HFW

COMMODITIES CASE UPDATE

MAY 2021

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May 2021

Introduction

We are delighted to present the Spring edition of the Commodities Case Update for 2021, our eleventh in the series. The update provides a summary of ten of the key cases relevant to the commodities sector so far this year.

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.

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Secretariat Consulting PTE Ltd anors v A Company [2021] EWCA Civ 6

Court: Court of Appeal

Date: 11 January 2021

Summary

There should be no tension between any fiduciary duty owed by an expert to a client and the expert's overriding duty to the court or tribunal. Where there is a contractual duty owed by an expert to its client to avoid conflicts of interest, that duty can extend to other companies in the expert group, depending on the facts. Whether an expert can act both for and against a client will depend on degree of overlap.

Facts

The developer of a petrochemical plant retained Singapore based Secretariat Consulting PTE Ltd (SCL) in an ICC arbitration commenced by a sub-contractor against a project manager. Later on, the project manager commenced its own, separate ICC arbitration against the developer, claiming unpaid fees. The project manager then approached the UK arm of Secretariat, Secretariat International UK (SIU) to provide expert services in relation to quantum. SIU accepted this instruction. The developer objected. The project manager and Secretariat tried to justify the acceptance of both retainers, arguing that information barriers were in place to prevent sharing of confidential information and that the experts were appointed in different disciplines and different geographic locations and had been engaged through different companies in the Secretariat group.

The developer sought an injunction from the Court to prevent SIU from acting in the second arbitration. At first instance, the Court held that SCL, which was engaged first, owed its client a fiduciary duty of loyalty which extended throughout the group. Therefore SIU could not provide similar expert services to the third party project manager in the second set of arbitration proceedings. SCL appealed, arguing that an expert's overriding duty to the court or tribunal would negate any fiduciary duty of loyalty and an expert could not put its own interest before that overriding duty.

Findings

The Court of Appeal rejected SCL's appeal but on a different basis. It was reluctant to find that there was a fiduciary duty of loyalty and ultimately did not need to do so. It concluded that experts may have a duty of loyalty but this is not contradicted by any duties to the court – there should be no tension between those two duties and complying with the overriding duty of the court is the best way in which an expert can satisfy its professional duty to the client.

The Court of Appeal did not need to consider whether there was a fiduciary duty in this case because it held that from the time of its engagement, SCL owed the respondent developer a contractual duty to avoid conflicts of interest. SCL's terms of engagement stated there "is not conflict of interest and…you will maintain this position for the duration of your engagement." That contractual duty was owed by the other entities in the Secretariat group. This conclusion was reached for two main reasons; (i) the conflict check was carried out across all companies in the Secretariat group and (ii) Secretarial International appears on invoices and email addresses and the company consciously markets itself as a global firm with regional offices rather than each office existing as a separate entity.

Finally, and most importantly, the Court of Appeal held that there was a conflict of interest in this case. SCL was advising the respondent developer in relation to its commercial position as well as giving expert evidence and SIU would be giving advice against the respondent. Experts can act both for and against the same client and this is common in larger companies. However, the key issue was one of degree. In this case, there was overlap in parties, role, project and subject matter. This was too much overlap for Secretariat to reasonably support opposite positions on similar issues.

HFW Comment

This case has identified some helpful guidance in relation to the appointment of experts, which could apply in other professional services contexts. It explains the relationship between fiduciary duty to a client and overriding duty to the court or tribunal, as well as clarifying the part played by degree of overlap in determining whether a conflict of interest arises. It is likely to be relevant in the context of global commodities trading, where experts are frequently retained by both parties to a dispute in different jurisdictions.

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Noble Chartering Inc v Priminds Shipping Hong Kong Ltd ("Tai Prize") [2021] EWCA Civ 87

Court: Court of Appeal

Date: 28 January 2021

Summary

Voyage charterers are not liable to owners for losses caused by misdescription of the condition of cargo in bills of lading.

Facts

The parties had entered into a voyage charter of the vessel "Tai Prize" for the carriage of bulk soya beans from Brazil to China. A "clean on board" bill of lading was signed on behalf of the master by agents of the head owners. However when the vessel arrived at the discharge port, the cargo was found to be damaged. The receivers brought a successful arbitration claim against the head owners in which the arbitrator found that pre-existing damage to the cargo was not apparent to the master who authorised the signature of the bill of lading. However, the shippers who had actually prepared that bill and presented it to the master for signature "*must be taken to have knowledge of the actual condition of the beans*".

Moving along the contractual chain of liability, head owners settled their claim against disponent owners who then sought to recover their liability from the voyage charterers at arbitration. They claimed that they were entitled to an indemnity because the condition of the cargo was misdescribed in the draft bill of lading. The master had no reason to find that out and it was the misdescription which had caused the loss.

The disponent owners' claim succeeded on two grounds. Firstly, the cargo was not in good order and condition when shipped and so was misdescribed. They were entitled to be indemnified against the consequences of the bill of lading being inaccurate as to the apparent condition of the cargo. Secondly, there was an implied warranty by the shippers (and therefore by the charterers who were responsible for the acts of the shippers) that the statements in the draft bill of lading were true because the shippers/charterers were in a position to ascertain them, whereas the master could not. Therefore the charterers were in breach of warranty. The charterers made a successful appeal to the Commercial Court, which decided that the arbitrator had made an error in law. Disponent owners appealed.

Findings

The Court of Appeal dismissed the appeal and upheld the Commercial Court's finding that generally speaking, shippers/charterers make no representation as to the apparent condition of the cargo when they present a bill of lading to the master. Instead it is merely an invitation to the master to make his own assessment. It is well-established that representations on bills of lading must be based on the master's reasonable assessment of the apparent condition of the cargo at the time of shipment. On the findings of fact made by the arbitrator, the statement in the bill of lading that the cargo was shipped in apparent good condition was accurate. In the circumstances, there was no need to imply an indemnity.

HFW Comment

Presentation of a bill of lading to the master for signature is a routine part of life for commodities traders who regularly act as voyage charterers in an FOB context. It can be easy to lose sight of the risks and potential liabilities associated with it. This case is a helpful restatement of those risks and liabilities – and also confirms the limits to them.

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Okpabi & Ors v Royal Dutch Shell Plc & Anor [2021] UKSC 3

Court: UK Supreme Court

Date: 12 February 2021

Summary

The Supreme Court allowed an appeal which means that a group of Nigerian citizens can bring a claim in tort in the English courts against Royal Dutch Shell Plc ('RDS'), as the UK incorporated parent company of the Shell group of companies, for the actions of one of its subsidiaries, Shell Petroleum Company of Nigeria Limited ('SPDC').

Facts

SPDC operates in and around the Niger Delta. A large group of local inhabitants (the Appellants) allege that leaks from oil pipelines operated by SPDC have impacted their lives, health and local environment. They have brought negligence claims against both SPDC and RDS. The claim against RDS is brought on the basis that RDS owes them a duty of care either because it exercised significant control over material aspects of SPDC's operations and/or because it assumed responsibility for SPDC's operations.

RDS applied under CPR Part 11(1) for orders declaring that the court had no jurisdiction to try the claims against it, or should not exercise such jurisdiction as it had.

At first instance, the High Court held that although the court had jurisdiction to try the claims against RDS, the claims did not have a real prospect of success and so the conditions for granting permission to serve the claim on SPDC as "necessary or proper party" to the claims against RDS for the purposes of the jurisdictional gateway was not made out. The Appellants appealed but the majority of Court of Appeal reached the same conclusion. The Appellants obtained permission to appeal to the Supreme Court on two main issues: (i) whether the Court of Appeal materially erred in law; and (ii) if so, whether the majority was wrong to decide that there was no real issue to be tried.

Findings

The Supreme Court allowed the appeal. It first reiterated the importance of proportionality in relation to jurisdiction issues. The analytical focus should be on the particulars of claim, or witness statement setting out the details of the claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. The Supreme Court indicated that the filing of large quantities of evidential material is inappropriate. (In this case there were over 2000 pages of evidence.)

In relation to the appeal, on the first issue, the Supreme Court found that the Court of Appeal had materially erred in law. It was drawn into conducting a mini-trial which led it to the adoption of an inappropriate approach to the contested factual issues and to the documentary evidence. Instead of focusing on the pleaded case and whether that disclosed an arguable claim, the court was drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. In addition, the Court of Appeal had appeared to accept a 'general principle' that a parent company could never incur a duty of care in respect of the activities of a subsidiary by maintaining group-wide policies and guidelines; it may also have focussed inappropriately on the issue of control. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity. That may or may not be demonstrated by the parent controlling the subsidiary. Finally, the Court of Appeal erred in its approach to whether a duty of care exists in this type of case.

The Supreme Court also held that there were real issues to be tried. In particular, the Shell group's vertical corporate structure, with organisational approval generally preceding corporate approval, allowed for delegation of authority, including in relation to operational safety and environmental responsibility. How this worked in practice and the extent to which authority was delegated, clearly raised triable issues.

HFW Comment

This case confirms that the English courts have jurisdiction over claims in tort involving a defendant foreign company, where jurisdiction is founded on an alleged common law duty of care owed by the UK domiciled parent company. A similar issue was addressed in the recent Supreme Court decision of Lungowe v Vedanta Resources plc [2019] UKSC 20. It seems likely that more claims will follow.

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Republic of Sierra Leone v SL Mining Limited [2021] EWHC 286 (Comm)

Court Commercial Court

Date 15 February 2021

Summary

The Commercial Court has held that non-compliance with a multi-tier dispute resolution provision is a question of admissibility rather than jurisdiction. The issue therefore fell within the competence of the arbitration tribunal and did not give rise to a ground for appeal under s.67 of the Arbitration Act 1996.

Facts

The underlying dispute concerned the suspension and subsequent cancellation of a large-scale mining licence agreement ('MLA') granted by the Republic of Sierra Leone ('the Claimant') to SL Mining ('the Defendant'). The MLA contained a multi-tier dispute resolution provision, which stated that:

"*c) In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with the International Rules of Conciliation and Arbitration of the... ICC ...*".

The Defendant served a Notice of Dispute on 14 July 2019. In August, the Defendant invoked the ICC's Emergency Arbitrator procedure and served a request for arbitration ('RFA'). The Claimant subsequently challenged the Tribunal's jurisdiction on the basis that no arbitration proceedings could be commenced before 14 October 2019 (three months from the Notice of Dispute). In a Partial Final Award, the Tribunal rejected the Claimant's challenge, concluding that the Defendant's alleged failure to comply with the multi-tier dispute resolution provision was a matter of admissibility and not of jurisdiction. The Claimant issued proceedings challenging the Partial Final Award under s.67 of the Arbitration Act 1996 (s.67), in relation to the substantive jurisdiction of the Tribunal.

The issues before the Court were: (1) whether the challenge to the prematurity of the RFA was a challenge to the substantive jurisdiction of the Tribunal and thus fell within s.67; (2) if so, did the Claimant consent to the issue of the RFA and/or waive the Defendant's non-compliance; (3) what was the proper construction of the multi-tier dispute resolution provision; and (4) did the Defendant comply with that provision.

Findings

The Court ruled that there was no basis for any challenge to the Partial Final Award under s.67. The alleged prematurity of the RFA was a challenge of admissibility rather than substantive jurisdiction. The Court cited various academic commentaries and international authorities in support of the distinction between admissibility and jurisdiction. In summary, it concluded that "*if the issue relates to whether a claim could not be brought to arbitration, the issue is ordinarily one of jurisdiction ... whereas if it relates to whether a claim should not be heard by the arbitrators at all, or at least not yet, the issue is ordinarily one of admissibility*". Although no longer determinative, the Court decided the remaining three issues in favour of the Defendant.

HFW Comment

The judgment provides welcome clarification on the distinction between jurisdiction and admissibility in English law. The Court's interpretation of the multi-tier dispute resolution clause is also noteworthy for its finding that a failure to reach amicable agreement within a stipulated time-period does not necessarily prevent the parties bringing arbitration proceedings before the end of such a period

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Black Sea Commodities Ltd v Lemarc Agromond Pte Ltd [2021] EWHC 287 (Comm)

Court: Commercial Court

Date: 15 February 2021

Summary

The parties reached a short form agreement on key terms for a sale of goods. Negotiations later broke down and they never agreed a formal contract. While neither party had objected to a proposed GAFTA arbitration clause contained in the draft contract, that did not mean that an arbitration agreement had been reached. Further, a GAFTA arbitration agreement was not implied by custom or usage.

Facts

In March 2018, the claimant ('Black Sea') and the defendant ('Lemarc Agromond') were involved in negotiations for the sale of Ukrainian corn FOB Odessa. On 9 March, they agreed some simple contractual terms such as price and quantity. Subsequently, they exchanged draft conditions and amendments by email. The draft conditions included a GAFTA arbitration clause. On 14 March, Black Sea pulled out of the negotiations and no formal contract was agreed.

Lemarc Agromond commenced GAFTA arbitration, arguing that the parties had concluded a contract and Black Sea was in breach by refusing to perform. Black Sea challenged the Tribunal's jurisdiction on the basis that the parties had not concluded a contract and even if they had, it did not include an arbitration agreement. The Tribunal concluded that it did have jurisdiction and subsequently found for Lemarc Agromond on the merits. Black Sea challenged both awards pursuant to section 67 of the Arbitration Act 1996 (the '1996 Act'). The Court considered two main questions: (i) Did the parties agree to resolve their disputes by GAFTA arbitration; and (ii) Alternatively, was a GAFTA arbitration agreement implied into the parties' contract by trade/custom.

Findings

Finding in favour of Black Sea, the Court set both awards aside. The Tribunal did not have jurisdiction to resolve the dispute. While the Court did not need to decide whether Black Sea and Lemarc Agromond had concluded a binding contract, it noted that a binding agreement was likely reached on 9 March. Nevertheless, this did not incorporate any arbitration agreement. In relation to the subsequent unsuccessful negotiation of draft conditions, the Court held that the doctrine of separability enshrined in s. 7 of the 1996 Act was irrelevant; the parties were not agreed on the terms of a formal contract and so they did not conclude an arbitration agreement capable of being separated. Lemarc Agromond was not allowed to "*pick and mix*" the terms of the draft conditions. Analysing the communication of the parties from the perspective of offer and acceptance, there was no meeting of the minds.

The Court considered whether, if the parties reached an agreement on 9 March, the agreement included a GAFTA arbitration agreement as a term implied by trade custom or usage. This argument, raised by means of a late amendment, failed. Lemarc Agromond had not established that a GAFTA 49 arbitration clause was "*an invariable, certain and general usage or custom*" of contracts for the FOB sale of Ukrainian corn from Odessa. The arbitration clause in the draft conditions itself differed from the GAFTA 49 clause. Significantly, "*no evidence such as is normally produced to prove such a trade custom or usage was adduced by [Lemarc Agromond]: no expert witness, no evidence from other traders and no documentation.*" Lastly, the Court indicated that such an implied term would likely not satisfy s. 6(2) of the 1996 Act, which requires an arbitration agreement to be in writing.

HFW Comment

If parties intend to resolve their disputes by means of arbitration, they should expressly agree to do so early in the negotiations. It should not be assumed that a party agrees to an arbitration clause simply because it does not reject it. HFW (Brian Perrott and Stephanie Morton) acted for Black Sea in this case.

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Leeds City Council and others v Barclays Bank plc and another [2021] EWHC 363 (Comm)

Court: Commercial Court

Date: 22 February 2021

Summary

In considering the correct legal test for demonstrating reliance on a misrepresentation, the Commercial Court has affirmed that 'awareness' of a representation is an essential element for a misrepresentation claim to be actionable.

Facts

A number of local authorities (the "**Claimants**") had obtained various long-term loans (the "**Loans**") from Barclays Bank (the "**Bank**") between 2006 and 2008. Pursuant to the Loans, the Bank had the option to alter the interest rates from time to time. If the Bank did so, however, the Claimants could elect to break the Loans, although this would incur breakage costs. LIBOR was used as the reference rate in relation to setting the interest rates and/or calculating the breakage costs. The Claimants applied for rescission on the basis that the Loans were tainted by the LIBOR manipulation scandal of 2012. It was alleged that the Bank had made fraudulent (implied) misrepresentations to the effect that: (i) LIBOR rates were "*being set honestly and properly*"; and (ii) the Bank was not "*engaging in any improper conduct in connection with its participation in the LIBOR panel*". The Bank applied to strike out the claims on two grounds. The first was that reliance on the alleged representations could not be demonstrated because the Claimants had not understood that they were being made at the time of the Loans. The second was that even if the Claimants could establish misrepresentation, they had nevertheless affirmed the Loans by continuing to make interest payments.

Findings

The Court found in favour of the Bank and struck out the claims. Having reviewed the relevant authorities, it concluded that both the authorities generally, and those in the context of LIBOR manipulation specifically, indicated that for a misrepresentation to be actionable, the representee must be aware of it at the relevant time.

What is required to establish 'awareness' will vary depending on the precise facts. In some cases the question might be whether the representee gave "*contemporaneous conscious thought*" to the misrepresentation, whereas in others it might be better expressed by asking whether the misrepresentation was "*actively present*" in the representee's mind. However, the authorities suggested that there is no scope for reliance based on an assumption where there is an issue regarding whether a representation was ever actively present. This is so regardless of whether the representation was express or implied, or whether it arose from conduct, words or both. The Claimants did not assert that any natural person had consciously, actively or in any way understood that representations were being made at the time of the Loans. Their position was that it was unnecessary to do so. Consequently, there could be no reliance by the Claimants, whose claims were doomed to fail. The issue regarding affirmation of the Loans did not arise given the findings in relation to reliance. The Court held that had the issue arisen, the strike out application would not have been granted on this ground. It was unclear whether the Claimants possessed sufficient factual knowledge regarding their rights to rescind for misrepresentation, and the issue would not have been suitable for summary determination.

HFW Comment

While judges may express themselves differently depending on the precise facts, this judgment confirms that "*proof of understanding of a representation is a constituent part of a case in misrepresentation*". Although a 'presumption of inducement' may be relevant when considering the reliance element of fraudulent misrepresentation, such a presumption cannot dispense with the preceding requirement of demonstrating that a misrepresentation existed.

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Duferco SA v CVG Ferrominera Orinoco CA [2021] EWHC 824 (Comm)

Court: Commercial Court

Date: 5 March 2021

Summary

The Commercial Court agreed to grant summary judgment in favour of a claimant in circumstances where the defendant had failed to file an acknowledgement of service or a defence. The claimant sought summary rather than default judgment because a judgment on the merits was more likely to enable enforcement against the defendant in Venezuela and other jurisdictions where the defendant held assets.

Facts

The claimant was Duferco SA ('Duferco'), a Luxembourg company specialising in steel trading and distribution. The defendant was CVG Ferrominera Orinoco CA ('FMO'), a state owned entity based in Venezuela that specialised in the manufacture and export of hot briquetted iron ('HBI'). Duferco and FMO had a significant trading history. In June 2007, FMO took over the operation of a HBI plant in Venezuela. The plant required a major overhaul, which Duferco agreed to fund. The parties entered into a prepayment Contract and an export contract agreeing the terms of the funding. Repayments of the money advanced by Duferco were principally to be effected through proceeds obtained from shipments of HBI made by FMO to Duferco. Duferco discharged its obligations to FMO by making agreed prepayments of just under US$87 million. FMO made certain repayments to Duferco amounting to US$76 million. A balance of around US$11 million was said to be due and owing. Duferco issued a claim form on 27 March 2019, which was served on FMO on 9 July 2019. FMO did not respond to the claim form by serving an acknowledgement of service. On 19 August 2020, Duferco made an application for permission to apply for summary judgment and for summary judgment against FMO. The applications and details of the hearing were notified to FMO but no response was received. The hearing therefore proceeded on an ex parte basis.

Findings

The Commercial Court granted both permission to apply for summary judgment and summary judgment in favour of Duferco. Duferco was entitled to the principal sum as a debt due and owing and/or as damages for breach of contract, as well as contractual interest in excess of US$10.9 million. Duferco required permission to seek summary judgment under CPR 24.4(1) because FMO had not filed an acknowledgement of service or a defence. A good and proper reason was required for permission to be granted. The Court held that assisting with enforcement was a good reason. Duferco had adduced evidence (which was accepted by the Court) that there was a risk that a default judgment against FMO would not be capable of enforcement in Venezuela. A judgment on the merits (i.e. summary judgment) was likely to be more readily enforced against FMO in Venezuela or other jurisdictions where it had assets. The Court also held that the fact that FMO had declined to engage with or defend the proceedings, despite being given every opportunity to do so, was a good reason for allowing permission.

In respect of the summary judgment application, the Court held that there was no real prospect of FMO successfully defending the claim. It was clear that FMO was in breach of the prepayment and export contracts. There was also no other compelling reason why the case should be disposed of at trial. The Court noted that a trial would cause unnecessary delay and based on its conduct to date, there was no reason to think that FMO would participate.

HFW Comment

This judgment shows the English courts' pragmatism and awareness of commercial realities. Even where a defendant has failed to engage with proceedings and default judgment would be the normal course, it is open to a claimant to seek summary judgment where this will assist with enforcement.

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Mozambique v Credit Suisse International [2021] EWCA Civ 329

Court: Court of Appeal (Civil Division)

Date: 11 March 2021

Summary

Claims for fraud, bribery and conspiracy brought by the Republic of Mozambique ('the Republic'), which arose under loans and guarantees, fell within the scope of arbitration clauses contained within the underlying supply contracts.

Facts

There were five defendants, (together 'the Privinvest companies'). Between 2013 and 2014, three corporate vehicles owned by the Republic entered into three supply contracts with three of the Privinvest companies. The supply contracts, which were sub-contracted out, were financed by loans from different banks. The Republic provided sovereign guarantees over the borrowing and the loans were not repaid. While the supply contracts were governed by Swiss law and each contained either an ICC or a SCIA arbitration clause, two of the sub-contracts, the loans and the guarantees were subject to English law and jurisdiction.

The Republic accused the Privinvest companies of bribing its officials and alleged there was a conspiratorial scheme against it. It commenced English court proceedings, bringing a number of claims including for deceit, bribery, conspiracy to injure by unlawful means, dishonest assistance and knowing receipt. The Privinvest companies applied for a stay of the proceedings under s. 9 of the Arbitration Act 1996 ('s. 9'). This provides that a party may apply for a stay of proceedings insofar as they concern a matter which the parties have agreed to refer to arbitration. The Privinvest companies had to show first, that both they and the Republic were parties to the arbitration agreements and second, that the matters alleged in the claim fell within the scope of the arbitration agreements. The second question, as to scope, was heard as a preliminary issue. At first instance, the Court held that the Republic's claims were not sufficiently connected with the supply contracts and fell outside the arbitration agreements. The Privinvest companies appealed.

Findings

The appeal was allowed. The Court of Appeal held that the Republic's claims against the Privinvest companies fell within the scope of the arbitration agreements contained in the supply contracts. It identified a two-fold test for the application of s. 9:

1. The matters in respect of which the proceedings are brought should be determined.

2. It should be assessed whether the parties have agreed that such matters were to be referred to arbitration.

When analysing the matters, the Court will look to substance and not form. The Republic argued that since the claims arose from the loans and guarantees rather than the supply contracts, they did not fall within the arbitration agreements. The Court of Appeal described this as the central flaw in the Republic's approach. The circumstances of the case together formed a single alleged fraudulent scheme, of which the supply contracts formed a key part. It held that when determining the "matters" as part of the first limb of the two-fold test, the Court is to search for all "*substantial issues to which the claim gave rise, including identified or reasonably foreseeable defences.*" It was reasonably foreseeable that the Privinvest companies would defend the claims by arguing that the supply contracts were valid and genuine commercial contracts. Applying the second limb of the test, those defences related directly to the supply contracts, and were therefore sufficiently connected to the arbitration agreements contained in those contracts.

HFW Comment

This is the first English Court of Appeal decision on what constitutes a "matter" for the purposes of s9 and indicates the broad scope which the English courts will adopt when assessing this.

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A v B [2021] EWHC793 (Comm)

Court Commercial Court

Date 31 March 2021

Summary

In an FOB sale contract, an invalid vessel nomination is not a breach of condition entitling the seller to terminate in circumstances where the buyer is still able to make a valid substitute nomination within the contractual delivery window. Further, it is not a breach of condition for the buyer to nominate a vessel before having fixed the charter.

Facts

The claim arose from an FOB sale of Ukrainian feed corn on GAFTA Form 49. The seller challenged the buyer's initial nomination because the vessel was already committed on another voyage. The seller terminated the contract for alleged repudiatory breach by the buyer in making a "fanciful" nomination. However, the buyer subsequently made a valid substitute nomination, within the delivery window, which the seller refused to accept. The buyer accused the seller of anticipatory breach. The parties reached a settlement under which the buyer agreed to pay a reduced price for the corn. This agreement made provision for a price adjustment in the event that the underlying dispute was taken to arbitration. At arbitration, the GAFTA tribunal found that although the first nomination was invalid, it was not a breach of condition which would allow the seller to terminate. The seller's proper remedy was to reject the termination; its rejection of the substitute (and valid) nomination was therefore a breach of contract. The seller was given permission to appeal on two issues relating to interest on the award of damages, together with the following questions:

1. Is the obligation on an FOB buyer not to make a false vessel nomination a condition, breach of which entitles a seller to terminate?
2. On a true construction of the contract, was the buyer obliged to nominate a vessel which had been chartered by them (or their sub-buyers) at the date of nomination?
3. Was the obligation on the buyer to provide a copy of the charterparty at seller's "first request" a condition, breach of which entitled the seller to terminate?

Findings

The Court dismissed all the appeals. On the first question, it concluded "*whilst there may be a case for regarding such a nomination as a breach sounding in damages, I do not believe that either authority or considerations of principle require it to be regarded as a breach of condition: provided, always, that a valid nomination is ultimately given in accordance with the contractual timetable.*" On the second, the Court found it did not need to remit this question since it would not affect the outcome of the case. However, the judge commented that, "*In my view the critical question is what needs to happen in order for the contract to work and for the parties to have the requisite degree of certainty about how it is to work. The seller's essential need in this context is for a valid and timely nomination to be given, and for the nominated vessel then to arrive on time ready to lift the cargo. The buyer's obligation to bring that about in itself requires sufficiently timely and effective steps to be taken to secure the vessel. I do not consider it possible to infer that the parties intended to go further by requiring, as a condition of the contract, that the charterparty actually be fixed at the time of the nomination.*" On the third question, the court held that it was not a breach of condition and that there would be no substantial injustice suffered by the seller as a result of the Tribunal's failure to consider the point and therefore, no serious irregularity giving rise to a breach of s68 of the Arbitration Act 1996.

HFW Comment

This is another cautionary tale against terminating a contract too soon, or where the proper remedy is something other than termination. It also offers helpful guidance on an FOB buyer's obligations in relation to nominating a vessel.

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Septo Trading Inc v Tintrade Limited [2021] EWCA Civ 718

Court: Court of Appeal

Date: 18 May 2021

Summary

The appeal in Septo Trading Inc v Tintrade Limited focused on the correct approach to take where an incorporated, standard term is alleged to conflict or to be inconsistent with a term expressly agreed between the parties.

Facts

The parties agreed terms for the FOB sale and purchase of a consignment of fuel oil. Those terms were recorded in an email recap (the Recap) and included a clause entitled "Determination of Quality and Quantity" which provided: "As ascertained at loadport by mutually acceptable first class independent inspector … Such result to be binding on parties save fraud or manifest error. Inspection costs to be shared 50/50 between buyer/seller." It also contained a clause incorporating BP's General Terms and Conditions for FOB sales (the BP Terms) "where not in conflict with the above."

The BP terms includes the following provision: "… certificates of quantity and quality … shall, except in cases of manifest error or fraud, be conclusive and binding on both parties for invoicing purposes … but without prejudice to the rights of either party to make any claim pursuant to Section 26" (Section 26 permitted a claim for damages in relation to quality or quantity.)

The cargo was loaded from seven separate short tanks, and blended on board the vessel. A composite sample from the shore tanks was tested at the loadport by a jointly instructed inspector and found to be on spec. The vessel sailed and the buyer sold the cargo on by means of a ship to ship transfer. At that point, it was found to be off spec. Later investigations concluded that the testing carried out at the loadport was unrepresentative of the cargo actually loaded on board.

The buyer claimed damages. The seller relied on the binding nature of the certificate of quality under the express term in the Recap. The buyer relied on the BP Terms to argue that the certificate was binding only for invoicing purposes and did not preclude it from bringing a claim for damages based on the quality of the product. At first instance, the Court found in the buyer's favour, holding that the cargo from all seven shore tanks was fundamentally incompatible, so that the cargo would inevitably become off-spec when it was blended in the vessel's tanks. The Court observed that if the Recap term had stood alone it would have excluded the buyer's quality claim because the certificate of quality (showing an on-spec cargo) would have been binding. However, the Court held the BP Terms qualified the Recap term, and there was no conflict between the terms; they could be read together to give effect to both.

The seller appealed, arguing that the BP Terms were in conflict with the Recap term.

Findings

The Court of Appeal allowed the appeal, reaffirming the principles set down in Pagnan SpA v Tradax Ocean Transportation SA[1] when approaching inconsistencies between express and incorporated contractual terms. In Pagnan, the Court of Appeal drew a distinction between a printed term that qualifies or supplements a specially agreed term and one that transforms or negates it. The test to determine which of these two categories a term falls into is whether the two clauses can be read together fairly and sensibly so as to give effect to both. If the printed term effectively deprives the special term of any effect, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it.

Following the Pagnan approach, the Court of Appeal held that the judge was right to conclude that the Recap term was intended to make the quality certificate binding for all purposes. It then considered the effect of the BP Term, concluding that the two provisions could not fairly and sensibly be read together. The printed term did not merely qualify or supplement the Recap term, but rather deprived it of practical effect. The Court of Appeal also noted that the quality determination provision in the Recap was a central feature of the contractual scheme and that it was unlikely that the parties would intend printed terms to detract from

1 [1987] 3 All ER 565

it. As Phillips LJ observed during the hearing, it is unlikely that parties who intended to have a non-binding certification regime would state the opposite in their Recap.

HFW Comment

This decision reaffirms the established English law approach to resolving conflict between an expressly agreed term and an incorporated, standard one and should reassure trading companies that specifically agreed terms will be given priority over incorporated standard terms and conditions. HFW (Alistair Feeney, Rosie Morrison and Samantha Cash) acted for Tintrade Limited.

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