PAYMENT TO THIRD PARTIES: WHAT CONSTITUTES A "LOSS"?

***Glory Wealth Shipping Pte Ltd v Flame SA [2016] EWHC 293 (Comm)* provides a fascinating example of the way in which the seemingly straightforward idea of the *"compensatory principle"* underpinning the law on damages can give rise to all sorts of intriguing arguments.**

Glory Wealth, as owners, had a long term COA with Flame as charterers. As it progressed, Flame breached that by consistently failing to nominate cargoes for carriage. As might be predicted the reasons behind this all relate to the sudden collapse of the market in 2008. Glory Wealth suffered a loss in freight income of approximately USD 3 million and claimed this in damages.

Glory Wealth's own position had also become parlous. They reached a position of near financial collapse and entered into a scheme of arrangement with their various creditors pursuant to Singaporean law.

In relation to this COA, however, they then used two companies (owned by Glory Wealth directors) to receive freights due and pay out sums due. This, as the judge (Teare, J.) records, *"amounted to dishonest concealment and turpitude"*. They were trying to hide potential assets from their creditors.

The arbitration tribunal refused to award Glory Wealth any damages. This is where the *"compensatory principle"* point comes in: the tribunal's reasoning being that since Glory Wealth were never going to receive the freights due from Flame, they had suffered no loss.

At appeal Flame's own barrister seems to have accepted this was a *"remarkable"* conclusion. In a relatively short judgment Teare, J. allowed the appeal. He makes it abundantly clear that he was deeply unimpressed by Glory Wealth's behaviour and states that he *"had not reached this conclusion with any enthusiasm"*.

As a matter of law, however, he pointed out that Glory Wealth had a contractual right to freight which was not paid to them. That right could not be rendered worthless (such that no loss had been suffered) just because Glory Wealth had decided for its own reasons that the freight would be paid to another company.

Whilst it was certainly correct that Glory Wealth would never have received the freight they did have a right to receive freight. They were entitled to dispose of the fruits of that right as they chose. By failing to ship cargoes Flame deprived them of the benefit which attached to the right to receive freight.

Given Glory Wealth's conduct the result of this case may look unattractive: they had ensured that freight did not pass through them for their own purposes but nonetheless were able to assert that damages should be assessed on the basis that the freight would have passed through their hands. The decision must, however, be correct particularly when one considers the position of Flame: they admitted breaches of the COA and that these breaches had caused a sum of more than USD 3 million to be lost.

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SECURITY FOR COSTS IN COMMERCIAL CASES: REMAIN SILENT AT YOUR PERIL

In the English legal system, where the general rule is that in litigation the successful party is entitled to recover their costs from the unsuccessful party, a defendant will not just want to defeat a claim made against them, but to have costs awarded in their favour and, actually to be able to recover these. For this reason a defendant will often seek security from a claimant in respect of the costs of defending a claim. These applications are usually very hard fought but rarely provide any riveting insights into the law in this area.

Nonetheless in *Sarpd Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120* the Court of Appeal, in allowing an appeal from the Commercial Court's initial refusal to order security for costs, does provide general guidance. The facts are relatively mundane and involve a straightforward sale of gas oil by Addax to Sarpd.

Sarpd claim that the product was off spec. Addax denies this and is defending the claim. In addition, they have joined Glencore in the action, who sold them the gas oil on back to back terms, on the basis that if Sarpd's claim against them is successful they can, in turn, recover from Glencore.

Addax issued an application for security for costs. The security claimed covered not just the direct costs of the defence against Sarpd but also the costs of both Addax and Glencore in the related action in the sale chain.

The Court of Appeal (Sales, Longmore L.J.J., Baker, J.) first dealt with the question whether security for costs should have been ordered. They reaffirmed that the test is a straightforward one. The court must simply have reason to believe that the claimant will not be able to pay the defendant's costs. In applying that test it is not sufficient that the court is left in doubt as to the claimant's ability to pay. Instead the court must have a reason.

This obviously begs the question of what is a sufficient *"reason"* and the facts of this case go a long way toward answering that. Sarpd are incorporated in the British Virgin Islands and are not obliged to publish their accounts. It would seem virtually nothing is known about their assets and finances or at least nothing which is publicly available.

In settlement negotiations and in the process leading up to the application, Sarpd also seemed to have provided little to display their good financial standing. The judge at first instance found this to be *"deliberate reticence"*. Nonetheless, he pointed to alternative explanations for this and was not satisfied that it provided a reason for him to believe that Sarpd would not satisfy any costs order made against them.

The Court of Appeal reviewed this in somewhat robust terms and in a passage from their judgment which will be of considerable use to practitioners stated:

"We consider, with all due respect to the judge, that he was plainly wrong. If a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so there is, in our view, every reason to believe that…it will be unable to do so. The judge said that the obvious explanation for the refusal was that Sarpd wanted, for the purposes of settlement negotiations, to leave Addax in doubt about whether it would recover its costs, even if it defeated the claim. But the thinking behind that is that it is permissible for Sarpd to give Addax reason to believe it will be unable to recover its costs but at the same time assert that there is no reason for the court so to believe. That is illogical and unacceptable."

It is, however, important to be clear that an applicant still bears the burden of proof. There is no requirement for the respondent to fill in the gaps in an applicant's evidence. What the Court of Appeal is saying is that a court can and should take account of deliberate reticence as part of the overall picture.

In this respect, it was suggested throughout (not the least by the judge at first instance who implicitly disapproved it and declined to follow it) that there is a general practice in the Commercial Court that security for costs will often be granted against a foreign company which is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position. The Court of Appeal said that if such a practice did exist it was a sound one and should be upheld.

The Court of Appeal also found that the security provided should include Addax's costs of suing Glencore and any of Glencore's costs in defending that claim which they might subsequently recover from Addax. The latter needs a little thinking about. The procedural rules allow an applicant to seek security for *"his"* costs. At present Glencore's costs are Glencore's costs, not Addax's. The court, however, took a forward looking approach to the question. If Addax lose against Glencore then they are likely to have to pay costs to Glencore. As such, those costs will become *"his"* (i.e. Addax's) costs.

The case demonstrates that the strategy of saying nothing about one's financial position and relying upon the lack of evidence brought by the defendant is a risky one. It is going to mean careful thought needs to be given to tactics if an order for security for costs is to be avoided.

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CLAIMS, COUNTERCLAIMS AND TIME BARS

***Glencore International AG v PT Tera Logistic [2016] EWHC 82 (Comm)* involved contracts for the charter of floating cranes to load coal into vessels at anchorage. Under its terms one or other of the parties had to pay compensation for delay to the other depending on the causes of the delay.**

PT Tera Logistic, as the owner, gave notices commencing two separate arbitrations in respect of claims under the contract. Glencore responded in each arbitration by appointing a second arbitrator in relation to *"all disputes"* under the contract. By the time Glencore had served defence and counterclaim submissions in the arbitrations, the limitation period for claims under the contracts had expired. The owner took the position that the counterclaims were time barred.

Although subject to rights of appeal, this is a point the arbitrators have power to decide. Not unsurprisingly, one of the arbitrators pointed out that Glencore's response was routinely made in the expectation that it would protect their position for all disputes – even if it was unclear to them, at that time, whether they would have a counterclaim. The other two arbitrators found otherwise and, by a majority, the tribunal ruled that Glencore's counterclaim was time barred.

In giving judgment reversing that finding Knowles, J. clearly felt it unhelpful if an overly legalistic approach were taken to the question. It is necessary to look objectively at what has passed between the parties to the reference, which involves construing their words in context.

He focused on the starting point of the arbitration process – that is the notices given by the owner. They were against a background where delay could lead to obligations on either side. There would potentially, therefore, be a balance of account and:

"The party commencing the arbitration is in effect asking for an account and asserting the balance in their favour".

This commercial approach is to be welcomed over one which requires an overly technical analysis of arbitration notices in balance of account cases. Nonetheless, care has to be taken. The claim and counterclaim here arose out of a single set of facts and it would be a mistake to assume that where potential counterclaims of a more remote nature are concerned that a very general response to a notice of arbitration will inevitably cover these.

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HAGUE OR HAGUE-VISBY LIMITS?

The first instance decision in the "SUPERIOR PESCADORES" appears in the July 2014 edition of this Bulletin. The case has now been re-examined by the Court of Appeal *[2016] EWCA Civ 101*.

The owners issued six bills of lading in respect of a cargo of machinery and equipment to be carried from Belgium to Yemen. Each bill of lading contained a Clause Paramount stating *"the Hague Rules…as enacted in the country of shipment shall apply"*. The cargo was severely damaged during shipment and the resulting cargo claim was, by agreement, later made subject to English law and jurisdiction. Since carriage began in Belgium, which is a Hague-Visby contracting state, owners paid the Hague-Visby package limit across all of the bills of lading.

The cargo interests argued that the Clause Paramount was a contractual incorporation of the Hague Rules and claimed that they were entitled to recover the higher package limit in each case (i.e. where the Hague Rules gave a higher package limit on particular facts, that would apply, and where the Hague-Visby Rules would give a higher package limit, that would apply). Although the Hague-Visby rules applied compulsorily under English law, Article IV Rule 5(g) of those rules allowed the parties to agree a higher package limitation figure, which they had done via the Clause Paramount. The owners denied that the Clause Paramount incorporated the Hague Rules, contending that the expression *"the Hague Rules…as enacted in the country of shipment"* in the clause was capable of including the Hague-Visby Rules, which were an amended version of the Hague Rules.

At first instance Mr Justice Males held that owners were entitled to judgment because although the Paramount Clause incorporated the old Hague Rules, it did not operate as an agreement for a higher limit within Article IV Rule 5(g) of the Hague-Visby Rules. Therefore, the Hague-Visby package limit applied. Both parties appealed to the Court of Appeal.

On appeal the Court of Appeal (Longmore, Tomlinson, McCombe, L.J.J.) found that the Hague-Visby Rules applied.

The first issue was whether the Paramount Clause operates as an agreement that the Hague Rules apply or that the Hague-Visby Rules apply. It should be remembered here that at first instance Males, J. had said he felt constrained by authority to find that the Hague Rules had been incorporated despite his wish to find that it was the Hague-Visby Rules. As said above, he then brought in the Hague-Visby Rules by a different route.

Lord Justice Longmore reviewed those authorities and felt no such constraint. Although he did not say so in these express terms, for him the words *"as enacted"* must mean that one looks to see precisely how the Hague Rules had been enacted. In England the Carriage of Goods by Sea Act 1971 had replaced the original Hague Rules with the modified wordings known as the Hague-Visby Rules. Although Belgium was actually the country of shipment it is a Hague-Visby contracting state and no evidence had been put forward that *"enacted"* be given any different meaning from the position found to apply in English law.

This case may well close the door on an odd lacuna. The Hague-Visby limits are generally higher than the Hague Rules, but not for packages weighing up to around 10 tonnes. For that reason a claimant may want to try to pick and choose between those rules. The court pointed out that most maritime nations have adopted the Hague-Visby Rules and that it would be odd if, decades after those Rules came into force, a Paramount Clause is still taken as incorporating the 1924 Hague Rules rather than the 1968 Hague-Visby Rules. The court did, however, indicate that if the clause in question specifically refers to both the Hague and Hague-Visby Rules and therefore draws a distinction between them (as many Clause Paramounts do), the answer would probably be different.

The court pointed out that most maritime nations have adopted the Hague-Visby Rules and that it would be odd if, decades after those Rules came into force, a Paramount Clause is still taken as incorporating the 1924 Hague Rules rather than the 1968 Hague-Visby Rules.

EXCLUSION OF COMMON LAW TERMINATION RIGHTS

Long term contracts will normally contain detailed provisions regarding termination and cancellation. The common law also has an important role: in particular the innocent party can bring the contract to an end if their contractual partner is in repudiatory breach.

There is a perception that there is a general trend in English law that very clear wording will be required to exclude or restrict these common law rights. If that is correct *Vinergy International (PVT) Ltd v Richmond Mercantile Ltd FZC [2016] EWHC 525 (Comm)* is a very good illustration of this. The main question of law forming the basis of the appeal spells that out in clear terms:

"Whether Richmond was able to rely on unhindered common law rights to terminate…(the contract)…by reason of a repudiatory breach so as to completely bypass the notice and remedy requirements in the termination clause."

The case concerned an agreement for the supply of bitumen for a term of 10 years from 2008. Richmond was the supplier under the agreement. After 39 shipments, disputes arose and Richmond terminated the agreement for alleged repudiatory breaches by Vinergy consisting of:

(i) breach of the exclusivity provisions of the contract, which required Vinergy to purchase bitumen exclusively from Richmond. Vinergy secretly contracted with a third party for three shipments of bitumen over three months.

(ii) failure to pay an invoice dated 9 July 2011 for almost a year.

(iii) failure to pay demurrage for certain shipments.

Clause 17 of the contract provided that either party could terminate the agreement upon failure of the other party to observe any of its terms, but that if the default was capable of being remedied then a notice was required calling upon the defaulting party to remedy the default within a period of not less than 20 days. The contract could not be terminated until the notice period had elapsed. Richmond did not give notice in accordance with Clause 17.

Vinergy denied liability and also contended that Richmond's termination was unlawful. Richmond relied upon their common law right to accept a repudiatory breach rather than the power to terminate under Clause 17, so as to circumvent the notice requirements. The tribunal found that Vinergy were guilty of the three alleged repudiatory breaches and that Richmond were entitled to terminate the contract. Vinergy appealed to the High Court.

Teare, J. dismissed the appeal. In his view, Clause 17 did not apply when the innocent party sought to exercise his right at common law to accept a repudiatory breach as terminating the contract. Instead Clause 17 provided an express right to terminate not dependent upon the defaulting party having committed a repudiatory breach. There is nothing in Clause 17 expressly referring to the right to accept a repudiatory breach and there was, therefore, no reason to imply an agreement that, before a party terminates the contract, they must follow the notice procedure laid down in Clause 17.

He went on to say (possibly with an eye to a further appeal) that if he was incorrect and Clause 17 did apply to all breaches which are capable of remedy within the notice period then the second and third breaches (failure to pay an invoice and the failure to pay demurrage) were remediable. That contrasted with the first breach, namely the breach of the exclusivity provision, which was not remediable. As such, it would not have fallen within the scope of the Clause 17 notice requirement.

In his view, Clause 17 did not apply when the innocent party sought to exercise his right at common law to accept a repudiatory breach as terminating the contract.

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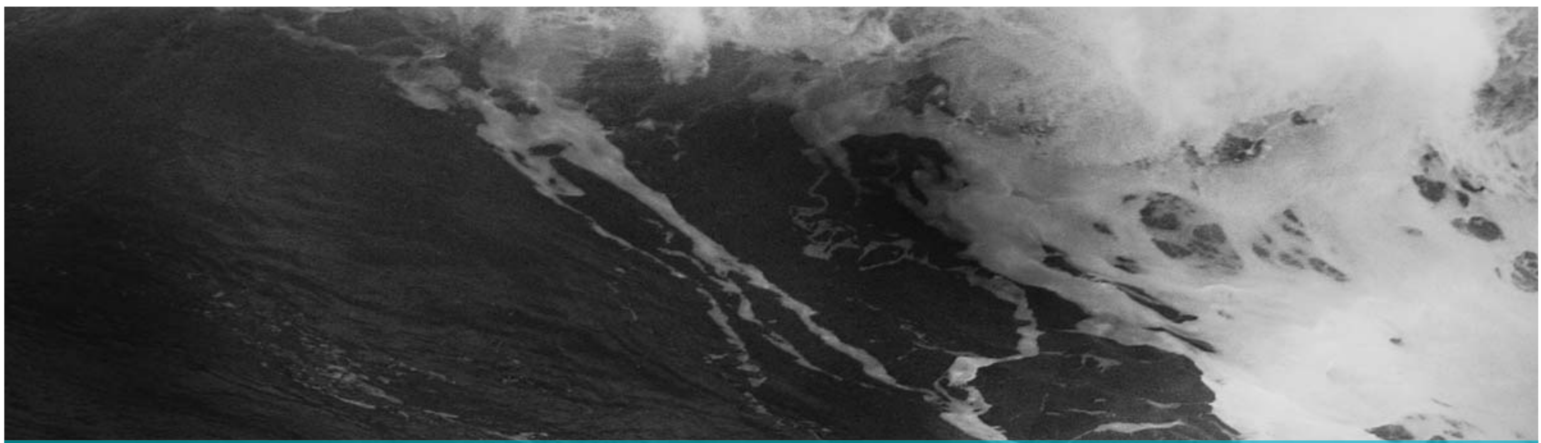

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