

SHIPPING | AUGUST 2021

SHANGHAI SHIPYARD CO LTD V REIGNWOOD INTERNATIONAL INVESTMENT (GROUP) COMPANY LIMITED [2021] EWCA CIV 1147

On 23 July 2021, the Court of Appeal (Sir Geoffrey Vos, Lord Justice Baker and Lord Justice Popplewell) handed down a unanimous judgment in an appeal by Shanghai Shipyard Co Ltd (Shanghai Shipyard) to a first instance decision by Knowles J. The first instance decision followed a preliminary issues trial concerning the proper characterisation of a shipbuilding performance guarantee issued by the parent company of the buyer, Reignwood International Investment (Group) Company Limited (Reignwood). The performance guarantee in this case was for the final instalment under the shipbuilding contract of US\$170M, which the buyer failed to pay.

Overturning the first instance decision, the Court of Appeal held that the performance guarantee was a "demand bond", entitling Shanghai Shipyard to payment on demand, not a traditional "see to it" guarantee imposing a secondary liability on Reignwood only. In reaching its decision, the Court of Appeal gave primacy to the words used in the performance guarantee, notwithstanding *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] 1 WLR 2497, which established that outside the banking context there is a presumption against interpreting such instruments as demand bonds.

The decision of the Court of Appeal applies normal principles of construction to guarantees and avoids the unattractive outcome of the same or similarly worded guarantees having quite different meanings if issued by a bank on the one hand, and a parent company on the other, even if the parent company was performing an investment or financing role in the underlying project similar to a bank's. The decision also clarifies the effect of arbitration carve outs in such instruments to the guarantor's obligation to pay on demand where a dispute arises over payment between obligor and obligee and that dispute is referred to arbitration within the period of time permitted. Such carve outs actually reinforce the point that absent a timely reference to arbitration, the instrument is an "on demand bond" rather than a "see to it" guarantee.

We believe the approach taken by the Court of Appeal will be welcomed by shipyards and other parties for whom such instruments are a guarantee of vital cash-flow.

Steven Berry QC represented the Shanghai Shipyard on the appeal. He was instructed by HFW Shanghai (Nick Poynder, Jenny Chester, Thilo Jahn and Andrea Chen).

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