HFW

COMMODITIES CASE UPDATE 17th edition

SEPTEMBER 2024

HFW

HFW COMMODITIES CASE UPDATE
SEPTEMBER 2024

We are delighted to present the seventeenth edition of the Commodities Case Update, with a summary of 12 key recent cases relevant to the commodities sector.

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 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.

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.	ADM International SARL v Grain House International SA [2024] EWCA Civ 33	4
2.	Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Limited Sirket v Agroinvest SA [2024] EWHC 479 (Comm)	5
3.	Sucden Financial Ltd v TMT Metals AG & Ors [2024] EWHC 1051 (Comm)	6
4.	London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime (PVT) Ltd and others [2024] EWHC 884	8
5.	UBS Switzerland AG v Anil Kumar [2024] EWHC 1058 (Ch)	9
6.	Sharp Corp Ltd v Viterra BV (previously known as Glencore Agriculture BV) [2024] UKSC 14	10
7.	RTI Ltd v MUR Shipping BV [2024] UKSC 18	12
8.	Rhine Shipping DMCC v Vitol SA [2024] EWCA Civ 580	13
9.	Barclays Banks PLC v PJSC Sovcombank and another [2024] EWHC 1338 (Comm)	15
10.	Celestial Aviation Services Limited v UniCredit [2024] EWCA Civ 628	17
11.	Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd [2024] EWCA Civ 639	19
12.	KSY Juice Blends UK Limited v Citrosuco GMBH [2024] EWHC 2098 (Comm)	21

ADM International SARL v Grain House International SA [2024] EWCA Civ 33

Court: Court of Appeal

Date: 25 January 2024

Summary

The Court of Appeal has reaffirmed the 'responsible persons liability principle', finding that it retained jurisdiction to commit directors for a company's breach of a court order. Additionally, it has clarified the meaning of 'value' in the standard freezing order form.

Facts

ADM International Sarl ("**ADM**") and Grain House International SA ("**GHI**"), a Moroccan grain company, entered into several contracts for the sale of various agricultural commodities. Following GHI's non-payment of its obligations under a payment plan, ADM commenced GAFTA arbitration proceedings and obtained an award against GHI. In an attempt to enforce the award under s.66 Arbitration Act 1996, ADM obtained an asset disclosure order, requiring GHI to state the *'value, location and details*' of its assets. Subsequently, ADM obtained a worldwide freezing order and a further disclosure order.

GHI's CEO served multiple affidavits, purportedly complying with the disclosure orders by revealing the unencumbered value of the company's assets. However, following the hearing of an application for contempt of court, the Court found GHI to be in contempt for failing to comply with the orders and imposed a £75,000 fine on GHI and a 12 month prison sentence on its CEO. GHI appealed.

Findings

The Court of Appeal held that the term 'value', as specified in the standard freezing order form, refers to 'market value' rather than 'unencumbered value'. While a claimant would typically wish to seek information on both the market value and any encumbrances to ascertain the true equitable value of a defendant's assets in order to satisfy an arbitration award, the plain reading of the standard freezing order's wording does not mandate such disclosure. As a result, the Court overturned the contempt convictions of both GHI and its CEO.

Nevertheless, in evaluating the 'responsible persons liability principle', the Court affirmed the other four findings of contempt. The Court's power to punish directors of a company who are personally responsible for a breach of a court order was found to be an inherent and substantive power of the Court. Despite its removal from CPR Part 81.4 in 2020, this legal principle predates both the CPR and the Common Law Procedure Act 1860, where it was first documented. Consequently, the Court's authority remains unaffected by the removal from the CPR, as it was merely a restatement of the rules. Accordingly, the Court of Appeal reduced GHI's fine from £75,000 to £50,000 and the CEO's sentence from 12 to 6 months. Permission to appeal to the Supreme Court was refused on the ground that there is no arguable point of law.

HFW Comment

There is now more clarity as to the disclosure requirements imposed by the standard freezing order form. (It should be noted that the Court of Appeal did recommend changes to this wording and provided guidance on the wording of asset disclosure orders.) Company directors should take note that this judgment by the Court of Appeal reaffirms the status of the responsible persons liability principle. Permission to appeal to the Supreme Court has been refused.

Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Limited Sirket v Agroinvest SA [2024] EWHC 479 (Comm)

Court: Commercial Court

Date: 5 March 2024

Summary

This case related to two issues: the default date under GAFTA standard form contracts and the nature of advance payments.

Facts

Agroinvest SA as seller ("**Agroinvest**") contracted with Ayhan Sezer Yag Ve Gida Endustrisi Ticaret Limited Sirket as buyer ("**Ayhan Sezer**"), for the sale of rape meal and soybean meal, incorporating GAFTA Contract No.100. Ayhan Sezer transferred an advance payment to Agroinvest pursuant to a clause in the contract which stated *"... advance payment/guarantee upon signing of the contract.*" Subsequently, Ayhan Sezer indicated it would not perform and requested the return of the advance payment. Agroinvest refused to return it, claiming that it was "not refundable".

Neither party contested that a repudiatory breach had occurred. However, a dispute emerged over the date of default for calculating damages under GAFTA 100 clause 23(c), which reads: "*The damages payable shall be based on...the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above...*" Ayhan Sezer argued that the date of default was April 4, the date of its first message to Agroinvest requesting the return of the advance payment. Agroinvest argued it was 16 May, the last possible date on which Agroinvest could have performed its obligations under the contract. However, it was willing to accept that damages should be calculated on the date on which it had accepted Ayhan Sezer's repudiation (7 May). The first-tier tribunal found that the date of default was the date Agroinvest accepted Ayhan Sezer's repudiation (7 May). It also held that the advance payment was refundable. On appeal, the Board of Appeal agreed that the date of default was 7 May but found that the advance payment was non-refundable as it was a deposit and/or security. Ayhan Seyzer appealed to the Commercial Court, arguing that the Board had made a mistake in law as to the actual date of default and the refundability of the advance payment.

Findings

The Court made clear that it would give primacy to the natural meaning of the language used in the contract in its interpretation. It held that the Board had erred in law on both issues. Relying on the decision in *Toprak v Finagrain Compagnie Commerciale* [1979] 2 Lloyd's Rep 98 which also concerned a repudiatory breach, it concluded that if there was more than one breach of contract, the earlier date should be used. Significantly, *Toprak* involved actual rather than anticipatory repudiatory breach. The Court recognised that given it was concerned with "non-fulfilment" for the purposes of deciding on the date of default, in the case of anticipatory breach, this was "less obvious" but ultimately, it found that the anticipatory nature of the breach did not change the outcome. The Court held the date of default was 27 April, being the point at which the wording in Ayhan Sezer's messages was unequivocal as to its intention to repudiate. Turning to the advance payment, the Court held that in the absence of specific language, there was no evidence that the parties intended it to be irrecoverable. Therefore, the payment was considered refundable.

HFW Comment

Given the widely understood principle that a repudiation will not be effective and will confer no rights until it is accepted, the decision that the date of default may precede acceptance is rather surprising. It matters because the date of default under GAFTA contracts has a bearing on the date at which damages must be calculated and therefore the amount recoverable. More straightforwardly, this decision confirms the importance of clear and unambiguous drafting in relation to the advance payment.

Sucden Financial Ltd v TMT Metals AG & Ors [2024] EWHC 1051 (Comm)

Court: Commercial Court

Date: 18 April 2024

Summary

The Commercial Court, reaffirming the prevention principle in futures and options trading facilities, issued summary judgment against a trader who defaulted on the broker's margin calls amidst market fluctuation.

Facts

A broker, Sucden Financial Ltd ("**SFL**"), provided a futures and options trading facility to a trader, TMT Metals AG ("**TMT**"), in 2010. The parties' relationship was governed by a trading facility letter which incorporated SFL's standard terms of business (the "**Contract**"). The facility allowed TMT to engage in margin trading which required TMT to make a cash deposit to SFL on the initiation of a trade. The deposit, representing a fraction of the trade, acted as collateral and allowed TMT to borrow from SFL to facilitate its trades. Specifically, Clause 8.1 of SFL's standard terms stated:

"*Margin call: You agree to pay us on demand such sums by way of margin as are required from time to time under the Rules of any relevant Market (if applicable) or as we may in our discretion reasonably require for the purpose of protecting ourselves against loss or risk of loss on present, future or contemplated Transactions under this Agreement*."

TMT established a '*substantial net short position*' in nickel prior to the outbreak of the Russia-Ukraine war in February 2022. When the war began, the value of nickel on the London Metal Exchange ("**LME**") rose by 270% over a three-day period. As a result, TMT encountered a '*significant margin shortfall*' in its ledger position, prompting SFL to issue margin calls by invoking Clause 8.1. Following the LME's temporary suspension of the nickel market in March 2022, TMT incurred substantial losses after closing its trades and was unable to meet SFL's margin calls in full.

SFL sought summary judgment against TMT for US$6.63 million for a failure to meet its margin calls. In its defence, TMT submitted the following arguments:

1. SFL was under an implied duty not to prevent performance by TMT ("**the prevention principle**").
2. TMT was coerced into terminating its positions which crystallised its losses and prevented payment of the margin calls.
3. SFL was under an obligation not to act arbitrarily and capriciously in exercising its contractual entitlement to the margin calls.

Findings

The Commercial Court found in favour of SFL and granted its application for summary judgment. On the first two points, the Court maintained that the incorporation of the prevention principle into the Contract was '*entirely conventional*'. However, it did not find any evidence of SFL applying illegitimate pressure on or prevention of performance by TMT. Instead, it was deemed commercially prudent for SFL to prompt TMT to settle its trades, as failure to do so could potentially subject both parties to even greater loss. The evidence showed that TMT's sales of its positions were distributed over an extended period, which did not substantiate its claim of alleged prevention. Furthermore, there were no complaints about SFL's conduct until the commencement of legal proceedings. On the third point, the Court did not find an obligation for SFL not to act arbitrarily and capriciously in exercising its contractual entitlement to the margin call. Clause 8.1 imposed a requirement for reasonableness. Even so, the Court found no basis on which SFL was acting arbitrarily, capriciously, or unreasonably in exercising its contractual discretion to make margin calls.

HFW Comment

This judgment underscores the Courts' reluctance to interfere with the bargain struck by the parties, even in times of volatile market conditions. It will also be reassuring for brokers to see that well-drafted standard terms operate effectively.

London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime (PVT) Ltd and others [2024] EWHC 884

Court: Commercial Court

Date: 23 April 2024

Summary

This judgment considered an insurer's application for a final anti-suit injunction, preventing third party cargo claimants from claiming under an insurance contract in the wrong jurisdiction. The Court laid out the established test for granting insurers anti-suit injunctions and made a declaration on the 'pay to be paid' clause.

Facts

The Claimant (the "Club") insured a container ship (the "Vessel") and its owners against P&I risks, under a contract of indemnity insurance (the "insurance contract"). The insurance contract enabled the Club to initiate proceedings in any jurisdiction but claims against the Club were to be initiated in London arbitration only. The Vessel sank on 2 June 2021 and the Defendants (the "Cargo Claimants") each asserted an interest in lost cargo. The Cargo Claimants (who were not party to the insurance contract) initiated legal proceedings in Sri Lanka, seeking compensation. According to expert evidence, Sri Lankan law did not provide an independent or direct right of recovery against the Club. Instead, the Sri Lankan Court would have looked to the insurance contract. The Club sought a final anti-suit injunction in the English Court, arguing that the claims in Sri Lanka were brought solely on the basis that it is liable "*as the insurer*" and must be referred to London arbitration. The Cargo Claimants did not participate in the English proceedings, despite being on notice. The Court was required to consider whether the Cargo Claimants were bound by the terms of the insurance contract, despite not being a party to it.

Findings

Firstly, the Court confirmed the established procedure to follow under English law when considering an application for an anti-suit injunction:

1. Decide whether the foreign claimant is seeking to enforce a contractual obligation derived from the insurance contract, or an independent right of recovery under local law. If the former and the insurance contract is subject to English law, the right being asserted is also governed by English law.
2. If so, the foreign claimant is bound by the insurance contract, including the arbitration provisions, on a 'benefit and burden' basis.
3. If stages 1 and 2 lead to the conclusion that the claim is linked to enforcement of the insurance contract so that the foreign claimant is bound by the arbitration agreement in the insurance contract, insurers may apply for an anti-suit injunction.

Noting that the claims arose solely from the Club being liable "*as the insurer*" and that English law applied, the Court held that the claim *'arises out of, and necessarily depends on, the terms of that contract.*' The Cargo Claimants were therefore bound by the arbitration clause. There was no good reason against granting the anti-suit injunction. Finally, the Court upheld the validity of the 'pay to be paid' clause, affirming that the Club's liability to indemnify required the insured to first pay the claims. The Court hoped to prevent a dispute over the effect of a clause which is established under English law, thereby assisting the Sri Lankan Court.

HFW Comment

This case is a concise illustration of established English law principles in relation to the granting of anti-suit injunctions. Cargo claimants who are not party to a contract of insurance should be aware that they may nevertheless be bound by it under the 'benefit and burden' principle.

UBS Switzerland AG v Anil Kumar [2024] EWHC 1058 (Ch)

Court: High Court (Chancery)

Date: 3 May 2024

Summary

The Court held that the sole director of a commodities company (**the Defendant**) breached certain statutory directors' duties under the Companies Act 2006 (**the 2006 Act**), including the obligation to act in the interests of creditors, when he entered into a series of transactions with two companies under the control of family members. The Defendant was ordered to pay equitable compensation to the claimant bank.

Facts

The claimant, UBS Switzerland (UBS), was assigned certain claims by liquidators of a commodities trading company (**Vincom**) in respect of alleged breaches by the Defendant. These breaches arose from certain transactions where Vincom acted as the middleman between a seller of nickel (**AST**) and the ultimate buyer (**DMT**). Vincom would buy nickel from AST using lines of credit from banks including UBS to then sell on to DMT. Usually, each of DMT's payments would have satisfied the corresponding line of bank credit. However, towards the end of 2017 or early in 2018, the Defendant issued credit notes with a total value of US$ 7.769m in DMT's favour (**the Notes**). The effect of the Notes was to cancel the corresponding receivables otherwise owed to Vincom by DMT. Vincom was placed into liquidation in January 2018.

UBS claimed damages from the Defendant, arguing that the issuance of the Notes was to the purposive benefit of AST and DMT and to the detriment of USB as a creditor to Vincom. It pointed to the fact that both AST and DMT were controlled by members of the Defendant's family, which was evidence of a desire to prefer. The Defendant, who was without legal representation, submitted among other contentions that the Notes were issued due to delays and defective goods no later than a few weeks after the transactions to which they related.

Findings

The Court found as a matter of fact that the Notes were likely issued after a winding up petition had been presented against Vincom and in any event at the point insolvency was likely inevitable. The Defendant had failed to prove that the cargoes were damaged to any material extent. In applying s.171(b) of the 2006 Act, the proper inference to draw was that the Defendant breached his duty to exercise powers for the purposes for which they are conferred. That is, the transactions were to the benefit of DMT and the Defendant had no subjective reason to issue the Notes. Such conduct likewise did not meet the required standard of care, i.e. that no reasonable company director would have acted as the Defendant did.

Moreover, the issuance of the Notes was more likely than not done so as to protect DMT (in which the Defendant's brother was a sizable shareholder) from claims made on Vincom's behalf in the imminent liquidation. The Defendant had breached s.172(3) of the 2006 Act, which contains the duty to act in the interest of Vincom creditors, because at the point the Notes were issued, Vincom was or was bordering on insolvency. The Defendant was also found liable for the same breaches of statutory duty in respect of certain transactions with AST.

HFW Comment

This case demonstrates that proving breaches of directors' duties is often a fact-finding exercise more than an interrogation of the law. It is also worth noting how the Court evaluated the Defendant's conduct in light of the Supreme Court decision in *BTI 2014 LLC v Sequana [2022] UKSC 25*, in which it was held that a director's duty to act in the interests of the company's shareholders and other stakeholders (pursuant to s.172 of the 2006 Act) undergoes a fundamental shift at the point insolvency has or is likely to emerge. At this point, a duty to act in the interests of the company's creditors (as a class) becomes properly engaged and must be balanced against competing interests.

Sharp Corp Ltd v Viterra BV (previously known as Glencore Agriculture BV) [2024] UKSC 14

Court: Supreme Court

Date: 8 May 2024

Summary

In this case, the Supreme Court confirmed that mitigation is a fundamental principle of the law of damages. It also provided guidance on the correct approach to an appeal under section 69 of the Arbitration Act 1996.

Facts

Viterra BV (the "**Sellers**") and Sharp Corp Ltd (the "**Buyers**") entered into two contracts for the sale of lentils and peas from Vancouver C&F Mundra. The Buyers failed to pay for the goods. On arrival in Mundra, the goods were discharged, customs cleared and stored in a warehouse pending payment, against a letter of indemnity (**LOI**) from the Buyers to the Sellers. The parties also agreed an Addendum allowing the Buyers to pay in instalments. During this time, the Indian government imposed import tariffs on lentils. The Buyers failed to pay and eventually released the goods. The Sellers re-sold them.

The Sellers claimed damages for non-acceptance under the standard GAFTA Default clause. The key question was whether, under sub-clause (c), the *"actual or estimated value of the goods, on the date of default"* was to be assessed by reference to (a) the market value of the goods at Mundra, where they were on the date of default; or (b) the theoretical cost on the date of default of buying the goods FOB Vancouver, plus the market freight rate for transporting them to Mundra free out. This would significantly impact quantum, as the value of the customs cleared goods in Mundra had increased substantially following the imposition of tariffs.

The GAFTA Board of Appeal found in favour of the Sellers and the Buyers appealed to the High Court. The High Court dismissed the Buyers' appeal, holding that the authorities overall supported the Sellers' argument that the value of the goods should be based on a notional substitute contract on the same terms. The Buyers appealed. The Court of Appeal applied *Bunge v Nidera*[1] and found that sub-clause (c) reflected the common law compensatory measure of loss, which aims to put the injured party in the same position as if the contract had been performed. The words "actual or estimated loss" contemplated loss measured by reference to the market price for comparable goods. The loss was measured by reference to a notional substitute contract entered into on the date of default on identical terms, except as to price. However, the Court of Appeal went on to find that the effect of the LOI and Addendum was to vary the contract to a customs cleared ex-warehouse sale, rather than a C&F sale.

The Sellers appealed to the Supreme Court, on the basis that:

1. The Court of Appeal had incorrectly amended the question of law.
2. It had decided a question of law which it was not asked to determine.
3. It had made a finding of fact on matters which it should not have done.

The Buyers cross-appealed, contending that the value of the goods should have been assessed by reference to their position in the hands of the Sellers, as they had been already cleared through customs.

Findings

The Sellers' first ground of appeal failed. However, they succeeded on the second and third grounds: the Supreme Court found that the Court of Appeal had erred in deciding a question of law which the Appeal Board was not asked to determine, namely whether the contract had been varied; it had inferred a finding of fact which did not "inevitably follow" from the findings which had been made, in relation to discharge of the goods.

The cross-appeal also succeeded: the Supreme Court held that the GAFTA Default clause should be considered in light of the two fundamental principles of the law of damages, which are both the compensatory principle and the mitigation principle. While the compensatory principle seeks to put the injured party in the position they would have been in had the contract been performed, the mitigation principle requires that party to take all reasonable steps to avoid the consequences of the wrong.

[1] [2015] UKSC 43

The Supreme Court noted that in many cases, the two principles work together and reasonable steps taken in mitigation fix the nature of compensatory damages. The GAFTA Default clause reflects both principles and the correct approach to damages should be on the basis of "the market in which it would be reasonable for the Sellers to sell the goods"[2], which in this case was as they were at the date of default; "customs cleared and stored [...] in a warehouse in Mundra".

HFW comment

The Supreme Court has identified the fundamental nature of the principle of mitigation in respect of damages claims. Going forward, this may lead to greater scrutiny of steps taken in mitigation by the innocent party in damages claims. The Supreme Court has also provided guidance on the Court's powers in respect of appeals under section 69 of the Arbitration Act 1996.

RTI Ltd v MUR Shipping BV [2024] UKSC 18

Court: Supreme Court

Date: 15 May 2024

Summary

In *RTI Ltd* ("**RTI**") v *MUR Shipping BV* ("**MUR**"), the Supreme Court held that a party affected by a force majeure ("**FM**") event and seeking to rely on a FM clause with a "reasonable endeavours" provision is not required to accept an offer of a non-contractual performance.

Facts

In 2016, MUR and RTI entered into a contract under which MUR was to make monthly shipments of bauxite and RTI was to make corresponding monthly payments in US dollars. The contract contained a FM clause which stated that an event would only be considered a FM event if it could not "*be overcome by reasonable endeavours from the party affected*". In 2018, the US government applied sanctions to RTI's parent company. Consequently, MUR sent a FM notice, noting that payment in US dollars would be delayed as a result of the sanctions. RTI rejected the notice, offering to pay in euros and to bear any additional costs or exchange rate losses suffered by MUR as a result of the currency conversion. This, they argued, would provide the same result as if the payment had been made in US dollars and would be of no detriment to MUR. MUR rejected this offer. RTI sought damages in arbitration for MUR's refusal to nominate further vessels. The tribunal found in RTI's favour, on the basis that the FM event (which it held to be likely delay, rather than prevention of payment) could have been overcome by reasonable endeavours, with no detriment to MUR. MUR appealed to the High Court. The Court held that the exercise of reasonable endeavours by MUR could not require it to accept performance inconsistent with the express terms of the contract (ie. non-contractual performance). RTI appealed. In a majority decision, the Court of Appeal reinstated the decision of the tribunal. MUR appealed.

Findings

The Supreme Court found in MUR's favour, unanimously holding that reasonable endeavours provisions, whether express or implied, do not extend to accepting non-contractual performance. Its reasoning was anchored in the following principles:

- FM clauses and "reasonable endeavours" provisos concern the performance of a contract according to its terms.
- Parties have the freedom to contract anything they wish, including the freedom not to accept a non-contractual performance.
- In order to forego valuable contractual rights, clear words are needed.
- Certainty and predictability are of particular importance in the context of English commercial law.

MUR's case was straightforward – absent clear wording, a "reasonable endeavours" proviso did not require the acceptance of an offer of a non-contractual performance. By contrast, the Supreme Court feared that RTI's interpretation required potentially complex and contentious inquiries as to whether the acceptance of the non-contractual performance would, in fact, be of no detriment to MUR and whether it would achieve the same result as the contractual performance in question.

HFW Comment

In light of the uptick in FM events due to international sanctions and disruptions to shipping supply chains, the Supreme Court's judgment provides welcome clarity on what is expected of a party seeking to rely on a FM provision. The Supreme Court's emphasis on the key principles of freedom of contract and the need for commercial parties to have certainty and predictability in relation to contractual interpretation is worthy of note.

Rhine Shipping DMCC v Vitol SA [2024] EWCA Civ 580

Court: Court of Appeal

Date: 23 May 2024

Summary

The Court of Appeal has held that unlike the benefit of external hedging gains, any benefit gained from internal hedging arrangements does not operate as mitigation to reduce the damages due to an affected party which has suffered loss under a related contract.

Facts

In a charterparty dispute between Rhine Shipping DMCC ("**Owners**") and Vitol SA ("**Vitol**"), Owners were found in breach due to the delayed arrival of the vessel at the loadport. Vitol had a related sale contract in place with a third-party supplier ("**TOTSA**") for the purchase of a cargo of crude oil (the "**TOTSA Cargo**"). The price payable by Vitol under the sale contract increased because of the delay and Vitol claimed damages from Owners.

Owners challenged the amount of damages due. Vitol used an internal risk management system called Vista, in which purchase and sale transactions were matched. This was referred to as a 'Vista hedge'. However, it was not a 'hedge' in the traditional sense: usually a hedge is a transaction with an external third-party to offset the risk of a physical transaction. Vista allowed Vitol to identify its net total pricing exposure across its book of physical trades to decide whether any risk management steps, such as external hedging or choosing to run an unhedged position, were required. It was not for the mitigation of specific price risk on an individual trade, such as the TOTSA contract. Within Vista, Vitol entered into a series of internal swaps, whereby the risk of an increase in the market price arising from the delayed loading of the TOTSA Cargo was matched against the risk of a decrease in the market price. When it became clear that the pricing dates for the TOTSA Cargo would be delayed, the swaps in place for those dates were 'rolled', so that the pricing dates of the internal hedge matched the revised dates. But for the delay, the swaps would not have been rolled in this way.

Vitol had to pay TOTSA an additional USD 3,674,834 due to the delay. However, the rolling of the swaps generated a gain (within Vista) of USD 2,871,971. The loss recorded in Vista in relation to the TOTSA cargo was therefore only USD 802,863. Vitol claimed the full amount paid to TOTSA but Owners argued that the benefit of the internal hedging must be taken into account, so that only the lower amount in Vista was due to Vitol by way of damages for breach.

At first instance, the High Court found that if the hedge had been external, this benefit would have been taken into account in mitigation. However, the internal rolling of the swaps could not be treated as having any effect on Vitol's profit or loss; it merely transferred the risk between Vitol's portfolios and did not remedy any loss to Vitol as a company.

Owners were granted permission to appeal on one ground: whether the internal swaps that had been entered into as a *direct consequence* of the breach of charter by Owners were lawfully relevant to the assessment of recoverable damages suffered by Vitol, in that they were not lawfully or materially different from external swaps. Before the hearing, Owners applied for permission to amend the grounds of appeal, arguing that when the breach occurred, a pricing risk was added to Vitol's overall net position. This was matched within Vista with an opposite risk. Without the breach, the opposite risk of the fall in market value would have existed in Vitol's book without the matching market increase risk. Vitol's policy was to hedge risk wherever possible, and inferences from evidence suggested that they would have bought an external hedge against the oppositional risk of a decrease in price, which would have created a loss. This loss was avoided by virtue of Owners' breach.

Findings

Applying the principles to be considered before allowing a new point on appeal, the Court of Appeal held that Owners' argument was entirely new conceptually, factually and legally and reached the conclusion that it would not be allowed, as it would require both new findings of fact not made by the judge at first instance and additional evidence. The Court of Appeal left open the legal question of whether an avoided hedging loss could be considered mitigation of loss or a collateral benefit, beyond

expressing a view that the collateral benefit principles "*would place formidable difficulties*" in the way of Owners' new argument.

As to the original ground of appeal, the Court of Appeal indicated that it agreed entirely with the judge at first instance: the avoided loss on other physical transactions was not a benefit derived from mitigation. The other transactions were not entered into for the purposes of hedging the TOTSA contract and Vitol did not enter into them as a result of the price risks to which it was exposed under the TOTSA contract.

HFW Comment

This decision by the Court of Appeal endorses previous decisions of the lower courts that the benefit of external hedges can be taken into account to reduce the amount of damages due in oil trading. However, given that large oil trading companies run very complex trading books, it would have been helpful to have had further guidance from the Court on the effect of these on damages claims, had Owners been given permission to appeal on the new ground.

Barclays Banks PLC v PJSC Sovcombank and another [2024] EWHC 1338 (Comm)

Court: Commercial Court

Date: 24 May 2024

Summary

Where a party to a contract governed by English law and subject to the exclusive jurisdiction of the English courts commences proceedings in another jurisdiction, the English courts are prepared to uphold the contract and grant injunctive and declaratory relief to contractual counterparties.

Facts

Barclays Bank Plc (the "**Applicant**") sought an anti-suit injunction, an anti-enforcement injunction, and declaratory relief against PJSC Sovcombank and AIS (the "**Respondents**"). This arose from a syndicated loan agreement between the Applicant and PJSC Sovcombank, governed by English law and containing an exclusive jurisdiction clause in favour of the Courts of England & Wales for all actions brought by PJSC Sovcombank (the "**Facility**").

Following the imposition of sanctions, the Applicant was prevented from making payments under the Facility. PJSC Sovcombank commenced proceedings in Russia, seeking damages for the non-payment of amounts it claimed were due under the Facility, relying upon various provisions of the Russian Civil Code to do so. On the basis that those proceedings involved a breach of the exclusive jurisdiction clause in the Facility, the Applicant obtained a without notice anti-suit injunction. After a renewal, the application came before the Court for final relief.

Findings

Anti-suit injunction

The Court accepted that the Russian proceedings were in breach of the exclusive jurisdiction clause, finding that the Applicant had proceeded with clean hands and that it was just and equitable to grant the anti-suit injunction sought. The Respondents' argument that it had had difficulty obtaining English legal representation was disregarded due to insufficient evidence.

Anti-enforcement injunction

The more unusual element of this case was the granting of an anti-enforcement injunction, being "*an injunction that would prevent a judgment creditor, who has obtained a judgment in proceedings brought abroad from taking steps to enforce that judgment*".

The Court stressed that this was a "*rare beast*" and would be an exceptional measure. However, there had been an increase in this form of relief against the background of the Russia / Ukraine war. Relying on *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, the Court held that there was no separate jurisdictional requirement of "*exceptionality*" above the usual threshold for granting an anti-suit injunction. It also distinguished between applications made at a pre-judgment stage, such as this application, and those made at a post-judgment stage, noting that acting at an earlier stage is less intrusive than doing so when a foreign court has already given judgment. In this case, the Court was satisfied that anti-enforcement relief should be granted as the facts and evidence aligned exactly with *Deutsche Bank v RusChemAlliance LLC* [2023] EWCA Civ 114, where the evidence suggested that even if the respondent to the anti-suit injunction sought to discontinue proceedings in Russia, the approval of the Russian court would still be required and may not be granted.

Declaratory relief

The Applicant sought a declaration that it was "*not liable to the first or second defendant on the claim advanced in the Russian proceedings relating to the freezing of €198,090.70, which it holds as agent under a senior facilities agreement*".

The Court held that the sanctions referred to in this case clearly extended to the payments the Applicant would be required to make under the Facility; such payments would be a breach of regulation under section 1(1) of SAMLA, amounting to a criminal offence. Section 44(1) of SAMLA offers a defence for non-payment where there is a reasonable belief that non-payment is required by the regulations. Therefore, there was

no breach by the Applicant in not making payments under the Facility.

The Court held that any reluctance to grant negative declaratory relief within English law had passed, and if such a declaration served a useful purpose, then it would be appropriate to grant it. Here, a declaration would serve a useful purpose, particularly if made by the Court of England & Wales which had exclusive jurisdiction, under a contract governed by English law, pertaining to sanctions that had been imposed within England & Wales.

HFW Comment

In the context of the increase in the extent and severity of sanctions, particularly against Russia following the invasion of Ukraine in 2022, this is a clear and helpful judgment for banks and other parties prevented from making contractual payments by sanctions and yet subject to claims for non-payment in foreign courts. The English courts are clearly prepared to uphold contractual agreements in which parties submit to English law and jurisdiction with injunctive and declaratory relief where appropriate, including with anti-enforcement injunctions.

Celestial Aviation Services Limited v UniCredit [2024] EWCA Civ 628

Court: Court of Appeal

Date: 11 June 2024

Summary

In this case, the Court of Appeal considered an appeal brought by UniCredit Bank GmbH ("**Unicredit**"), regarding the impact of sanctions against Russia in the context of payment obligations under letters of credit ("**LCs**").

Facts

The dispute related to several LCs issued by the Russian bank Sberbank to Celestial Aviation Services Limited ("**Celestial**") and Constitution Aircraft Leasing (Ireland) 3 Limited and Constitution Aircraft Leasing (Ireland) 5 Limited ("**Constitution**") in relation to leases of aircraft to Russian companies. Unicredit was the confirming bank. In March 2022, Celestial and Constitution made valid demands for payment in US dollars under the LCs. UniCredit refused to make payment on the grounds that it was prohibited from doing so by reason of sanctions imposed by the UK and the EU in response to the conflict in Ukraine, specifically: Regulations 11, 13 and 28 of the Russia (Sanctions) (EU Exit) Regulations 2019 No. 855 (UK Regulations) and of Article 3c of Council Regulation (EU) 2022/328 (EU Regulation). UniCredit also claimed US sanctions prohibited it from paying US dollar sums.

Celestial and Constitution claimed against Unicredit. Before judgment was handed down, UniCredit applied for and obtained licences in the UK, EU and US to permit payment to go ahead. However, a dispute remained on the issues of costs and interest. The main issues were

- Did the UK Regulations prohibit payment under the LCs. (The parties accepted that this would also determine whether EU Regulations prohibited payment under LCs as the Regulations were materially the same.)
- Did US law have the effect of suspending or otherwise excusing non-performance of UniCredit's obligation to pay in US dollars under the LCs.

At first instance, the Court found that UniCredit was not relieved of the obligation to make payment under the LCs by the UK Regulations and it was not satisfied that as a matter of US law, payment under the LCs would breach the terms of the relevant US sanctions. It confirmed that standby LCs are separate from any underlying transaction and held that any underlying obligations that might be discharged by Unicredit's payment were a wholly collateral matter. Further, US dollar payment was still possible as it could be made in cash rather than through a correspondent bank in the US. There were no relevant US sanctions in place when the payment obligation arose. The defence under s44 Sanctions and Anti-Money Laundering Act 2018 (SAMLA) was not available. Unicredit's belief that payment was not possible was not objectively reasonable.

UniCredit appealed on the following issues:

- Whether payment under the standby LCs would have been "*in connection with*" an arrangement which had the object or effect of supplying aircraft to or for use in Russia, or to a Russian person, and so prohibited by Regulation 28(3) of the UK Regulations ("**Regulation 28(3)**").
- If that prohibition did not apply, whether UniCredit had a defence under section 44 of SAMLA because its belief that it was complying with the UK Regulations was reasonable.
- Whether the question of illegality under the US sanctions regime was engaged because payment in US Dollars required the involvement of a correspondent bank in the US.
- If the US sanctions regime was engaged, whether payment in accordance with the demands under the standby LCs would have been illegal under that regime.

Findings

The Court of Appeal allowed the appeal in part. It held that Regulation 28(3) did prohibit payment under the LCs. The phrase "*in connection with*" was the broadest possible term. In essence, for Regulation 28(3) to apply, a factual connection to a relevant arrangement is required. The prohibition is not limited to circumstances where there is a legal connection. Regulation 28(3) is a "*relatively blunt instrument*," but any unintended

consequences could be dealt with by means of licensing.

In non-binding comments, the Court of Appeal held that in order to rely on S.44 SAMLA, the party must have subjectively believed that it would have been acting in breach of sanctions and the belief itself is objectively reasonable. However, as S.44 is a defence, it can only be relied upon until licences are obtained from the relevant authorities. Further, where there is an express method of payment, there was no obligation on UniCredit to pay either in cash or use an alternative currency. The defence of illegality arose only if reasonable efforts had been made to obtain a licence from the US authorities.

HFW Comment

This is a surprising result which appears to go against the principle that standby LCs are wholly independent from any other elements in a transaction. It will be interesting to see whether it is appealed.

Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd [2024] EWCA Civ 639

Court: Court of Appeal

Date: 18 June 2024

Summary

Without clear words to the contrary, a sub-participation contract which is based on a standard form will give effect to the expected terms in such a contract, including that the sub-participant's capital is at risk because it shares in the risk of default by the underlying borrower.

Facts

In March 2021, the respondent ("**Yieldpoint**") entered into a participation agreement with the appellant ("**Kimura**"), agreeing to pay Kimura US$5m to participate in its 50% share of an extended loan facility (the "**Participation**"). Under the facility, Kimura and others advanced US$45m to a Chilean mining company.

The Participation incorporated the terms of a Master Participation Agreement for Trade Transactions and was based on or comprised the BAFT standard form (the "**MPA**"). It also included some additional terms - a 'Maturity Date of Participation' of 31 March 2022 (the "**Maturity Date**") and Special Conditions for Yieldpoint to renew its participation. Kimura provided US$22.5m under the facility but the borrower defaulted before the Maturity Date. Yieldpoint sought to recover the US$5m from Kimura.

It was common ground that the terms of the MPA were intended to govern agreements under which Yieldpoint would be a sub-participant in Kimura's trade finance transactions. In doing so, Yieldpoint would expose its capital investment (as well as its rights to interest and income) to the risk of default by Kimura's counterparties. If a default occurred, Yieldpoint's sole remedy would be to enforce rights of recourse against the defaulting counterparty, which Kimura agreed to transfer to Yieldpoint in proportion to its participation.

Yieldpoint argued that the addition of the Maturity Date and Special Conditions had the effect of turning the Participation from a conventional sub-participation into a fixed term loan from Yieldpoint to Kimura, repayable in full by Kimura on the Maturity Date, regardless of any default.

The Court at first instance held '*not without discomfort*' that the Participation was a fixed term loan and not a true sub-participation. The Maturity Date was '*alien to sub-participation*' and demonstrated wording '*sufficiently strong and clear to depart from the pre-ordained sub-participation structure*'. Kimura appealed. It argued that the Court had overridden the entire contractual scheme, wrongly rejecting Kimura's case that incorporation of a 'Maturity Date' was workable in the context of that scheme. Further, the Court had wrongly relied on pre-contractual assurances, negotiations, drafts and subjective expectations.

Findings

Kimura was successful on appeal. The Court of Appeal found that there was no agreement as to what would happen if the borrower defaulted before the Maturity Date. There was only a clear agreement that the Participation would end on 31 March 2022 and Yieldpoint's investment would be redeemed if all went to plan. The Court at first instance had erred by analysing only specific contractual terms. The correct approach would have been to '*reach a coherent interpretation of the entire contract*'. Only if that was impossible would it have been necessary to prioritise certain provisions, such as by weighting the Maturity Date against countervailing terms in the MPA and Participation. Terms not highlighted to the first instance judge further undermined the importance of the Maturity Date. Finally, where there were competing interpretations, it was wrong to dismiss the fact that Yieldpoint's analysis undermined the commercial sense of the MPA.

HFW Comment

Parties entering into a participation, particularly one which incorporates standard terms, must use clear, express wording to denote their intentions, especially where they depart from the standard form in any way.

KSY Juice Blends UK Limited v Citrosuco GMBH [2024] EWHC 2098 (Comm)

Court: Commercial Court

Date: 9 August 2024

Summary

Where a contract provides that a price for the sale of goods is to be agreed at a later date, it is merely an "agreement to agree" and unenforceable.

Facts

In 2018, the claimant seller (the "**Seller**") agreed to sell the defendant buyer (the "**Buyer**") orange pulp wash, or "wesos" for delivery in 2019, 2020 and 2021 under a written contract (the "2018 Contract"). This included the following provisions:

"3. Price
Invoicing price is 1.600euro/mt for 60 brix
Price adjustable according to Brix value +- 5 Brix
Free trucks will be offered from the seller according to the agreed volume & price of each year.
Calculation basis for the 1.200mt fixed is 1.350 euro/mt which corresponds to the 400mt/year 2019-2020-2021
5. Delivery period:
1.200MT per each year
Deliveries to start January to December with the following split:
400mt fixed at 1.350euro/mt - invoicing price is 1600euro/mt
Difference of price in free trucks
800mt at open price to be fixed latest by December of the previous year
Difference of price in free trucks.

17. Severance

The parties hereto intend this Agreement to be valid and enforceable to the fullest extent possible. Therefore, every provision of this Agreement is intended to be severable, and if any provision or term is declared to be invalid or unenforceable for any reason, that provision or term shall be severed from this Agreement and the remaining provisions will be fully valid and enforceable in accordance with their terms."

400MT of wesos was delivered and paid for in 2019 but the Buyer refused to accept an additional 800MT. 126MT of wesos was delivered in 2020 but the Buyer only paid for 84MT. In September 2020, the Seller terminated the 2018 Contract for repudiatory breach. The Buyer claimed that the Seller's termination was itself a repudiatory breach.

There were five issues for the Court to decide:

Issue 1 - In so far as the 2018 Contract did not specify the price for wesos beyond 400 MT per year, was the contract for the sale of wesos beyond 400 MT per year enforceable, or was it unenforceable as a mere agreement to agree?
Issue 2 - If the contract was enforceable, what was the contractual price?
Issue 3 - Was the Seller entitled to claim the contractual price for wesos up to termination?
Issue 4 - Was the Seller entitled to damages for non-acceptance of the wesos prior to termination?
Issue 5 - Was the Seller entitled to terminate the 2018 Contract as a result of the Buyer's repudiatory breach, or was that termination itself a wrongful repudiation?
Issue 6 – If the Seller was entitled to terminate, what damages was it entitled to claim?

Findings

The Court had to decide whether the parties intended there to be a binding contract for the whole 1,200 MT per year of wesos, or simply the sale of 400MT of wesos with, in effect, an option for the sale and purchase of more if they could agree a price. It held

that pre-contractual negotiations were relevant only in so far as they demonstrated an intention by both parties to enter a contract for 1200MT wesos.

Issues 1 and 2 – The Court held that if a contractual price could be established, there was self-evidently an enforceable contract. Price is an essential component of a sale contract. Section 8(1) of the Sale of Goods Act 1979 ("SOGA") provides, "*The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties*." If a contract is silent on price, the buyer must pay a reasonable price (s.8(2) SOGA). Here, it was not silent: it left the price to be decided at a later time.

After a detailed analysis of the principles it must follow when identifying an agreement to agree, s.8 SOGA and the rules of contractual interpretation, the Court concluded that whilst it was clear that the parties intended to contract for the full amount of 1200 MT per year, there was no agreement as to price beyond the first 400 MT wesos, only an agreement to agree which could not be enforced. The Court did not need to strive as hard to find evidence of an agreement as to price in circumstances where the contract was severable and had been partially fulfilled. Further, there were no grounds for the Court to imply a term, either as to price or requiring the parties to use reasonable endeavours to agree a price. The outcome of the remaining issues was therefore academic, but the Court nevertheless made findings on them, holding that if it was wrong on the contract price and there *had* been an enforceable contract:

Issue 3 – The Seller's claim for a right to the price under s49 SOGA would have failed.

Issue 4 – The Court would have held that there was no available market for the goods and the Seller's failure to sell them was not a failure to mitigate. The Seller would have been entitled to damages.

Issue 5 – The Court could "*see no easy response*" to the Seller's case that the Buyer's letter of 30 July 2020 put it in repudiatory breach which the Seller was entitled to accept.

Issue 6 – The Seller would have been entitled to damages for non-acceptance, with no deduction for failure to mitigate.

HFW Comment

This decision has been appealed and the hearing set for July 2025. It is a good example of the need for clear and effective drafting of contractual terms, particularly such key contractual elements as the price of goods in a sale contract.

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

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

OLIVIER BAZIN
Partner, Geneva
T +41 (0)22 322 4814
M +41 (0)79 582 66 48
E olivier.bazin@hfw.com

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

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

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

HFW

HFW COMMODITIES CONTACTS

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

NICK BRAGANZA
Partner, Dubai
T +971 4 423 0587
M +971 52 923 3335
E nick.braganza@hfw.com

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

DAN PERERA
Partner, Singapore
T +65 6411 6347
M +65 9635 6824
E dan.perera@hfw.com

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

PETER ZAMAN
Partner, Singapore
T +65 6411 5305
M +65 8511 0250
E peter.zaman@hfw.com

SUZANNE MEIKLEJOHN
Partner, Singapore
T +65 6411 5346
M +65 9025 1894
E suzanne.meiklejohn@hfw.com

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

RANJANI SUNDAR
Partner, Sydney
T +61 (0)2 9320 4609
M +61 (0)403 145 846
E ranjani.sundar@hfw.com

OWEN WEBB
Partner, Melbourne
T +61 (0)3 8601 4526
M +61 (0)427 035 897
E owen.webb@hfw.com

MICHAEL BUFFHAM
Partner, London
T +44 (0)20 7264 8429
M +44 (0)7823 532974
E michael.buffham@hfw.com

EDWARD BEELEY
Partner, Hong Kong
T +852 3983 7737
M +852 5181 4956
E edward.beeley@hfw.com

PETER SADLER
Partner, Perth
T +61 (0)8 9422 4702
M +61 (0)451 700 481
E peter.sadler@hfw.com

PAUL D EVANS
Partner, Perth
T +61 (0)8 9422 4703
M +61 (0)407 787 712
E pauldevans@hfw.com

hfw.com

©2024 Holman Fenwick Willan LLP. All rights reserved. Ref: 006356

Americas | Europe | Middle East | Asia Pacific