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COMMODITIES CASE UPDATE 18th edition

MAY 2025

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We are delighted to present the eighteenth edition of the Commodities Case Update, with a summary of 10 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.

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INDEX

MOK Petro Energy v. Argo (No. 604) Limited [2024] EWHC 1935 (Comm)

Court: Commercial Court

Date: 26 July 2024

Summary

This case considered the meaning of "**damage**" in the context of an insurance dispute. The Court held that, given "**damage**" requires a change in physical state that negatively impacts the economic value of a product, and applying the decision in a case known as *Bacardi Breezer*[1] (about "**damage**" in another context i.e. a limitation clause), the cargo did not exist in final form during the blending process and was not "damaged".

Facts

The claimant assured, MOK Petro Energy FZC ("**MOK**"), was an oil trading company, trading a cargo of unleaded gasoline (the "**Cargo**") that was insured under an all-risks marine cargo open cover on ICC(A) terms 'Shore tank to shore tank' (the "**Policy**"). The defendants, Argo No 604 Limited (the "**Defendants**"), were London market reinsurers of the Policy and were directly liable to MOK by virtue of a cut-through clause[2] within the Policy.

The Cargo was produced by combining gasoline and methanol blend stocks on board the vessel. It was loaded in May 2017, at which point a Certificate of Quality was issued, indicating that it complied with contractual specifications. However, the Cargo was rejected at the discharge port, where port authorities observed phase separation in its samples. (Phase separation occurs when a blended cargo separates into its constituent components once subjected to lower temperatures.) Subsequent laboratory analysis confirmed that the Cargo was off-specification and had a raised phase separation temperature. Further joint testing was carried out in 2018. The Cargo was rejected by the purchasers and ultimately sold to a salvage buyer. MOK claimed that the Cargo was on-specification at the loadport but was fortuitously contaminated by water during loading. It ran an alternative case on fortuity, contending that the proportions in which the stocks were blended themselves constituted a "fortuity" for the purposes of the Policy (ie that the proportions in which the stocks were mixed by the company which sold the Cargo to MOK caused the damage to the Cargo). It claimed an indemnity under the Policy for the difference between the sound value of the Cargo and its actual value. The Defendants accepted that, if MOK could rely on the load port inspection certification as a reflection of the Cargo, subject to any breach of warranty claim, then MOK could have recovered the loss. However, it claimed that the Cargo could never have been on-specification as certified at the loadport but in fact was always off-specification and commercially unmarketable, irrespective of any subsequent water contamination. Therefore, MOK had suffered no loss. Alternatively, the Defendants asserted that any claim under the Policy was precluded by MOK's breach of a survey warranty in the Policy.

The Court had to determine whether MOK could prove that the Cargo *had* been on-specification at the point of loading; and that it was subsequently damaged by a fortuity beyond MOK's control.

Findings

The Court found in favour of the Defendants. It rejected MOK's primary claim finding that the certificates did not accurately represent the quality of the Cargo on loading and subsequent testing had shown that the cargo would always have had an elevated phase-separation temperature. On the alternative case, it also held that "damage" requires a change in physical state that negatively impacts the economic value of a product. Here, considering the inherent nature of the blended Cargo, phase separation was inevitable and MOK had failed to prove that a different blend of the stocks could have yielded an on-specification cargo. The fact that the blended cargo had a propensity

[1] Bacardi-Martini Beverages Limited v Thomas Hardy Packaging (2002) EWCA CIV 549

[2] A cut-through clause allows the original insured a direct right of action against the reinsurer in certain circumstances.

to undergo a change in physical state under certain conditions did not constitute damage. Phase separation was the natural behaviour of a particular product. There was no damage capable of constituting a fortuity under the Policy and therefore no claim to which the insurance could attach.

The Court also held that there could be no claim under the insurance because the Cargo had only ever existed in its defective condition: until the gasoline and methanol blend stocks were loaded from the shore tanks, there was nothing to which the insurance could attach, as the cover was for a specific shipment on a specific vessel (although there was an insured interest in the undivided bulk in the shore tanks). Further, the individual blend stocks were not damaged; all that happened was that they combined to form an inherently defective product (applying *Barcardi Breezers*). The blended product never existed in any other state.

The claim would have failed in any event because the Court found there had been a breach of a warranty which required inspection and certification of the shorelines at the loadport. The shorelines had been inspected but not certified, and although it was unlikely the parties intended cover to be lost due to a lack of certification nonetheless the Defendants were entitled to rely on the certification part of the warranty.

The Court also held that the insured was not entitled to rely on s11 of the Insurance Act 2015, which provides that where a term tends to reduce the risk of loss of a particular kind, at a particular location, or at a particular time, then if the insured shows the non-compliance could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred, the insurers cannot rely on the breach to deny cover. MOK argued that the lack of certification did not tend to reduce the risk of loss where the inspection had taken place, but the Judge accepted the Defendants' submissions that s11 is directed at the effect of compliance with the entire term. Compliance with the warranty as a whole was capable of minimising the risk of loss from water contamination.

HFW Comment

The Commercial Court's decision provides insight into what is required to meet the threshold of physical 'damage' in a claim. However, there is some doubt as to whether the Court's application of *Bacardi Breezers* in this insurance context was correct. The Court's obiter comments on s11 are also open to doubt.

HFW (Jonathan Bruce) acted for the Claimants.

Augusta Energy v Top Oil and Gas Development [2024] EWHC 2285 (Comm)

Court: Commercial Court

Date: 6 September 2024

Summary

The Commercial Court was prepared to uphold an exclusive jurisdiction clause, despite it being contained in long-form contract terms circulated after the initial transaction.

Facts

Between 2012 and 2015, Augusta Energy S.A. ("**Augusta**") and Cast Oil and Gas Limited ("**Cast Oil**") entered into several contracts for the sale of automotive gasoil ("**AGO**"). In April 2015, Cast Oil requested a further transaction, acting on behalf of Top Oil and Gas Development Company Limited ("**Top Oil**"). Augusta, as seller, contracted with Top Oil, as buyer, for the sale of 10,000mt AGO CIF Lagos. To facilitate this transaction, Cast Oil and Top Oil entered a Memorandum of Understanding ("**MOU**"). The MOU allowed Cast Oil to use Top Oil's letter of credit facility with Access Bank Plc, with Cast Oil repaying this amount plus a premium from the ultimate sale proceeds of the AGO. The MOU was signed by the Managing Director of Top Oil. After the sale transaction was concluded, and the letter of credit issued, Augusta sent a long-form sale contract to Cast Oil (the "**Detailed Terms**"), which included an exclusive jurisdiction clause in favour of the High Court in London. The Detailed Terms were not signed, nor were they intended to be, according to Augusta. After discharge at Lagos, as ordered by Cast Oil, Augusta was paid under the letter of credit. However, Cast Oil failed to reimburse both Access Bank Plc and Top Oil. Top Oil initiated legal proceedings in Nigeria against Augusta and its Chairman, alleging fraud and conspiracy (the "**Nigerian Proceedings**"). In response, Augusta commenced proceedings in the English Court, seeking an anti-suit injunction. Top Oil filed an Acknowledgement of Service, indicating an intention to challenge jurisdiction, but failed to file an application to do so within the permissible time limit. The Court faced two issues:

1. Had Augusta demonstrated a high degree of probability that Top Oil was bound by the exclusive jurisdiction clause in the Detailed Terms, justifying the Court's intervention in restraining the Nigerian Proceedings.
2. Could Top Oil request a time extension to file an application to challenge jurisdiction.

Findings

The Court ruled in Augusta's favour, granting the interim anti-suit injunction and dismissing Top Oil's application to challenge jurisdiction. The Detailed Terms had been requested by Cast Oil, which chose to proceed with the transaction after receiving them. The exercise of the trigger pricing options in the Detailed Terms (but not in earlier documents) amounted to acceptance by conduct. Under the MOU, Cast Oil acted as Top Oil's agent when agreeing to the Detailed Terms. The MOU was not reached on a corrupt basis, despite Top Oil's allegations of bribery. Both parties understood the transaction as Cast Oil "fronting" for Top Oil, to take advantage of their finance facility in return for a fixed fee or commission and the MOU was subsequently ratified by Top Oil's chairman. Top Oil's actions after filing the Acknowledgement of Service amounted to submission to the Court's jurisdiction, in particular its failure to file the application or indicate an intention to do so, and its request for an extension of time to file its defence.

HFW Comment

Parties should carefully consider any terms sent after concluding a contract and raise objections promptly. Any steps indicating an intention to defend the underlying claim can undermine a jurisdictional challenge; ignorance of court rules is not a valid reason for a time extension to file a jurisdiction challenge.

Elliott Associates L.P. v London Metal Exchange [2024] EWCA Civ 1168

Court: Court of Appeal

Date: 7 October 2024

Summary

The Court of Appeal dismissed the appeal by Elliott Associates L.P. and Elliott International L.P. ("Elliott") against the London Metal Exchange ("LME") and LME Clear Limited ("LME Clear"). It upheld the LME's decisions during the nickel price spike in March 2022, concluding that it had acted within its authority to ensure market stability and mitigate systemic risk.

Facts

On 8 March 2022, the price of 3M nickel on the LME surged from just under US$30,000 per tonne to over US$100,000 per tonne. The LME suspended trading and cancelled all trades executed since midnight to prevent market disorder. Elliott, a hedge fund, challenged these actions, arguing they were unlawful and an abuse of power. It sought judicial review against the LME and LME Clear, claiming they had acted irrationally and beyond their regulatory remit. It also sought damages under the Human Rights Act. The High Court ruled in the LME's favour and Elliott appealed.

Findings

The Court of Appeal clarified that entering into contracts with public authorities does not diminish public law protections. Despite the commercial context, the LME's actions were therefore scrutinised under standard public law principles. It examined the LME's duties under the Financial Services and Markets Act 2000, emphasising the duty to maintain an orderly market and prevent systemic risk during extreme volatility. It held that the LME's decision to cancel trades and suspend trading was necessary and within its regulatory powers, deeming it a legitimate exercise of discretion to ensure market stability.

Elliott had argued there was procedural unfairness, as the LME did not allow affected parties to make representations. The Court of Appeal found that in extreme market conditions, this was justified to prevent systemic risk, necessitating swift action without the usual procedural safeguards. The LME had acted rationally within its regulatory framework, considering the unprecedented market volatility and potential for widespread financial instability.

The decision to cancel trades was a proportionate response to maintain market integrity and stability. The intra-day margin requirements imposed by LME Clear were appropriately calculated based on market conditions and the need for financial stability. Although the Court of Appeal held that Elliot did have possessions arising from its trading activity on 8 March 2022, there had been no unlawful interference with these and so no claim arose under the Human Rights Act.

HFW Comment

This judgment clarifies the scope of the LME's authority and its role in ensuring market stability during extreme volatility.

Stournaras Stylianos Monoprosopi EPE v Maersk A/S [2024] EWHC 2494 (Comm)

Court: Commercial Court

Date: 7 October 2024

Summary

The purchaser of containers of copper, who was the victim of a fraud by the shippers, was not able to claim damages from the owner of the vessel that had carried the containers for issuing clean bills of lading ("**B/Ls**") despite significant discrepancies between the original declared weight of the containers and their actual weight.

Facts

Three consignments of copper wire scrap were bought pursuant to contracts between Stournaras Stylianos Monoprosopi EPE, (the "**Claimant**"), and Alembery General Trd Fzc (the "**Shipper**"). The consignments were shipped in 22 containers from Jebel Ali. However, on arrival in Piraeus, it was found that the containers contained "*worthless concrete blocks*" (the "**Cargo**"). The Claimant initially obtained a default judgment against the Shipper in Dubai but was unable to enforce it due to the Shipper's disappearance. As an alternative means of recovery, the Claimant claimed against Maersk A/S, (the "**Carrier**" / "**Maersk**"), on the basis that Maersk had issued three clean B/Ls in relation to the Cargo when it should not have done so. The Claimant argued that Maersk should have claused or refused to issue the B/Ls due to the sizeable discrepancy in the gross weight declared by the Shipper in their original shipping instructions and the Verified Gross Mass ("**VGM**") certificates generated by DP World when preparing the ship's stowage plan. The actual weight of the containers was found to be only 30-40% of the original declared weights. At the time, Maersk had no system in place to cross check the actual weight of containers with the VGM certificates. The Claimant's claim had three elements:

1. Maersk had breached Article III rule 3(c) of the Hague Rules (which were incorporated into the B/Ls) because the level of discrepancy in the weight of the cargo was so high that it should have cast doubt on the order and condition of the goods.
2. Maersk made a negligent misstatement in relation to the cargo, through an implied representation in the B/Ls.
3. Maersk (as carrier) owed the Claimant (as named consignee) a tortious or implied contractual duty of care to take reasonable steps not to issue a clean B/L which included, without qualification, shipper's particulars that a reasonably competent carrier would know or suspect on reasonable grounds to be fraudulent.

Findings

The Claimant failed on all three grounds. The Commercial Court held that once a shipper demands a B/L with an Article III rule (3)(c) declaration, a carrier is obliged to include it and has a contractual duty both to perform a reasonable check of the apparent order and condition of the goods prior to making the declaration, and to make an accurate declaration. The Claimant had argued that these contractual duties are in place in part to protect the consignee and are enforceable by them. Significantly, the Court agreed that if Maersk had been in breach of its contractual duties, the Claimant would have been entitled to claim against Maersk. However, here, the Court decided there was no breach. The Claimant had not been able to demonstrate that Maersk was aware of the discrepancy in the weight of the containers because in 2019, Maersk did not have a system in place which compared the weights provided by the Shipper with VGM data. Maersk's duty to perform a reasonable check of the apparent order and condition of the goods was confined to a reasonable examination of their external condition. A carrier is not entitled to ignore clear evidence that goods contained inside containers are in poor condition but weight was not a factor that could be determined through external examination and therefore, Maersk would not have been able to identify the discrepancy in weight upon conducting such an examination.

The Court held that it was not possible for Maersk to have made an implied representation in relation to the particulars of the cargo, as this is excluded by Article III rule 3 of the Hague Rules. As for the duty of care, the Court held that where a consignee under a straight B/L can establish that the carrier knew or ought to have known when issuing the B/L that there was a substantial discrepancy between the shipper declared weights and the actual verified weights, it has a strong case that the carrier ought not to issue an unclaused B/L, or ought not to issue a B/L at all. Such a discrepancy would give rise to an assumption on the part of the carrier that the bill was being used as an instrument of fraud. Here, the claim failed on the facts.

HFW comment

Cases of fraud, particularly in relation to metals, are unfortunately common. This decision gives victims of fraud the option to consider a claim against the carrier, particularly where, as here, the fraudster has disappeared. It confirms that, although a carrier's duty to assess the order and condition of the goods is limited for containerised cargo, it still has an obligation to perform a reasonable check of the exterior of the container. If a carrier is aware of discrepancies between the shipper's declared weights and the confirmed weights of containerised cargo, this puts a carrier on notice of potential fraud and it has a duty not to issue an unclaused B/L. Here, Maersk did not have the requisite knowledge – but that might not have been the outcome had the fraud occurred after it changed its weight verification system.

AMS Ameropa Marketing Sales AG v Ocean Unity Navigation Inc [2024] EWCA Civ 1312

Court: Court of Appeal

Date: 1 November 2024

Summary

A bill of lading holder that makes a claim against a shipowner for damage to cargo occurring during the voyage does not need to give credit for a payment received from the seller of the damaged goods.

Facts

During a voyage from the USA to Egypt, part of a yellow soybean cargo was damaged. The damaged part (the "Rejected Cargo") was separated from the rest, despite containing both sound and damaged soybeans, and sold at a discount through a salvage sale. The Seller compensated the Buyer with the proceeds from the salvage sale and a credit note to cover the loss incurred. The Buyer then transferred all rights related to the shipment, including the right to claim for the loss due to the carrier's breach, to the Seller. The Seller pursued a claim against the carrier (the "Owners"). The Owners admitted to breaching their contractual duty to take reasonable care for the cargo but argued that the Buyer had already been compensated through the salvage sale and the credit note. The Court found in the Buyer's favour. The Owners appealed, arguing that the Buyer must account for the payment made by the Seller, which had effectively compensated it in full. They contended that the Seller, as the assignee of the Buyer's claim, should not be in a better position. The payment had either avoided or significantly reduced the Buyer's loss and could not be considered merely collateral.

Findings

The Court of Appeal rejected the Owners' arguments. It reaffirmed the well-established principle that when cargo is damaged by a shipowner during a voyage, the bill of lading holder with the right to sue is entitled to recover damages based on the difference between the sound arrived value and the actual value of the damaged cargo, without deducting any payment received under a contract of sale to which the bill of lading holder is a party. Such payments are considered collateral, as they arise from the relationship between the parties in the sale contract, not from the Owners' breach. The payment under the sale contract did not affect the Buyer's right to recover full damages from the Owners. It was evident that the Buyer sought compensation from the Seller based on the sale contract; otherwise, the Seller would not have been involved in disposing of the damaged cargo or agreeing to make a payment. The cargo damage would have been solely the Buyer's issue. This was a commercial settlement.

HFW Comment

This decision confirms that a bill of lading holder can make a claim against a shipowner for damage to cargo occurring during the voyage, without giving credit for a payment received from the seller of the damaged goods. It also offers commercial certainty regarding the law on collateral benefits.

United Overseas Bank Ltd v Owner/Demise Charterer of "MAERSK KATALIN", Winson Oil Trading Pte Ltd intervening [2024] SGHC 282

Court: High Court of the Republic of Singapore

Date: 4 November 2024

Summary

Where a bank holding a bill of lading ("B/L") as security brings a misdelivery claim against a carrier following discharge to another party under a letter of indemnity ("LOI"), the courts may consider complex factual evidence when deciding on the causation of the bank's loss.

Facts

The dispute arose out of the collapse of Hin Leong Trading (Pte) Ltd ("Hin Leong") in 2020. The claimant and B/L holder, United Overseas Bank Ltd ("UOB"), brought a claim against Maersk Tankers Singapore Pte Ltd ("Maersk"), the defendant shipowner, for misdelivery of a cargo of gasoil sold to Hin Leong by Winson Oil Trading Pte Ltd ("Winson"). In February 2020, the cargo was discharged without original B/Ls under LOIs provided by Winson to Maersk. In March 2020, Hin Leong applied to UOB for a letter of credit ("LC") to finance its purchase of the cargo. UOB later approved payment under the LC after having been presented with compliant documents. After Hin Leong announced its insolvency, UOB sought to enforce its security under the B/Ls by claiming against Maersk for misdelivery. It brought claims in negligence, bailment and conversion. Maersk did not dispute that it had discharged the cargo without presentation of the BLs but raised a number of defences, including a causation defence similar to a defence that had succeeded in the English Court of Appeal. It argued that UOB never intended the B/Ls to function as security and would have authorised discharge of the cargo without production of original B/Ls, so that the misdelivery was not the effective cause of UOB's loss.

Findings

The Singapore High Court ("SGHC") rejected Maersk's defences and held it liable to UOB. On causation, it held that the legal burden of proof fell on UOB to show that Maersk's breach was the effective cause of its loss but Maersk bore the evidential burden of proving that, counterfactually, UOB would have authorised discharge without production of the B/Ls had they been asked. The SGHC started with the "*baseline inference*" that banks take security for a reason and will not part with it without commercial reasons for doing so and found Maersk had failed to discharge its evidential burden. It also considered whether it could be inferred that UOB had consented to discharge without B/Ls because it issued the LC after discharge has taken place. It was not persuaded on a balance of probabilities that UOB knew at the time it issued the LC that the cargo had already been discharged.

HFW Comment

This decision highlights the complexities now involved in misdelivery claims and the challenges carriers face in proving causation defences.

O v C [2024] EWHC 2838 (Comm)

Court: Commercial Court

Date: 8 November 2024

Summary

In O v C, the Court addressed the complex interplay between arbitration and compliance with US sanctions. Following a request for interim relief under Section 44 of the Arbitration Act 1996 (the "s44 the Act"), it mandated that the proceeds from the sale of a cargo – deemed "blocked property" under US sanctions regulations – be deposited into the Court rather than into a US account, despite concerns that this could potentially violate US sanctions.

Facts

The claimant, O, owned a vessel carrying a cargo of naphtha loaded by the respondent, C, in Singapore. Shortly after loading, C was added to the US Specially Designated Nationals (SDN) List by the US Office of Foreign Assets Control (OFAC). As a result, O terminated the charterparty and refused to discharge the cargo. C started arbitration proceedings to seek compensation from O for the alleged conversion of the cargo. O claimed it had the right to terminate the charterparty due to US sanctions and applied for interim relief under s44 the Act to sell the cargo and deposit the proceeds into a blocked account at a US financial institution, as permitted by OFAC. Typically, when disputed cargo is sold, the proceeds are deposited into Court to ensure they are preserved until a claim is resolved. However, in this instance, O argued that doing so could potentially breach sanctions and there was a real risk that O, its parent company and US based personnel, could be prosecuted. C did not oppose the sale but argued that the proceeds should be paid into Court, arguing that the question of whether the cargo was blocked was for the tribunal and that paying the proceeds into a blocked account would cause it prejudice.

Findings

Given the risk that payment into Court could breach US sanctions, the Court determined that such an order would not be made lightly. It assessed the context and OFAC guidelines, finding no real prospect of prosecution of O or the US citizens controlling it. Factors included the UK's allied jurisdiction status, O's compliance efforts, the involuntary nature of the actions compelled by the Court's order and the purpose of preserving sale proceeds pending arbitration rather than avoiding sanctions. Consequently, the Court ordered that the proceeds of sale to be paid into Court, concluding there was no real risk of prosecution. Even if there was such a risk, it would be very low and required a balancing exercise. Payment into Court would be simpler and more effective in facilitating enforcement of the arbitral tribunal's decision. The primary concern was to preserve the proceeds of sale and the sanctions regime did not preclude such an order. The Court noted O's reasonable and good faith efforts to comply with sanctions while fulfilling contractual obligations.

HFW Comment

This ruling is significant as it clarifies the Court's approach to balancing compliance with sanctions and facilitating arbitration. It illustrates the Court's commitment to balancing the interests of both parties and ensuring the effectiveness of arbitration processes, even in light of stringent sanctions regimes.

Fimbank Plc v KCH Shipping Co Ltd [2024] UKSC 38

Court: Supreme Court

Date: 13 November 2024

Summary

The Supreme Court ruled that the one-year time bar under Article III, Rule 6 of the Hague-Visby Rules ("HVR") is applicable to claims for misdelivery occurring after discharge of the goods.

Facts

The appellant, Fimbank Plc ("Fimbank"), was the holder of 13 bills of lading ("B/Ls") covering a cargo of steam coal being shipped from Indonesia to India. The respondent, KCH Shipping Co Ltd ("KCH"), was the demise charterer of the vessel and the contractual carrier under the B/Ls.

Clause 13.10 of the charterparty read: "*This Charterparty shall have effect subject to the Hague-Visby Rules, which shall apply to any bill of lading issued under this Charterparty.*"

The B/Ls were on the 1994 Congenbill form and read at clause 2(c): "*The Carrier shall in no case be responsible for loss of or damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel.*"

The cargo was discharged against letters of indemnity. Fimbank claimed that KCH had misdelivered the cargo without presentation of the original B/Ls. It initially erroneously brought arbitration proceedings against the bareboat charterers, before bringing arbitration proceedings against KCH in 2020 – more than one year after the date of discharge. The arbitral tribunal held that the charterparty successfully incorporated the HVR and determined that the one-year time limit in Article III, Rule 6 of the HVR applied to misdelivery claims, meaning that Fimbank's claim was time-barred. The Commercial Court upheld this ruling and found that the HVR were not disapplied by clause 2(c) of the B/Ls. The Court of Appeal upheld these decisions, noting that the Visby revision to Article III, Rule 6 of the Hague Rules was intended to broaden its scope to cover, for example, claims for misdelivery. Fimbank appealed to the UK Supreme Court.

Findings

The Supreme Court upheld the decisions of the lower courts. It emphasised the broad and all-encompassing language of Article III, Rule 6, which states that the carrier shall be discharged from "*all liability whatsoever*" unless suit is brought within one year of delivery or the date when the goods should have been delivered. It noted that the purpose of the time bar is to ensure finality and to allow carriers to close their books, which would be undermined if misdelivery claims were excluded. The *travaux préparatoires* of the HVR made it clear that the reason for broadening the wording of Article III, Rule 6 was to cover misdelivery, which they referred to as "*wrongful delivery*".

The Supreme Court also rejected the argument that the effect of clause 2(c) of the B/Ls was to exclude the operation of the HVR. It noted that the intention of clause 2(c) was to protect the carrier, and that it would be counter-intuitive, if not perverse, for it to have the effect of preventing the carrier from relying on an otherwise applicable time bar. The Court also noted that clause 2(c) does not refer to the HVR or to the time bar.

HFW Comment

The judgment confirms that the time bar under Article III, Rule 6 of the HVR applies to claims for misdelivery after discharge. Parties seeking to bring misdelivery claims will be reminded that they must do so in a timely manner and should always be vigilant of deadlines.

CE Energy DMCC v Bashar [2025] EWHC 297 (Comm)

Court: Commercial Court

Date: 14 February 2025

Summary

In these applications for summary judgment, the Court provided insight into the distinction between a demand guarantee and a contract of suretyship. Additionally, it reviewed authority regarding of s49(2) of the Sales of Goods Act 1979 ("**SOGA**") and in particular, the interpretation of "*payable on a day certain irrespective of delivery*."

Facts

In 2022 and 2023, CE Energy DMCC (the "**Claimant**") agreed to sell gasoil and jet fuel to Ultimate Oil & Gas DMCC ("**UOG**") under 5 spot contracts. Various claims arose and arbitration proceedings were commenced. In 2024, the Claimant and UOG entered into a payment agreement, under which UOG agreed to pay off the outstanding debt in instalments and the Claimant agreed to supply two more spot cargoes, for which UOG would pay. This agreement included several recitals with admission of default on payment by UOG. Mr Bashar, UOG's owner and chairman, also provided a personal guarantee to the Claimant, on behalf of UOG, for the payment agreement and additional cargoes. However, UOG did not pay the agreed amounts in full. The Claimant did not supply the second additional spot cargo and the arbitrations were re-activated. In addition, the Claimant commenced two sets of court proceedings, against UOG for the amount due under the spot contract made after the payment agreement and against Mr Bashar under the guarantee, applying for summary judgment in both. The central issues were whether:

1. Mr Bashar had a realistic prospect of persuading a court that the guarantee was a contract for suretyship, not a demand guarantee - so that the Claimant must establish UOG's liability before it could call on him to pay – and if so, whether the Claimant could establish UOG's liability. If it was a demand guarantee, Mr Bashar would be liable for UOG's obligations upon request, with no requirement of default.
2. UOG had a realistic prospect of defending the claim for non-payment.

Findings

The Court granted both applications for summary judgment. In relation to the first issue, it found that the guarantee was more likely a suretyship, requiring proof of UOG's default. However, UOG's express admissions of liability in the payment agreement recitals negated any realistic prospect of defending the claim. The Court held that whether a clause is a guarantee or suretyship is a matter of construction and it is necessary to consider commercial background and wider contractual intention. Simple use of the word "demand', for example, is insufficient by itself to demonstrate a demand guarantee.

The Court also found that UOG had no realistic prospect of defending the claim for non-payment. An issue relating to s49 SOGA arose in relation to the claim against UOG under the additional spot contract. The Court of Appeal has held that s49 SOGA provides an exclusive remedy for the price of goods, so that where property in the goods has not passed to the buyer, for example (as here) due to a retention of title clause, the seller may not be able to bring such an action. However, s.49(2) carves out an exception where the price is "*payable on a day certain irrespective of delivery*" and the buyer wrongfully does not pay. Although commenting that the role of s49 was "ripe for appeal", in this case the Court was able to follow the authorities in holding that: (a) "*day certain*" did not require a specific date to be expressly stated, so long as the relevant date can be ascertained by reference to a contingent or future event; and (b) "*irrespective of delivery*" did not mean that delivery should not have taken place if payment was to be due. Under the spot contract, time for payment was fixed by reference to a notice of readiness which was likely to occur following delivery ex-ship but was not linked to it. The Court held that on the law as it stands, this would be both a "*date certain*" and "*irrespective of delivery*". It would be a date certain because it was ascertainable from the occurrence of an event

defined in the contract, though not specified as a fixed date. And it would be irrespective of delivery because it would not be bound to coincide with delivery, and because nothing in the contract made payment conditional upon delivery having occurred.

HFW Comment

This case serves as an important reminder for commercial parties to consider what type of security is required when drafting a guarantee and to ensure that this is expressed clearly and consistent with both commercial background and the intention of the contract. Additionally, the Court's comments on s49(2) SOGA will be of interest to parties who regularly use retention of title to goods as security.

Litasco SA -v- Banque El Amana SA [2025] EWHC 312 (Comm)

Court: Commercial Court

Date: 14 February 2025

Summary

An attempt to resist summary judgment for failure to pay under a standby letter of credit ("SBLC") failed where English law was found to govern the SBLC and the principle in *Ralli Bros* was found not to apply. This was because the principle does not apply in the case of illegality as a result of a foreign court order (rather than under foreign legislation or regulation), nor where the illegality is in a jurisdiction other than the place of performance. Finally, a *Ralli Bros* defence is not available to a defendant who is at fault.

Facts

In 2019 the defendant, Banque El Amana S.A. ("BEA"), issued a SBLC to the claimant Litasco S.A. ("Litasco") as security for the third in a series of loan agreements between Litasco as lender and Société Kerkoub pour l'Investissement SA ("SKI") as borrower, to fund the construction and development of an LPG network in Guinea. SKI failed to pay and so in 2022, Litasco made a compliant presentation under the SBLC. BEA failed to pay out and Litasco brought a claim against BEA for summary judgment in the English Commercial Court. Two sets of proceedings were also brought in Mauritania in 2024, a civil claim by SKI against performance of the SBLC, under which a Stay Order was made and a criminal claim, under which an Attachment Order for the seizure of the SBLC was made.

In its defence, BEA argued that the governing law of the SBLC was not English law, because of an error in the SWIFT message which confirmed that English law would govern. It also argued that Litasco had submitted to the Mauritanian proceedings and that as a result of both the Stay Order and Attachment Order, BEA was no longer able to pay the SBLC amount. It also relied on the *Ralli Bros*[3] principle. (This provides that the enforceability of an English law contract is determined without reference to illegality under any other law *except* where contractual performance necessarily requires an act to be done in a place where it would be unlawful to carry it out.)

Findings

The Court began by confirming that the error in the SWIFT message was obviously typographical and there was no real prospect of persuading the Court otherwise at trial. The governing law of the SBLC was therefore English law and the English court had jurisdiction to determine BEA's liability to Litasco under the SBLC. The Court also confirmed, based on the evidence of BEA's own expert, that Litasco had not submitted to the jurisdiction of the Mauritanian courts and was not bound by the Stay Order.

The Court then considered the effect of the Attachment Order and concluded that it only prohibited BEA from making payment while it remained in effect. This did not offer BEA a defence with a real prospect of success at trial. The Court went on to consider whether the *Ralli Bros* principle applied. Having examined the authorities, it agreed with Litasco that the *Ralli Bros* principle does not apply to acts of performance in a foreign jurisdiction which are unlawful in the sense of being in breach of a foreign court order. For the principle to apply, there must be a breach of legislation or regulation in the foreign jurisdiction. On that basis alone, the Court held that the *Ralli Bros* principle did not offer BEA any real prospect of success at trial.

The Court went on to offer other reasons why BEA could not rely on the *Ralli Bros* principle. First, it is not available as a defence where the defendant is at fault in some way. In the present case, payment was due on 17 January 2022 and the first Order was made on 30 April 2024. There was a period of two years in which payment could have been made, precluding BEA from relying upon this defence. In addition, under English law, the place of performance of the SBLC was the place of receipt, which was

[3] Ralli Brothers v Compania Naviera Sota y Aznar [1920] 2 KB 287 (CA).

Switzerland. Any unlawfulness under Mauritanian law was therefore irrelevant for these purposes, even if performance necessarily required an act to be done in a place (here, Mauritania) where that act would be unlawful. The authorities established that for the purposes of the *Ralli Bros* principle, the illegality must be in the place of contractual performance, not in another jurisdiction.

HFW Comment

This judgment provides a helpful illustration of how the *Ralli Bros* principle works in practice. The summary judgment decision in Litasco's favour perhaps offers some comfort to those parties concerned that security in the form of a SBLC may be less valuable where it is difficult to enforce. The takeaway here is that to improve the security offered by a SBLC, it will be important to ensure that English law is the governing law.

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