COMMERCIAL DISPUTES WEEKLY – ISSUE 136

18 OCTOBER 2022 • ARTICLE

BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "What renders RSA liable to salvage... is not merely its ownership of the Silver, but also the Silver being properly characterised as its 'cargo', which itself requires an inquiry which looks back to the point before salvage occurred."
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> Argentum Exploration Ltd v Silver

State Immunity

The Court of Appeal has dismissed the appeal brought by the Government of South Africa against a decision that they could not invoke state immunity to a claim for salvage in rem against a cargo of silver. The silver had been on its way to South Africa in 1942 to be minted into coinage when the ship carrying it was hit by torpedoes and sunk. When it was salved in 2017, South Africa claimed state immunity for the salvage charges. The court concluded that 'at the time when the cause of action arose' (namely when the vessel sank), the cargo of silver was being used for commercial purposes because South Africa had entered into a contract of carriage with a merchant ship to carry the cargo. As a result, the silver fell within an exception to state immunity set out within section 10(4)(a) of the State Immunity Act 1978.

Argentum Exploration Ltd v Silver [2022] EWCA Civ 1318, 11 October 2022

Aviation

Optimares agreed to design, manufacture, sell and deliver seats for various aircraft to Qatar Airways. Qatar Airways terminated the contracts shortly before delivery of the seats, alleging numerous delays by Optimares. Optimares asserted that there were excusable delays. The Commercial Court held that Qatar Airways was free to terminate the contract for convenience under clause 12.2.3 without any fetters from the existence of an excusable delay clause or the duty of good faith in clause 16.13. As a matter of straightforward contractual interpretation, clause 16.13 applied to responsibilities and obligations and the right to terminate was neither of those. Further the right to terminate applied "notwithstanding anything to the contrary". Optimares was then ordered to pay costs on an indemnity basis for having advanced a thin case, with weak construction arguments that sought to disregard the plain wording of professionally drawn contracts, as well as a vague, unpleaded but serious and unsustainable allegation of bad faith against Qatar.

Optimares SpA v Qatar Airways Group QCSC [2022] EWHC 2461 (Comm) – Main Judgment, 7 October 2022

Costs Judgment [2022] EWHC 2507 (Comm), 7 October 2022

Events of Default – Administration

Lehman Brothers ("LB") and Firth Rixson ("FR") entered into interest rate swaps incorporating the 1992 and 2002 ISDA Master Agreements. FR owed LB around $60 million but for over ten years was entitled to rely on a provision to suspend their payment obligations to LB, which said that any payment obligation was subject to the condition precedent that "*no Event of Default or Potential Event of Default with respect to the other party has occurred and is continuing*". FR chose not to rely on the termination provisions. The administration of LB was successful and control was to be given back to the LB directors. The court held that the event of default of administration can be cured when the administration is brought to an end. So when all the relevant steps have been taken by the administrators, FR will once again be obliged to pay the sums owing.

Grant and others v FR Acquisitions Corporation (Europe) Ltd and another, In the matter of Lehman Brothers International (Europe) (In Administration) [2022] EWHC 2532 (Ch), 11 October 2022

Waiver of Privilege

Barclays was subject to proceedings alleging that it assisted a company's directors in breaches of fiduciary duty which resulted in the company's liquidation. It claimed privilege over certain communications during disclosure. In a witness statement from Mr Sweeney, Barclays business support unit manager, he referred to Eversheds' role as Barclays legal adviser and stated that there was 'nothing to put me on alert' in the context of dishonest assistance allegations. He also referred to an email of advice from a solicitor at Eversheds, saying that the email was privileged, but denying the claimant's assertion that the email referred to some balance sheets. The claimant sought disclosure of the privileged advice. The court said that waiver of privilege was an acutely fact sensitive exercise and held that the words did not bear the meaning or effect of waiver when viewed fairly, objectively and in proper context. The application for disclosure was rejected.

Henderson & Jones Ltd v Ross and others [2022] EWHC 2560 (Ch), 5 October 2022

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

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