

**INTERNATIONAL TRADE AND COMMODITIES  
LEGAL UPDATE  
JULY 2011**

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## INTRODUCTION

I am pleased to introduce the fourth issue of our International Trade and Commodities Legal Update. As usual, we have included articles which cover a broad range of issues that we believe will be of interest to our readers.

The *Novasen v Alimenta* case will be relevant to parties to commodities contracts who frequently use agents, usually brokers, to negotiate and conclude deals on their behalf. In the case of commodity sales on standard form contracts, the English court will usually assume that a party is willing to contract with an agent acting on behalf of whoever his undisclosed principal might be unless it has clearly said otherwise.

*B v S* is of particular interest because it makes it clear that *Scott v Avery* clauses, which provide that parties cannot take any court action before first obtaining an arbitration award, also prohibit ancillary court proceedings, such as applications for freezing orders. *Scott v Avery* clauses are frequently found in standard form contracts, for example GAFTA and FOSFA forms. Parties may therefore wish to consider whether they want to amend *Scott v Avery* arbitration clauses in their contracts to allow them to make such applications to the court before an arbitration award is issued. *Rotenberg v Sucarina* reflects the English court's inclination to dismiss applications for extensions of time in arbitration proceedings unless there would be substantial injustice in doing so.

On the demurrage front, in *Suek AG v Glencore*, the Commercial Court had to interpret the laytime and demurrage provisions in a CIF sale contract where delivery of a shipment had been delayed by reason of tidal conditions and unavailability of berth. In the *MV JAG RAVI*, the court held that shipowners were entitled to the benefit of a letter of indemnity issued by receivers to the voyage charterers to permit delivery of the cargo without presentation of original bills of lading. The shipowners were held to have acted as charterers' agents in delivering the cargo and were consequently entitled to claim under the LOI pursuant to the Contracts (Rights of Third Parties) Act 1999. Receivers issuing LOIs should therefore be alert to their potential exposure to carriers in similar circumstances.

On the trade finance side, articles on *Fortis Bank v (1) Stemcor UK and (2) IOB* have featured in some of our previous Updates. We report on the latest episode which underlines the difficulty in attaching a bank with liabilities over and above its obligation to pay under the letter of credit.

Finally, we examine the Bribery Act which came into force on 1 July 2011. Our article focuses on the Act's implications for traders with a UK connection, who will need to ensure they have adequate procedures in place to prevent bribery and corruption within their organisation, including by their overseas representatives and agents.

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biofuels, coal, sugar/molasses, grain and feed, oils and fats and metals. If you have any queries arising out of the content of this Update, or any other matters you wish to discuss with us, please feel free to contact me or the authors of specific case reports you are interested in, or your usual contact at Ince & Co.



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## TRADING

### Undisclosed principal and agent in commodities contracts

*Novasen S.A. v Alimenta S.A.* [2011] EWHC 49 (Comm)

Parties to commodities contracts will often use an agent, usually a broker, to negotiate and conclude the deal on their behalf. Usually, it is clear to the counter-party that an agent is being used as an intermediary and is acting on behalf of a principal, who is the true party to the contract. The identity of the principal will generally be known to the counter-party although, in some cases, the agent acts for an undisclosed principal.

Under English law, an undisclosed principal may sue and be sued on a contract made by an agent on its behalf, acting within the scope of his actual authority, unless the terms of the contract expressly or by implication exclude the principal's right to sue and his liability to be sued. So long as the agent has actual authority and enters into a contract with another party intending to do so on behalf of his principal, it is irrelevant whether or not he discloses to the counter-party the identity of the principal or even that he is contracting on behalf of a principal at all. As to the counter-party's willingness to contract with anyone on whose behalf the agent is authorised to contract, that willingness is assumed in a commercial contract unless the counter-party has made it clear that it does not wish to do so or there are other circumstances which point to this conclusion.

#### Background facts

In a recent case that came before the Commercial Court, N (as seller) entered into a FOSFA 201 form contract with S (as buyer) for the sale of groundnut oil CIF Geneva, with payment to be made CAD in Brussels. Originally, the draft contract had provided for S to receive a brokers' fee on the contract. However, it was subsequently agreed between N and S that the commission should be deleted and instead the price be reduced from US\$1.62 to US\$1.612 per m.t. The reason for this change may have been to facilitate permissions or exchange control requirements within S.

Meanwhile, S was concluding another FOSFA 201 contract for the same quality and quantity of product as the contract with N. This second contract stated that the seller was N, the buyer was A and S was "Agent acting for Buyers' account". The price was US\$1.62 with payment to be made CAD in Geneva. The contract further provided that "the buying agent, Sogescol SA, is discharged by buyers Alimenta SA of any costs and consequences resulting from a failure of shippers/sellers Novasen SA in the execution of this contract, particularly short shipped weight, quality and late delivery". S signed this contract as "Buyer's Agent" and, in a separate message, stated that their commission as "buying agent" for A was 1%. It was common ground between the parties that N was not aware of this contract between S and A until arbitration proceedings were underway.

N did not perform the contract, no goods were shipped and A started FOSFA arbitration against N under the contract that had been concluded through S. N argued that it had contracted with S not A and that had it known its counter-party was in fact A, it would not have proceeded. Among other things, there would appear to have been a commercial relationship in the past between N and A, which had allegedly ended when the parties had a disagreement over N's financial viability. N now argued that as they had no contract with A, there was no arbitration agreement between them and, therefore, the FOSFA arbitration tribunal had no jurisdiction in relation to any alleged claim by A against N.

The FOSFA Umpire disagreed. In an award on jurisdiction, he concluded that N had not proved that it would not have contracted with A as a principal. He further held that A was the undisclosed principal of S and so a party to the contract.

N appealed to the court. It argued among other things that the transaction was in fact a string sale, hence the difference in price and the requirement for the place of payment to be different under the two contracts. N also pointed out that the contract they had signed identified S as the "buyer". N submitted that the agreement between A and S was probably no more than that S should "get" the cargo for A at the price agreed.

#### The Commercial Court decision

The judge agreed with the FOSFA Umpire. He held that intervention by A as undisclosed principal would not be incompatible with the terms of the contract negotiated between N and S. On the facts, he also rejected N's contention that it would have refused to contract with A or that this had been communicated to A or to S. In coming to this conclusion, he commented that given N was under economic pressure, it was unlikely that N would, as a matter of principle, have refused to enter into a contract with A. He added that there was no reason for A not to be able to intervene in this contact as undisclosed principal, this would not be incompatible with the terms of the contract negotiated between N and S. Rather, this was the sale of a commodity on a standard form of contract to a buyer, a classic example of the sort of case where a willingness to contract with anyone on whose behalf the agent is authorised to contract is assumed.

N had another argument, namely that S did not have actual authority to agree a reduction in price in the contract with N and therefore A was not entitled to intervene in that contract. The judge's view was that, pursuant to the House of Lords decision in *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254, that was a matter for the FOSFA arbitrators to decide pursuant to the arbitration clause in the FOSFA contract. If S was authorised by A to enter into a FOSFA arbitration clause with N, then whether S acted outside the scope of its authority when and if it agreed a reduction in price in the N contract should be left to the arbitrators.

## Comment

This decision is useful in restating the English law position on undisclosed principal and agent and demonstrates the pragmatic attitude the court will take in recognising this relationship where it is dealing with a commercial contract rather than a personal one. The judgment also confirms the significance of the *Fiona Trust* judgment (an *Ince & Co* case), where Lord Hoffman made it clear that, in principle, an arbitration agreement may be binding even though the existence or validity of the underlying contract is being questioned.



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## Can you apply for a freezing injunction when the claim is subject to FOSFA arbitration?

*B v S* [2011] EWHC 691 (Comm)

In the recent case of *B v S*, the court considered the nature and effect of *Scott v Avery* clauses, which provide that an arbitration award is a condition precedent to the right to bring any court action. Such clauses are commonly included in commodity associations' standard forms, including FOSFA and GAFTA. The sale contracts in this case were on the FOSFA 54 form, clause 29 (arbitration clause) of which contains a *Scott v Avery* clause. The Commercial Court judge held that a freezing injunction obtained by the Buyer over the Seller's assets was in breach of this clause.

### Background facts

The applicant, B, obtained a worldwide freezing injunction from the English court, on a 'without notice' application, over S's assets in support of its claims against S in FOSFA arbitration. S then applied to set aside the injunction on the grounds that Clause 29 (Arbitration Clause) of the FOSFA 54 Form operated so as to prevent the parties from bringing any court proceedings unless and until an arbitration award had been issued.

B argued that, on a true construction of the clause, ancillary proceedings, such as an application for a freezing injunction, which invite the court to exercise its powers under section 44 of the Arbitration Act 1996 ("the 1996 Act"), were not in breach of this form of arbitration clause.

Clause 29 provided for FOSFA arbitration in respect of "any disputes arising out of this contract" and continued as follows:

*"Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute"*

Section 44 of the 1996 Act provides among other things as follows:

*"Court powers exercisable in support of arbitral proceedings*

*(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*

*(2) Those matters are...*

*....*

*(e) the granting of an interim injunction or the appointment of a receiver."*

### The Commercial Court decision

Mr. Justice Flaux agreed with S that the wording of the FOSFA arbitration clause prevented a party from bringing any court proceedings unless and until an arbitration award had been issued. Accordingly, he held that S's application for a freezing injunction was prohibited by Clause 29 and ordered that the freezing injunction be discharged.

The Judge observed that as a matter of language, "proceedings are *'in respect of a dispute'* not just when they seek to determine the substance of the dispute but also when they are ancillary to the dispute or are seeking security for it". He added that the opening words of section 44 of the 1996 Act specifically state that the parties can agree to exclude the supervisory powers of the court. The Judge highlighted the fact that under the previous Arbitration Act 1950 (now repealed), the relevant section had provided that the jurisdiction of the English courts could not be ousted by the agreement of the parties and so case-law on this issue predating the 1996 Act was of limited relevance. In the Judge's view, there is now no obstacle, either as a matter of law or as a matter of construction, to giving the wide words of Clause 29 their full meaning and effect.

Mr. Justice Flaux said that in each case the contractual provisions in question should be considered to see whether, on their true construction, they amounted to an agreement to exclude the powers the courts would otherwise have. Whilst the Judge considered that a standard form of arbitration clause without a *Scott v Avery* element would not be sufficient to exclude the powers under section 44 of the 1996 Act, he also thought that there was no requirement for a special form of words to be used in order to achieve this effect.

The Judge also commented that the purpose of the court's supervisory powers under section 44 of the 1996 Act is to regulate any dispute subject to arbitration, not to assist the successful party in execution of any award. The exclusion of those powers by agreement did not, therefore, frustrate the purpose of the arbitration clause.

Finally, from a commercial perspective, he said that although a conclusion that a FOSFA/GAFTA *Scott v Avery* clause amounted to an agreement to exclude the court's powers under section 44 of the Act 1996 might be surprising to some of those who trade in the commodity markets, that was no reason not to give the words of the clause their clear meaning and effect. Any concerns in the market or of individual trading parties could be addressed by amending the clause if the parties considered it desirable to do so.

### Comment

Parties considering contracting on FOSFA/GAFTA standard forms, or any other contracts which contain similar *Scott v Avery* wording, should now consider, at the outset, whether they are content to exclude the court's powers under section 44 of the 1996 Act or whether they may prefer to amend the standard arbitration clause to leave it open to both parties to apply to the court for interim relief, including applications for freezing orders, before the arbitration award is made.



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## The status of interim arbitration awards: are they “provisional” or “partial”?

*Nicola Rotenberg v Sucafina SA* [2011] EWHC 901 (Comm)

The issue in this case was whether the Claimant could rely on Section 79 of the Arbitration Act 1996 (the “Act”) to extend a time limit under the arbitration rules of the Coffee Trade Federation Limited (the “CTF”). The Court also considered whether the “interim” awards made by the arbitration appeal panel on these issues should stand. The judge did not think that an extension was justified in the circumstances and provided some useful insight into the status of “interim” awards, where the Act applies.

### Background Facts

The appellant, Mr. Rotenberg, was the co-managing director and shareholder of a general trading company ILFEC, based in the Democratic Republic of Congo, and which was affiliated to a company known as CAFECA in the Central African Republic. In September 2002, the respondents, Sucafina, a Swiss company, commenced arbitration in London against Mr. Rotenberg in relation to 64 contracts for the supply of coffee. The principal issue between the parties was whether the contracts were concluded by Mr Rotenberg personally or with ILFEC or CAFECA.

The award of the Arbitrators (“Original Award”) held Mr. Rotenberg liable to pay Sucafina damages together with interest and costs. On appeal, the appeal board appointed by the CTF made several “interim appeal awards” pursuant to the arbitration rules of the CTF (the “CTF Rules”) including a decision that only nine of the 65 contracts in question were made with Mr. Rotenberg personally and, in fact, Sucafina was liable to Mr. Rotenberg under those nine contracts.

Before publishing its Final Award, the CTF called for payment of its fees and expenses. The parties failed to meet the deadline imposed by the CTF for payment of such fees and although payment was later made, the CTF refused to publish this Final Award as it was entitled to do under the CTF Rules. Mr. Rotenberg appealed to the Commercial Court seeking an order under Section 79 of the Act, for an extension of the time limit under the CTF Rules.

### The Commercial Court Decision

#### *The Declaration*

The judge granted a declaration that the Interim Awards should be considered final and binding. Whilst the word “interim” was ambiguous, the best construction of the CTF Rules 48 was that the tribunal had the power to make a partial award (as opposed to a provisional award) which was final and binding. The CTF Rules provided for the “Original Award” to be binding in the event that the appeal award was not taken up within a specific time. The judge held that where there was one or more partial award which was intended to be final and binding subject only to an appeal, the Rule would apply such that that partial award would stand if the appeal award was not taken up in time.

#### *The order for an extension of the time limit*

Section 79 of the Act provides that a court may extend any time limit in arbitration proceedings, with the exception of time limits to commence arbitral proceedings. Before making such an order, the Court must be satisfied that all other recourse has been exhausted and that a substantial injustice would otherwise be done. After considering the factual circumstances, the Court declined to grant an order. It was accepted by the Court that although the first test of lack of alternative recourse had been satisfied, the second test of “substantial injustice” was a more stringent one which, on the facts, had not been fulfilled.

The “substantial injustice” test is intended to prevent parties from circumventing the agreed arbitral process. Accordingly, such an order should rarely be made by the Court. Although the Court accepted that there would be no disruption of the arbitral process (as the arbitration had come to a close) it was unimpressed by Mr. Rotenberg’s reasons for the delay in payment, which were described as “...at best, sketchy and unpersuasive”. Mr. Rotenberg was represented throughout by English solicitors and counsel with whom he was in regular contact during the period in question; the CTF arbitral process was not a new one and the deadline was clearly set out and notified to all parties; the Court had reason to believe that Mr. Rotenberg was aware that there would be serious consequences of missing the deadline; and it was clear that Mr. Rotenberg would have had no difficulty in meeting the payment which was relatively minor in comparison to the amounts in dispute. The Court further declined to exercise its discretion to grant the order on the basis that the appellant took almost a year from the date of the deadline for payment to bring a claim in the Commercial Court.

### Comment

This decision assists in showing where an “interim award” can be understood to be a “partial” award rather than a “provisional” award. Further, the decision in this case reflects the general trend of the Courts to dismiss applications for extensions of time in arbitration proceedings (see e.g. *SOS Corporacion Alimentaria SA and another v Inerco Trade SA* [2010] EWHC 162 (Comm), in the context of a request under s.12 of the Arbitration Act 1996 to extend time for commencement of proceedings). It appears that, in order to overcome the “stringent hurdle” that is the substantial injustice test, the appellant would have to have an extremely persuasive argument as to its reasons for failing to comply with the time limit in question.



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## Laytime and demurrage in sale contracts

*Suek AG v Glencore International AG* [2011] EWHC 1361

In this recent case, the Commercial Court considered the construction of laytime and demurrage provisions in a sale contract.

### Background and relevant terms of the contract

The case concerned a contract for the sale of 390,000 metric tons (+/- 10%) of coal by Suek AG (the Claimants) to Glencore International AG (the Respondents) in six shipments across 2010 on a CIF basis.

The key terms of the sale contract were as follows:

*"7.1 The shipment of the Coal from the Loading Port to the Discharging Port shall be the responsibility of the Seller. The Seller shall arrange the shipment of the Coal to be delivered under a Clean on Board Bill of Lading..."*

*7.11 The Buyer shall provide a safe berth for the Carrying Vessel at the Discharge Port..*

*7.13 Upon arrival at the Discharge Berth the Master of the Carrying Vessel shall give a Notice of Readiness to discharge at any time during the day or night SSHINC whether in Free Pratique or not, and whether customs cleared or not, by telex, radio or e-mail. Except for Wilhelmhaven where Notice of Readiness to be tendered within office hours Mon-Fri 8.00 am – 5.00 pm and Sat 8.00 am – Noon. In case the berth is occupied on arrival, vessel can tender NOR at the usual waiting place ATDN SSHINC, whether in berth or not, whether in port or not, whether in Free Pratique or not, whether customs cleared or not.*

*7.15 Laytime shall commence 12 hours after Notice of Readiness for discharging has been tendered in accordance with the Clause 7.13, herein or upon commencement of discharging whichever is sooner.*

*7.20 Time taken waiting for first available tide after the Carrying Vessel's arrival and/or to shift from pilot station or anchorage to berth, and opening of the Carrying Vessel's hatch covers shall not count as laytime or time for Demurrage.*

*7.21 Periods of bad weather shall not count as laytime subject to such bad weather conditions being duly recorded in the SOF and signed for by all parties."*

### The issue in dispute

The dispute arose when the vessel upon which one of the shipments under the contract was shipped arrived at the discharge port and found that the berth at which it was to discharge the cargo was occupied by another vessel. In addition, the tidal conditions were such that the vessel would have been unable to reach the berth even if it had been available. Notwithstanding this, the Master gave NOR on arrival at the usual waiting place.

The issue for determination by the Commercial Court was whether, given that the berth at which the vessel was to discharge was occupied by another vessel such that she was unable to reach the berth upon arrival, and also given that the tidal conditions were such that the vessel would in any case

have been unable to reach the berth on arrival, was the Master entitled to give NOR at the usual waiting place, such that the NOR was one tendered in accordance with clause 7.13 of the contract?

Suek argued that this was not a port charterparty or a berth charterparty but was a contract of sale in which the seller was not the carrier but simply nominated a carrying vessel and arranged to ship the coal to the port. In addition, Glencore were responsible for providing a (safe) berth for the carrying vessel at the discharge port. With regards to clause 7.13, Suek argued that the vessel was entitled to tender NOR upon arrival at the usual waiting place regardless of the fact that the vessel is not in berth, in port etc.

Glencore argued that the primary obligation was on Suek to carry the cargo to the berth. Further, it was contended that the WIBON provision in clause 7.13 imported an obligation for Suek to establish causation, such that the clause 7.13 exception is to be construed as applying only if the vessel has arrived and the unavailability of the berth is the sole reason why the vessel cannot proceed to berth. The argument followed that if there were weather or tide problems, then the vessel must wait until that condition had cleared and only if the berth remains unavailable at that time can the Master give NOR.

### The decision of the Commercial Court

Mr Justice Burton agreed with Suek and concluded that it would not be correct to interpret the clause 7.13 exception as interfering with an overriding or otherwise primary obligation of the buyer to provide a berth. Whilst the Judge acknowledged that there may be some inconvenience to the buyer if NOR is given when both causes (i.e. congestion and tidal conditions) exist at the time of the vessel's arrival at the port and the berth then becomes available before the weather/tide conditions lift, it remains the case that the buyer was under a primary obligation to provide a berth. In any event, the Judge noted that if a berth was available when the vessel arrived at the port then, irrespective of weather or tide conditions, the buyer would be protected and service of an NOR would not be permitted if the berth was available and the only cause preventing the vessel from reaching the berth was weather/tide conditions.

Ultimately, the Judge was convinced by Suek's arguments as to simplicity. He noted that Glencore's case would require a re-writing of clause 7.13 so that the exception would **only** apply if the unavailability of the berth were the **only** reason why the vessel could not access it. The Judge saw no need for such re-writing and concluded that, notwithstanding the presence of tidal conditions that would have prevented the vessel accessing the berth, the unavailability of that berth entitled the vessel to give NOR.



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## Enforcing a letter of indemnity

*Great Eastern Shipping Company Ltd v (1) Far East Chartering Limited and (2) Binani Cement Ltd (MV JAG RAVI)* [2011] EWHC 1372 (Comm)

In *The Laemthong Glory (No 2)* [2005] 1 LLR 688, the Court held that the provisions of a letter of indemnity (“LOI”) issued by receivers to voyage charterers requesting delivery of cargo without presentation of original bills of lading purported to confer a benefit on the shipowners in their capacity as the agents of the charterers for the purpose of delivering the cargo and consequently, the owners were entitled to enforce the LOI in their own name pursuant to section 1(1) of the Contracts (Rights of Third Parties) Act 1999 (the “Act”). The Act allows a third party to enforce in his own right a term of a contract if the contract expressly provides that he may do so or if the term “purports to confer a benefit on him”. In the present case, His Honour Judge Mackie QC considered that the LOI issued by receivers was in terms identical to the LOIs in *The Laemthong Glory* except in minor respects. He concluded that the shipowners in this dispute were entitled to enforce the LOI.

### The background facts

An FOB sale contract for shipments of coal was entered into by a Swiss company, VICAG, as buyer and an Indonesian company as seller. One of those shipments was sold on by VICAG to Binani Cement Ltd (“Binani”) on CIF terms. The on-sale contract provided for VICAG to make a prior arrangement with shipowners to permit unloading against Binani’s LOI in the event that bills of lading were not available on the vessel’s arrival at discharge port.

VICAG was part of a group of companies whose chartering arm was Far East Chartering Limited (“FEC”). FEC entered into a voyage charter with the owners for the carriage of the coal from Indonesia to India. The charterparty recap provided for owners to discharge cargo against charterers’ LOI in owners’ P&I Club format in the event that the bills of lading did not arrive in time.

Owners issued bills of lading, naming the Indonesian seller as shippers. Shortly before the arrival of the vessel in India, FEC requested and obtained from Binani an LOI in the P&I Club standard form as provided for in the charterparty. The LOI was addressed to “*The Owners/Disponent Owners/Charterers of the MV JAG RAVI*” and was expressed to be an indemnity to “*you, your servants and agents..*”

At the discharge port, owners issued a delivery order to the Port Authority in favour of Binani pursuant, it seems, to an instruction from FEC and the entire cargo was discharged. Binani removed a part of the cargo from the port and their surveyors inspected that part and determined that it was below the specification required in the on-sale contract. Binani took this up with their seller, VICAG, and ultimately paid a reduced price for the cargo. The shipper subsequently put owners on notice of a claim for damages for delivery of the cargo to Binani without presentation of the bills of lading. Owners tried to but were unsuccessful in preventing Binani from removing the remainder of the cargo from the port.

The owners commenced proceedings in the English court to enforce the LOI against Binani on the primary ground that they were acting as charterers’ agents in delivering the cargo to Binani and, under the terms of the LOI, the indemnity was extended to “*the servants and agents*” of charterers. Therefore, owners argued that they were entitled to enforce the Act. Alternatively, they said that there was a unilateral contract between them and Binani because the LOI was also addressed to “*Owners*” even though the owners were unaware of the LOI when they delivered the cargo.

### The Commercial Court decision

#### *Parties to the LOI*

The judge dismissed receivers’ argument that there was no indemnity agreement between Binani and FEC because the LOI was not expressly addressed to FEC and therefore no contract in respect of which the Act could be invoked. Rather, he said, the LOI was addressed generically to charterers and it was clear from its terms that it was issued to charterers.

As to whether there was a unilateral contract, the judge was doubtful but ultimately did not decide the point as it was unnecessary for him to do so.

#### *Delivery of the cargo*

The judge also dismissed Binani’s argument that there had been no delivery of the cargo to them within the meaning of the LOI and that, therefore, the contractual indemnity did not come into play. Binani had argued that owners had not delivered the cargo into Binani’s possession but had instead physically delivered it to the Port Authority which received it not as Binani’s agent but as bailees for owners. The judge held that in issuing the delivery order to the Port Authority in the receiver’s favour and discharging the cargo, the owners had done what they needed to do to enable Binani to claim the goods. According to the judge, “*In the context of the LOI, and in any ordinary use of the English language, a cargo which has reached a port, been discharged and collected by the receiver has been delivered*”.

#### *Owners’ “deliberate wrongdoing”*

Binani also argued that the delivery of the cargo which took place after owners had been put on notice of shippers’ claims was wrongful to the knowledge of owners and that, as a matter of public policy, owners could not rely on their own wrong to obtain and enforce rights under the LOI. The judge disagreed and said that this was not a public policy case but simply a bona fide commercial dispute. In the judge’s view, there were no relevant acts in this case which could fairly be described as manifestly unlawful or known to be unlawful by the parties in this action. In particular, it had not been shown that the instructions given to owners to deliver the cargo without the bills of lading were given for an illegal purpose.

## Comment

In his conclusion on the issue of construing the LOI, the judge emphasised that LOIs, particularly those in standard form, are important commercial instruments which need to be interpreted robustly in a straightforward way. He also took into account that they are often issued and relied on (as in this case) by parties for whom English is not their first language. In his view an overly close textual analysis of the wording is not therefore appropriate.



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## TRADE FINANCE

### Letters of credit: issuing bank's limited liability as consignee under the bills of lading

(1) *Fortis Bank S.A./N.V. and (2) Stemcor UK Ltd v Indian Overseas Bank* [2011] EWHC 538 (Comm)

*Please see our website at [www.incelaw.com](http://www.incelaw.com) for the following related articles: "Letters of credit and documentary discrepancies: the doctrine of strict compliance" and "Implied obligation under Article 16(f) of UCP 600 to return rejected documents reasonably promptly". These articles were published in our International Trade and Legal Updates for February and October 2010, also available on our website.*

#### The background to this dispute

This Commercial Court decision is the latest in a line of judgments from the English courts dealing with various disputes arising out of five letters of credit ("L/Cs") that were opened by the Indian Overseas Bank ("IOB") at the request of an Indian government-owned company, MSTC, whose role includes assisting Indian companies to purchase steel scrap from abroad. The L/Cs related to five sale contracts for steel scrap, with Stemcor as the seller and SESA as the buyer. The advising bank was Fortis Bank in London. The letters of credit were all subject to the Uniform Customs and Practice for Documentary Credits, 2007 revision ("UCP 600").

The goods were shipped in containers from European ports to Haldia port in India over a period of almost seven weeks towards the end of 2008. The bills of lading named Stemcor as the shipper and the consignee was "to the order of" IOB. However, by the time of shipment, the market price for scrap steel had fallen considerably and was below the contract price. SESA wished to extract itself from the now unprofitable contracts and therefore raised with MSTC a number of alleged discrepancies in the documentation presented by Stemcor for payment under the L/Cs. However, by this time, Fortis had already negotiated and honoured the first three L/Cs, numbers 1-3, and had paid the relevant sums to Stemcor. In respect of the two remaining L/Cs, numbers 4-5, Fortis had not added its confirmation but had forwarded the documents presented by Stemcor to IOB.

Given SESA/ MSTC's allegations of discrepant documents, IOB declined to reimburse Fortis for the payments under L/C numbers 1-3 and declined to pay Stemcor under L/C numbers 4-5.

#### Previous court proceedings

In September 2009, the Commercial Court dismissed all the alleged discrepancies in the documents presented under the L/Cs, apart from the objection that the beneficiary's consolidated certificate failed to satisfy the requirements of the L/Cs. The judge held that this document was discrepant, but left open the issue whether IOB was precluded from relying on this point because it had delayed in returning the documents to Fortis. Judgment was entered against IOB in respect of the shipments to which the preclusion point did not apply.

In January 2010, the Commercial Court held that, having given a refusal notice, IOB was under an implied obligation to return the rejected documents to Fortis/Stemcor reasonably

promptly, that it had failed to do so and that it was consequently precluded under Article 16(f) of UCP 600 from relying on the discrepancy in the beneficiary's consolidated certificate.

IOB appealed to the Court of Appeal in respect of both judgments. In January 2011, the Court of Appeal dismissed the appeal. In respect of the preclusion point, the Court of Appeal commented that the practice of bankers and international traders was that, on rejection, the issuing bank would either hold the documents pending the presenter's instructions or return them promptly and without delay. Accordingly, where a bank elected to return documents, it was required to do so with reasonable promptness. On the facts of this case, the appeal judges concluded that IOB had not returned the documents with reasonable promptness (there was a period of some months between the Article 16 notice and actual return of the documents) and it was therefore precluded from relying on the discrepancy.

### The present Commercial Court proceedings

The steel scrap had been left unclaimed at Haldia port and Stemcor incurred substantial storage charges and container demurrage costs. It subsequently sought to recover these costs from IOB either as damages resulting from IOB's wrongful delay in making payment under the L/Cs, alternatively by way of restitution. The judge dismissed Stemcor's claim in its entirety.

#### *Claim in damages*

*L/C numbers 1-3:* Stemcor had argued that IOB had breached its obligations under the letters of credit and was therefore liable for any damages caused. However, the judge agreed with IOB that, in respect of the L/C numbers 1-3, where Stemcor had been paid by Fortis as the confirming bank, IOB had breached its obligation to reimburse Fortis but that was not an obligation owed to Stemcor. Stemcor could not therefore claim damages for that breach.

*L/C numbers 4-5:* The judge held that IOB was in breach of contractual obligations owed to Stemcor. As to when the breach occurred in the cases where the discrepancy in the beneficiary's consolidated certificate applied, the judge held that IOB's obligation to return the documents with reasonable promptness meant within three banking days of the "return" notice, absent extenuating circumstances. Nonetheless, the judge held that the claim for damages against IOB also failed because, on the balance of probabilities, IOB's non-payment under the L/Cs had not caused Stemcor's loss. Rather, the judge found that, on the evidence, SESA would likely have refused to pay MSTC for the goods, collect the steel scrap and paying outstanding charges and thus the charges incurred by Stemcor would have been incurred in any event.

#### *Restitution*

The judge also dismissed the argument that IOB owed an obligation as named consignee under the bills of lading to pay the storage charges and the container demurrage to the carriers and that they should reimburse Stemcor for discharging that liability on their behalf. Under the Carriage of Goods by Sea Act 1992 ("COGSA"), IOB would only have been liable as consignee if it had taken or demanded delivery of the goods from the carrier or if it had made a claim under the bills of lading against the carrier in respect of those goods. However, the

judge said that IOB was not the buyer of the goods, nor did it have an interest in the contracts of carriage. It had only a notional security interest.

He also rejected an argument that Stemcor had entered into the contracts of carriage on behalf of IOB. The judge doubted that every time a bank required in a letter of credit that it be named as consignee in the bill of lading, it was authorising the shipper to contract on its behalf: "*such a conclusion would run contrary to the regime established by COGSA and open banks up to potentially enormous liabilities*".

### Comment

The judgment in this case acknowledges the limited involvement of banks issuing documentary credits in the context of the contracts of carriage relating to the sale contracts. An issuing bank will usually have no knowledge of the terms and conditions of any bills of lading issued, even though the bills may be made out to its order. Consequently, it would be unjust for a bank with only a security interest in the goods to be saddled with the liabilities of the original shipper simply because it was the lawful holder of the bills, except in circumstances where that bank sought to exercise or enforce its rights under those bills.



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## LEGISLATION

### The Bribery Act 2010: significant implications for international trade

Much has been written in the past year or so about the UK Bribery Act ("the Act"), which came into force on 1 July 2011 and which replaced previous UK anti-corruption and bribery law comprising a mix of common law and various ageing statutes. The Act has extra-territorial reach in that any UK citizen or company can be liable in the UK under the Act for their business practices abroad. In addition, non-UK companies will potentially be affected if they have a UK office or operation, even if the offences complained of were not approved or financed by the UK branch or subsidiary.

As a result, and given that many multinational companies have bases in the UK, usually in London, the Act is expected to have significant implications for how international traders and multinational companies with a UK connection do business in the future.

#### High risk sectors within international trade

Recent research by accountancy firm Ernst & Young suggests that the oil and gas sectors are those industries most at risk from what have been referred to by some as the Act's "draconian" provisions. Ernst & Young were at pains to stress that this was not due to individuals and companies within the oil and gas sector being intrinsically more corrupt than in other sectors. Rather, it is the nature and locations (mostly emerging markets) of their businesses that expose them to significant risks. The Ernst & Young findings were based on an analysis of bribery convictions under the US Foreign and Corrupt Practices Act ("FCPA"); apparently oil and gas companies accounted for 18% of all prosecutions.

As a result, greater transparency is now being called for among such companies. Moreover, given that the UK legislation is even tougher than the FCPA and will affect all multinational corporations with a UK connection, the need for transparency will extend well beyond the oil and gas sector and across the board to all other multinational companies with bases in the UK. In fact, in a report prepared in May 2010, Transparency International UK stated that commodities companies are particularly exposed to three high risk factors: operating in corrupt environments; interaction with public officials (e.g. to obtain certificates, negotiate customs procedures etc) and reliance on local agents who may not share similar ethical standards. Some examples that Transparency International give in their report of corrupt behaviour include tales of deals facilitated with gifts of diamond jewellery and use of suspense accounts to open hedges on behalf of clients, with winning positions allocated to favoured clients at the close of play.

#### The Offences under the Act

In essence, the four new offences created by the Act are as follows:

Section 1: a general offence of paying a bribe;

Section 2: a general offence of accepting a bribe;

Section 6: a specific offence prohibiting the bribery of foreign public officials; and

Section 7: a corporate offence of failing to prevent bribery.

Sections 6 and 7 will be of most concern to international companies. The only defence to a substantiated allegation that a corporation has failed to prevent bribery is that the corporation had adequate procedures in place to prevent the conduct complained of. The Act does not specify what adequate procedures are but the Ministry of Justice's Guidance on the Act, published on 31 March 2011, gives some assistance.

#### Adequate procedures

The Guidance indicates that these need to be considered in the light of the size and kind of company involved. In other words, there is a concept of proportionality. Large multinational organisations will require more extensive procedures than small businesses. In addition, the Guidance sets out six principles to assist companies in putting into place proportionate procedures to prevent bribery and corruption:

1. clear, practical and accessible policies and procedures and effective implementation;
2. top level commitment;
3. risk assessment;
4. due diligence;
5. communication; and
6. monitoring and review.

#### Bribing foreign public officials

Foreign public officials can include, among others, government officials and those who work for international organisations. An offence will be committed if the intention is to influence that official in his official capacity in order to obtain or retain business, unless the official is required or permitted by local written law to do so. In other words, backhanders are not allowed. Furthermore, there is no requirement that the official was in fact induced to act improperly.

#### Corporate failure to prevent bribery

Commercial organisations will be liable for a corrupt act committed by someone performing services on their behalf anywhere in the world. It is not necessary to show that the company knew about the bribe or intended for it to take place. Therefore, corporations' accountability has been significantly widened and, assuming the bribery took place, having adequate procedures designed to prevent such bribery will be the only defence.

#### Facilitation payments

Otherwise known as "grease" payments, these are commonly made in jurisdictions where it has become customary to use small bribes to expedite matters locally. Unlike the FCPA, the Act prohibits these in their entirety notwithstanding that they are a commercial reality in many jurisdictions. The extent to which the Serious Fraud Office ("SFO") will exercise its discretion to prosecute minor facilitation payments remains to be seen although, once again, the best protection is to ensure that adequate procedures are in place.

#### Corporate hospitality

The Guidance confirms that corporate hospitality is not prohibited. The expenditure must be reasonable and proportionate, however. Furthermore, the hospitality must not be intended to induce improper performance, even if the

expenditure is very modest. Companies are therefore well advised to lay down strict criteria within their organisations in respect of permissible hospitality.

### Penalties and Prosecutions

Individuals can be imprisoned for up to 10 years per offence and/or be subject to unlimited fines. Company directors may be disqualified from holding directorships. Businesses can be liable for unlimited fines and/or may have to pay compensation. Businesses can also become disqualified from participating in public contracts.

The original aim of the Act was to establish a “zero tolerance” approach across the board. Nonetheless, the Guidance points out that the intention of the Act is not to penalise ethically run organisations which face isolated instances of bribery. Furthermore, the SFO and other prosecuting authorities will have discretion as to whether or not to exercise their authority to prosecute on a case by case basis. Organisations will need to ensure that they establish adequate procedures to prevent bribery especially as some commentators are anticipating that the SFO will aim for a few high level prosecutions in the early days of the Act to deter future infringements.

*For a detailed review of the Guidance on the Bribery Act, please see “The Bribery Act 2010 - briefing and guidance” in the Our Knowledge section of the Ince & Co website - [www.incelaw.com](http://www.incelaw.com).*



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