Cotton

August 2011

NO BLAME GAME - AT A PRICE

RECENT DECISION DISCUSSING INABILITY OF PARTIES TO OUST INVOICING-BACK PROCEDURE

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The English High Court has recently held that International Cotton Association Bylaw 201 cannot be amended by contracting parties, even if they have negotiated a force majeure provision (*Dunavant Enterprises Incorporated v Olympia Spinning & Weaving Mills Limited* [2011] EWHC 2028).

Bylaw 102 states that *"all of the Bylaws in this book will apply to the contract and no amendment by the buyer and seller is allowed; but the buyer and seller can agree terms in their contract which are different to any of the Rules".*

Bylaw 201 states that *"if any contract has not been, or will not be performed, it will not be treated as cancelled. It will be closed by being invoiced back to the seller under our Rules in force at the date of the contract."*

Rule 225 provides that *"if for any reason a contract or part of a contract has not been, or will not be, performed (whether due to a breach of the contract by either party or due to any other reason whatsoever) it will not be cancelled"* but shall be invoiced back. The mechanism for the invoicing-back procedure is set out in Rule 226.

The dispute between Dunavant Enterprises Incorporated ("Sellers") and Weaving Mills Limited ("Buyers") arose due to Buyers failing to open letters of credit in accordance with the sale contract *"due to banking restrictions"* and both parties agreeing (at the time) for the contract to be invoiced back in accordance with Rules 225 and 226. Because the market price had moved upwards, this meant a sum was due from Sellers to Buyers.

Mr Justice Burton was presented with an appeal from Sellers who submitted that the existence of a force majeure clause in the sale contract overrode the operation of Bylaw 201, with the effect that the invoicing back mechanism did not apply. A number of submissions were made by Sellers in an attempt to bring themselves within the force majeure provision, but Mr Justice Burton

rejected them all finding that the clause in question was *"wholly inapplicable"* to the circumstances of the case.

More importantly, Mr Justice Burton concluded that *"it is quite clear... that the operation of Bylaw 201 cannot be ousted, and does, indeed, have the result that, irrespective of whether there is breach or not, the close-out operates so as to create a contractual obligation only to make payment pursuant to the terms of Rules 225 and 226."*

This decision, means that rider clauses that seek to provide a result other than invoicing-back, whether due to a breach of contract or a defined force majeure event, will not be upheld.

However, it would seem from the wording of Bylaws 102 and 201 that parties can negotiate a force majeure clause that *varies* the invoicing-back methodology contained in Rule 226. This is because the parties are free to amend Rules 225 and 226 (as per Bylaw 102) and Bylaw 201 simply says that all or part of an unperformed contract is to be closed by invoicing-back *"in accordance with our Rules"* - rules which can be amended. Therefore, although not argued before or considered by Mr Justice Burton, it would appear that a force majeure provision that provides for a different invoicing-back methodology than that contained in Rules 225 and 226 would be consistent with both Bylaw 201 and the ability of the parties to amend the Rules.

Permission for leave to appeal Mr Justice Burton's decision was not granted. Therefore, parties will only be able to avoid an invoicing-back process if the ICA remove Bylaw 201 from the Rule Book. In the meantime, if parties wish to make provision for force majeure events or breaches of contract, they ought to include tailored rider clauses into their contracts consistent with invoicing-back.

Please contact a member of the HFW Cotton Team below if you require tailor made rider clauses.

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