

**INTERNATIONAL TRADE AND COMMODITIES  
LEGAL UPDATE  
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## INTRODUCTION

I am pleased to introduce the fifth issue of our International Trade and Commodities Legal Update. Once again, we have included articles on recent decisions of the English courts which cover a wide range of issues that we believe will be interesting to our readers.

The *Linsen International v. Humpuss Sea Transport* case is of particular interest in view of the numerous contractual defaults which have taken place in the past few years due to market conditions. It illustrates that an attempt to pierce the corporate veil under English law, in order to “follow the money” that may have passed into the hands of other companies within the same corporate group as the defaulting party, will only succeed in very limited circumstances, as will any attempt to freeze that money where it is held by any other company within the group over which the English court does not have jurisdiction. In *Linsen International*, Mr Justice Flaux distinguished another 2011 decision of the Commercial Court in *Antonio Gramsci Shipping v. Stepanovs*. In the latter case, the court's view was that there was a good arguable case that the whole purpose of the corporate structure was to perpetrate the relevant fraud and that both the chartering companies and the charterparties themselves were a sham or facade from the outset. In *Linsen Transport*, on the other hand, there was no evidence that the corporate structure had been abused or that the original charterparties and guarantee were anything but genuine contracts.

In *R G Grain Trade v. Feed Factors*, we focus on the issue of whether the fact that the goods did not meet the contractual specification entitled the buyers to reject them. The Court stated that that would depend on whether the specification was a condition of the FOB contract, a warranty or an innominate term.

In *Thai Maparn Trading v. Louis Dreyfus*, the Commercial Court judge dismissed the FOB sellers' appeal from two GAFTA arbitration awards. The judge rejected the sellers' argument that the contractual requirement of “minimum 7 working days written” prior notice of the nominated vessels' ETA was a condition precedent to the sellers' obligation to provide and load the cargo.

*Sovarex v. Alvarez* highlights the English court's power to enter an arbitration award as an English court judgment so that it can be enforced as a court judgment. This is one of three cases this year where the Commercial Court has granted such an application in circumstances where one of the parties had commenced court proceedings in another EU Member State in breach of the London arbitration provision. The advantage of turning the arbitration award into an English court judgment is that under the Brussels Regulation, that court judgment should take precedence over any conflicting judgment rendered subsequently by the court of another EU Member State.

The report on *AstraZeneca v. Albemarle* provides an overview of the English court's approach to the interpretation of limitation and exclusion clauses in commercial contracts.

Finally, on the trade finance side, *Swotbooks.com Ltd v. Royal Bank of Scotland* reinforces the importance of the doctrine of strict compliance both under the Uniform Rules for Documentary Credits (“UCP”) and in relation to letters of credit generally.

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## TRADING

### Piercing the corporate veil and Chabra injunctions – clarification from the English High Court

*Linsen International v. Humpuss Sea Transport & others* [2011] EWHC 2339 (Comm)

In this case, the Commercial Court (Mr Justice Flaux) has reviewed and examined the relevant English legal principles with regard to piercing the corporate veil, as well as the specific set of circumstances in which a Chabra injunction may be obtained. A Chabra injunction is, in essence, a freezing order directed to a party against whom the Claimant does not have a substantive cause of action (the “NCAD”) which is made in aid of enforcement of a judgment, or anticipated judgment, against a party against whom the Claimant does have a substantive cause of action (“CAD”).

#### The background facts

The Claimant ship-owners (“owners”) were companies in a group of which Empire Chemical Holdings Inc was head (“the Empire Group”). In 2007, the Empire Group entered into negotiations with a number of shipyards for the construction of 12 chemical tankers, and also entered into an agreement where seven of those tankers would be chartered to the Defendant charterers, who were companies in the Humpuss group of companies (“the Humpuss Group”). Various time charterparties were entered into between various companies in the Empire Group and the Humpuss Group in October 2007 and again in January 2008.

By the time the vessels were delivered to the charterers under the charterparties in early 2009, the freight market had collapsed. The charterers were unable to sub-charter the vessels at rates which covered the time charter hire and so did not pay hire to the owners by the due dates. The owners commenced arbitration, obtained arbitral awards against the charterers for repudiatory breach of the charterparties and also obtained summary judgment against the guarantor of the charterers’ obligations under the charterparties. They also obtained freezing orders against both the First and Second Defendants (the charterers and guarantors) in these proceedings. However, neither the arbitral awards nor the summary judgment were honoured, and the owners applied for and obtained world wide freezing orders against the Third to Thirteenth Defendants on an *ex parte* basis. Those defendants were principally other companies within the Humpuss Group, and the orders were granted on the basis that (i) there was a good arguable case that there had been abuse of the corporate structure of the Humpuss Group; and (ii) thus that various corporate veils could be lifted so as to render the other companies within this group liable as parties to the charterparties/guarantees on the basis that they were in fact the “true” parties to the charterparties/guarantees.

The present application before Mr Justice Flaux was for a continuation of the freezing orders against the Third to Thirteenth Defendants.

#### The Commercial Court decision

##### *Piercing the corporate veil*

The judge reviewed the evidence submitted by the owners to support their case that there had been an abuse by the

Defendants of their corporate structure entitling the owners to pierce the corporate veil. He rejected many of the owners’ allegations in respect of abuse but did accept that there was evidence that assets had been moved from the First Defendant to the Third Defendant with a view to frustrating enforcement against the First Defendant.

He then went on to review the authorities in relation to the piercing of the corporate veil to identify in what circumstances the corporate veil would be pierced so as to impose liability in contract on a party who was not, ostensibly, a party to the contract concerned. One of the cases relied upon by the owners on this issue was the recent Commercial Court decision of Mr Justice Burton in *Antonio Gramsci Shipping v. Stepanovs* [2011] 1 Lloyd’s Rep 647, where the Court held that it was sufficiently arguable (for the purpose of founding jurisdiction) that the Claimant ship-owners could pierce the corporate veil of the chartering entities, so as to hold Mr Stepanovs liable as a party to the charterparties.

In his judgment, Mr Justice Flaux notes that there are circumstances in which a court may lift the corporate veil so as to ignore transactions which are plainly a sham. However, he said that there was no authority which supported the proposition that abuse of the corporate structure subsequent to the conclusion of contracts could be used to pierce the corporate veil in the sense of rendering third parties liable under contracts concluded prior to such abuse. The Court’s decision in the *Antonio Gramsci* case could, he said, easily be distinguished from the present case since, in that case, the Court found that the Claimants had a good arguable case that the whole purpose of the corporate structure was to perpetrate the relevant fraud and that both the chartering companies and the charterparties themselves were effectively a sham or façade from the outset. In the present case, the Court concluded that at the time the original charterparties and guarantees were entered into in 2007, “*there was no question of any abuse of the corporate structure*” and that there was “*no basis for impugning the genuineness of the original charterparties or guarantees or for suggesting that those contracts were shams...*”.

In the circumstances, he concluded that there was no basis for any of the Third to Thirteenth Defendants being held liable as parties to the charterparties and the existing freezing orders against them should not be continued.

##### *The application for a Chabra injunction*

Mr Justice Flaux then considered the application for a Chabra injunction against the Third Defendant. In doing so, he reviewed the various authorities in relation to the basis for the grant of a Chabra injunction. He considered the question of the level of control over the disposal of the asset held by the NCAD which the CAD had to have in order to justify such an injunction against the NCAD. In doing so, he adopted much of an earlier judgment of Sir John Chadwick regarding a case in the Cayman Islands which had stated that, whilst it was necessary that the CAD had to have substantial control over the assets held by the NCAD, the Court should also be satisfied that there was a good reason to suppose that (i) the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used to satisfy a judgment; or (ii) that there is some other process of enforcement by which the Claimant can obtain recourse to the assets held by the NCAD.

On the facts of this case, Mr Justice Flaux concluded that, leaving aside the issue of jurisdiction, the requirements for a Chabra injunction were satisfied as against the Third Defendant. However, the Third Defendant was based in Indonesia and was not prepared to accede to the jurisdiction of the English court. The issue was, therefore, whether the Court had jurisdiction to order that the Third Defendant be joined to the proceedings for the purposes of granting a Chabra injunction against it. In that respect, the owners relied on paragraph 3.1(3) of the Practice Direction 6B of the Civil Procedure Rules which allows for service out of the jurisdiction where:

*"A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –*

- a. *there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
- b. *the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."*

The judge held that the above provision did not permit the Court to assume jurisdiction over the Third Defendant because the dispute between the Claimant (i.e. owners) and the First Defendant was subject to London arbitration in accordance with the arbitration clause in the charterparties. Thus, there was never going to be an issue for the Court to try. The Court, therefore, had no basis for assuming jurisdiction so as to make any Chabra injunction as against the Third Defendant.

#### Comment

The decision in the *Antonio Gramsci* case may have acted as an encouragement to parties to seek to pierce the corporate veil so as to fix puppeteers with the liability of their puppets irrespective of the date on which the abusive relationship between the two began. The decision in this case acts as something of a brake on such enthusiasm - underlining, as it does, that subsequent abusive conduct cannot be used to fix liability on the puppeteer in relation to contracts entered into before the abuse occurs.

So far as the Chabra jurisdiction is concerned, this can provide useful protection in some cases but only if the substantive dispute is subject to the jurisdiction of the English courts. As this decision confirms, it will provide no assistance when that dispute is subject to arbitration or, of course, the jurisdiction of the courts of another country.



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#### Remedies for breach of sale contract specification

*RG Grain Trade LLP (UK) v. Feed Factors International Limited* [2011] EWHC 1889 (Comm)

#### The background facts

This case concerns the FOB sale by RG Grain Trade (sellers) to Feed Factors (buyers) of a cargo of sunflower expeller. A dispute arose in relation to whether the goods supplied under the contract were in accordance with the contractual specification. The buyers ultimately rejected the goods and the documents. The goods were subsequently sold at a lower price by agreement between the parties. Against that background, the sellers claimed approximately US\$670,000, the balance of the purchase price, and the buyers counterclaimed damages in the region of US\$380,000. The GAFTA First Tier Tribunal found for the sellers but the GAFTA Board of Appeal allowed the buyers' damages claim and dismissed the sellers' claim for the balance of the price.

There was a significant dispute between the parties concerning the interpretation of various provisions in the contract, both express and incorporated by reference, in relation to the determination of the quality of the goods supplied under the contract. We do not intend to dwell on that particular issue save to record that the Board of Appeal and the Court concluded that by virtue of the various contractual provisions, the goods had been determined not to comply with the contractual specification.

What we do intend to look at, however, is the Court's determination on the issue of whether the fact that the goods did not meet the contractual specification entitled the buyers to reject them. So far as is relevant to this issue, the contract provided as follows:

*"Commodity: UKRAINIAN ORIGIN SUNFLOWER EXPELLER*

*In bulk, sound, loyal and merchantable quality.*

*Specifications: protein min 32% moisture max 7% - fiber (sic) max 23% - fat min 11%.*

*Special Conditions: Other terms and conditions not in contradiction with above as per GAFTA 119.."*

Clause 5 of GAFTA 119 provides as follows:

*"5. Quality*

*Official...certificate of inspection, at time of loading into the ocean carrying vessel, shall be final as to quality.*

*Warranted to contain not less than ...% of oil and protein combined and not more than 1.5% of sand and/or silica. Should the whole, or any portion, not turn out equal to warranty the goods must be taken at an allowance to be agreed or settled by arbitration as provided for below".*

The Board of Appeal found that a certificate issued by Salomon & Seaber was final and binding and Mr Justice Hamblen agreed. That certificate stated that the protein content of the cargo was 26.8% (less than the minimum of 32% specified in the contract) and the fibre content was 26.57% (more than the maximum of 23% specified in the contract).

In light of this finding, the Board of Appeal said in its Award:

*“If a contract does not contain a scale of allowances for deficiency in certain specifications (viz fibre) and the goods subsequently fall outside this then it must follow that the goods can be rejected unless the parties agree to any other course of action.”*

The sellers contended before Mr Justice Hamblen that this conclusion was wrong on two grounds:

1. The Board had failed to give effect to clause 5 of GAFTA 119 which is a non-rejection clause; and
2. The Board had proceeded on the erroneous basis that any failure of the goods to meet the specification would justify rejection.

### The Commercial Court decision

With regard to ground (1), the Court agreed with the Board of Appeal that the provision in clause 5 of GAFTA 119 referring to the goods being taken at an allowance applied only to the warranties in respect of oil and protein combined and sand and/or silica as expressly referred to in that clause. It did not, therefore, apply to the specification in relation to fibre. Accordingly, that clause did not, of itself, prevent rejection of the cargo by the buyers on account of a failure of the cargo to meet the contractual specification in relation to fibre.

With regard to ground (2), the underlying issue was whether the contractual requirement that the goods have a maximum fibre content of 23% was (i) a condition entitling the sellers to reject the cargo; or (ii) a warranty limiting the sellers' remedy to damages; or (iii) an innominate term, the breach of which would only entitle the buyers to reject if the breach would deprive them of substantially the whole benefit of the contract.

The buyers contended that the Board had in fact determined that the breach was one of a condition, alternatively that the Board's conclusion could be upheld on that basis. In particular, the buyers argued that the breach in respect of fibre content was a breach of description – the implied obligation that the goods supplied would meet the contractual description being a condition. Mr Justice Hamblen noted that there was no suggestion in the Board's reasons that they regarded the fibre content provision as a matter of description. Indeed, it was clear that the judge was of the view that it was a matter of quality, referring as he did to the fact that the fibre content provision appeared under the heading “Specifications” and next to a specification characteristic which was clearly a matter of quality rather than description, namely protein.

As to the contractual nature of the provision with regard to fibre content, Mr Justice Hamblen referred extensively to the judgment of Mr Justice Slynn in *Tradex v. Goldschmidt SA* [1977] 2 LLR 604, where the judge found that a contractual provision providing for “4% foreign matters” was an innominate term. Mr Justice Hamblen commented that there is “*no hint in the Board's reasons that they have addressed their minds to the issue of whether the fibre content provision should properly be regarded as a condition, as opposed to a warranty or an innominate term. They have assumed that the term is a condition unless there is an indication to the contrary. That is not the law*”.

On that basis, Mr Justice Hamblen concluded that the Board had erred in law. In such circumstances, and as he recorded, it was common ground between the parties that the appropriate cause of action was to remit the matter to the Board of Appeal to consider whether the specification in relation to fibre was a condition, warranty or innominate term, rather than for the Court to decide that issue.

### Comment

There may be cases where there would be a legitimate debate as to whether a contractual requirement in respect of goods to be supplied under a contract amounts to a matter of description or quality – and there may be cases where it will be a matter of both. However, the requirements of a contractual specification will normally be a matter of quality not description. If so, one then needs to determine whether that aspect of the contractual specification amounts to a condition, warranty or an innominate term. This will depend upon the intentions of the parties derived from the wording of the contract. However, all things being equal, in most cases the requirements of a specification will amount to an innominate term, the breach of which will only give rise to the right to reject the goods if the breach is such as to deprive the buyer of substantially the whole benefit of the contract. In most cases, this is unlikely to be the position.

One must also bear in mind, however, that if the contract is governed by English law, then unless excluded, the buyer may be able to rely upon the implied condition in S.14 of the Sale of Goods Act that the goods supplied will be of satisfactory quality. Of course, a breach of the contractual specification will not necessarily render the goods “unsatisfactory”. It will be a question of whether the failure of the goods to meet the specification renders the goods “unsatisfactory” applying all the factors which are to be taken into account, in accordance with S.14, in determining that question.



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## Does short notice of nominated vessels' ETA invalidate the notice?

*Thai Maparn Trading Co Ltd v. Louis Dreyfus Commodities Asia Pte Ltd* [2011] EWHC 2494 (Comm)

### The background facts

This was an appeal by the sellers (Thai Maparn Trading) under S.69 Arbitration Act 1996 (error of law) against two arbitration awards issued by the GAFTA Board of Appeal.

The dispute arose out of two FOB contracts for the sale of rice based on GAFTA Form 120. In both cases, the GAFTA Board had upheld the first tier GAFTA awards that the sellers (Claimants in the appeal) had repudiated the contracts by making it clear to the buyers (Louis Dreyfus, Defendants in the appeal) that they did not and would not have cargo available to meet the vessel nominated in each case by the buyers. The GAFTA Board held that these repudiations amounted to a default under Clause 23 of GAFTA 120 and that the buyers were therefore entitled to damages assessed as at the date of the sellers' default. In both cases, the sellers had tried (and failed) to argue that the buyers had given short notice of the arrival of the vessel, which was non-contractual, thus entitling the sellers to reject the nominations.

### The contractual provisions

Both contracts stipulated loading terms that required the buyers to give a minimum of seven working days written pre-notice of the vessel's ETA and for NOR to be tendered in writing during normal business hours. The relevant terms of GAFTA 120, as incorporated into each of the two contracts, provided as follows:

- > The buyers were to serve not less than a certain number of consecutive days notice of the name and probable readiness date of the vessel and the estimated tonnage required. Provided that the vessel was presented at the loading port in readiness to load within the delivery period, the sellers should, if necessary, complete loading after the delivery period. Any notice received after 16.00 hours on a business day would be deemed to have been received on the business day following (Clause 6 - Nomination of Vessel).
- > Notification of the vessel's readiness to load at the port of loading was to be served on the sellers at their office at the port between certain specified hours (Clause 10 - Loading).
- > If either party defaulted in fulfilling the contract, the damages payable were to be based on, but not limited to, the difference between the contract price and either (a) the default price obtained by the innocent party by selling to or purchasing from an alternative supplier; or (b) the actual or estimated value of the goods on the default date (Clause 23(c) - Default).

### The findings of the GAFTA Boards of Appeal

In each case, the buyers nominated the vessels under the contracts, at the same time giving their written pre-notice of the vessels' ETAs, but then called on the sellers to bring the cargo alongside the vessels on dates that were before the requisite seven working days' notice periods would expire. However, the nominations of the vessels were valid in all other material respects.

In response to the nominations, the sellers responded with messages that stated, in respect of the first cargo, "we are not ready with cargo and printed bags, and hence, we cannot accept your above nomination" and, in respect of the second cargo, "we regret, with due respect, due to unavailability of goods and printed bags, we cannot accept [your nomination]". In neither case did the sellers state that their rejection of the nomination was because they regarded the nomination itself as invalid.

The Boards of Appeal held that the short notice in both cases was insufficient to entitle the sellers to reject the nominations, since they could instead have simply accepted the vessels when the seven working days' notice periods expired.

Against this background, the GAFTA Boards held that the sellers' responses to the buyers' nominations and pre-notice of ETAs were in anticipatory repudiatory breach of contract, entitling the buyers to accept the repudiation and bring the contracts to an end. The arbitrators took the day after the date of the sellers' message that constituted repudiation in the case of each contract as the default date for the purposes of calculating damages.

The sellers appealed to the Court.

### The Commercial Court decision

Mr Justice Beatson disagreed with the sellers' counsel that the contractual requirement of "minimum 7 working days written" prior notice of the nominated vessels' ETA was a condition precedent to the sellers' obligation to provide and load the cargo. He also rejected the contention that the short notices were invalid and of no effect, because this would wrongly assume that the obligation in the contracts to provide the cargo after the tender of valid NOR depended on seven days notice of the vessels' ETA. In fact, the notice of ETA was only an estimated time of arrival and the vessel might well arrive before the expiry of the period stated even if at the time it was given it was anticipated that she would arrive more than seven days later.

So far as triggering the obligation to load the cargo - and for the purposes of laytime and demurrage - time would, *prima facie*, start to run when the NOR was given because it was the NOR that triggered the obligation to load and the running of laytime. However, as the Boards found, on a proper construction of the contract the obligation to load and the running of laytime would not commence on the date of the NOR if the NOR was tendered before the expiry of seven days from the nomination, because the sellers were entitled to be given seven days notice to have the cargo available for loading. In such case, time would begin to run from expiry of seven days after the notice.

The judge distinguished this matter from *Bunge v. Tradax* [1981] UKHL 11 because there the breach consisted not of giving less than the requisite number of days' notice, but of giving notice after the last date on which it could legitimately be given, because the required 15 days' notice in that case would have ended after the last contractual date of shipment.

The judge saw no reason to criticise the GAFTA Boards' findings that the sellers' messages were repudiatory, based on the evidence before them. Regarding the date of default, the judge referred to *Toprak v. Finagrain* [1979] 2 Lloyd's Rep 98, where it was held that the date of default in an equivalent GAFTA default clause was the date of the breach and not the

date on which the breach was accepted as repudiatory by the other party. He rejected the argument that, as long as the contracts remained open for performance because the buyers had not stated they were treating the contracts as repudiated, then only nominal damages were claimable.

### Comment

This case illustrates that the courts will look at the substantive purpose of the obligations to give notice of nominations and will not permit technical points to be used to invalidate otherwise valid nominations. It also offers a lesson that when responding to such notices, whether valid or not, the receiving party needs to choose its words extremely carefully so as not to appear to be itself refusing to perform the contract – and thereby risk putting itself in default.



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## FOSFA arbitration award entered as English court judgment

*Sovarex SA v. Romero Alvarez SA* [2011] EWHC 1661 (Comm)

### The background facts

The original dispute in this case arose out of a contract under which Sovarex sold sunflower seeds to Alvarez. The contract was governed by English law and provided for FOSFA arbitration in London in the event of a dispute. Alvarez did not perform its obligations as the buyer. Sovarex commenced FOSFA arbitration proceedings against Alvarez for repudiatory breach of contract. Alvarez countered that the contract was in fact never concluded. The tribunal found in Sovarex's favour and ordered Alvarez to pay damages.

The present decision was made in an application by Sovarex to have the arbitration award entered as an English court judgment in the same terms as the award, so that it could be enforced as though it were an English court judgment. Mr Justice Hamblen allowed the application and, in doing so, reached the following conclusions:

1. Alvarez had not lost its right to challenge the substantive jurisdiction of the arbitrators;
2. Sovarex was entitled to bring the application under S.66 of the Arbitration Act 1996, even though Alvarez's defence raised issues of fact; and
3. In the particular circumstances, the fact that Alvarez had brought related proceedings in Spain, before the FOSFA arbitration was started, did not mean that the English court had to dismiss or stay the application.

We discuss these findings below.

### Alvarez's right to challenge the tribunal's jurisdiction

The court's power to enter a judgment in the terms of an arbitration award is based on S.66 of the Arbitration Act 1996, which provides that the court shall not exercise its power to do so if the losing party shows that the tribunal lacked substantive jurisdiction and provided that the losing party had not submitted to the jurisdiction of the tribunal.

S.73 of the Arbitration Act provides that a party will lose its right to object to the substantive jurisdiction of the tribunal if that party does not object **before** taking part in the arbitration proceedings.

In this case, Alvarez had written to FOSFA a number of times to state that (i) a contract was never concluded and therefore, there was no FOSFA arbitration agreement; (ii) it had commenced a related action in Spain, which process FOSFA should respect; and (iii) FOSFA should stop the arbitration because the award would be unenforceable as the issue would be decided by the Spanish court. Throughout, Alvarez said that it would not make any submissions to FOSFA because that would amount to recognising the FOSFA arbitration process.

The judge held that Alvarez had not taken part in the arbitration. He considered the case law on this point, which draws a fairly narrow distinction between, on the one hand, protesting that the tribunal has no jurisdiction and asserting that the question of jurisdiction should be decided in some other forum and, on the other hand, asking the tribunal to consider the issue of jurisdiction. The judge found on the facts that Alvarez had protested the jurisdiction of the tribunal and

explained why it would not participate in the arbitration. Mr Justice Hamblen decided that inviting the tribunal to decline jurisdiction (for the reasons Alvarez set out in its letters) did not amount to making submissions or asking the FOSFA tribunal to consider its own substantive jurisdiction.

While the judgment goes into some detail as to the test for whether a party has submitted to the jurisdiction of a tribunal, it is plain that the outcome will depend heavily on the facts in each case, and the overall tone of the correspondence with the tribunal.

### **S.66 Arbitration Act – appropriate procedure to decide issues of fact?**

Alvarez argued that S.66 of the Arbitration Act 1996 provides for a summary procedure, only to be used in clear cut cases and which could not be used where “*there is a real ground for doubting the validity of the award*”. Instead, where there were triable issues of fact in dispute, a judgment could only be entered in the same terms as an arbitration award following a common law ‘action on the award’.

The judge disagreed. He held that there was a presumption that the award was valid, which the party challenging the jurisdiction of the tribunal must overcome. If the applicant had to bring an action on the award, he would effectively have to start from scratch to establish the jurisdiction of the tribunal and prove his case on the merits. This reversal of the burden of proof, back onto the winning party in the arbitration, would be contrary to the UN Model Law, the New York Convention and the general ethos of the UK Arbitration Act. Further, although historically S.66 (and its earlier equivalent) was a summary procedure, it had been used more and more over time, in gradually more complex cases. There was no reason why disputed issues of fact (in this case, relatively straightforward issues) could not be dealt with as the court had the necessary case management powers to make directions such that disputes of fact could be heard.

### **Competing Spanish court proceedings**

Alvarez had commenced an action in the Spanish courts before the FOSFA arbitration was commenced, seeking a declaration that there was no concluded contract. The Spanish court had refused Sovarex’s application to stay the action in favour of the FOSFA arbitration. However, the Spanish court subsequently dismissed the action because it said that it did not have power to issue the negative declaratory relief sought. Alvarez was appealing this decision.

Mr Justice Hamblen was not persuaded by Alvarez’s arguments that (i) to hear the application would amount to interfering with the Spanish court’s jurisdiction; (ii) the issue had already been decided; and/or (iii) that the English court was not the most appropriate forum.

To the contrary, the judge held that (i) the Spanish court had declined jurisdiction by dismissing the action and the appeal made no difference to this and thus there was no question of interfering with the Spanish court’s jurisdiction to hear the dispute; (ii) the question of whether there was a contract had not been previously determined by the Spanish court and so there was no issue estoppel; (iii) the English court was the court of the seat of arbitration, and the agreement (if it existed) was governed by English law and therefore England was the natural forum. In addition, Mr Justice Hamblen held, applying the

decision in *West Tankers v. Allianz SpA (the Front Comor)* [2011] EWHC 829 (Comm), that a S.66 application should not be stayed or dismissed by reason of competing EC Regulation proceedings in another Member State if the award creditor had a real prospect of establishing the primacy of the award, by its conversion into an English court judgment, over any inconsistent foreign judgment.

### **Comment**

This decision makes it clear that, consistent with the UN Model law and the New York Convention, the English court will place the burden of proving that an arbitral tribunal lacked jurisdiction to make an award on the losing party, and it will carefully consider the argument that it should refuse to recognise an award because related proceedings have been commenced in another Member State court.



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## Construing exclusion clauses: do they cover a deliberate repudiatory breach of contract?

*AstraZeneca UK Limited v. Albemarle International Corporation and another* [2011] EWHC 1574 (Comm)

Where a contract becomes unworkable or unprofitable because economic or other conditions have changed, one or other party may not fulfil some of its obligations under the contract or may even try to walk away from the contract entirely. This puts that party in breach of the contract, for which its innocent counter-party may be able to recover damages. Where the breach is sufficiently serious as to entitle the counter-party to treat the contract as terminated with immediate effect and sue for damages as well, this is known as a repudiatory breach of contract. A party will be in repudiatory breach if it demonstrates, either by something it says or does, an intention not to be bound by its obligations under the contract or to deliberately walk away from it. If the contract contains a limitation or exclusion clause, the issue is then whether that clause is effective to cap the defaulting party's liability at a certain amount or to rule out the recovery of damages entirely.

### Limitation/exclusion clauses

Limitation or exclusion clauses are widely used to allocate risk within commercial contracts, so that the parties know from the outset what the financial consequences will be if either party defaults on any of its contractual obligations. Problems arise, however, when the clause is drafted in such a way that its wording is open to more than one interpretation. There are certain basic principles that the English courts will apply in interpreting limitation or exclusion clauses. These can be summarised as follows:

1. If there is any ambiguity or uncertainty as to the meaning of such a clause, it should be construed strictly against the party relying on it (known as the *contra preferentem* rule);
2. Although an exclusion clause is construed strictly against the party relying on it, the clause in question still needs to be considered carefully to establish whether it covers the breach in question;
3. Express words are required to exclude liability for negligence;
4. Where the parties have expressly incorporated a clause in their contract, the court will give the clause commercial effect and will not interpret it in such a way that it would deprive one of the parties of any meaningful remedy for its claims because if that were the true meaning of the clause, then there would be no real incentive for the performing party to comply with its contractual obligations.

### Deliberate repudiatory breach

One contentious issue which has arisen is whether a limitation or exclusion clause will apply to a deliberate repudiatory breach of contract. In two House of Lords cases, *Suisse Atlantique Societe d'Armement Maritime v. NV Rotterdam Kolen Centrale* in 1967 and *Photo Production v. Securicor* in 1980, the idea that different rules should apply to deliberate repudiatory breaches as compared to other breaches was dismissed. The reasoning was that a deliberate breach could be serious or it could be minor. If it was only minor, then it could be remedied by an award of damages without giving the innocent party the right to terminate the contract. If it was sufficiently serious, then it could entitle the innocent party not to perform its own

obligations under the contract and to bring the contract to an end, in addition to claiming damages. Either way, it will be a question of construing the clause being relied on as to whether it covers a particular breach, whether deliberate or not.

### The *NETTV* case

In 2010, however, a first instance judge in *Internet Broadcasting Corporation (NETTV) v. MAR LLC (Marhedge)* held that there was a rebuttable presumption that an exclusion clause should not apply to a deliberate repudiatory breach of contract and that very clear and strong language would need to be used in such a clause if it was intended to cover a deliberate, repudiatory breach. The judge also said that a literal interpretation of an exclusion clause should be rejected where that would defeat the main purpose of the contract because it would allow a party to deliberately breach its contractual obligations with impunity.

That decision suggested that if a party decided not to fulfil its contractual obligations for whatever reason, the exclusion clause would be ineffective to limit or exclude the consequent claim for damages. It therefore caused some concern because few parties, at the outset of a contract, would wish to release their counterparty from liability for deliberate breach.

### *AstraZeneca v. Albemarle*

In this case, the issue of deliberate repudiatory breach came up once again. In essence, the facts were as follows; Albemarle supplied AstraZeneca with a pharmaceutical product called DIP which was used to produce a sleeping pill called propofol. Under the supply agreement, if AstraZeneca decided to buy propofol ready-made, it was obliged to give Albemarle first refusal on supplying it with the propofol. AstraZeneca subsequently entered into an agreement with a third party for the supply of propofol, even though Albemarle had matched the third party's offer. In the meantime, Albemarle had not supplied AstraZeneca with one of its orders for DIP under the supply agreement. Each party accused the other of repudiatory breach of contract.

The court had among other things to consider the limitation clause in the supply agreement, which stated as follows:

*"Claims: No claims by BUYER of any kind, whether as to the products delivered or for non-delivery of the products, or otherwise, shall be greater in amount than the purchase price of the product in respect of which such damages are claimed...; In no case shall BUYER or SELLER be liable for loss of profits or incidental or consequential damages."*

In respect of AstraZeneca's claims against Albemarle, the judge held that Albemarle were in breach of the supply agreement for failing to supply an order of DIP but that the failure to supply one or two orders under a minimum three year contract was not a repudiatory (or sufficiently serious) breach that justified AstraZeneca's purported termination of the agreement. AstraZeneca could be adequately compensated for this breach by an award of damages alone. He also said that Albemarle's breach was not deliberate because they had honestly but mistakenly believed they were acting within their contractual rights on the (wrong) advice of their lawyers. The judge then concluded that the limitation provision was effective to cap Albemarle's liability to AstraZeneca for this breach to *"the purchase price of the product in respect of which damages are claimed"*, in other words to the contract price of the DIP as opposed to the much higher price of replacement DIP.

Although he had decided that Albemarle's breach was not deliberate, the judge nevertheless considered what the position might have been under the exclusion clause even if there had been a deliberate breach. He disagreed with the view put forward in *NETTV* that there was a rebuttable presumption that an exclusion clause would not apply to such a breach. Rather, he said, the normal rules of construing such clauses applied, in other words that they were construed strictly against the party relying on them and that each clause had to be reviewed to establish whether it covered the breach in question, irrespective of whether the breach was minor or serious. He added that the wording of this particular clause ("*of any kind*") was in fact wide enough to cover a deliberate breach by Albemarle had there been one, and to limit their liability.

Turning to Albemarle's claims against AstraZeneca, he held that AstraZeneca had breached the contractual obligation to give Albemarle the right of first refusal for the supply of propofol and that Albemarle had been entitled to terminate the supply agreement as a result of this repudiatory breach. AstraZeneca argued that the exclusion clause meant they were not liable for Albemarle's "*loss of profits*". The judge, however, agreed with Albemarle that those words had to be read in the context of the previous sentence in the clause, meaning that loss of profits was only excluded in relation to the supply or non-supply of DIP (being what was meant by "*product*") and did not extend to loss of profits that Albemarle would have earned in supplying AstraZeneca with the propofol. The judge commented that AstraZeneca's interpretation would strip the right of first refusal of any commercial effect.

#### Comment

Although the views of the judge in *AstraZeneca v Albemarle* were *obiter* and not therefore strictly binding, they are persuasive and it remains to be seen which way future decisions on this issue will go. In the meantime, parties should consider the wording of the limitation and exclusion clauses in their contracts very carefully and, where necessary, seek legal advice on how to draft them to achieve the required result. Where it is intended that a deliberate repudiatory breach should be covered by the clause, then it is recommended that the clause say so expressly in unambiguous terms.



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## TRADE FINANCE

### Letters of credit: strict compliance and documentary discrepancies

*Swotbooks.com Limited v. Royal Bank of Scotland PLC* [2011] EWHC 2025 (QB)

The Uniform Customs and Practice for Documentary Credits 500 ("UCP 500") is the predecessor to the UCP 600, which was published by the International Chamber of Commerce ("ICC") in July 2007. The UCP are uniform rules for documentary credits which apply to a letter of credit where expressly incorporated. This case relates to a dispute arising out of a letter of credit incorporating the UCP 500 but is nonetheless relevant for its discussion of the doctrine of strict compliance in documentary credits and discrepant documents generally.

#### The background facts

S, an internet book retailer, entered into a sale agreement with a German book wholesaler, L, which required S to provide L with a guarantee for sums due to L. S therefore applied to RBS, which duly issued an irrevocable standby letter of credit. The credit expressly incorporated UCP 500 and provided that payment would be at sight on presentation of certain documents including a certified copy of the invoice evidencing the value of the goods delivered and a certified copy of the transport document.

In return, S agreed to indemnify RBS in respect of its commitments to L and subsequently paid money into an account with RBS as security. After S went into liquidation, a dispute arose as to whether RBS had paid L against discrepant documents and whether it was consequently not entitled to debit S's account for the amounts paid.

#### Discrepant documents

##### *Transport document*

The judge held that the transport document submitted by L, a letter from DHL referring to the number of packets consigned by DHL, together with a Packing List prepared by L, was non-compliant. Although the letter of credit had not specified the type of transport document required, the judge concluded that what was required was a document of the type referred to in UCP 500, for example, a bill of lading or air transport document issued by a carrier when the goods are consigned and evidencing that the goods have been despatched. Whilst UCP 500 also provides for transport documents issued by a courier, the DHL document in this case had not provided details as to the date or place of consignment nor as to the consignee and did not constitute evidence from DHL of the consignment of any goods to S's order at any time.

The judge also held that presenting a single document as the transport document was not consistent with the invoice which, on its face, referred to many different transport documents, each with its own number. Article 13 of UCP 500 provides that "*documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit*".

### The Invoice

According to the International Standard Banking Practice for the Examination of Documents under Documentary Credits (“ISBP”), “an invoice must evidence the value of the goods shipped. Unit price(s), if any, and currency shown in the invoice must agree with that shown in the credit”. The judge stated that the invoice had to be in the currency of the credit (in this case, sterling) because otherwise there would be uncertainty as to the sum to be paid under the credit, there being no basis on which to decide which exchange rate to apply and as at what date. Here, the amount in the invoice presented was one for which S had been invoiced for items supplied at various times during the previous year, in Euros, and L had simply applied an exchange rate from an unspecified source to the total of those sums as at the date of the invoice. The judge concluded that RBS had no sound basis for accepting that exchange rate or the date chosen for applying it and that it should have rejected the invoice as discrepant.

The judge concluded that both RBS’s payment to L and the debit to S’s security account were unauthorised by S.

### Ratification

RBS sought to argue that accounting entries authorised by a director of S and subsequently by S’s liquidator constituted ratification of RBS’s payment to L because they purportedly demonstrated that S took the benefit of RBS’s payment so as to reduce its debt to L. The judge disagreed and said that it was not possible to conclude that S ratified RBS’s payment in circumstances where the company accounts expressly recorded that the payment was unauthorised, that S was maintaining a claim against RBS in that regard and that that claim was an asset of S.

### Unjust enrichment

Whilst S had received payment in full from its customers, the judge disagreed that allowing S to recover from RBS would amount to unjust enrichment. Rather, as RBS’s payment to L had been made without S’s authority, it did not discharge S’s debt to L and L could have pursued S for the full amount of the debt (and might have done so had RBS sought to join L in the proceedings and recover its payment to L on the basis that it had been made by mistake).

### Comment

The terms of the letter of credit in this case were arguably unsuitable for the underlying trade relationship where L was despatching books directly to S’s customers on an ongoing basis and there were thousands of individual delivery documents for the books supplied being transmitted electronically. However, this case highlights the fact that banks which pay against non-compliant documents cannot look to their customer even if their payment directly facilitates the delivery of goods to them.



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