SHIPPING & TRADE LAW

Mark Windsor
Informa Law, Telephone House, 69–77 Paul Street,
London EC2A 4LQ, United Kingdom
Telephone: +44 (0)20 7017 5266
Email mark.windsor@informa.com

Inrorma Law is an Informa business, one of the world's leading providers of specialist information and services for the academic, scientific, professional and commercial business communities.
Registered Office: Mortimer House, 37–41 Mortimer Street, London W1T 3JH.
Registered in England and Wales No 1072954.

SHIPPING & TRADE LAW

The need for speed: Court of Appeal interprets UCP 600

Under art 16(c) of UCP 600, issuing or confirming banks must serve notice in case of non-compliance between the documents tendered by the seller and the letter of credit. The notice needs to specify any discrepancies and the documents should be returned to the seller, although art 16 is silent in relation to timing. Confirming the first instance judgment, the Court of Appeal in Fortis Bank SA/NV v Indian Overseas Bank *[2011] EWCA Civ 58 re-emphasised the importance of a prompt return of documents to sender.*

Facts

The issuing bank Indian Overseas Bank ('IOB'), the defendant in the proceedings, opened five letters of credit in respect of five contracts of sale concluded between seller Stemcor and buyer SESA International for the trade of containerised scrap. Three of the five letters of credit were confirmed by the appellant, Fortis Bank London, whilst for the remaining two, Fortis Bank acted as an advising bank.

Following the presentation of the documents by Stemcor which Fortis Bank considered consistent with the letters of credit, the seller was paid and the documents were forwarded to IOB by Fortis Bank in November 2008. Having discovered some discrepancies, IOB gave notice to Fortis Bank under UCP 600 art 16(c) stating that it was returning the documents in respect of all the presentations except for five presentations where it purported to exercise the option in sub-art 16(c)(iii)(a) to hold the documents, pending further instructions from the presenter. Those further instructions were given, on terms, by Fortis Bank on 13 January 2009. IOB did not return any of the documents until 16 February 2009.

Article 16(c) of UCP 600 reads as follows:

'c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state: i. that the bank is refusing to honour or negotiate; and ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and iii. a) that the bank is holding the documents pending further instructions from the presenter; or b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or c) that the bank is returning the documents; or d) that the bank is acting in accordance with instructions previously received from the presenter.'

Article 16(f) of UCP 600 reads as follows:

'If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article,

April 2011
Volume 11 • Number 3

IN THIS ISSUE

it shall be precluded from claiming that the documents do not constitute a complying presentation.'

The claimants obtained summary judgment ([2009] EWHC 2303 (Comm)) in respect of all five letters of credit issued by IOB, and in respect of three remaining issues on 28 January 2010 ([2010] EWHC 84 (Comm)) when Hamblen J gave judgment for the claimants, noted in this publication by Melis Özdel at (2010) 10 *STL* (3) pages 1 and 2. Hamblen J implied a term to the effect that IOB, once it had elected to return the documents under art 16, was under an obligation under that article to do so with reasonable promptness. As IOB had failed to return the documents, it was precluded under sub-art 16(f) from relying on the discrepancies it had detected. IOB appealed.

The Court of Appeal judgment

The appeal of IOB revolved around two main issues: (i) whether IOB was precluded under sub-art 16(f) from relying on the discrepancies; and (ii) whether the bill of lading date was the date of shipment on board. Fortis and Stemcor – the seller under the sale contract and beneficiary of the letters of credit – cross-appealed on a third issue: (iii) whether there was a discrepancy in the beneficiary's consolidated certificate.

Both the appeal and cross-appeal were dismissed. Starting with the third issue, as the judge had found, there was indeed a discrepancy, in that each letter of credit stated that the negotiating bank had been advised to despatch original shipping documents only by air courier service to the letter of credit opening bank 'at our cost', whereas the documents presented under each letter of credit certified that this had taken place 'at issuing bank's cost'. 'Our' referred back to the first word of the clause, 'we', which referred to Stemcor, not Fortis Bank. The discrepancy could not be regarded as so trivial as to be ignored, such as a mistake of name or obvious error discernable from the document. As for the second bill of lading, issue the terms of the letter of credit required presentation within 21 days of the date of the bill of lading. The bill of lading contained a 'shipped on board' date and an 'issued' date. It was held that the latter was to be taken as the date of the bill of lading and that therefore presentation thereof was within time according to the terms of the letter of credit.

In relation to the first and main issue, ie the failure to return the documents promptly, it was held that UCP 600 art 16(f) would preclude IOB under from claiming that the documents did not constitute a complying presentation. While IOB did indeed have to return the documents, the question was whether the obligation to do so promptly arose under UCP 600. On a proper construction of UCP sub-art 16(c), there was an obligation to act in accordance with the notice given and return the documents promptly. IOB had been in breach of that obligation.

Comments

In the Court of Appeal, the most important issue was in relation to the scenario which arises when an issuing bank, having rejected documents presented under a letter of credit, serves notice that it is returning the documents to the presenter. Upholding the judgment of Hamblen J, the Court of Appeal held that when an issuing bank gives notice under art 16 of UCP 600, it is, on the proper construction of that article, under the obligation to return the documents promptly. If it does not, the bank is consequently precluded from claiming that the documents do not comply with the credit and will then be bound to honour the credit notwithstanding the discrepancies.

Exactly as at first instance, the Court of Appeal was willing to uphold a purposive interpretation of UCP 600 to accord with its underlying aims and purposes, reflecting in this way the international banking practice and the reasonable expectations of international banks and traders.

The Court of Appeal, having decided the case on the interpretation of UCP 600, appeared significantly more reluctant than the judge at first instance to alternatively imply a term into UCP 600. Thomas LJ notably commented that 'there would be real difficulties in using a rule of national law as to the implication of terms to write an obligation into the UCP' (at para 55). English courts have in the past implied terms in an attempt to amend discrepancies between UCP and the expectations of the market. In *Bankers Trust Co v State Bank of India* [1991] 1 Lloyd's Rep. 587, Hirst J held that in spite of the absence of any express wording to that effect in art 14 (d) of UCP 400, it was implied that the rejection telex referred to 'all' the discrepancies in the documents tendered by the seller in case of non-compliance. Imposing this implied obligation on the issuing bank was deemed necessary in order to enhance business efficacy.

In the present judgment, the Court of Appeal judgment reaches the same result via the less intrusive tool of a purposive interpretation of UCP 600. The judgment should be welcomed by the trading community. In international trade, time is of the essence, and a prompt return of the documents to the beneficiaries is of the utmost importance not only in order to enable them to re-tender the documents, but also in order to allow a possible re-sale to a different, more accommodating buyer. Nevertheless, the judicial creation of obligations within the framework of UCP could give rise to uncertainty. The aim of UCP is to create a practical and efficient framework of rules designed to assist the parties involved in documentary credits; this means that banks need to operate and base their decisions on the wording of UCP and, to a certain extent, that was exactly what IOB did. Judicial interpretation should not be designed to encourage banks to start second-guessing judicial perceptions of the purpose of UCP 600, let alone the existence of implied terms whenever the wording of UCP 600 is ambiguous. Interpretation must be the exception rather than the rule. *Fortis Bank* thus represents a lesson to be taken into account in future revisions of UCP 600.

Andrea Lista, Lecturer in Commercial Law,
University of Southampton Law School

Case update

Sale of goods

Electrosteel Europe SA v Edil Centro SpA Case C-87/10

Jurisdiction – Place of delivery – Incoterms – Ex works – Free from the seller's premises

Facts

This preliminary reference to the Court of Justice of the European Union arose out of a sale of goods contract. The seller was domiciled in Italy, the buyer in France and the goods were sold in Italy. The contract contained a term providing that delivery was to be 'free from the seller's premises' (in the original: '*Resa: Franco ns. sede*') to a carrier and that the goods would finally be transferred to France. When the buyer was asked to pay the price of the goods in Italy, it objected that the Italian court did not have jurisdiction to decide the matter. This, in the opinion of the Italian court might trigger the application of art 5(1)(b) of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments on civil and commercial matters, establishing a jurisdiction additional to the domicile of the defendant. In order to decide whether it was competent to deal with the issue, the Italian court had to determine the place of delivery. Was it the place of the final destination of the goods, ie France, or the place of delivery to the carrier, ie Italy?

The preliminary reference

Per art 5(1)(b), the place of performance of the seller's obligation, in the case of a sale of goods, is the place where the goods were in fact or should have been delivered. The Tribunal of Vicenza asked: in order to determine which court has jurisdiction, should the place of delivery be considered to be the place of the final destination of the goods, or perhaps the place where the seller performs his obligation, according to the substantive law applicable to the contract, or finally, should the place of delivery be determined in some other way?

Place of delivery

Advocate General Kokott in an opinion dated 3 March 2011 admitted that the issue of defining the place of delivery has proved controversial and the main approaches have been two: either the place of delivery should be found by virtue of factual criteria; or guidance should be sought from the principles of substantive law.

The Advocate General first considered the judgment of the Court of Justice of the European Union in *Car Trim GmbH v KeySafety Systems Srl* (Case C-381/08), decided in February 2010, which could *prima facie* give the answer to the present case. According to that case, which also involved a sale of goods, the place of delivery has to be settled by the national tribunal, first on the basis of the provisions of the sale contract, without reference to the substantive law applicable to that contract. If this fails, then the place of delivery would be the place where the physical transfer of the goods took place. In *Car Trim*, the parties had used a term similar to the one at issue in *Electrosteel*, but the Court of Justice then did not get into the substance of its definition.

The Advocate General stated that first, the meaning of the term 'free from the seller's premises' had to be defined. However, she considered that this should be left to the competence of the Italian tribunal, which would have to assess the exact purpose of the parties and also examine whether the clause was identical to the 'franco fabrica' (or 'ex works' clause) of Incoterms 2000.

She then proceeded to the core issue, namely what requirements deriving from art 5(1)(b) of the Regulation that the national court has to consider in order to determine whether there is an agreement of the parties concerning the place of performance of the seller's obligation or a contractual stipulation of the place of delivery. The *Car Trim* case provided that the place of delivery may be determined on the basis of contract stipulations, but without prior or supplementary reference to the substantive law applicable to the contract. The question, thus triggered was whether the ex works Incoterm could be of assistance, falling thus under the category *of the contractual stipulations*, which as per *Car Trim* are the primary indicators of the intention of the parties.

The Advocate General considered that points A4 and B4 of Incoterms 2000 provide a sufficient definition of the place of delivery of the goods. She acknowledged that this, along with the fact that Incoterms are terms well studied by the International Chamber of Commerce may adequately convey the parties' agreement, especially in comparison with other freely-chosen provisions or terms expressed in a language that the parties are not familiar with. She concluded that Incoterms and analogous trade terms in principle are contractual stipulations that can be used as a basis for determining *the place of delivery*, as per art 5(1)(b).

Modification of the *Car Trim* principle

The Advocate General underlined that the principles established in *Car Trim* should apply not only in sales of goods at a distance (such as those involving carriage to the buyer's premises), but should be extended to all purchases, given that art 5(1)(b) makes no relevant distinction.

In setting out the steps for determining the genuine contractual will, she asserted that the crucial starting point should be the contractual provisions themselves. Furthermore, if the sale contract lacks clarity, Incoterms and similar trade terms with well defined content may also constitute contractual stipulations capable of determining the

place of delivery under art 5(1)(b). If the contract fails to determine the place of delivery, then objective criteria should determine what is the place of performance, per *Car Trim*. The primordial factor at this point is the place of physical delivery of the goods, at which the buyer obtained or should have obtained the actual disposal over the goods, a factual question of the buyer's possession.

The Advocate General highlights that the place of handing over the goods to a carrier other than the buyer itself does not yet qualify as a place of delivery in this sense because it is not physical delivery to the buyer. Having as point of reference the purchase itself, the place of delivery is the place of physical transfer of the goods whereby the buyer obtains actual control over them, and not *the place of the final destination of the sale*, in the equivocal terminology of *Car Trim*. It is especially the adjective *final* that may give rise to ambiguity. In contrast, the physical delivery constitutes a safe and predictable criterion for both parties involved in the purchase, as it is a *pragmatic* one: where is the buyer (or should he be) in a position to exercise physical control over the goods?

The opinion issued by the Advocate General affirms that art 5(1)(b) should be interpreted to mean that the place of delivery can be determined on the basis of the expressed contractual provisions in the agreement of the parties. Incoterms and analogous trade terms can, in principle, form part of the contractual provisions, in that sense. Finally, when it is impossible to determine the place of delivery without prior recourse to the substantive applicable law of the contract, then the place of delivery will be deemed to be the place where the buyer acquired or should have obtained the actual physical power of disposal of the said goods.

Comments

The opinion of the Advocate General acknowledges the basic principle of both continental and common law contract law that the first point of reference in any dispute is the contract. If the contractual wording is unclear, then the genuine will of the parties needs to be sought. Sale contracts frequently incorporate Incoterms; even if they are not expressly incorporated, as appears to have been the case here, Incoterms may be of assistance, bearing in mind that they reflect trade customs and practices. However, the author suggests that reference to Incoterms as guidance for interpretation should be cautious and limited. If the parties wanted to be bound by them, they could have expressly stated so. This confirms once again the importance of proper drafting of sale contracts, with wording with which both parties are familiar, so that misinterpretations and unnecessary court interference are avoided. Thus, traders should be as precise as possible when drafting their contracts, with express incorporations and exclusions, and avoid using terminology or sets of rules merely because of their popularity in the market. Being aware of each and every aspect of the contract is the optimal way in which the parties can guarantee their trading rights and interests, and in this case, to avoid being drawn into litigation in Italian courts.

Note: as of 27 March 2011 the AG's opinion is not yet available in English.

Ioanna Magklasi, LLM
PhD Candidate,
University of Southampton Law School

Arbitration

Nanjing Tianshun Shipbuilding Co Ltd and Anor v Orchard Tankers Pte Ltd [2011] EWHC 164 (Comm)

Shipbuilding Contract – Dispute resolution – Shipbuilder's failure to institute arbitration proceedings timeously – Time bar

The facts

Under a shipbuilding contract dated 8 November 2006 between the claimants, (i) Nanjing Tianshun Shipbuilding Co Ltd and (ii) Jiangsu Skyrun International Group Co Ltd as sellers (the 'sellers') and the respondent, Orchard Tankers Pte Ltd as buyers (the 'buyers'), the sellers agreed to sell and the buyers agreed to buy a vessel with hull number TS 0609 (the 'vessel'). The shipbuilding contract was in conventional form, including, *inter alia*, the following provisions:

(1) Article II.3: the contract price was payable by way of instalments.
(2) Article II.6: these payments were in the nature of advances to the sellers and, in the event that the buyers terminate the shipbuilding contract, the instalments were repayable with interest. The sellers were to procure a refund guarantee in favour of the buyers to secure the prepaid instalments: art II.6A.
(3) Article III: in the event of delay in delivery beyond the permitted contractual timeframe, the buyers were entitled to terminate the shipbuilding contract in accordance with art X.
(4) Article VII: the agreed delivery date on or before 31 July 2008 would be subject to an extension in the event of *force majeure* events and permissible delays as per art VIII.
(5) Article X: if the buyers exercised a right to terminate the shipbuilding contract, the buyers were entitled to demand a refund of all prepaid installments under the refund guarantee. However, the sellers were to have the right to dispute the buyers' cancellation by instituting arbitration in London within 30 days of the buyers' cancellation. Upon the commencement of the London arbitration, the sellers would not have to refund the buyers until an arbitral award was issued in favour of the buyers (or in the event of appeal, a final court order in favour of the buyers). Upon the refund of the required amount, all obligations,

duties and liabilities of each of the parties between themselves under the shipbuilding contract was to be completely discharged.

An interesting and unusual provision was the shipbuilding contract's art XIII. Article XIII.1 provided that any disputes relating to the shipbuilding contract or the specifications between the parties were to be submitted for determination of the head office of the classification society. Article XIII.2 stated that any dispute relating to the construction of the vessel other than art XIII.1 shall be resolved by London arbitration. Article XIII.3, further provided that in case of any disputes arising out of the shipbuilding contract, such dispute was to be submitted to the English courts for determination.

As per the shipbuilding contract, the sellers thereafter applied for a refund guarantee issued by a Chinese bank. It entitled the bank to withhold and defer the refund to the buyers if there was an arbitration between the parties, and the bank was obliged to repay the instalments to the buyers if the sellers failed to honour the arbitral award or court order within 30 days after the buyers' demand. The refund guarantee further stipulated that in the event of existing arbitration proceedings being commenced between the parties before expiration of the refund guarantee, the validity of the refund guarantee would be automatically extended until 90 days after the date of issue of a final arbitral award or, in case of appeal, 90 days after the date of issue of a final court order.

The buyers had effected the first four instalments under the shipbuilding contract. However, on 2 February 2010, by sending a notice of cancellation, the buyers exercised their rights to terminate the shipbuilding contract alleging that the vessel was delayed in delivery. The sellers disputed the buyers' entitlement to cancel the shipbuilding contract but had failed to institute arbitration proceedings until shortly after the prescribed 30-day period in art X. Accordingly, the buyers contended that the seller's claim was time-barred. The sellers argued that their right to dispute the cancellation by the buyers was not time-barred and, given the ambiguity of the provisions in the shipbuilding contract, only the remedy to be obtained by way of an arbitral award was barred.

The law

David Steel J gave a short but strong and unambiguous decision ruling that the buyers' construction of the terms of the shipbuilding contract was preferred. The sellers' application under s67 of the Arbitration Act 1996 failed and leave to appeal under s69 was refused.

(1) The buyers' cancellation could only be disputed and the buyer's refund of prepayments could only be deferred by the sellers by commencing an arbitration within 30 days in accordance with art XIII of the shipbuilding contract. This contractual mechanism was also confirmed by the terms of the refund guarantee.

(2) Since the refund of the instalments had discharged all the obligations of the parties under the shipbuilding contract in accordance with art X.3, it would be 'a bizarre outcome' for the buyers' liabilities to be retained after the refund has been effected.

(3) There was no commercial purpose in granting the sellers an option either to be able to institute a private arbitration within 30 days or to institute court litigation after 30 days but within six years.

(4) The underlying premise was that the bank's liability under the guarantee only arose when the builder had failed to effect repayment of the instalments. If the sellers were permitted to commence proceedings challenging their obligation to refund after the 30-day limitation, it would be inconsistent with the aforementioned premise.

(5) In case of a valid commencement of arbitration, the bank's obligation would only be triggered once the sellers failed to honour a consequent arbitral award in favour of the buyers.

(6) Article X and the wording of the refund guarantee clearly referred back to arbitration under art XIII, therefore art X and art XIII should not be read separately. Article X did not contain any specific right to arbitration separate from art XIII in respect of an issue falling outside art XIII.1 and 2. The availability of two separate facilities for arbitration would result in enormous complexity in determining which scheme had to be invoked with widely disparate time limits, and accordingly that construction must be resisted.

(7) The failure to invoke arbitration under art X did not break the jurisdictional agreement in art XIII.3. Article XIII.3 was a catch-all clause covering all disputes outside the arbitration regime arising out of art X and XIII.

Comment

The decision reconfirms a well-established approach in the English courts that ambiguously worded time bar clauses will be construed as 'barring the claim' rather than 'barring the remedy'. Shipbuilding contracts usually have terms stipulating arbitration as the default means of dispute resolution and setting out the procedures to be followed by the parties. Therefore, it is as ever crucial that the parties to a shipbuilding contract should comply with the contractual time limits by validly instituting arbitration proceedings.

Edward Yang Liu,
Paralegal, Reed Smith Richards Butler,
PhD candidate, University of Hong Kong

Charterparty arbitration

X v Y [2011] EWHC 152 (Comm)

Consecutive voyage charterparty – Time bar for claim in respect of first voyage

The facts

A claim for US$376,086.03 in demurrage arose in respect of the first voyage under a consecutive voyage

charterparty made for three consecutive voyages. It was a Continent Grain charterparty containing terms otherwise in accordance with a SYNACOMEX 2000 form and containing a number of additional clauses including cl 36, a modification of the Centrocon arbitration clause. This clause provided, *inter alia*, that a claim would be time-barred unless the claimant's arbitrator was appointed 'within 12 months of final discharge or termination of this charterparty'.

Discharge in respect of the first of the three voyages was completed on 8 February 2008. By virtue of Additional Clause 30 'balance of freight, less despatch or plus demurrage, as the case may be, is payable 28 days after completion of discharge and receipt/agreement of all closing accounts, including Time Sheets supported by Statements of Facts and Notices of Readiness', meaning that demurrage was payable by 7 March 2008. Discharge on the third voyage was completed on 18 May 2008, and the balance of freight was consequently due on 14 June 2008. It had become common ground that the charterparty should be treated as terminated on that date.

Twelve months from the first date of discharge was accordingly 8 February 2009, but Y only commenced arbitration in respect of its claim on 23 February 2009. On Y's case, clause 36 should be read so as to allow claims to be made until 12 months from termination of the charterparty, such that the cut-off date was not until 14 June 2009. X for its part contended that the cut-off date for claims in respect of the first voyage was 8 February 2009, 12 months from the date of discharge on the voyage in question.

The award

The arbitrator decided the issue according to *Agro Company of Canada Ltd v Richmond Shipping Ltd (The Simonburn)* [1973] 1 Lloyd's Rep. 392, that final discharge in a consecutive voyage charter means final discharge of the cargo on the voyage in respect of which the claim arises, which in this case was the first of the three voyages. As for 'termination of this charterparty', he concluded that that meant termination of the charterparty at the end of the third voyage, and that the claim was not time-barred by reference to that alternative time limit expressly provided for in cl 36. Charterers X appealed.

The judgment

Burton J, sitting in the Commercial Court gave judgment on 9 February 2011. He dismissed the appeal. On the first issue, the meaning of 'final discharge' was decided by Mocatta J in *The Simonburn*. In a consecutive voyage charter, it had become generally accepted as meaning the discharge of the cargo on the voyage in respect of which the claim is made. The arbitrator had been correct to conclude that the claim for demurrage had been made within the time limit laid down by the charterparty. On the second issue, the arbitration clause in *The Simonburn* provided no guidance as the clause here was longer: the clause 'within 12 months of final discharge or termination of this charterparty' plainly meant that there were two starting points for the giving of notice, either the final discharge or the termination of the charterparty, and the claim was in time if it complied with either deadline. The judge did not agree with X that this interpretation depended on reading the clause as if it ended with the words 'whichever is the later'.

Johanna Hjalmarsson

Marine insurance

Argo Systems FZE v Liberty Insurance and Anor [2011] EWHC 301 (Comm)

Breach of warranty – Waiver by estoppel – Affirmation of contract – Misrepresentation – Damages

The facts

In March 2003 the floating casino *Copa Casino*, owned by Argo (claimant) and insured by Liberty (defendant), became a total loss while being towed from the US Gulf to India. Argo claimed against Liberty, but the claim was declined in July 2003. Litigation started in May 2004 in the Alabama court in the United States, where the court decided that it had no jurisdiction over the case against Liberty and dismissed the claim against the insurance brokers, DSI, on the merits. In February 2009 proceedings started in England.

The voyage policy was for a total loss against perils of the sea, subject to English law, on the terms of the Institute Voyage Clauses 1983 for a sum of US$1,225,000 and a premium of US$160,000. It contained a warranty, that 'no release, waivers or hold-harmless' provisions will be granted to the 'Tug and Towers'. The towing contract was subject to the TOWCON International Towage Agreement, where cl 18 mutually released the tug-owner and the tow-owner from specific kinds of liability towards each other. In March 2003 Argo also warranted to Liberty, *inter alia*, that 'no release, waivers or hold-harmless has been given to Tug or Towers' and in June 2003 it delivered to Liberty the towage agreement.

The preliminary points discussed in court were whether there was:

(1) a breach of the 'no hold-harmless' warranty,
(2) a waiver by equitable estoppel of such breach,
(3) an affirmation of the contract, a waiver of the right to avoid or an estoppel barring the misrepresentation/non-disclosure allegation, and
(4) a valid claim for damages, assuming the defendant could not avoid the policy.

The law

On the first preliminary point, HHJ Mackie QC rejected Argo's argument that construction of the warranty should also depend on the fact that a policy with a high premium

(US$160,000) should not be easily invalidated and that the standardised formulation of towage contracts provided no margin for a differentiation. Agreeing with insurers, the judge held that standard form contracts can be amended and that, given the wording of the warranty, the obligation not to grant release from liability to the tug-owner was clear. Additionally, he continued, the court should not impose on the defendant knowledge of the contents of the towage contract and acceptance of construction of the warranty in a way which would subject it to the standard terms of another agreement. Therefore, it was held, there was a breach of warranty.

On the second point, the claimant argued that the defendant by its conduct had waived its right to allege a breach of the 'no hold-harmless' warranty and that an equitable estoppel had arisen. HHJ Mackie QC acceded to this on the basis that Liberty, while being aware of its right to rely on the breach of warranty, had not indicated at any point during the last seven years of litigation that it would do so. When Liberty had provided Argo with details on the rejection of the claim for a total loss, no mention had been made of the breach of the 'no hold-harmless' warranty. Liberty had also informed Argo that further grounds for denial of payment would be brought if new information were to come to light. This was taken by the court to mean that, since the breach was known and was not used and new information could only lead to new reasons (ie not the then already known breach of the 'no hold-harmless' warranty), then that argument would not be brought in court at all. Argo asserted that it had relied upon these representations and that this was the very reason why it had moved against DSI in the Alabama court on only the grounds that it had failed to obtain coverage from the correct port of departure. Finally, Liberty brought the warranty breach argument forward only once recourse against DSI had become impossible for Argo through the final decision of the Alabama court. Therefore, it would be inequitable for Liberty to rely on that at this point. For these reasons, it was held that there was a waiver by operation of an equitable estoppel.

The third point, on waiver of the right to avoid due to misrepresentation and non-disclosure, HHJ Mackie QC held that waiver by election takes place by a clear, unequivocal and communicated choice of one right over another which is inconsistent with the first. Liberty was fully aware of the facts of the case and its legal rights. It refused to satisfy the claim for a total loss under its contractual rights and had never elected to avoid, while it had also never offered to return the premium in a period of seven years. Liberty could therefore not be allowed to both rely on its policy defenses and reserve its right to avoid the policy in case the former failed. It had elected to affirm the contract by its conduct, waiving its right to avoidance due to misrepresentation and non-disclosure by an estoppel.

Finally, in relation to the possibility of a claim for damages due to misrepresentation, HHJ Mackie QC held that a claim for damages in lieu of avoidance under s2(1) of the Misrepresentation Act 1967 was not 'bad in law'. Nonetheless, he did not accept that damages would be available as a remedy if the right to avoid has been lost, since it would be inequitable for Liberty to receive the same gain in that way as it would have had through avoidance. The final point was held in favour of Argo and insurers have obtained permission to appeal.

Comments

The judgment of HHJ Mackie QC is a learned review of English law and its principles, leaving little doubt in his decision, but much food for thought. On the point of the existence of a breach of the 'no hold-harmless' warranty, the law was properly applied in its strict form. The claimant tried to argue that he could not opt out of the standard clauses of the TOWCON, because of market practice. A promissory warranty, though inflexible in nature, must not be allowed to be circumvented so easily. It would be incongruous if a clear and negotiated provision, which constitutes part of the basis of the insurer's cover and bears harsh, albeit just results, could be nullified or adjusted by a later clause between different contractual parties. A warranty can be given a modified meaning in certain circumstances, as in *Pratt v Aigaion Insurance Co SA (The Resolute*) (CA) [2009] 1 Lloyd's Rep. 225 where it was observed that it would be incorrect to retain the ordinary and natural meaning. Nevertheless, it would still be inappropriate to extend this reasoning so as to subject warranties to subsequent contract clauses alien to the insurance policy. According to the Marine Insurance Act 1906, exceptions to compliance with a warranty are permissible only in the face of following inability of application or illegality of the warranty; s34(1).

The claimant also tried to argue that a second paragraph added after cl 1.1 in the 1995 edition of the Institute Voyage Clauses should be used to clarify the meaning of the 1983 wording. In the view of both the court and, respectfully, the writer, this would fly directly against accepted construction methods, since the two editions are separate and independent and, secondly, if the true meaning of the clause is to be found by comparison, then one should look at previous, not later editions. Therefore, if Argo wished for a different meaning of the 1983 edition, then it should have included the 1995 provision in the contract.

In relation to the waiver of the 'no hold-harmless' warranty point, HHJ Mackie QC upheld the existing law. The

only remedy to an automatically operating warranty is waiver (MIA 1906, s34(3); *The Good Luck* [1991] 2 Lloyd's Rep. 191; [1992] 1 AC 233). The waiver does not operate by positive action of the insurer, but rather through an equitable estoppel. An unequivocal communicated representation is needed, along with reliance on that representation and inequity in going back on it (according to *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2003] Lloyd's Rep. IR 1, there is also a need for a willingness to forego one's rights and its communication). This leads to the observation of the actions, ie the conduct, of the insurer. Consequently, all such cases are, as HHJ Mackie QC said, 'highly fact sensitive'. It is the whole conduct that must point to a will to waive, thus creating the need for an estoppel.

In addition, the representor must be aware of all facts and especially of his (legal) rights. This would mean that mere conjecture of having a right is not enough. Full knowledge, as a matter of law, must be obtained that failure to make use of a right will lead to an estoppel. An attractive practical challenge in relation to proof of this last point can easily arise, but is as easily defeated. The reason is that full knowledge of all legal rights is considered to exist once one is legally represented in court (as HHJ Mackie QC held in para 39 with reference to Colman J in *Moore Large & Co Ltd v Hermes Credit and Guarantee plc* [2003] 1 Lloyd's Rep. 163).

In this case, the defendant knew that he could rely on the breach of warranty, but did not do so for a long time (almost seven years). This was behaviour inconsistent with his right and the knowledge of that right. Permission to rely on it, irrespective of the freedom to amend the pleading at any time (subject to the discretion of the court and any applicable time bar restrictions), would abuse the process by inequitably surprising both the other party (which could not at that time defend against it) and the court. Of course, if an argument is not raised, it does not, by itself, preclude that it will be raised at a later stage. Silence is equivocal. But if one's continuous conduct points clearly towards non-use of the argument, then an estoppel should arise.

In reviewing the conduct of a party, the court examines all its acts inferring meaning from all communication documents. In this case, the insurers were aware of the "no hold-harmless" warranty breach, when they rejected the claim for a total loss, and they listed their legal arguments without referring to that breach (July 2003). In addition, a reservation was made for additional future grounds based on new information. This justifiably lead the court to infer that as knowledge of the breach existed at the time of the rejection and the argument was not used and only new information would give new reasons to refuse indemnification, the breach of warranty allegation would not be used at any point onwards.

Finally, the judge's decision on the point of affirmation confirms that parties must act swiftly and determinedly. By not making an election, a party is not suspending the time of choice, but rather acts by contributing to the formation of an impression. Inaction is a conduct which bears legal results, especially when facing a decision between conflicting choices and in this case affirmation of a contract or avoidance. In *Simner v New India Assurance Co Ltd* [1995] LRLR 240, election was inferred by silence of the underwriter. Even the simplest acts can result in a choice – in *O' Kane v Jones (The Martin P)* [2004] 1 Lloyd's Rep. 389, the insurers cancelled the policy which amounted to acknowledgement of the validity of the policy, thus excluding avoidance as an option, since that option alleges invalidity. The exercise of a contractual right will affirm the policy, as was also the case in *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1996] 1 Lloyd's Rep. 519, in which the insurer asked for the premium to be paid directly to it, thus recognizing the validity of that agreement; see also *Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio* (1992) 1 Re LR 213.

Konstantinos Kofopoulos, LLM
PhD candidate,
University of Southampton Law School

informa
law

ISSN 1471 9614
***Shipping & Trade Law* is published by**: Informa Law,
Telephone House, 69–77 Paul Street, London EC2A 4LQ, UK
• tel: +44 (0)20 7017 5532 • fax: +44 (0)20 7017 4781

Head of Production: Please contact Liz Lewis on tel:+44 (0)20 7017 7389 or email liz.lewis@informa.com
Subscription orders: Please contact Clare Davey on tel: +44 (0)20 7017 5192 or email clare.davey@informa.com
Editorial queries: Please contact Leigh Stutter on tel: +44 (0)20 7017 5919 or email leigh.stutter@informa.com
Printed by: Premier Print Group, Bow, London.This newsletter has been printed on paper from sustainable sources.