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COURT OF APPEAL REAFFIRMS APPROACH TO CONFLICTS BETWEEN SPECIFIC AND GENERAL TERMS

The appeal in *Septo Trading Inc v Tintrade Limited*¹ focused on the correct approach to take where an incorporated, standard term is alleged to conflict or to be inconsistent with a term expressly agreed between the parties.

Background

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

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

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

The buyer claimed damages. The seller relied on the binding nature of the certificate of quality under the express term in the Recap. The buyer relied on the BP Terms to argue that the certificate was binding only for invoicing purposes and did not preclude it from bringing a claim for damages based on the quality of the product.

First instance decision

At first instance, the Court found in the buyer's favour, holding that the cargo from all seven shore tanks was fundamentally incompatible, so that the cargo would inevitably become off-spec when it was blended in the vessel's tanks.

The Court observed that if the Recap term had stood alone it would have excluded the buyer's quality claim because the certificate of quality (showing an on-spec cargo) would have been binding on the parties. However, the Court held the BP Terms qualified the Recap term, and there was no conflict between the terms; they could be read together to give effect to both.

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

Court of Appeal decision

The Court of Appeal allowed the appeal, reaffirming the principles set down in *Pagnan SpA v Tradax Ocean Transportation SA*² when approaching inconsistencies between express and incorporated contractual terms.

¹ [2021] EWCA Civ 718

² [1987] 3 All ER 565

In *Pagnan*, the Court of Appeal drew a distinction between a printed term that qualifies or supplements a specially agreed term and one that transforms or negates it. The test to determine which of these two categories a term falls into is whether the two clauses can be read together fairly and sensibly so as to give effect to both. If the printed term effectively deprives the special term of any effect, the two clauses are likely to be inconsistent.

It will also be relevant to consider whether the specially agreed term is a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it.

Following the *Pagnan* approach, the Court of Appeal held that the judge was right to conclude that the Recap term was intended to make the quality certificate binding for all purposes. It then considered the effect of the BP Term, concluding that the two provisions could not fairly and sensibly be read together. The printed term did not merely qualify or supplement the Recap term, but rather deprived it of practical effect.

The Court of Appeal also noted that the quality determination provision in the Recap was a central feature of the contractual scheme and that it was unlikely that the parties would intend printed terms to detract from it. As Phillips LJ observed during the hearing, it is unlikely that parties who intended to have a non-binding certification regime would state the opposite in their Recap.

HFW Comment

This decision reaffirms the established English law approach to resolving conflict between an expressly agreed term and an incorporated, standard one and should reassure trading companies that specifically agreed terms will be given priority over incorporated standard terms and conditions.

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