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Clyde & Co’s International Trade & Commodities Newsletter reports on recent legal developments within the sector.

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What’s new?
A series of our most recent updates which report on the latest legal developments and discuss general issues of interest.

For further information about any of the issues raised in this newsletter, please do not hesitate to speak to your usual contact or the authors listed herein. You can also email us at info@clydeco.com.
GAFTA introduces consolidated “Prevention of Shipment” clause to replace Prohibition, Force Majeure and Strike clauses

Francesca Corns

Traditionally handled through separate clauses, GAFTA’s Prohibition, Force Majeure, and Strike provisions have now been revised in all CIF, C&F and FOB standard form contracts entered into from 1 June 2014, with the central notion of force majeure now singularly encapsulating all three.

At first glance, the Prevention of Shipment clause (which applies equally to FOB contracts except that the clause refers to “Delivery” as opposed to “Shipment”) merely consolidates the pre-existing provisions, but traders need to be acutely aware of the subtle differences which we set out below.

The clause

The contract will be suspended if an Event of Force Majeure (Event) prevents the sellers’ performance (partially or otherwise), provided that sufficient notice of the event is given (within 7 consecutive days of the event, or not later than 21 consecutive days before commencement of the shipment period, whichever is the later).

The new Prevention of Shipment clause defines an event as follows:

**Prevention of shipment**

“Event of Force Majeure” means (a) prohibition of export, namely an executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situate, restricting export, whether partially or otherwise, or (b) blockade, or (c) acts of terrorism, or (d) hostilities, or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) ice, or (j) Act of God, or (k) unforeseeable and unavoidable impediments to transportation or navigation, or (l) any other event comprehended in the term “force majeure”.

Buyers have the option to cancel the unfulfilled part of the contract if the Event continues for 21 consecutive days after the end of the shipment period by serving notice on the sellers, exercising the option no later than the first business day after expiry of this 21 day period.

If the buyers do not exercise this option, the contract remains in force for a further 14 consecutive days after which, if the Event has not ceased and, therefore, continues to prevent performance, any unfulfilled part of the contract is automatically cancelled.

If the Event ceases before the contract can be cancelled, sellers must notify buyers that this is the case and then sellers themselves are entitled to as much time as remained for shipment under the contract before the Event occurred; or 14 days, whichever is longer, to perform.

As previously, only the Seller can invoke the new “Prevention of Shipment” clause but the clause now explicitly puts the burden of proof on sellers to prove that an Event occurred which prevented performance.

Key changes

We set out below the key changes in this approach that both sellers and buyers alike need to look out for:

- Force majeure is now all-encompassing, defined by reference to 12 listed impediments, including those that were previously dealt with under the Prohibition and Strike clauses. This definition now also includes an explicit reference to “acts of terrorism”
Very significantly, the cancellation of the contract is no longer automatic in the event of a prohibition of export, blockade, hostilities or legislative act restricting export. Instead, as explained above, performance is suspended for up to 21 days following the shipment period (as long as the sellers have complied with the notice requirements), following which either i) buyers have the option to terminate; or ii) the Event continues for a further 14 consecutive days and the contract terminates automatically.

This new articulation requires the sellers’ performance of the contract to actually be prevented for the clause to operate to suspend performance, unlike the previous articulations of force majeure terms which allowed notice to be given if delay was “anticipated” or “likely to occur”. Therefore, the bar is now set higher for sellers wishing to invoke the clause, although it is more in line with the old Prohibition clause in which a partial or total restriction was required.

The notice provisions for sellers are now less onerous, requiring notification of only the Event, and not a second notice claiming an extension of time for shipment, as was required under the old Force Majeure and Strikes clause.

Timings on termination of the contract have diminished in the new revision, with buyers able to cancel if the Event continues for 21 consecutive days after the shipment period, as opposed to 30 days under the previous Force Majeure and Strikes clauses, and now 14 as opposed to 30 consecutive days before automatic cancellation if buyers do not exercise this option. This constitutes a dramatic reduction, with the contract now terminating (at buyers’ option or otherwise) significantly earlier if the Event persists.

Sellers are now obliged to notify buyers “without delay” if the Event ceases before the contract can be cancelled, and are then entitled to the remaining time left for shipment under the contract before the Event began, or, if the time remaining is less than 14 days, the sellers are now granted 14 consecutive days to perform.

Comment
The uniformity now introduced by GAFTA between the various prevention of shipment, strikes, and prohibition clauses should be welcomed by traders. The streamlined and simplified notification process should lead to fewer missed deadlines on the part of the seller. However, both sellers and buyers alike would be well advised to familiarise themselves with the revised deadlines and notice periods under this new clause.
GAFTA 49 Contract: Buyer’s right to extend the delivery period re-examined

Pressiana McQuinn

In Nidera BV v Venus International Free Zone for Trading & Marine Services SAE [2014], the Commercial Court considered the meaning of clause 8 of the GAFTA 49 standard form of contract (Extension of Delivery clause) and held that, on the evidence, where a timely notice was served, there was an unqualified right to extend the delivery period.

Facts
The case concerned a contract for the sale and shipment of Ukrainian yellow corn, 2010 crop, on FOB terms. The sale contract incorporated the GAFTA 49 standard form of contract.

The buyers (Venus) nominated the “PIONEER WAVE” to lift the cargo. The vessel arrived within the delivery period but before the corn could be loaded, the Ukrainian government set a new quota for corn export and prescribed an export licence application procedure.

The sellers (Nidera) told the buyers that they had the goods, and that they would investigate the possibility of obtaining a licence but reserved the right to rely on the prohibition clause if they were unable to perform. The parties discussed the possibility of resolving the matter by arranging a substitute vessel to load the goods, but were unable to agree who should be responsible for the costs involved.

Immediately prior to the end of the delivery period, on 29 October 2010, the buyers served notice claiming an extension of the shipment period of 21 days, to 21 November 2010, in accordance with Clause 8 of GAFTA 49 (Extension of Delivery clause).

The sellers applied for a licence but failed to obtain one. On 2 November 2010, shortly after the initial delivery period had expired, the sellers took the view that the government restriction on the export of corn prevented them from effecting delivery of the contract goods and, consequently, purported to cancel the contract pursuant to the standard Prohibition clause in GAFTA 49. The buyers claimed that the delivery period had been validly extended until 21 November 2010, and held the sellers in default on the basis that they were in repudiatory breach of contract.

Decision
The main question before the court was whether the extension claimed by the buyers was valid and effective. It was common ground that the answer to this question turned on the construction of Clause 8 of the GAFTA 49 contract which states:

8. Extension of delivery –
[8.1] The contract period of delivery shall be extended by an additional period of not more than 21 consecutive days, provided that Buyers serve notice claiming extension not later than the next business day following the last day of the delivery period.

[8.6] Should Buyers fail to present a vessel in readiness to load under the extension period, Sellers shall have the option of declaring Buyers to be in default, or shall be entitled to demand payment at the contract price plus such charges as stated above, less current FOB charges, against warehouse warrants and the tender of such warehouse warrants shall be considered complete delivery of the contract on the part of Sellers.

Both parties put forward competing interpretations of Clause 8. The buyers argued that the right to claim an extension under Clause 8 was unqualified. The sellers, on the other hand, contended that Clause 8 had a limited purpose and that, on a true construction of GAFTA 49, particularly by reading clause 6 (Period of Delivery clause) and 8 together, the right to claim an extension existed only in circumstances where a buyer feared that the nominated vessel might not be presented in readiness to load within the stipulated period.
The GAFTA arbitrators and Appeal Board found that the extension claimed by the buyers was valid and effective. Justice Walker agreed, concluding that there was no sound basis for departing from what Clause 8 appears to say on its face, namely that where a timely notice is served, there is an unqualified right of extension under Clause 8. Justice Walker took the view that the Clause 8 construction issue concerned an unmodified provision in a standard form contract used all over the world from day to day. Therefore, where there are clear and unqualified words in such a contract, and where it would not be obvious to a trader that they have a limited meaning, then there would have to be the most compelling case before the court could properly limit the scope of the provision.

Comment
Pre 1 June 2014
This decision is important for both buyers and sellers who use the GAFTA 49 standard form of contract, not least because this issue will not be subject to review by the Court of Appeal since Justice Walker refused to grant permission to appeal. It should also be noted that, although this decision concerned clause 8 of GAFTA 49, it should be considered of broader application because identical extension clauses appear in other GAFTA contract forms.

From a practical perspective, the decision introduces clarity in the meaning and effect of Clause 8 which should assist companies trading on the basis of the GAFTA 49 contract. For buyers, the decision is useful as it means that where shipment is delayed, the buyer can, provided that a timely notice is served, secure additional time under Clause 8.

For sellers, the decision confirms that, where the buyer applies for a time extension, they will be required to continue attempting to load over a longer period. Sellers should also be careful to take into account any time extensions before exercising any options that may be available to them under the contract.

It should be noted that post 1 June 2014, GAFTA’s new Prevention of Shipment/Delivery clause now applies in relation to force majeure events – see our article GAFTA introduces consolidated “Prevention of Shipment” clause to replace Prohibition, Force Majeure and Strike clauses - p.2
GAFTA 64: 1600 hours cut off time in time extension notice clause re-examined

George Mingay
Aysha Azam

The Commercial Court recently had the opportunity to review a buyer’s right to apply for a time extension of the delivery period under a contract incorporating GAFTA 64 terms in Soufflet Negoce SA v Fedcominvest Europe SARL [2014]. The Court considered, on appeal from a GAFTA Board award, the interpretation of a “Notices” provision (clause 19 of GAFTA 64) which appears in numerous GAFTA standard forms.

Facts

The proceedings were brought by Soufflet Negoce SA (Sellers) who agreed to sell 38,000 mt of French feed barley to Fedcominvest Europe SARL (Buyers) on FOB terms. The contract incorporated the terms of GAFTA 64, including a “Notices” clause which provided that:

“In case of resales/repurchases all notices shall be served without delay by sellers on their respective buyers or vice versa, and any notice received after 1600 hours on a business day shall be deemed to have been received on the business day following.”

The sales contract also provided for the possibility to apply for an extension of the delivery period by serving a notice no later than the next business day following the last day of the agreed delivery period.

Owing to the delay of the nominated vessel, the buyers decided to exercise their rights to apply for an extension. Accordingly, they tendered a notice on the first business day after the contracted delivery period. However, the sellers refused to perform, maintaining that the notice was late because it had been served after 16.00 on that day, and was thus deemed, under clause 19, to have been received on the following day.

The buyers opposed this construction by arguing that the “Notices” clause applied only to cases of resales and repurchases and, therefore, it was not relevant to any other notice requirement provided for in the contract.

Decision

The dispute was initially heard by the GAFTA Board which found in favour of the buyers. The sellers proceeded to appeal to the Commercial Court.

Having considered the Board’s award and the parties’ submissions, the Commercial Court decided that the substance of the “Notices” clause was relevant only to cases of resales and repurchases and not to any other notices which might be required under the contract.

Indeed, the Buyers’ interpretation of the provision was to be preferred as it made “more business sense” when considering the industry practices relating to resales and repurchases. The seller had submitted that where there was a string of resales/repurchases, the need for contractual notices to be passed on by the intermediate sellers/buyers without delay and during business hours was obvious; in particular, with resales/repurchases, it made good sense to require that the notice be received before 16.00 hours because intermediate sellers/buyers might not otherwise see it until the following day.

Thus, the court confirmed that the more restrictive approach to serving notices under clause 19 of GAFTA 64 should be reserved to resale/repurchases only, and should not be of application to other notice applications. It should be noted that this ruling is of wider application than simply GAFTA 64 as it will also be of relevance to other GAFTA form contracts containing a similar provision.
Buyer bound by arbitration clause despite not signing sugar contract negotiated by agent

Maria Perucca

The Commercial Court ruled in Toyota Tsusho Sugar Trading Ltd v Prolat S.R.L [2014] that the terms of a contract for the sale of sugar had been agreed between the seller and a party who had both actual and ostensible authority to act as the buyer’s agent.

Toyota made an application under section 32 of the Arbitration Act 1996 asking the court to determine whether an Arbitration Tribunal appointed by the Refined Sugar Association (RSA) had substantive jurisdiction over disputes between Toyota and Prolat, in particular with regard to disputes it had submitted to arbitration under the rules of the RSA. Prolat had commenced separate proceedings before an Italian court in Naples, where it was domiciled, and was not present, nor represented, in the Commercial Court proceedings.

After considering the arguments put forward by Prolat in Italy and in the arbitration, the Court found it was common ground that there was a contract for the sale and purchase of approximately 10,000 mt of sugar.

The four issues to be determined by the court were as follows:

1. **Whether the application satisfied the requirements of section 32 of the Arbitration Act 1996**

   Section 32 sets out the requirements necessary for a court to determine any question regarding the substantive jurisdiction of a tribunal. Here, the requirements were satisfied as the court agreed that there were factual issues to be resolved in determining the jurisdiction dispute and that, should the matter be resolved by the tribunal itself, an appeal was very likely to follow. Determination of the issue by the court was therefore likely to produce substantial savings in costs. In addition, the application had been made without delay and the existence of the proceedings in Naples was another reason why the court should decide the issue.

2. **Whether the court had jurisdiction to hear the application**

   Although the Italian court was first seized, the court confirmed that English courts could also consider the same issue, as arbitration is excluded from Regulation 44/2001 which regulates jurisdictional issues among EU member states. Although Regulation 44/2001 is going to be replaced by Regulation 1215/2012 in January 2015, the arbitration exclusion will remain in place and some may regard the new Regulation as “declaratory of the existing state of law.”

3. **Which law should be applied by the court when considering the main issue**

   The court found that any contract for the sale of sugar between Toyota and Prolat could only be governed by English law because the main contract and all the addenda contained a clause providing for English law. There was no manifestly closer connection between the contract and another country to displace that, notwithstanding that Prolat was resident in Italy, because Toyota was based in England.

4. **Whether there was a binding arbitration agreement between the parties**

   An analysis of the evidence before the court, which included reference to a man (Mr D) who, according to Toyota, had acted as Prolat’s agent, but who, according to Prolat, had acted as Toyota’s broker, led the Court to conclude there was a binding arbitration agreement.
At a number of meetings, Mr D had been held out by a member of Prolat as the person with whom negotiations should be conducted. Toyota’s representative stated at one of the meetings that any dispute would be resolved by arbitration under RSA rules.

Following negotiations over emails and telephone conversations, a contract had been sent to Mr D which contained the relevant arbitration clause.

Toyota, having requested copies of Prolat’s financial statements from Mr D, received them directly from Prolat.

Copies of a guarantee required under the contract (with express reference to the contract number), shipping details, pricing details and several addenda to the contract had all been sent to Prolat. Prolat had also asked Toyota for price confirmation.

In the circumstances, as Mr D was given specific authority to negotiate and agree the contract and addenda in the presence of Toyota, he not only had ostensible authority to act for Prolat, but also actual authority.

Prolat was well aware of the agreements which had been made, and had never objected. In addition, Prolat took delivery of some cargoes of sugar in the full knowledge of the terms of the contract, sold on 46% approximately and was, thereby, taken to have ratified the contract entered into by Mr D. By its own conduct, Prolat was also taken to have agreed to the terms of the contract regardless of Mr D’s status.

The contract itself and two addenda specifically referred to the governing law as English law, to the RSA arbitration clause and to the RSA rules. A third addendum reinforced these terms, including its specific reference to the arbitration clause.

On the evidence, the court found that the requirements of Section 5 of the Arbitration Act 1996, which establishes that the arbitration agreement must be in writing for Part I of the Act to apply, had been met.

The court concluded that the arbitration agreement was wide enough to encompass both the claims made by Toyota in the Arbitration and the claims made by Prolat in the Italian proceedings. The parties were therefore bound to refer such disputes to arbitration in accordance with the terms of the arbitration clause.

**Comment**

This case indicates that companies will find it difficult to hide behind an agent to avoid being bound by an arbitration agreement. Where there is evidence that the agent acted with authority, the principal company will be bound by all the terms, including an agreement to arbitrate.
ICA: Arbitration clause fails to incorporate institutional rules into sale contract

Anousheh Bromfield

The court, allowing an appeal against an Award of the Technical Appeal Committee (TAC) of the International Cotton Association (ICA), held, when considering whether institutional rules were incorporated into a contract, that the starting point was to consider the incorporating words in the “host” contract and not to consider the rules which were alleged to be incorporated. The alternative approach was found to be “a wrong approach in law and involves assuming what has to be proved”.

Background
The claimant (C) appealed pursuant to section 69 of the Action Act 1996 against an Award of the ICA's TAC.

The dispute arose in respect of a sales contract (the Contract) by which C sold 600 mt of cotton to the Defendant (P). The fundamental issue on appeal was whether the Contract incorporated the ICA’s Arbitration Bylaws only (as C submitted) or whether it incorporated all of the ICA’s Bylaws and Rules (as P submitted).

The relevant part of the arbitration clause read as follows:

“All disputes relating to this contract will be resolved through Arbitration in accordance with the Bylaws of the International Cotton Association Limited. This agreement incorporates the Bylaws which set out the Association’s Arbitration procedure.”

The TAC began by looking at the first step in the arbitration procedure as set out in the ICA’s trading terms, Bylaw 201, which contained among other provisions that “the contract will incorporate the Bylaws and Rules of The International Cotton Association Limited as they were when the contract was agreed” and “if any contract has not been or will not be performed, it will not be as cancelled. It will be closed by being invoiced back to the seller under our Rules in force at the date of the contract”. The Bylaw also contained the arbitration clause cited above.

Having considered this Bylaw, the TAC concluded that all the Rules and Bylaws of the ICA had been incorporated into the Contract by virtue of the arbitration clause, and, consequently, that P was entitled to payments in accordance with the invoicing back provision of the ICA Rules.

The TAC findings

The TAC’s Award found in P’s favour, holding that all of the ICA’s Bylaws and Rules were incorporated. The consequence of this finding was that an “invoicing back” provision contained in the ICA’s Rules was held to be incorporated in the contract so that P was entitled to payment from C regardless of which party was liable for the breach of contract.

The relevant part of the arbitration clause read as follows:

“All disputes relating to this contract will be resolved through Arbitration in accordance with the Bylaws of the International Cotton Association Limited. This agreement incorporates the Bylaws which set out the Association’s Arbitration procedure.”

The ICA has Bylaws and Rules which are set out in four sections, two of which were relevant for the present case:

1) Section 2: dealing with trading terms (Bylaws 200-203 and Rules 200-240)
2) Section 3: Arbitration (Bylaws 300-361)

1 Cottonex Anstalt v Patriot Spinning Mills Ltd [2013]
The Commercial Court findings
Mr Justice Hamblen rejected the TAC’s findings, holding that they were wrong to consider the wording of the Rules alleged to be incorporated rather than addressing the incorporating words themselves, as found in the “host” contract.

He explained that the starting point was not Bylaw 201 but instead the “incorporating words used in the “host” contract” which in this case referred exclusively to Bylaws which set out the ICA’s arbitration procedure. Further, there was no difficulty in identifying the relevant Bylaws which were contained within a separate section of the ICA Bylaws and Rules.

Mr Justice Hamblen noted that it would be “unusual to incorporate a set of rules containing important and governing substantive obligations” which would have the effect of incorporating all of the ICA’s Rules and Bylaws, as part of an arbitration clause.

Comment
This case shows the importance of clearly identifying the extent to which any institutional rules are intended to be incorporated into contracts. The incorporation of institutional rules should be expressly provided for in an independent contractual provision separate from any arbitration or dispute resolution clause. The Cottonex case provides clarification when considering the extent to which any institutional rules are incorporated into a contract; the starting point should be examining the incorporating wording in the “host” contract and not the allegedly incorporated rules.
Court of Appeal defines scope of “Charterers’ Agent” in an Off-Hire Clause

Ed Mills-Webb
Dolly Brown

The Court of Appeal has considered whether, in the context of a common off-hire clause in an NYPE time charter, sub-sub-charterers and/or receivers are considered “agents” for the purposes of a common exception to off-hire. This was a case involving an amended NYPE form of time charterparty, the terms of which placed the vessel off-hire for any arrest or other lawful detention of the vessel, subject to certain exceptions, as follows: “Should the vessel be captured or seizure [sic] or detained or arrested by any authority or by any legal process during the currency this Charter Party, the payment of hire shall be suspended until the time of her release, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents…” [Emphasis added]. The case focused on the meaning of the last underlined phrase in the clause.

The facts of the case are, briefly, as follows. NYK were the Claimant Owners. They had chartered the “GLOBAL SANTOSH” to Cargill as charterers, who in turn sub-voyage-chartered the vessel. The vessel was carrying a cargo of cement sold by Transclear SA (Sellers) to IBG Investment Ltd (Buyers). Ultimately, sellers were also sub-charterers in the voyage charter chain. The contract between sellers and buyers were on C&FFO terms which, inter alia, provided that demurrage would be payable to the sellers by the buyers for any delays experienced at the discharge port.

The vessel arrived at the discharge port, Port Harcourt, but was delayed for some two months in getting onto berth due to congestion in the port arising in part from the breakdown of the buyers’ discharging equipment. By the time the vessel was permitted onto the berth, further delay arose as the result of a local court order for arrest of the cargo, obtained by the sellers against the buyers, to secure their sizeable demurrage claim. The order for arrest mistakenly also named the vessel by reason of which further delay was experienced. Cargill sought to place the vessel off-hire by reason of the off-hire clause referred to above. NYK argued that the proviso to the off-hire clause was activated because the delay had been occasioned by act and/or omission and/or default of Cargill’s agents. An arbitral Tribunal ruled in favour of Cargill and dismissed NYK’s claims.

On appeal to the Commercial Court, Field J allowed NYK’s appeal and held that parties such as sub-charterers, sub-sub-charterers or receivers to whom Cargill, by subletting the vessel, had delegated or sub-delegated the performance of its responsibilities under the charterparty could be Cargill’s agents for the purposes of the proviso to the off-hire clause, irrespective of the precise contractual relationship with the delegated party. However, that would only be the case where the act or omission or default referred to in the proviso to the off-hire clause occurred in the course of the performance by the delegate of a delegated task. On the facts, the court at first instance held that while the sellers were not agents within the meaning of the clause, buyers were. Accordingly, NYK were within the proviso to the clause so long as Buyers’ actions had “occasioned” the arrest. That was a question of causation which was remitted to the tribunal. Both parties appealed. The Court of Appeal held as follows:

1. The proviso in the off-hire clause was wider than the trial judge had held – it was not limited solely to acts, omissions or defaults carried out by Cargill or their agents in the performance of a delegated task by a delegate. So long as a party was a delegate for the purposes of the proviso, then regardless of the legal nature of the act, omission or default, if the said

\(^1\) NYK Bulkship (Atlantic) NV v Cargill International SA - The “GLOBAL SANTOSH” [2014]
act, omission, etc. occasioned the arrest of the vessel, then owners were within the meaning of the proviso. Not every act or omission of the delegate needed to be in the course of performance of a delegated task. Accordingly, both Sellers and Buyers were “agents” within the meaning of the proviso.

2. That was the interpretation that made the most sense looking at the language of the proviso, the charterparty as a whole and the commercial context. The classic division of risk under a time charterparty envisaged that the risk of delay would be for charterers to bear. The owners are responsible for the vessel and its crew; the charterer for the consequences of its liberty to trade the vessel. Pursuant to Cargill’s liberty to sublet the vessel under the terms of the NYPE form, consequences arising from its trading of the vessel were on its “side of the line.”

3. The question of causation was, as the trial judge held, to be remitted to the tribunal. The widening of the highlighted proviso in the clause, by the Court of Appeal, places increased responsibility on time-charterers, even where they have little or no effective control over the actions of independent sellers and buyers. First published in Gaftaworld, Issue 209, August 2014
Yukos Capital v Rosneft: The latest ruling analysed

Rupert Gordon
George Mingay

In a case arising from the collapse of Yukos that has escaped attention amid the clamour over the Permanent Court of Arbitration awards, the English High Court has confirmed that arbitration awards annulled by a Russian supervisory court may still be given effect under English law.

As such, interest on the sums claimed may be recoverable under section 35A of the Senior Courts Act 1981.

The story so far

Arbitral tribunals operating under the auspices of the International Commercial Arbitration Court in Moscow rendered four awards in favour of Yukos Capital in September 2006.

Yukos Capital was awarded 12.9 billion roubles (equivalent to approximately USD 483.5 million at that time) and almost USD 858,000 in principal - believed to be in respect of different liabilities. The awards made no provision in respect of interest.

On 23 May 2007, the Moscow Arbitrazh Court set aside the awards in judgments that were upheld on appeal. Yukos Capital nonetheless sought leave to enforce the awards in the Netherlands, having identified assets of Rosneft in that jurisdiction.

Although the Dutch District Court refused leave to enforce the awards, in April 2009 the Court of Appeal overturned that decision and granted Yukos Capital leave to enforce the awards. It did so on the basis that the set-aside decisions were not consistent with principles of private international law and Dutch law. As the awards remained unpaid, in March 2010 Yukos Capital sought to enforce them in England under the New York Convention and at common law. It also obtained a without notice freezing injunction against Rosneft, which was subsequently discharged by the provision of acceptable security.

The Dutch proceedings continued and, in June 2010, the Dutch Supreme Court dismissed Rosneft’s appeal from the Court of Appeal decision and the awards were paid.
The latest judgment

The English proceedings continued in respect of Yukos Capital’s claim for post-award interest, and the recent judgment concerned two preliminary issues in that claim: firstly, whether the set-aside decisions had the effect that the awards could not be enforced at common law because they no longer existed in a legal sense; and secondly, whether interest was recoverable as a matter of Russian law, and/or under section 35A of the Senior Courts Act 1981.

The court decided the first of these issues in favour of Yukos Capital, holding that there was no principle in English law of *ex nihilo nil fit* (or “nothing comes of nothing”) as had been asserted by the defendant. Rosneft had argued that as a result of the set-aside decisions, the awards could not be enforced at common law as they no longer existed.

The court favoured Yukos Capital’s argument, that at common law a foreign arbitration award could be enforced provided it stemmed from a valid arbitration agreement and was final and binding according to its governing law. It was not necessary that the award remained enforceable under the governing law of the arbitration in order for it to be enforced at common law. However, the court would only disregard a foreign decision to set aside an award in circumstances where that foreign decision would not be recognised by the English court.

It was therefore open to Yukos Capital to argue that no effect should be given to the set-aside decisions based on conventional English conflict of laws principles, for example, on the basis that the decisions were obtained by fraud, that their enforcement would be contrary to public policy, or that the judgments were obtained in breach of principles of natural justice.

In reaching this decision, the judge considered the analysis in Dicey, Morris and Collins on The Conflicts of Law (at chapter 16-148) of the same point in the context of the New York Convention, and related case law. The answer to the question of whether the awards could be enforced was not to be found in theories of legal philosophy, but by a test: whether the court in considering whether to give effect to an award would (in particular and identifiable circumstances) treat it as having legal effect notwithstanding a later order of a court annulling the award.

In applying this test the court was not bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy. Simon J held that, subject to Yukos Capital proving that the set-aside decisions did offend against those basic principles (as the company had pleaded) the English Court would give effect to the awards.

The court was also asked to decide two preliminary issues relating to whether the claim for interest could proceed, either under Russian law or under section 35A of the Senior Courts Act 1981. The judge, applying Russian law, held that no claim for interest could proceed as a matter of Russian law since such a claim only arose on the date that *exequaturs* were obtained as part of enforcement proceedings.

There were no *exequaturs* in this case owing to the set-aside decisions so there could be no claim for interest as a matter of Russian law.

Interest in respect of the late payment of a foreign award could in principle be claimed under section 35A of the Senior Courts Act 1981 as the English claim was in essence a claim to enforce a debt. However, the court would need to be persuaded that it should exercise its discretion to award interest, and the circumstances in which the arbitrators and the Dutch Court of Appeal declined to grant an award of interest would be relevant to the exercise of that discretion.

The court was not asked to decide whether to make an award of interest at this juncture.

The relevance

The decision is clearly of relevance to parties that have agreed to the resolution of disputes by arbitration in a forum outside England and who can show that they have suffered from a supervisory court decision offending against basic principles of honesty, natural justice and domestic concepts of public policy.

Of course, such cases are likely to be few and far between, but provided that the jurisdiction of the English courts can be established, in certain, narrow, circumstances, assistance will be available. It remains to be seen how the Russian courts will react to this decision but given the current climate and the high profile of the underlying dispute we shall be watching this space with interest.

First published in Global Arbitration Review - 15 August 2014

Yukos Capital S.à.R.L. v OJSC Oil Company Rosneft [2014] EWHC 2188 (Comm)
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- **EU significantly expands sanctions against Crimea and Sevastopol**
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- **President Obama announces significant easing of Cuba sanctions**
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  Recent developments within the shipping sector.
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