COMMERCIAL DISPUTES WEEKLY – ISSUE 163

23 MAY 2023 • ARTICLE

BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "...it was at all times willing and able to pay, but was prevented from doing so by sanctions."
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> Fortenova Group DD v LLC Shushary Holdings and others

Sanctions – Loan Notes

The defendant, Shushary, was a subsidiary of a Russian bank called VTB Bank PJSC and therefore became subject to sanctions because of the war in Ukraine. The claimant, Fortenova, had issued loan notes with a face value of approximately €400m that were held by Shushary. The notes are governed by English law and subject to the exclusive jurisdiction of the English courts. Fortenova wanted to refinance and therefore redeem the notes held by Shushary before their maturity date in September 2023 but was concerned that this was prohibited by the sanctions in place. The court held that the notes could be redeemed with the money being paid into court. Shushary would then have to apply for the money to be released from there, when and if sanctions are lifted. The court also held that Fortenova was not liable for default interest on the notes because it had been unable to pay interest to Shushary in accordance with the subscription agreement while the sanctions had been in place.

Fortenova Group DD v LLC Shushary Holdings and others [2023] EWHC 1165 (Ch), 12 May 2023

Aviation – Leasing

The defendant agreed to lease a Boeing 737-700 from the claimant for a term of 96 months, due to end on 3 May 2026. The defendant defaulted on a number of payments. A rent deferral agreement was entered into but there were then further payment defaults. The claimant brought a claim for the accrued sums due and also future rentals that became due upon the Events of Default. The defendant remained in possession of the aircraft. The court held in favour of the claimant and granted summary judgment, rejecting the defendant's arguments as to lack of verification of sums due and lack of entitlement under the contract. The invoices and schedules of sums due that the claimant produced were sufficient "determinations" for the purposes of the lessor determination clause (although they were not certificates). There was no suggestion of any error in calculation. Once there was an Event of Default, the claimant was automatically entitled to payment of all sums due up to the date of redelivery, namely 3 May 2026. Notwithstanding the unsatisfactory drafting of the lease, the meaning was clear and the suggestion that the clause was a penalty was rejected.

VS MSN 36118 CAV Designated Activity Company v Spicejet Limited [2023] EWHC 1146 (Comm), 15 May 2023

ESG – Company directors

ClientEarth has unsuccessfully sought permission to bring a derivative action against Shell's company directors for alleged breach of their duties under the Companies Act 2006. ClientEarth has 27 shares in Shell and sought to bring the claim on Shell's behalf against the directors. The allegations included assertions that the directors had failed to set appropriate emissions targets to achieve net zero and had not prepared a plan to ensure compliance with a Dutch court order imposing an emissions reduction obligation by 2030. The court concluded that ClientEarth had not established that the directors' actions were such that no reasonable board of directors would manage the business risks in that way. The evidence fell short of establishing a *prima facie* case that the way in which Shell's business was being managed by the directors could not properly be regarded as in the best interests of Shell's members as a whole. ClientEarth has already indicated that it will challenge the decision.
ClientEarth v Shell Plc and others [2023] EWHC 1137 (Ch), 12 May 2023

For a more detailed discussion of the case, see this article by London Partner, Sarah Ellington.

Arbitration – Commodities

A vessel broke free of its moorings during loading of a cargo of Brazilian soyabeans and damaged the port's ship loaders. The vessel left the berth with part of the cargo on board and was arrested on behalf of various parties. The cargo and vessel were subject to an extensive chain of contracts. In arbitration proceedings between Mitsui as sub-seller and DGO as buyer for an indemnity from DGO for claims brought against Mitsui by parties further up the chain, a FOSFA umpire found in Mitsui's favour against DGO. The Board of Appeal dismissed Mitsui's indemnity claims but found that DGO was in breach for failing to have the vessel called back to berth sooner and awarded damages to Mitsui. The court allowed Mitsui's appeal under section 69 Arbitration Act 1996 and remitted the decision to the Board. The Board of Appeal had misdirected itself as to the test for remoteness. It had not done what it should have done, which was to consider whether the losses for which Mitsui claimed an indemnity were of a 'type' or 'kind' which would have been in the parties' reasonable or specific contemplation at the time of contracting as not unlikely to result from the breach.
Mitsui and Co (USA) Inc v Asia-Potash International Investment (Guangzhou) Co Ltd [2023] EWHC 1119 (Comm), 15 May 2023

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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