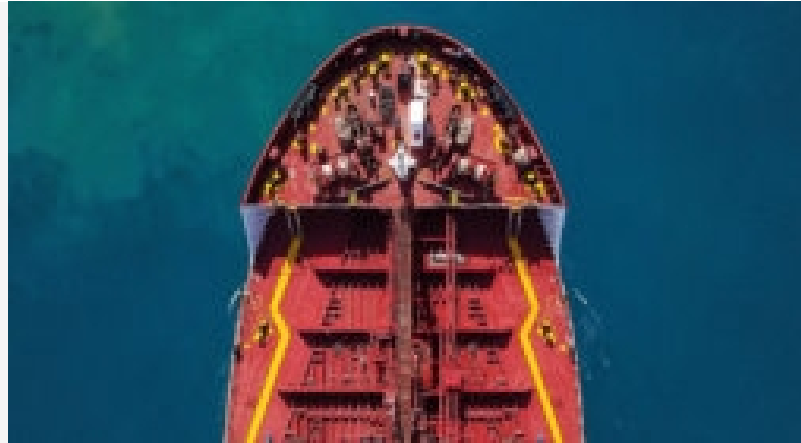


SECURING A SECURITY: IMPLYING LIMITS IN A GUARANTEE

13 APRIL 2021 • ARTICLE



In an interesting decision concerning the implication of terms into guarantees, which may raise alarm bells for some parties in the maritime sector, the English Commercial Court has considered the circumstances in which a party may be able to obtain security for claims against a guarantor. The decision in *CVLC Three Carrier Corp & Anr v Arab Maritime Petroleum Transport Company*¹, which is a rare instance of a successful challenge to an arbitration award, also provides useful guidance on the factors to be considered when identifying “the question” to be answered when granting permission to appeal.

"A term will not be implied merely because it seems fair or because the parties would have agreed to the term if it had been suggested to them."

BACKGROUND

The claim concerned the charter of two crude oil tankers to Al-Iraqia Shipping Services and Oil Trading (“Al-Iraqia”) under separate bareboat charters in early March 2019. Arab Maritime Petroleum Transport Company (“Arab Maritime”) guaranteed (as a primary obligor and not merely as surety) the performance of Al-Iraqia’s obligations under the charterparties.

In late 2019, the Owners terminated the charterparties on the basis of alleged breaches by Al-Iraqia. As well as commencing arbitration against Al-Iraqia, they also brought separate arbitral proceedings against Arab Maritime under the subject guarantees (“Guarantees”).

In July 2020, the Owners then successfully applied to the Provincial Court of Luanda, Angola for the arrest of an unconnected vessel owned by Arab Maritime as security for their claims under the Guarantees. However, following an expedited application based on limited facts, Arab Maritime obtained a declaration from the tribunal that the Guarantees were subject to an implied term that the Owners would not seek additional security in respect of the matters covered by the Guarantees. The Owners appealed that decision to the English court under section 69 of the Arbitration Act 1996.

THE DECISION

Implying terms into guarantees?

The legal test for implication of terms is, as the Commercial Court noted, a high one. A term will not be implied merely because it seems fair or because the parties would have agreed to the term if it had been suggested to them. Instead, a term will only be implied if it is necessary in order for the contract to work. However, in this case it was not clear that the arbitrator had addressed the correct legal question, and on the application of the test, the Commercial Court did not consider that the circumstances warranted the implication of an additional security term in the Guarantees:

"A court will generally require clear words before it will conclude that a contract has taken away the common law rights or remedies of a party and there was no clear indication of such an intention in the wording of the Guarantees."

- The Guarantees were on “boilerplate terms”. Implying the additional security term proposed into these Guarantees would suggest that the term should be implied into other generically worded guarantees;
- Arab Maritime contended that without an implied term limiting the Owners’ rights to further security, the Owners would be entitled to “double security” in response to any breach by Al-Iraqia (i.e., the Guarantees issued by Arab Maritime **and** Arab Maritime’s arrested vessel). However, the Court disagreed, noting that the Guarantees created a separate contractual relationship to that between the Owners and Al-Iraqia. The Guarantees could be called on according to their terms if there was an arguable breach by Al-Iraqia, while the right to seek security against Arab Maritime became available only if Arab Maritime did not respond under the Guarantees;
- The Court also rejected Arab Maritime’s attempt to draw an analogy to arresting a P&I Club’s assets, commenting that *“there is no reason of principle why such security would not be available”*, but that practicalities rather than legal principles may deter such course of action. Indeed, in most circumstances, it would be rare that the

financial position of a guarantor is such that it is necessary to seek security;

- The arbitrator had held that the Guarantees must have been considered to provide “adequate security” because otherwise the charterparties would not have been entered into. The Court also made short shrift of this argument, noting that while the contract with Al-Iraqia had been concluded because the Guarantees were sufficient security in respect of Al-Iraqia’s obligations, this did not mean that an adequate security was contemplated vis-à-vis Arab Maritime, who had an independent and separate obligation as the guarantor; and
- The Court recognised that in normal circumstances, a party will often be able to obtain security in the event of an arguable default. The implied additional security term in this case was therefore akin to an exclusion clause, taking away such a right. However, a court will generally require clear words before it will conclude that a contract has taken away the common law rights or remedies of a party and there was no clear indication of such an intention in the wording of the Guarantees.

Although the normal position following a successful appeal under section 69 is for remission of the award back to the tribunal, in this case the Commercial Court declined to do so, noting that the parties had agreed an expedited reference which did not allow factual matters being dealt with as part of the determination. This was not a case where there was an error of law to be applied to determined facts and the arbitrator could not *“sensibly re-run the determination”* in light of the clarification on the point of law. The Commercial Court’s decision that there was no implied term was therefore substituted for the tribunal’s award.

Section 69 Applications

The decision is also noteworthy for the court’s approach to applications under section 69:

- Leave to appeal from an arbitration award on a point of law will ordinarily only be granted if the question was one which the tribunal was asked to determine. However, in this case the Court took a broad approach, granting permission on the basis that “a question of law akin to that identified can be identified and was asked”; and
- Following the grant of permission to appeal, Arab Maritime nevertheless sought again to argue at the substantive appeal that the question of law at issue had never been posed to the tribunal, and permission should not have been given. However, the Court rejected this argument, noting that the permission stage on a section 69 application is intended to be a qualifying hurdle which is not revisited and that, while it may not be impossible to revisit the various component parts of the permission decision, there have to be “highly unusual circumstances” justifying this course. There were no such circumstances in this case.

"The permission stage on a section 69 application is intended to be a qualifying hurdle which is not revisited."

COMMENT

While it is, perhaps, unsurprising that the Court would be hesitant to imply a term restricting a party's ability to obtain security for claims into a contract, especially into a guarantee, the concept of seeking such security may not have been something that many parties will have considered. While the guarantee might well provide adequate security for breach of a charterer's obligations under a charter, an arrest that is intended to secure the entirely separate breach of the guarantor's obligations under the guarantee may be permissible. Parties to such contracts should expressly exclude the right to seek additional security over and above that provided by the guarantee, if they so wish. It is important to also note that the basis on which a party may arrest a ship will vary depending on the relevant jurisdiction. In the present case, it is unclear on what basis the Arab Maritime's vessel was arrested in Angola.

[1] [2021] EWHC 551 (Comm)

KEY CONTACTS



MIKE PHILLIPS
PARTNER • LONDON

T: +44 20 7814 8170

mphillips@wfw.com



ARCHIT DHIR
SENIOR ASSOCIATE • LONDON

T: +44 203 036 9821

adhir@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

WATSON FARLEY & WILLIAMS

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.