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Contract chains and liability

In an appeal to the High Court, Mitsui & Co (USA) Inc. vs. Asia-Potash International Investment (Guangzhou) Co Ltd, the High Court considered whether the mere fact that contracts were not back-to-back (or in a 'chain') prevented liabilities from being passed down the contractual chain. Ahmed Hassan explains.

Overview

This case, an appeal to the High Court from the FOSFA Board of Appeal, discussed helpfully whether the mere fact that contracts were not back-to-back (or in a 'chain') prevented liabilities from being passed down the contractual chain.

The short answer: no. A party cannot successfully argue it should not be liable for a claim for liabilities arising under a contract further up the CP chain, just because the contracts failed to be properly 'back-to-back' or in a 'chain'.

When deciding whether a party is liable, it is necessary to consider each claim heading properly and assess whether it is a type of loss which is i) not too remote and ii) was of a type or kind which would have been in the reasonable contemplation of the parties at the time of entering into the contract.

Background

This case was (and is) part of a longer sequences of cases between the various parties in the contractual chain.

The underlying dispute arose out of a contract of sale dated 2 May 2012 between **Mitsui** as the Seller and **DGO** as the Buyer for 60,000 MT of Brazilian Soyabeans (the "**Cargo**") for delivery FOBST ex Santos between 15 and 31 July 2012 (the "**Contract**"). The Contract was on FOSFA 4 and ANEC 41 forms.

DGO opened a letter of credit in accordance with the Contract, and on 17 July 2012 nominated MV *Yusho Regulus* (the "**Vessel**") to load about 66,000 metric tons.

On or around 13 September 2012, and following receipt of the necessary approvals from the Port Authority (CODESP), the Vessel berthed and began loading.

On or around 15 September 2012, the Vessel broke free from its moorings and damaged the port's ship-loaders. The Vessel left berth with approximately 42,000 metric tons of Cargo, and was arrested by various parties.

Although it was found that the Vessel could have re-berthed from 16 October 2012, it did not do so. Mitsui claimed that DGO needed to apply to the Port Authority to permit the Vessel's re-berthing, while DGO claimed that the Contract was at an end, either by operation of the force majeure provisions therein, or because of a breach by Mitsui. This impasse continued for some time and ultimately failed to be resolved.

On 30 November 2012, the letter of credit lapsed and, although Mitsui continued to insist on DGO's performance of the Contract, those attempts proved unsuccessful. On 7 or 8 January 2013, Mitsui accepted DGO's conduct as a repudiatory breach of the Contract, bringing it to an end.

Claims were accordingly brought, and formal proceedings commenced up and down the contractual chain.

First Tier FOSFA Umpire

Mitsui claimed for a range of indemnities, including in respect of i) the sums awarded up the contractual chain for which Mitsui would in fact be found liable, ii) Mitsui's costs exposure in the various references, iii) storage costs and circulation charges and iv) tax liabilities. Mitsui also claimed, in the alternative, damages.

The first tier FOSFA Umpire issued an award dated 24 July 2020, finding substantially in favour of Mitsui. DGO appealed this decision.

Board of Appeal

The Board of Appeal issued its Award on 20 December 2021, and although it found that DGO were in breach by failing to have the Vessel called back to berth on/after 16 October 2012 (such that Mitsui were entitled to their damages arising therefrom), it found against Mitsui in respect of its various indemnity claims.

This, it appears, was on the basis that i) the differences in contractual terms between the Contract and the other contracts up the chain were substantial, ii) Mitsui had broken the chain of material back-to-back contracts, and iii) '*the Contract with very distinct terms* [had] *to be considered as a stand-alone Contract'*, such that the indemnity claims failed.

Mitsui appealed this decision to the King's Bench Division.

Appeal allowed

Mr. Justice Picken's confirmed in self-explanatory terms that '*this is an appeal which should be allowed since the Board of Appeal did not do what they should have done, which was to consider whether the losses were of a 'type' or 'kind' which would have been in the parties' reasonable or specific contemplation at the time of contracting as not unlikely to result from the breach'*.

The Judge in reaching this decision confirmed that the mere fact that a contractual chain might have been broken, because a party down the chain had contracted on materially different terms, did not mean that losses were prevented from being passed down the chain.

Instead, the Board of Appeal should have taken a three-stage approach. The first stage would be to consider whether the types of loss claimed by Mitsui were foreseeable regardless of any difference of terms between the contracts; the second stage would be to consider which terms in each contract were relevant to those types or kinds of loss and whether such terms differed between the contract; the third stage was whether the same or greater losses would have flowed had the contracts been back-to-back.

As the Board of Appeal had not undertaken this analysis, the matter would be referred back to them to consider whether the losses claimed were in fact too remote or not by applying the correct legal test.

Comment

The decision is a helpful restatement of the principle of remoteness of damages. The mere fact that in an industry it may be common practice (and often advisable) to contract on entirely back-to-back terms in string sales does not mean that it is necessary to do so in order to recover losses caused by the breach of contracts up the chain.

At the same time however, it should also be noted that the Court remitted the question of whether in this case the damages in question were too remote back to the Board of Appeal for determination. Mitsui may have won the argument on the nature of the test for whether the claimed losses are too remote; however, the application of that test remains to be decided.

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