HFW

COMMODITIES CASE UPDATE

JULY 2018

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We are delighted to present the fifth Commodities Case Update which is being provided to a small group of clients quarterly. The update provides a summary of ten of the key cases relevant to the commodities sector from the last few months.

If you would be interested in receiving a bespoke training session, please contact Andrew Williams, Damian Honey or your usual contact at HFW.

HFW would also like to offer the opportunity to come in and present the update by way of a training session. We can speak about all ten cases, or about a smaller number which are of particular interest to you (and chosen by you).

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 them by way of the training session. Please do contact us if this would be of interest.

We hope that you find this update useful.

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1. **Phones4U Limited (in administration) v EE Limited [2018] EWHC 49 (Comm)**

Court Commercial Court
Date 16 January 2018

Case Summary

A party terminating a contract on the basis of one ground cannot then claim damages on other grounds. It cannot re-characterise events and claim alternative grounds for breach. A reservation of rights in the notice of termination may not be sufficient to protect alternative grounds.

Facts

In 2014, the mobile phone contract retailer Phones4U Ltd ("Phones4U") got into financial difficulties. A number of network operators opted to bring their agreements with Phones4U to an end, including EE. When the board of Phones4U agreed to appoint administrators, this gave EE a contractual right to terminate its trading agreement with the company.

Two days after Phones4U suspended its trading operations, EE sent a letter terminating Phones4U's authority to sell EE products and services under the agreement, expressly identifying the appointment of administrators and the associated clause, 14.1.2, as the reason for termination. EE included a reservation of its rights and remedies under the agreement in its letter.

Phones4U brought a claim against EE for payments from previous products sold for EE. However, EE counterclaimed for loss of bargain damages of over £200 million, arguing that Phones4U had repudiated its agreement with EE by failing to engage in normal trade activities as an authorised seller of EE products and services. Phones4U applied to the court for summary judgment dismissing EE's counterclaim.

Findings

The Court had to deal with four questions: first, was there a breach by Phones4U; second, if so, was it repudiatory; third, was there a renunciation by Phones4U; and fourth, did the terms of EE's termination letter defeat its claim for loss of bargain damages?

The Court held that there was a reasonable prospect that EE would be able to establish both that there was a breach by Phones4U and that it was repudiatory. The third issue, on renunciation, was not addressed as a result. Finally, the Court held that the terms of EE's letter defeated any claim it had for common law loss of bargain damages.

EE's letter communicated that it was terminating under a contractual clause. It did not clearly communicate that it was exercising its common law right to terminate for repudiatory breach. The letter did not establish that this alternative was even contemplated at the time.

The Court considered an earlier decision, *Boston Deep Sea Fishing & Ice Co v Ansell*[1]*,* which concluded that a party terminating a contract for a bad reason can defend itself against a claim for wrongful termination by reference to a good reason existing at the time of termination. It seems that the Court distinguished between the two situations because here, EE was bringing a claim for damages, not defending itself against a claim for wrongful termination. It concluded that this principle applied only in defence and not to give rise to a new cause of action as attempted by EE.

It is also noteworthy that the reservation of rights in EE's letter was not considered by the Court to be sufficient to save its claim for repudiation.

HFW Comment

This was a very costly decision for EE. It highlights the importance of getting grounds for and notice of termination right. Here, a notice relying solely on a contractual right to terminate and not identifying or relying on the common law right to terminate for repudiatory breach, resulted in the loss of the right to recover common law, "loss of bargain" damages.

[1] [1888] 39 ChD 339

2. Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited [2018] EWHC 163 (Comm)

Court Commercial Court
Date 2 February 2018

Summary

This was an appeal from arbitration. Owners brought a demurrage claim against charterers which charterers rejected as time barred. Owners argued (and the Tribunal agreed) that one element of their claim, relating to time spent waiting for orders, fell outside the demurrage regime. Charterers successfully appealed to the Commercial Court.

Facts

Lukoil as charterers entered into a voyage charter with Ocean Tankers as owners. The charterparty was based on a fixture recap which incorporated the standard terms of the ExxonMobil VOY2005 form and the Lukoil International Trading and Supply Company Exxonvoy 2005 clauses dated 30.05.2006 ("the LITASCO clauses").

Clause 2A of the LITASCO clauses set out a time limit for bringing demurrage claims whilst Clause 2B listed the supporting documents required to be submitted with a demurrage claim. Clause 4 stated that time waiting for orders was to be counted as demurrage, if the vessel was on demurrage.

Owners submitted a demurrage claim of around $772,000 which charterers rejected as time barred. One element of the claim was a claim under Clause 4 of the LITASCO clauses, for time spent waiting for orders. Owners argued that this element was not time barred as it was not a demurrage claim and fell outside the regime imposed by Clause 2. The Tribunal agreed and charterers appealed.

Findings

In reaching its decision, the Court relied upon the "abundance of recent high authority" on contractual interpretation, including *Investors Compensation Scheme Ltd v West Bromwich Building Society*[2], *Arnold v Britton*[3] and *Wood v Capita Insurance Services Ltd*[4].

The Court made plain that it was setting out to ascertain the objective meaning of the language which the parties had chosen to express their agreement. In order to achieve this, it would consider the language used and what a reasonable person would have understood the parties to have meant.

On reviewing the terms of the whole contract, including the recap, the ExxonMobil VOY2005 form and the LITASCO clauses, the Court agreed that a claim under Clause 4 of the LITASCO clauses for time spent waiting for orders whilst already on demurrage was itself to be counted as demurrage. Where the parties had wanted to draw a distinction between demurrage claims and other types of delay claim elsewhere in the contract, they had used clear language to do so.

As a result of this conclusion, it followed that the requirements under Clause 2A applied to that element of the claim and so the claim was time barred. The Court also considered the commercial context of the documentary requirements set out in Clause 2B, namely that these were imposed so as to allow swift accounting and an investigation of the claim whilst the facts were still fresh. These commercial considerations applied equally to a claim for time spent waiting for orders.

HFW Comment

This decision is an example of the clear approach that the English Court will adopt when asked to interpret an agreement between commercial parties. This approach allows parties contracting on the basis of English law to have commercial certainty. Commodities traders frequently contract on the basis of incorporated terms and should take care to ensure that the final version of the whole agreement properly reflects what the parties intend to agree. They should also beware of contractual time bars.

[2] [2010] 1 All ER 571
[3] [2015] AC 1619
[4] [2017] AC 1173

3. **Sea Tank Shipping A.S. v Vinnlustodin HF and others [2018] EWCA Civ 276 (the "AQASIA")**

Court Court of Appeal
Date 22 February 2018

Summary

It is not uncommon for commodities cargoes to sustain damage during a sea voyage and this is the first of several decisions covered in this update which consider the question of liability for that damage and opportunities to limit liability (see also 6 and 8). This case concerned damage sustained to a bulk cargo of fish-oil. The key issue was whether the package limitation in Article IV Rule 5 of the Hague Rules applied to reduce the shipowner's liability for the damage.

Facts

A cargo of about 2,000 tons of fish oil was loaded in bulk at one load port. Another 500 tons were commingled with this original cargo at a second load port. At the discharge port, around a quarter of the cargo was found to be damaged. A dispute arose between the charterer and the shipowner.

The charterer claimed over US$367,000 with interest and costs, whilst the owner relied on Article IV Rule 5 of the Hague Rules, incorporated into the charterparty, to argue that liability was limited to £57,730, on the basis of the limitation allowance of £100 per metric ton of cargo damaged.

Article IV rule 5 of the Hague Rules provides:

"… *Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100l per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading* ...."

The charterer argued that this rule did not apply to bulk cargoes. The parties agreed that despite an arbitration clause in the charterparty, they would allow the English Commercial Court to determine this question as a preliminary issue. At first instance, the Court found that "unit" meant a physical item for shipment and not a unit for measurement, so that Article IV Rule 5 did not operate to limit the shipowner's liability. The shipowner appealed.

Findings

The Court of Appeal upheld the Commercial Court's decision. It confirmed that Article IV Rule 5 of the Hague Rules does not apply to liquid or bulk cargoes, with the result that the unit and package limitations do not apply to them. The Court of Appeal approved an earlier unreported decision which found that "units" are "identifiably separate items of cargo, as in fact shipped." The term "unit" refers to a physical item of cargo rather than a unit of measurement such as kilograms or tonnes.

Whilst the owner argued that the charterparty itself only contemplated carriage of a bulk cargo, so that the Court had to give meaning to the application of Article IV Rule 5 in those circumstances, the Court ruled that individual rules would only be available to rely upon in the circumstances in which they clearly apply.

HFW Comment

For commodities traders acting as charterers, this is a helpful decision as it clarifies – and limits – the circumstances in which a shipowner can limit its liability for cargo damage during a sea voyage.

4. **Songa Chemicals A.S. v Navig8 Chemical Pool Inc [2018] EWHC 397 (Comm) (the "SONGA WINDS")**

Court Commercial Court
Date 2 March 2018

Summary

Letters of Indemnity (LOIs) using standard P&I club wording are regularly required to protect shipowners in circumstances where they are asked to discharge cargo without production of a bill of lading. This decision will be of interest to commodities traders, and banks, who may find themselves holding original bills and wanting to recover losses under an LOI, or needing to rely on an LOI for protection.

Facts

The case arises out of a chain of letters of indemnity issued in turn by Glencore to Navig8 and Navig8 to Songa, seeking discharge of cargo to Aavanti Industries Pte (Aavanti) in the absence of the original bills of lading. The cargo was in fact discharged to Aavanti's buyer, Ruchi Soya Industries Ltd (Ruchi).

Aavanti's purchases were financed by Société Générale ("SocGen"). After discharge of the cargo, SocGen claimed to be the rightful bill of lading holders and brought a claim against Songa for misdelivery of the goods. Songa passed the claim along the chain of LOIs until it reached Glencore. Glencore, and all the parties along the chain, claimed that the LOIs had not been engaged because discharge had been effected to Ruchi and not Aavanti.

Findings

The Court disagreed. It held that on the facts, delivery to Ruchi did trigger the various LOIs because Ruchi was representing or acting on behalf of Aavanti for the purpose of the LOIs.

Ruchi in this case was Aavanti's buyer but had also acted as their agent in previous transactions. It was common practice between Aavanti and Ruchi for delivery to be made without production of bills of lading or even payment. The Court also acknowledged that Aavanti had no presence or storage tanks at either of the delivery ports from where it was to receive and sell the cargo, whereas Ruchi did.

Therefore, it could be concluded that the cargo was delivered to Aavanti (with Ruchi as receiver), triggering the chain of LOIs and activating Navig8's obligation to indemnify Songa against SocGen. The judgment accepted and continued the line of legal reasoning in *Bremen Max*[5] which states that delivery to the party named as receiver in an LOI is a pre-condition of liability.

HFW Comment

This case demonstrates the care required when discharging without bills, particularly where there is a contractual chain. It is important that indemnities are on back to back terms and that those terms are followed exactly, so as to ensure that they really do provide the protection they purport to offer.

[5] [2009] 1 Lloyd's Rep 81

5. **Lehman Brothers Special Financing v National Power Corporation [2018] EWHC 487 (Comm)**

Court Commercial Court
Date 12 March 2018

Summary

This decision deals with the close out provisions under the 2002 ISDA Master Agreement. There was a disparity in what the parties considered a reasonable close out payment. The Court ruled that such a determination must be on good faith and "using commercially reasonable procedures in order to produce a commercially reasonable result".

Facts

National Power Corporation ("NPC"), controlled by the government of the Philippines, issued US$300 million of bonds maturing in 2028. As part of this, it entered into a forward currency swap with Lehman Brothers Special Financing ("LBSF").

Following the collapse of Lehman Brothers, NPC terminated the transaction and designated an Early Termination Date of 3 November 2008. On the same day, it obtained quotations from three leading market dealers and a few days later, entered into a replacement transaction. NPC then submitted a calculation notice seeking payment from LBSF based on this replacement transaction.

LBSF challenged the calculation notice, arguing that NPC had not acted in good faith, nor used "commercially reasonable procedures" in order to reach a "commercially reasonable result" as required by the 2002 ISDA Master Agreement. The relevant provision also stated that information including quotations for replacement transactions could be considered. LBSF later commenced legal proceedings against NPC and subsequently, NPC purported to withdraw the calculation notice and submit a revised one based on the first quotation it had obtained for the replacement transaction. This was on less favourable terms to NPC, thereby increasing the amount NPC was claiming from LBSF.

Findings

The Court confirmed that in English law, there is a difference in the standards of reasonableness required of the determining party under the 1992 and 2002 ISDA Master Agreements. The 1992 standard is to "reasonably determine in good faith", which only requires the determining party not to reach a determination that no reasonable non-defaulting party could reach. The 2002 standard requires the determining party to "act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result". This is a stricter test than the 1992 standard, requiring the determining party to act in a way that an objective third party would consider commercially reasonable. In addition, there was a separate obligation to "produce a commercially reasonable result".

The Court found that NPC was entitled to rely upon the replacement transaction to determine the amount due, after deducting amounts which were agreed by both parties. It also held that it would not have been commercially reasonable to rely on the indicative quotations obtained on the Early Termination Date because firm quotations and an actual price had been obtained later.

NPC was not allowed to withdraw its calculation and serve an amended statement; serving the calculation was a contractual event that could not be reversed. Only the court or tribunal could declare an error after that.

HFW comment

This decision contains some useful guidance on the operation of the close out provisions under the ISDA 2002 Master Agreement and also highlights the different requirements for reasonableness under the 1992 and 2002 ISDA Master Agreements. As it was subject to the stricter, 2002 standard, NPC had to show that it had acted in a way that an objective third party would consider commercially reasonable. It is important to remember that this does not mean there is one "right" way to determine the amount payable on close-out - what is required is that the determining party can justify its approach. The Court did not prescribe what NPC ought to have done - although it did find that NPC was entitled to rely on the replacement transaction and that although a party is entitled under the Master Agreement to rely on indicative quotations, this would not be justifiable where firm quotations or an actual price are available.

6. Sevylor Shipping and Trading Corp v Altfadul Company for Food, Fruits and Livestock and Siat [2018] EWHC 629 (Comm) (the "THE BALTIC STRAIT")

Court Commercial Court
Date 23 March 2018

Summary

This decision addressed several interesting points in relation to a buyer's right to recover for loss or damage to cargo during a voyage. The Court found that the buyers, as bill of lading holders, were entitled to claim from the shipowners the full loss represented by damage to the cargo, irrespective of any earlier recovery from the seller under the sale contract.

Facts

The case arose out of damage to a cargo of bananas during a sea voyage. The buyers reached an agreement with the sellers under the CIF sale contract whereby the sellers effectively gave them the benefit of cargo insurance payments by giving them an equivalent amount of credit in relation to subsequent sales. This arrangement was held by the tribunal to be by way of settlement of the sale contract dispute rather than an insurance payment.

The tribunal also allowed the buyers, as bill of lading holders, to recover two sums from the carriers, as follows:

1. buyers' own recoverable loss (giving credit for the sum already credited to buyers by sellers); and,
2. the additional sum of the loss suffered by sellers in settling with buyers, but claimed by buyers under s2(4) of the Carriage of Goods by Sea Act 1992 (COGSA 1992).

This second element of the recovery was challenged by the shipowner on appeal to the English Commercial Court.

The buyers argued that under English common law, a bill of lading holder claiming under the bill of lading can recover full damages despite an earlier recovery from an intermediate seller ("earlier" meaning prior to the date on which damages were awarded). Accordingly, they were entitled to recover full damages without reference to the sum already paid by the sellers to settle the sale contract dispute between them.

The shipowners argued that the authorities for this were questionable and based on a contractual title to sue under the old Bills of Lading Act 1855 (rather than COGSA 1992). The leading modern authority and analysis in this area held that the doctrine of full recovery in respect of damaged cargo is limited to cases where the claimant owned or was entitled to immediate possession of the cargo at the time it was damaged (an issue which had not been dealt with in the tribunal's award).

Findings

The Court agreed with the buyers that they were entitled to claim the full loss represented by the damage to the banana cargo, irrespective of any earlier recovery from sellers.

This meant that two further issues under COGSA 1992 no longer mattered (although the Court did decide upon them). We do not address them in this summary.

HFW Comment

Richard Mabane and Alessio Sbraga from HFW's London office successfully defended the insurers SIAT in this case. (The insurers were the ultimate defendants, as assignees of the rights of the sellers that had included the rights of buyers under the bills of lading, previously assigned by buyers to sellers under an earlier assignment.)

Damage to cargo in transit can give rise to the need to conduct a complex analysis of claims and rights to recover. This is a helpful decision for cargo interests, in particular because of the ruling that a full loss for damage to cargo can be claimed from the shipowner, irrespective of earlier recovery from an intermediate seller; a shipowner will not be able to rely on a technical defence to avoid liability where they ought to be responsible for the loss.

7. **London Arbitration 12/18 (2018) 1001 LMLN 3**

Publication Lloyds Maritime Law Newsletter
Date 13 April 2018

Summary

Sellers claimed that buyers had repudiated a sale of goods contract by failing to open a letter of credit (LC) in time. The Tribunal rejected the idea that the obligation on the buyer under a sale contract to open a LC is a condition entitling the seller to terminate if breached.

Facts

The claimant sellers agreed to ship and supply road salt to the respondent buyers. The sellers claimed that the buyers had repudiated the contract by failing to open a LC in time, claiming damages by way of loss of profit. The buyers denied liability and contended it was the sellers who were in breach for early termination.

The contract required the buyer to open a LC within two banking days "*from the date of this contract"*.

The sellers signed on 6 September and this date also appeared on every page and twice on the signature page. It was sellers' case that a LC had to be in place by 8 September. The buyers argued that they had signed and returned the contract on 7 September and so had until the end of 9 September to open the LC. Accordingly, buyers contended that sellers were premature in terminating the contract on 9 September. Alternatively, they argued that breach of the deadline for opening a LC was a breach not of a condition of the contract but of an innominate, or intermediate, term, which did not deprive sellers of substantially the whole benefit of the contract in a way that would have justified repudiation.

Findings

The Tribunal agreed that the effective date of the contract was 7 September, when the contract had been signed and returned to buyers by sellers.

The Tribunal then turned to buyers' email on 9 September, advising sellers that the process of opening a LC would take longer than hoped but that cooperation was still anticipated. Sellers terminated several hours later in response, later arguing that buyers' email was a repudiatory breach of a condition by failing to open the LC on time. After reviewing the case law, the Tribunal ruled that a requirement to open a LC within two days was an innominate term. Sellers had themselves acknowledged that there was a risk of delay in setting it up. The failure to open a LC within two days was not a breach which would deprive the sellers of substantially the whole benefit of the contract. It was therefore not a repudiatory breach entitling sellers to terminate and their termination was wrongful. The Tribunal acknowledged that the requirement to open a LC can often be a condition precedent to a seller performing its obligations, but they did not equate a condition precedent to a condition of the contract giving rise to a right to terminate if breached.

HFW Comment

This decision suggests that there is uncertainty as to whether a contractual requirement to open a LC will be a condition entitling a seller to terminate if not met or a mere innominate term. If an innominate term, there is further uncertainty as to the point at which a seller would be entitled to terminate if no LC is opened. Sellers should exercise caution as to whether and when to terminate a contract following failure by a buyer to open a LC. It may assist sellers to state in the contract that opening a LC is a condition of the contract - but there is a risk that a Tribunal may not uphold this.

8. AP Moller-Maersk v Kyokuyo Limited (the "MAERSK TANGIER") [2018] EWCA Civ 778

Court Court of Appeal
Date 17 April 2018

Summary

In another decision relating to liability for cargo damaged during a sea voyage, the Court of Appeal considered Article IV Rule 5 of the Hague-Visby Rules and how its package limitation provisions apply to containerised cargoes where no bill of lading is issued. The Court ruled that it is not necessary to include packaging in the description of the cargo on the bill of lading - it is sufficient to state the number of units inside a container.

Facts

Large pieces of unpacked tuna were transported in three refrigerated containers. Tuna loins were packed as individual units and frozen tuna pieces were stuffed in their bags. The contracts of carriage incorporated the defendant's standard terms and conditions containing an implied term that shippers were entitled to demand a bill of lading. A draft bill of lading was drawn up, enumerating the tuna pieces as individual units within the containers. Three of the twelve packages were transhipped onto another Maersk vessel. Due to an alarm discharging in one container, the contents were re-stuffed in another container and shipped on the original ship, Maersk Tangier. No bill of lading was ever issued for the three containers on their second voyage since the parties wanted to avoid delays. Non-negotiable sea waybills were issued after the voyage at the agreement of the parties. On discharge, it was alleged that raised temperatures and rough handling during re-stuffing had damaged the tuna.

Findings

First, the Court had to decide whether the Hague-Visby Rules applied at all. The Hague-Visby Rules only apply to contracts of carriage which are 'covered by a bill of lading'. In this case, the carrier argued that because waybills had been issued, the Hague-Visby Rules did not apply. Both the Commercial Court and the Court of Appeal rejected the carrier's argument. The relevant question was not whether a bill of lading was actually issued, but whether the contract contemplated the issuing of a bill, as here, in which case the Rules continue to apply even where a waybill is issued.

The next issue was whether the tuna pieces were individual "units" for the purpose of Article IV Rule 5. The Court of Appeal held that each individual piece, as enumerated on the waybill, constituted a unit, rather than the three refrigeration units. Article IV Rule 5 did not require enumeration of the cargo "as packed". It merely required that the number of packages or units inside the container be accurately stated in the bill of lading. In this case, the waybills stated that the containers contained a certain number of pieces of tuna. Each piece of tuna was in fact a 'unit'. The waybills therefore accurately enumerated the number of units in the containers.

HFW Comment

This case clarifies several points for parties shipping commodities by sea. First, it clarifies that the Hague-Visby Rules will apply where the contract contemplates the issue of a bill of lading, even if ultimately, a bill is not issued. Second, it clarifies what constitutes a "unit" under Article IV Rule 5 of the Rules.

9. RBRG Trading v Sinocore International [2018] EWCA Civ 838

Court Court of Appeal
Date 23 April 2018

Summary

This case concerns the enforceability of a CIETAC arbitration award in circumstances where the underlying claim involved an element of fraud. RBRG argued that the award was not enforceable as it was contrary to public policy under s103 Arbitration Act 1996. The English Court of Appeal ruled that public policy grounds should be very carefully applied, and limited to circumstances where the contract is unlawful in the place of performance or the award gives effect to corrupt practice.

Facts

The case related to a contract for the sale by Sinocore of rolled steel coils to RBRG. Payment was to be by irrevocable letter of credit (LC). It transpired that forged or misdated bills of lading were presented in order to comply with a purported amended shipment date under the LC. Payment under the LC was prevented by an injunction and Sinocore purported to terminate the sale contract on the basis of repudiatory breach by RBRG.

RBRG commenced a CIETAC arbitration in China under the sale contract and Sinocore counterclaimed for damages caused by RBRG's breach in attempting to amend the shipment date under the LC. Sinocore won the arbitration and, since China and the UK are both signatories to the New York Convention, proceeded to attempt enforcement against RBRG in the UK by applying to the English court. RBRG argued that recognition of the award would be contrary to public policy under s103 Arbitration Act 1996. The English Commercial Court rejected RBRG's argument and upheld the award. RBRG appealed on 4 grounds: first, that the judge had applied an overly narrow test in determining that Sinocore's claim did not rely on its own fraud; second, had the judge applied the correct test, he would have considered balancing factors from *Patel v Mirza*[6] which would have led him to refuse enforcement of the award; third, the judge was in any event incorrect to find that Sinocore's claim was not based on its own illegality: Sinocore's loss was caused by its own decision to present forged bills; finally, that the judge was wrong to enforce the award in light of its finding that Sinocore was conducting "plainly fraudulent" parallel proceedings in China.

Findings

The Court of Appeal dismissed the application of *Patel v Mirza* in the context of s103 Arbitration Act 1996, recognising a strong presumption of enforceability regarding New York Convention awards and the extreme care with which public policy defences must be treated.

The Court of Appeal found a number of reasons why the attempted fraud by Sinocore was not sufficiently connected to engage the public policy exception to enforcement. The LC itself as amended by RBRG was the operative cause of loss and not tainted by the fraudulent bills issued by Sinocore. As the CIETAC tribunal had held, Sinocore's attempt could be characterised at most as a failed attempted fraud and as "essentially collateral"; neither RBRG nor the bank were deceived by it. The public policy grounds for refusal were therefore not triggered.

HFW Comment

Brian Perrott, Marie-Anne Boothroyd and Prashant Kukadia from HFW's London office successfully defended Sinocore in this case. The Court of Appeal affirmed the importance of upholding the New York Convention on arbitration even in circumstances where the conduct of the party relying on enforcement is unacceptable. This pro-enforcement attitude is helpful for those engaged in international arbitration, in particular when looking to enforce New York Convention awards against assets held in the UK.

[6] [2015] 2 WLR 405

10. Rock Advertising Limited v MWB Business Exchange Centres Limited [2018] UKSC 24

Court Supreme Court
Date 16 May 2018

Summary

"No oral modification" (NOM) clauses are relatively common in contracts. They provide that a contract can only be varied in writing, signed by both parties. There has always been doubt as to whether NOM clauses are effective. This decision by the Supreme Court has brought an end to that doubt by finding that they are.

Facts

MWB was the licensor of serviced office space, with Rock being one of its licensees on a fixed term of 12 months. The licence agreement contained a standard NOM clause, stating that all variations must be set out in writing and signed to take effect.

Rock had fallen into arrears with its monthly licence fees, prompting MWB to serve a notice to terminate the licence. Rock argued that an oral agreement had been reached between MWB's credit controller and a director of Rock to reschedule the monthly licence fees. At first instance, the Court held that an effective oral agreement to vary the contract had indeed been reached, despite the NOM clause. The Court of Appeal agreed.

Findings

MWB appealed to the Supreme Court on two grounds: first, was the oral variation valid? Second, was there valid consideration between the parties?

On the first issue, the Supreme Court held that the oral variation was not valid. The parties had either overlooked the NOM clause or deliberately risked invalidity.

Lord Sumption gave the leading judgment. He emphasised the importance of NOM clauses and classified arguments advanced against them as purely conceptual and divorced from business practicality. In reaching this conclusion, he considered party autonomy, emphasising that parties can validly agree to bind their future conduct. If they did not wish to be bound by the NOM clause, the parties could always have agreed to make a written change deleting it. Lord Sumption also made the point that parties include NOM clauses in their agreements for good reason: they prevent written agreements being undermined; they avoid misunderstandings giving rise to disputes; and they make internal management of who has authority to agree variations easier. (In fact this case itself demonstrated several of these factors.)

The Supreme Court briefly considered whether there could have been an estoppel, creating a collateral agreement, but this did not arise on the facts as there was no demonstrable indicator of a valid and agreed oral variation that could then be relied upon; there was only reference to an informal promise. To extend the doctrine of estoppel to cover this contingency would destroy the advantage of certainty for which the parties had contracted in the first place.

Given the Supreme Court's conclusion in relation to the first ground of appeal, there was no need to rule on the second.

Commentary

This decision is generally to be welcomed because it makes clear that NOM clauses are effective. When varying their contracts, parties should check to see whether their contracts contain a NOM clause and if so, pay careful attention to its terms in order to achieve the desired variation successfully.

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