantee") to Shanghai. By a novation agreement, all of Reignwood's rights and obligations under the Contract (but not the Guarantee) were later transferred to Opus Tiger 1 ("Opus"). Opus refused to take delivery of the vessel, claiming there were a number of significant defects and it was not in a deliverable condition. Shanghai claimed the final instalment due from Opus and when Opus failed to pay, issued a demand to Reignwood under the Guarantee. When Reignwood failed to pay, Shanghai commenced proceedings against them under the Guarantee in the English Commercial Court. Subsequently, Reignwood commenced separate arbitration proceedings on behalf of Opus against Shanghai under the Contract.

The first instance decision in the court proceedings followed a preliminary issues trial concerning (a) whether the Guarantee was a demand guarantee or a "see to it" guarantee and (b) whether under the terms of the Guarantee, Reignwood was entitled to withhold payment of the final instalment until the outcome of the arbitration was known. The judge at first instance found in favour of Reignwood on both issues, holding that it was a "see to it" guarantee and that the relevant clause in the Guarantee had been triggered by the commencement of the arbitration, even though that came after Shanghai had issued its demand. Shanghai obtained permission to appeal on both issues.

Findings

Overturning the first instance decision, the Court of Appeal held that the Guarantee was a "demand bond", entitling Shanghai Shipyard to payment on demand, not a traditional “see to it” guarantee imposing only a secondary liability on Reignwood. In reaching its decision, the Court of Appeal gave primacy to the words used in the Guarantee, notwithstanding *Marubeni Hong Kong and South China Ltd v Government of Mongolia [2005] 1 WLR 2497*, which established that outside the banking context, there is a presumption against interpreting such instruments as demand bonds.

The Court of Appeal also held that the wording of the Guarantee indicated an intention to require commencement of any arbitration prior to demand; there was nothing uncommercial to there being a relatively short window in which to trigger a proviso to a demand guarantee, which was intended to protect cash flow.

HFW Comment

The decision of the Court of Appeal applies normal principles of construction to guarantees and avoids the unattractive outcome of the same or similarly worded guarantees having quite different meanings if issued by a bank on the one hand, and a parent company on the other, even if the parent company was performing an investment or financing role in the underlying project similar to that of a bank. The decision also clarifies the effect of arbitration carve-outs in such guarantees on the guarantor's obligation to pay on demand where a dispute arises which is referred to arbitration within the period of time permitted. Such carve-outs actually reinforce the point that absent a timely reference to arbitration, the instrument is an "on demand" bond rather than a "see to it" guarantee. The Court of Appeal's approach will be welcomed by parties for whom such instruments are a guarantee of vital cash-flow.

HFW (Nick Poynder, Jenny Chester, Thilo Jahn and Andrea Chen) represented Shanghai Shipyard in the appeal.

BP Oil International Ltd v Vega Petroleum Ltd and another [2021] EWHC 1364 (Comm)

Court Commercial Court

Date 30 July 20201

Summary

The Court upheld a claim in unjust enrichment for the reimbursement of several millions of US dollars paid for crude oil that was never delivered. The Court found that the contract clearly provided for FOB delivery and that, having never received the oil, the claimant oil company was entitled to reimbursement of the sums it had paid, as restitution for total failure of consideration (now more commonly referred to as "failure of basis").

Facts

Vega Petroleum Ltd ("Vega") was part of a joint venture that acted as the operator of the Ras El Ush oilfield in Egypt. BP Oil International Ltd ("BPOI") paid around USD17 million to Vega under a series of contracts for Gulf of Suez Mix crude oil ("GOSM") over a period of two years. The contracts provided for delivery to be "*FOB Ras Shukehir Terminal*". BPOI never received this GOSM and therefore issued a claim for unjust enrichment seeking the return of the prepayments it had made on the basis that it received no consideration.

The question for the Court was whether, as argued by BPOI, the payments made were for the FOB delivery of the GOSM such that if the oil was not delivered, BPOI was entitled to its money back or whether, as contended by Vega, those payments were instead to acquire a right to lift quantities of GOSM and that they were, therefore, unconditional payments such that BPOI had no recourse against Vega if BPOI chose never to lift the oil.

Findings

The Court found in favour of BPOI. The contracts clearly provided for FOB delivery of the GOSM; this was a very strong preliminary indication in favour of BPOI's contention that the contracts provided for the delivery of GOSM (rather than simply the right to lift); and, the relevant factual matrix did not add any ambiguity as to this otherwise plain reading of the contract. Indeed, the Court noted that Vega's case on construction of the contract appeared "*convoluted and extremely uncommercial to the eyes of a commodities lawyer*".

The Court then considered BPOI's claim for restitution of its prepayments. BPOI claimed these sums under the "failure of basis" ground for restitution, as set out in s. 54 of the Sale of Goods Act 1979. The Court confirmed that the test for establishing this remedy was that (a) a party had received no consideration for the payments it had made; and (b) the contracts had been terminated, determined or discharged. This test was met by BPOI. Firstly, by never receiving the goods BPOI received no consideration. Secondly, while the Court found that the contracts had in fact been brought to an end by BPOI's wrongful termination, this part of the test was still met – the law provides that a party's repudiatory breach does not bar a claim for restitution.

The Court found that Vega's failure to deliver the GOSM was a failure of basis under the contracts. BPOI was therefore entitled to restitution of its prepayments in full on the grounds that Vega had been unjustly enriched.

HFW Comment

This judgment is of interest for its consideration of the nature of prepayments under oil sale and purchase contracts and the application of the law of unjust enrichment in this context. It also highlights the importance of contractual wording in determining the parties' rights and obligations under their contracts – it will be very unusual for a contract which clearly provides for delivery of goods on an FOB basis to give the buyer a right to lift the goods, rather than a right to have those goods delivered.

HFW (Alistair Feeney, Clare Chyb and Catherina Yurchyshyn) acted for BPOI.

Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant) [2021] UKSC 40

Court: Supreme Court

Judgment: 18 August 2021

Summary

In a landmark decision, the Supreme Court reiterated the key elements of lawful act economic duress and specifically, the very high standard to be reached in order for it to be established in the context of commercial negotiations. Crucially, for there to be illegitimate pressure, there must have been a "bad faith demand" by the defendant or the defendant must have acted reprehensibly to coerce the claimant into waiving its claim.

Facts

Pakistan International Airline Corporation ("PIAC"), had entered into a contract with Times Travel (UK) Ltd ("TT"), pursuant to which TT would earn commission, acting as a ticketing agent for PIAC. By 2012, a large number of PIAC's ticketing agents had either commenced or threatened proceedings to recover substantial sums allegedly owed to them by PIAC by way of commission. In September 2012, PIAC gave lawful notice of the termination of its existing agency contracts and offered TT a new contract (the "New Agreement"). The New Agreement contained a waiver by TT of its claims for unpaid commission under the prior arrangements. TT accepted and signed the New Agreement.

It is this waiver that TT alleged was given as a result of economic duress by PIAC. At first instance, the Court agreed, holding that the terms of the New Agreement and commission scheme may have represented adequate reward for future services but they could not be seen as adequate compensation for the waiver of existing claims. Notably however, the Court also found that PIAC had genuinely believed that the disputed commission was not due. PIAC appealed and the Court of Appeal allowed PIAC's appeal because PIAC had not acted in bad faith. TT appealed to the Supreme Court.

Findings

The Supreme Court dismissed TT's appeal and upheld the Court of Appeal's findings that PIAC had neither made a "bad faith demand" nor acted reprehensibly such that the pressure exerted by them on TT was illegitimate. The Court confirmed that a claimant must establish three key elements in order to succeed in a claim of economic duress:

1. the threat or pressure by the defendant must have been illegitimate.
2. the threat or pressure must have caused the claimant to enter the contract.
3. the claimant must have had no reasonable alternative to giving in to the threat or pressure.

The key issue in this case was whether the pressure by PIAC was indeed illegitimate. In delivering the leading judgment, Lord Hodge identified two circumstances in which the English courts have recognised lawful act economic duress. The first is where a defendant uses its knowledge of the claimant's criminal activity to threaten the claimant. The second is where the defendant, having exposed itself to a civil claim by the claimant, uses reprehensible means to manoeuvre the claimant into a position of vulnerability to force a waiver of the claim. Although in almost complete agreement with Lord Hodge, Lord Burrows disagreed on what should be the test for an illegitimate threat. He took the view that in relation to a demand for a waiver, the Court should find there to be an illegitimate threat and the demand to be unjustified, where (a) the demanding party has deliberately created, or increased, the other party's vulnerability to the demand; and (b) the "bad faith demand" requirement is satisfied. The demand is made in bad faith where the threatening party does not genuinely believe that it has any defence (and there is no defence) to the claim being waived.

HFW Comment

The case identifies the very limited circumstances in which an English Court will find lawful act economic duress in the context of a commercial agreement or negotiations between parties. Although Lord Hodge and Lord Burrows used slightly different approaches to determine whether PIAC's pressure on TT was illegitimate, they arrived at the same result.

Euronav v Repsol [2021] EWHC 2565 (Comm)

Court: Commercial Court

Date: 24 September 2021

Summary

Absent an express contractual term addressing time and date, for the purposes of the period for notification of demurrage claims, the date of the triggering event (here, discharge) should be determined using local time at the place where the triggering event took place.

Facts

Euronav NV ("Owners"), owned The Maria (the 'Vessel'), and chartered her out to Repsol ("Charterers"), under a Shellvoy 6 form (the "Charterparty"), for the carriage of a cargo of crude oil from Brazil to Long Beach California.

The Vessel spent 151 hours and 48 minutes in total on demurrage, which resulted in a claim for approximately USD500,000. Clause 13(5) of the Charterparty held that any demurrage claim by the Owners was to be notified to the Charterers "*within 30 days after completion of discharge*". Discharge was completed at:

21:54 (PST) on 24 December 2019 in California, the location of discharge; or

05:54 (GMT) on 25 December 2019 in England, the location of the governing law of the Charterparty; or

06:54 (CET) on 25 December 2019 in Belgium/Spain, the Owners' and Charterers' location

On 24 January 2020 the Owners tendered notice of their demurrage claim to the Charterers. The key question became which time zone should be used to determine the date of completion of discharge and consequently whether the Owners' demurrage claim would be time-barred. The Charterers submitted that the time zone applicable to the notice was California, the location of discharge. The last day of notification - or 'day 30' – was therefore 23 January 2020, time-barring the Owners' demurrage claim. The Owners submitted that the relevant time zone was Europe as it had the closest and most real connection with clause 15(3), because the Owners and Charterers are both European companies, the contract applied English law and neither party had any administrative staff in California. Discharge was therefore complete on 25 December 2019, making 24 January 2020 notification 'day 30' and Owners' claim in time.

Findings

The Court found for Charterers, emphasising that contractual interpretation should be underpinned by principles of clarity and certainty. It was held that that time is a local concept and absent any express agreement in the contract, the day of an event should be determined using the local time at the place where the event occurred, in this instance the tangible event of discharge. The Owners' demurrage claim was therefore time-barred.

HFW Comment

This judgment gives useful guidance on contractual time-bars involving multiple time zones. In the absence of a contractual provision to the contrary, the relevant time zone for a demurrage claim notification will be the time zone in the place of discharge. It is essential when drafting contracts to leave no room for ambiguity in terms of date and time provisions. Notifications should be brought in a timely manner and in any event in accordance with the contractual provisions or where there is ambiguity, before the earliest possible interpretation.

BP Oil International Ltd v Glencore Energy UK Ltd [2021] EWHC 2876

Court: Commercial Court

Date: 8 October 2021

Summary

In a claim for damages in respect of the supply of allegedly contaminated crude oil, the defendant was refused permission to amend its defence. This was because the trial was 3 months away, the amendments would require further disclosure, factual and expert evidence and would prejudice the claimant.

Facts

Glencore Energy UK ("Glencore") agreed to supply BP Oil International Ltd ("BPOI") with a cargo of Russian crude oil. BPOI alleged that the oil was off spec and took action to remedy this by chartering vessels for storing and transporting the oil to a sister company in order to blend it. BPOI sold the oil to its sister company and then bought it back, before selling it on to another BP company.

In May 2020, BPOI took action against Glencore for breach of contract, bringing several claims. One claim was for around USD3.7 million, being the cost of chartering two ships to store and transport the cargo until it could be fully discharged ashore at its sister company's refinery. Another was for around USD5.9 million, being the difference in value between a sound cargo and the allegedly off spec cargo. Glencore disputed both liability and quantum and the proceedings progressed in the usual way. At a CMC in November 2020, the trial was fixed for January 2022. BPOI gave disclosure in February 2021 and witness statements were exchanged in June 2021. Then, in July 2021, Glencore stated that it intended to amend its defence; it sent draft amendments in August and September 2021 and the application to amend was heard in October 2021.

In relation to the claim for USD3.7m, Glencore sought permission to amend its defence to plead that BPOI's chartering arrangements were unreasonable, which required expert evidence. These were called the “Category 2 amendments.” In relation to the claim for USD5.9m, Glencore sought permission to amend its defence to plead what it described as further particulars of its plea that the discounted price agreed by BPOI with its sister company was unreasonably low and to add further particulars to what it said was its existing case that two heads of loss claimed were duplicative. These were called the "Category 3 and 4 amendments." BPOI resisted the amendments on the grounds that Glencore had applied for permission to amend too late.

Findings

In refusing all the amendments, the Court applied the legal framework established by a number of cases which set out the principles to be applied in relation to amendments resisted on grounds of lateness and prejudice. The Category 2 amendments were refused for a number of reasons. Bearing in mind that the trial was 3 months away, a period which included Christmas and New Year, the amendments were late, or very late, according to the legal framework. Glencore had known about the shipping arrangements at an early stage; further disclosure, factual and expert evidence would be required; and BPOI could not be criticised for failing to start work on the amendments before the application had been heard. Allowing the amendments would be prejudicial to BPOI's preparation for trial whereas the Court was not persuaded that there would be significant prejudice to Glencore if permission was refused. It was also dubious that the amendments could be addressed within the eight day trial period.

The Category 3 and 4 amendments were refused because either they were simply particulars of the existing case, in which case they were unnecessary and given the opposition to them, should not be allowed; or, they involved a new case which would require additional evidence and possibly additional disclosure. There was no good explanation as to why any such new case could not have been made earlier and there would undoubtedly be prejudice to BPOI in preparing for any such new case.

HFW Comment

This is a salutory reminder that the Court will not look kindly on parties applying for amendments to their case at a late stage in proceedings without good reason, as well as providing a recap of the principles on lateness and prejudice which the Court will take into account when considering such applications.

Kabab-Ji SAL v Kout Food Group (Kuwait) [2021] UKSC 48

Court Supreme Court

Date 27 October 2021

Summary

The UK Supreme Court reaffirmed the principles set out in last year's Supreme Court decision, *Enka v Chubb [2020] "UKSC 38* that, where there is no provision for which governing law applies to an arbitration agreement, the governing law of the contract containing the arbitration agreement is sufficient to indicate the parties' choice, despite the choice of seat being different.

Facts

In 2001 Kabab-ji SAL ("Kabab-Ji"), a Lebanese company, entered into a Franchise Development Agreement ("FDA") with Al Homaizi, a Kuwaiti company. The FDA contained an English governing law clause and an ICC arbitration agreement clause with the seat in Paris. The arbitration agreement did not expressly state by which law it was to be governed.

A dispute arose under the FDA and Kabab-ji brought arbitration proceedings against Kout Food Group (Kuwait) ("KFG"), the parent company of Al Homaizi. KFG participated in the arbitration under protest, claiming it was not a party to the FDA. The Tribunal decided that whether KFG was bound by the arbitration agreement was a question of French law, as the seat of the arbitration was Paris. However, the Tribunal relied on English law to decide that KFG was an additional party to the FDA on the basis of "novation by addition". KFG was held to be in breach of the FDA and ordered to pay Kabab-Ji USD6.7 million.

Kabab-ji sought to enforce the award in England and KFG applied to have the award struck out in France. Both parties failed. The Paris Court refused to strike out the award. KFG appealed again and final judgment in France is still awaited. The English Commercial Court held that English law governed the question of whether the arbitration agreement in the FDA was valid and, applying English law principles, found that KFG was not a party to the FDA, or the arbitration agreement, but resisted making a final decision on enforcement until the French Court of Appeal had published its decision. Both parties appealed to the English Court of Appeal, which refused to enforce, agreeing that there was no real prospect of KFG being found to be a party to the arbitration agreement and giving summary judgment refusing recognition and enforcement of the ICC arbitration award. Kabab-ji appealed to the English Supreme Court.

Findings

The English Supreme Court found that English law applied to the arbitration agreement, in line with the decision in *Enka*, and that there was no real prospect of KFG being found to be a party to the arbitration agreement as there was no agreement in writing to this effect (and this was required because the FDA contained a no oral modification, or NOM, clause). It also upheld the summary judgment refusing recognition and enforcement of the ICC award because the outcome of the French proceedings had no bearing on the outcome of the English proceedings.

HFW Comment

This judgment gives clear direction on the way in which the English courts will interpret arbitration agreements that do not expressly specify the governing law applicable to them. The Supreme Court's dismissal of the suggestion that a novation by conduct or by addition will succeed in the face of a NOM clause is also valuable.

K Line Pte Limited v Priminds Shipping (HK) Co Limited [2021] EWCA Civ 1712

Court Court of Appeal

Date 18 November 2021

Summary

The Court of Appeal has held that demurrage is the exclusive remedy for loss arising from a breach of charterparty by failing to complete cargo operations within laytime.

Facts

K Line Pte Limited ("Owners") and Priminds Shipping (HK) Co Limited ("Charterers") entered into a contract of affreightment on an amended Norgrain 1973 form. Owners nominated the dry bulk carrier *Eternal Bliss* to carry soybeans from Brazil to China. On arrival, she was kept at anchor for 31 days and on discharge, the cargo had deteriorated. Owners settled with the receivers and commenced arbitration against Charterers, claiming damages for losses arising out of the settlement. These losses were in addition to their claim for demurrage but were also brought under the demurrage clause.

A question of law arose which was referred to the courts for determination under s. 45 Arbitration Act 1996. This was, what damage does demurrage liquidate? Charterers argued it is an exclusive remedy, liquidating all damages which flow from detention of the vessel beyond laytime. Owners argued that if there is a separate head of loss not directly related to detention (here, loss of cargo), that loss can be claimed in addition. At first instance, the Court found for Owners, allowing an additional claim for unliquidated damages for cargo claims resulting from the detention above and beyond demurrage for loss of use of the vessel. Charterers appealed.

On appeal, Charterers argued that to claim for a loss additional to loss of use of the vessel, Owners would have to show a separate breach beyond detention. The demurrage clause exclusively provides for compensation arising from delay/detention, so an additional breach is required to claim a separate loss. Owners argued that demurrage only quantifies loss of the freight-earning use of the vessel and does not seek to measure any other kinds of loss not taken into account when fixing demurrage rates. Therefore, if detention results in additional losses, Owners should be entitled to claim separately (albeit under the same breach).

Findings

The Court of Appeal allowed Charterers' appeal. Reversing the first instance decision, it concluded that "*...in the absence of any contrary indication in a particular charterparty, demurrage liquidates the whole of the damages arising from a charterer's breach of charter in failing to complete cargo operations within the laytime... Accordingly, if a shipowner seeks to recover damages in addition to demurrage arising from delay, it must prove a breach of a separate obligation.*" (Males LJ at para. 52). The reasons for this decision included:

1. For liquidated damages to liquidate only certain damages arising from the same breach struck the Court as an unusual commercial agreement, which in the circumstances should have been clearly stated if that really was the parties' intention.
2. While demurrage rates might often be agreed with the intention that they cover the loss of potential freight earnings, this does not mean that demurrage should liquidate only loss of earnings. Demurrage is often higher or lower than market freight rates and is more commonly decided by negotiation than by reference to the market.
3. Were demurrage held to liquidate only certain types of loss, it would not be obvious what would be covered. This would inevitably lead to disputes.
4. Owners typically take out insurance against cargo claims; charterers rely on demurrage rates to limit their liability. A different judgment might "disturb the balance of risk inherent in the parties' contract."
5. "*...to allow the appeal will produce clarity and certainty, while leaving it open to individual parties or to industry bodies to stipulate for a different result if they wish to do so.*"

HFW Comment

This significant judgment brings clarity on a point which has long divided opinion. The Court of Appeal approached the issue as one of principle and was keen to ground its decision in commercial common

sense, having consideration for the market. The decision restores the status quo: charterers will be relieved, whilst owners will need to establish two distinct breaches, with two heads of loss, if they are to succeed in a claim for damages in excess of demurrage. It is not yet known whether the case will progress to the Supreme Court.

Navig8 Chemicals Pool Inc v Aeturnum Energy International Pte Ltd [2021] EWHC 3132 (Comm)

Court: Commercial

Date: 23 November 2021

Summary

The Court ordered specific performance of a letter of indemnity ("LOI") under which, if it requested discharge of the cargo without production of the original bill of lading, a charterer was obliged to provide security to obtain the release of the vessel arrested by a party claiming to be the true owner of the cargo.

Facts

Navig8 Chemicals Pool Inc ("Navig8") had time chartered a vessel from a shipowner. Aeturnum Energy International Pte Ltd ("Aeturnum") chartered the vessel from Navig8 for a single voyage. The voyage charter provided that, at Aeturnum's request, the cargo would be discharged without presentation of the original bill of lading on provision of reasonable identification of the receiver to the master and in consideration of Aeturnum indemnifying Navig8 by means of an LOI. The LOI provided that Aeturnum would indemnify Navig8 for any liability, loss, damage or expense sustained by reason of delivering the cargo in accordance with its request, provide funds to enable Navig8 to defend any proceedings commenced in connection with the delivery of the cargo, and provide security to obtain release of the vessel if arrested in connection with delivery of the cargo. Navig8 had agreed similar terms in its time charter with the head owner.

At Aeturnum's request, Navig8 asked the master to discharge the cargo without the original bill of lading. A bank then alleged that it was the true owner of the cargo, began proceedings and arrested the vessel. Aeturnum failed to comply with Navig8's request to provide security for release of the vessel and Navig8 obtained an interim injunction requiring Aeturnum to do so. Aeturnum played no active part in the proceedings after the CMC and claimed to be in financial difficulties. Eventually, Navig8 provided the head owner with the necessary security to obtain the vessel's release and began proceedings to recover its losses from Aeturnum.

The issues before the Court were whether delivery of the cargo was in accordance with Aeturnum's instructions and the terms of the LOI; whether Aeturnum had breached its obligations under the LOI; whether specific performance should be ordered; and whether damages should be awarded.

Findings

The Court found in Navig8's favour. Delivery had been in accordance with Aeturnum's request and the LOI had therefore been engaged. The master had complied with his obligation to deliver to the party who he reasonably believed to be the party identified by Aeturnum. The production of identification was a condition precedent to the triggering of Aeturnum's obligations. Those obligations were triggered by the delivery of the cargo to the party identified by Aeturnum when delivery was made at Aeturnum's request, without production of the bill of lading. Aeturnum was in breach of its obligations under the LOI. It was an appropriate case for specific performance and damages were not an adequate remedy. Nothing had changed since Navig8 had been granted an interim mandatory injunction. Despite Aeturnum's disengagement from the proceedings and its alleged financial position, it remained possible that it would comply with an order for specific performance. If the order was not granted, Aeturnum's strategy of non-compliance and non-participation would have been rewarded by the court. Damages were awarded for loss and damages suffered by reason of the loss of use of the vessel during her arrest.

HFW Comment

The use of LOIs is common in commodities trading and the factual scenario in this case will be a familiar one. This judgment will be welcome for those having to rely on LOIs and is a reminder to consider carefully the terms of an LOI to establish (a) whether it offers sufficient protection if you are the party relying on it; or (b), the risks to which it exposes you if you are the party providing it. If you are part of a chain of LOIs, as here, it is also vital to ensure you are in a "back to back" position.

Nord Naphtha Limited v New Stream Trading AG [2021] EWCA Civ 1829

Court: Court of Appeal

Date: 30 November 2021

Summary

The natural reading of a particular provision in a force majeure clause was that Nord Naphtha Ltd (the "Buyer") had a right of repayment of advance payments in circumstances where the goods had not been delivered and New Stream Trading AG (the "Seller") had declared force majeure ("FM"). Where there were two possible constructions of such a clause, the Court would choose the construction which did not offend business common sense.

Facts

The parties contracted for the sale and purchase of low sulphur diesel (the "Product"), to be supplied by a refinery (the "Refinery"). Payment was to be 90% in advance. There was no express clause in the contract dealing with a right of repayment, but Clause 14.5 included the words: "*...nothing herein shall impair the obligations by the Seller to repay to the Buyer the amount of the advance payment or any Outstanding Advance Amount under this Contract in the event that the delivery...is not made...due to Force Majeure Event*".

Advance payment of around USD16m was duly made but in the event, the Refinery collapsed into liquidation, delivery did not take place, the Seller declared FM and the Buyer terminated the contract. The Buyer brought a claim for repayment of the advance payment on the grounds that the Seller was contractually obliged to repay it pursuant to Clause 14.5 or alternatively, on the grounds of unjust enrichment.

Following the Buyer's application for summary judgment, the Court found in its favour. In doing so, it was required to distinguish a previous decision in *Totsa Total Oil Trading SA v New Stream Trading AG [2020] EWHC 855 (Comm).* In that case, the Court had suggested obiter that a repayment clause in exactly the same terms as in the present case and where the refinery had also gone into liquidation, did not create a repayment obligation. In this case, the Court held that "*the starting point is that it would be a very surprising result if a buyer has no ability to reclaim its prepayment from [the Seller] in any circumstances. One can only make sense of Clause 14.5 by reading into it an express obligation to repay.*"

The Seller appealed, arguing that the construction of the contract was defective and that rather than considering the commercial context, "the starting point" should properly have been a close textual analysis of the clause. The word "*impair*" in Clause 14.5 suggested the preservation of a right and could not be construed as creating one. Further, in *Totsa*, the repayment obligation was stated elsewhere in the contract but not so here – and that difference was as a result of negotiation between the parties.

Findings

The Court of Appeal held that the principles of construction required it to ascertain the objective meaning of the language chosen by the parties, aiming to understand what a reasonable person with the background knowledge available to the parties when the contract was made would have understood them to mean. It must consider the Contract as a whole and if there are two possible constructions, it can opt for the construction consistent with business common sense. The Court must also consider the quality of the drafting and the possibilities that one side may have agreed something which it later regretted and that a provision may be a negotiated compromise.

The Court of Appeal found that the judgment in *Totsa* was irrelevant to the resolution of this case. The judge in *Totsa* "*was construing a materially different contract, in order to answer a different question, set in a different context.*" The contracts in the two cases were different and the Court of Appeal could not sensibly make any inferences as to why that was so. The words "*nothing herein shall impair*" were not the operative words of the clause; they were merely an introduction to what followed. To read those words as creating a limitation was unnatural and strained and "*the more natural reading of that clause is that it creates and confirms that the seller is obliged to repay...*" If the Seller's interpretation was right, clause 14.5 would be largely redundant. The Court of Appeal would "*take some persuading*" to find that a whole clause should be disregarded.

In conclusion, the Court of Appeal found that "*[a] reasonable person reading clause 14.5, armed with the information available to New Stream and Nord Naphtha as they entered the Contract, would have no real doubt that that clause provided Nord Naphtha with a right of repayment of the Advance in the*

event of non-delivery for force majeure reasons. The right is expressed by that clause, in words which are clear enough when read objectively."

HFW Comment

The root cause of this dispute was a clumsily worded repayment clause. It is another reminder of the importance of making sure that contracts are drafted clearly and simply and achieve what they are supposed to do. It is also a demonstration of the English courts' common sense approach to contractual interpretation.

HFW

HFW COMMODITIES CONTACTS

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

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

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

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

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

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

HFW

HFW COMMODITIES CONTACTS

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

MARCO CRUSAFIO
Partner, Monaco
T +377 92 00 13 23
M +377 (0)6 40 62 88 84
E marco.crusafio@hfw.com

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

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

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

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

© 2021 Holman Fenwick Willan LLP. All rights reserved.

Americas | Europe | Middle East | Asia Pacific