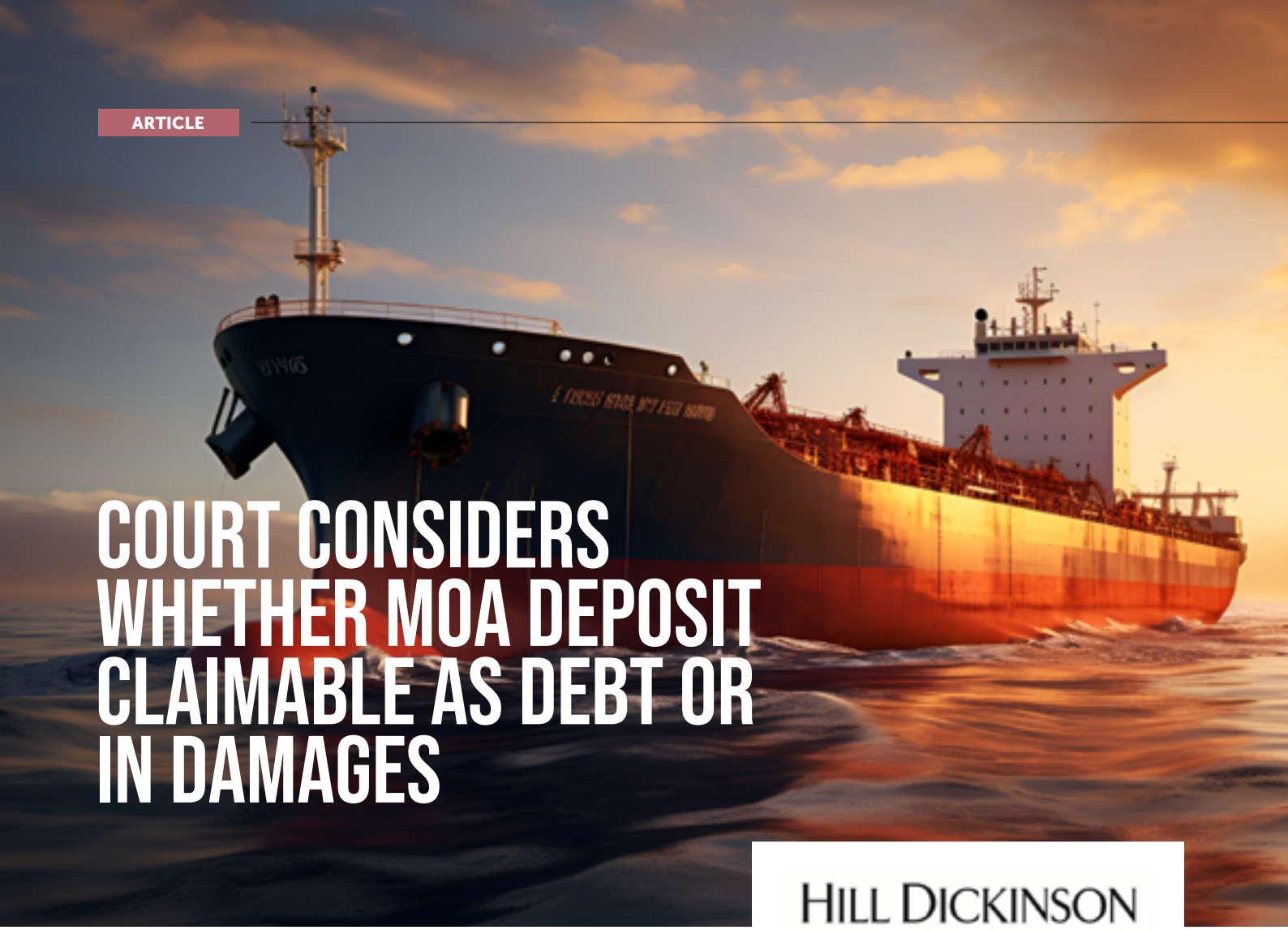
ARTICLE



COURT CONSIDERS WHETHER MOA DEPOSIT CLAIMABLE AS DEBT OR IN DAMAGES

HILL DICKINSON

King Crude Carriers SA & others -v- Ridgebury November LLC & others (Re an Arbitration Claim) [2023] EWHC 3220 (Comm)

Originally published by Hill Dickinson on 16 January 2024

Court considers whether MOA deposit claimable as debt or in damages

It is not particularly common for a dispute arising out of the 2012 version of the Norwegian Saleform (NSF 2012) to reach the English Court. Therefore, the Court's findings in this case on issues arising out of four ship sale contracts based on the NSF 2012 form provide useful guidance, particularly on whether the Sellers could claim the deposits in debt or only in damages. The Court concluded that the deposits were in principle recoverable as damages.

Debt or damages?

The distinction is an important one in terms of recoverability. In simple terms, a claim in debt can be brought where a specific sum becomes due and payable under the contract but remains outstanding. The claimant can sue for the full amount and does not have to prove its loss.

A claim in damages is brought where one party has failed to perform a primary obligation under the contract (eg non-delivery) and the innocent party sues for any losses it has suffered as a result of the breach. The claimant must prove its losses arising out of the breach and the amount of damages it recovers will be dependent on satisfying requirements which can be difficult (and costly) to prove, eg foreseeability, remoteness and mitigation of loss. Under English law, damages are compensatory (not punitive) and the innocent party must be put in the financial position it would have been in but for the breach. If there has been a breach of contract, but the innocent party cannot sufficiently demonstrate any, or any significant, loss, it may recover nothing or very little.

The background facts

This was a case of four concurrent tanker sales, all concluded on (amended) NSF 2012 terms.

Clause 2 of the relevant Memoranda of Agreement (MOAs) provided that the three-day deadline for payment of the deposit would start running after

> *"(ii) the Deposit Holder has confirmed in writing to the Parties that the account has been fully opened and ready to receive funds. … The Parties shall provide to the Deposit Holder all necessary documentation to open and maintain the account without delay".*

An additional clause 21 in the MOAs provided that:

> *"[i]n the event that Buyers, acting reasonably in good faith, are unable to enter into Management agreements with the Vessel's Managers by the time of Sellers tendering NOR, then the Parties shall cooperate and make best endeavours to find a solution so that the Buyers are not in default and the Vessel can be delivered as promptly as possible."*

In breach of contract, the Buyers did not provide the necessary KYC documents to the Deposit Holder and, as a result, the escrow account could not be opened and no deposit was paid. The Sellers terminated the MOAs and commenced four arbitrations (one under each MOA), where they also brought a claim for the deposit in each case. By the time of the termination of the MOAs, despite best endeavours and good faith on the Buyers' part, it had not been possible to conclude any management agreements.

There was no unanimity between the tribunals. Three of the four tribunals (by a majority) found for the Sellers on the basis of what they thought was a general principle of English law that where: (a) a party is in breach of contract and; (b) as a result of that breach, a pre-condition to the accrual of a debt due to the other party is left unsatisfied, then the relevant pre-condition is deemed to be either waived or satisfied. Therefore, the deposits were claimable as debts. Alternatively, the majority found that the Sellers could claim in damages for breach of contract. The Buyers appealed these awards.

The fourth tribunal (again by a majority) found for the Buyers on the basis that it construed Clause 21 in the relevant MOA as relieving the Buyers from any obligations under Clause 2 unless the Buyers had already entered into a management agreement, or a different mutually acceptable solution had been found within the meaning of Clause 21. The Sellers appealed this conclusion.

The Commercial Court decision

In summary, the Court's key findings were as follows:

Buyers' appeal

1. On a review of the authorities (the key authority being a Scottish case in 1881, *MacKay -v- Dick*), the Court's view was that there was no established and general principle of deemed waiver/satisfaction. The Court did however acknowledge that the state of English law on this point was far from clear and could benefit from a higher court decision. In the meantime, there were other legal avenues (eg implied term of cooperation, waiver, contractual construction) to prevent a party from deriving a benefit from its own wrong, depending on the context.
2. On the parties' amended wording of Clause 2 of the NSF 2012 form, a claim in debt would not arise until the escrow agent had confirmed that the escrow account had been opened and was ready to receive funds. As that had not occurred in this case, the Sellers were confined to a claim in damages and had to meet all the evidential hurdles that followed such a claim.
3. The Court found that the Deposit Holder's confirmation that the escrow account had been opened was a true condition precedent to the accrual of the Buyers' obligation to pay the deposit and the Sellers' corresponding right to sue for it as a debt. In the absence of such confirmation, the three banking days would not start running.
4. However, there was serious irregularity on the part of the tribunals because they had failed to deal with the Buyers' pleaded case on damages, namely that it was not inevitable that the deposits would have been released to the Sellers because the MOAs would inevitably have come to an end in any event as a result of the Sellers' own breach of their obligation to co-operate under Clause 21.

The awards were, therefore, remitted back to the tribunals for reconsideration of this issue.

Sellers' appeal

The Court disagreed with the majority tribunal's reading of Clause 21 (which it decided must have been based on an implied term) and decided that it did not relieve the Buyers from paying the deposits.

The majority tribunal had in essence found that delivery of the vessel had become impossible because it had not proved possible to conclude a management agreement, therefore the deposit would never have been released to the Sellers even if it had been paid.

However, the Court thought that it was not necessary or obvious to imply such a term (and anything short of necessity or obviousness will not suffice): any 'impossibility' might have been temporary, in which case payment of the deposit was not pointless. As long as there was any possibility that a management agreement could be concluded or alternative solution found, then it would make commercial sense for the deposit to be paid and all other pre-delivery obligations complied with so that delivery could take place as soon as possible thereafter. There was also no prejudice to the Buyers in paying the deposit. If delivery could not ultimately take place, they would get their deposit back.

The award was, therefore, remitted back to the tribunal for reconsideration.

Comment

The deposit is a guarantee of due performance. Pursuant to clause 13 of NSF 2012, as unamended, where the buyer fails to pay the deposit, the seller can cancel the agreement and claim compensation for its losses. Where the purchase price is not paid, the seller can cancel the agreement and forfeit the deposit plus any accrued interest (but cannot claim additional compensation).

However, amendments to the standard form wording (as in this case) can affect directly or indirectly when and on what terms obligations accrue (such as when the deposit becomes payable and on what terms it can be forfeited).

Parties negotiating the terms of a MOA should consider carefully what they are agreeing to and express in clear words what they intend. If they fail to do so, they may find that arguments based on implied terms are of no assistance (if implied terms have not been expressly excluded altogether, as is the case with clause 18 of the NSF 2012).

The dispute also demonstrates that different tribunals dealing with similar or identical issues may legitimately come to different conclusions. Those looking for uniform outcomes in related disputes may consider whether it would be sensible to appoint identical tribunals.

About the authors

Rosie Goncare, is a partner at Hill Dickinson specialising in charterparty and bills of lading disputes, marine insurance, international sale of goods, MOA disputes, arrests, trade sanctions, advising UK ports and assistance to crews during casualty investigations.

Based in the firm's London (City) office, Rosie qualified as a solicitor in England and Wales in 2014. She previously obtained her Masters in Law at Vilnius University, Lithuania, and completed her postgraduate studies at St Petersburg State University in Russia. She obtained her LLM in International Trade and Commercial law from the University of Durham, UK, and her LPC at the College of Law in London.

Rosie is fluent in English, Lithuanian and Russian and is a member of the Lithuanian City of London Club.

Vassilis Mavrakis is a senior associate at the firm's office in Piraeus, Greece. He advises on a wide variety of contentious shipping matters, often across multiple jurisdictions, including charterparty and cargo disputes, vessel arrests, shipping finance litigation, MoA cases and marine insurance matters. Vassilis has experience in arbitration (predominantly on LMAA terms), arbitration appeals, and High Court litigation (having recently acted for the successful owners in *The Aquafreedom* [2024] EWHC 255 (Comm)).

Vassilis is ranked as a 'Rising Star' in the 2024 edition of *The Legal 500*.

Reema Shour is a qualified barrister (non-practising) and an experienced senior knowledge lawyer in Hill Dickinson's global shipping team. She spent her first 15 years post-qualification as a fee earner in international commercial litigation, with particular experience in the shipping, international trade and commodities sectors and has worked as a professional support lawyer since 2009, joining Hill Dickinson in 2023.

Reema keeps the firm's shipping and trade groups fully informed on all legal and regulatory developments within the industry and authors a number of internal updates.

Reema holds two master's degrees, one in law and one in translation. In addition to English, she speak Arabic, French, German and Italian.