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THE REMAINS OF THE (BANKING) DAY: INTERPRETING PAYMENT PROVISIONS IN THE NORWEGIAN SALEFORM 2012

The High Court, allowing an appeal under s.69 of the Arbitration Act 1996, has held that the deadline for release of purchase funds under an MOA based on the Norwegian Saleform 2012 was midnight at the end of the date for performance, and that the applicable time zone was that in which the obligation was to be performed.

BACKGROUND

The claimant (the “**Sellers**”) agreed to sell the MT Songa Coral to the defendant (the “**Buyers**”). The sale contract was based on the Norwegian Saleform 2012 (the “**MOA**”). Clause 3 of the MOA required payment by release of a sum in an escrow account to the Seller’s account, both at the same Norwegian bank, not later than three “Banking Days” after notice of readiness was given. Payment had not been made by midnight (Norway time) at the end of 8 September 2022, the day on which the three Banking Days expired. The Sellers served a purported notice of cancellation at 00:09 on 9 September (also Norway time).

The situation was complicated by the fact that countries in six different time zones were listed as being relevant for the determination of which days were Banking Days: (i) the United Arab Emirates; (ii) Turkey and Greece; (iii) the UK; (iv) Switzerland and Norway; (v) Canada; and (vi) the USA. While midnight had passed in Norway when the Sellers gave their notice, it had not passed in all the relevant countries.

THE AWARD

The LMAA Tribunal considered two preliminary issues. The first concerned the question of whether 8 September 2022 was a “Banking Day”. They held that it was, and their conclusion was not challenged.

The second preliminary issue was whether the time for performance under clause 3 expired: (a) at midnight on the end of 8 September 2022 in the last of the countries listed in the definition of ‘Banking Days’, (i.e. until midnight Hawaii-Aleutian Standard Time, that being the westernmost time zone in the USA); or (b) at midnight on the end of 8 September 2022 in Norway. The Tribunal held that the Buyers had until midnight on 8 September 2022, Hawaii-Aleutian Standard Time, before being in breach in failing to pay.



The Tribunal said that both interpretations were plausible, albeit that they each lead to ‘odd results’. However, they preferred the Buyers’ construction on the basis that it aligned most closely with the definition of ‘Banking Days’, and they found that the contractual language displaced the presumption that an obligation that is to be performed in a particular place must be performed by midnight there.

THE HIGH COURT APPEAL

The sole question before Paul Stanley KC, sitting as a Deputy High Court Judge (the “**Judge**”), was whether the obligation to ensure the release of the funds from the escrow account was one that the Buyers were obliged to perform before midnight at the end of 8 September, Norway time. He concluded that the answer was yes.

He held that the definition of “Banking Days” simply marked certain calendar days as relevant or irrelevant for calculating the interval, but did not alter the ordinary meaning of “day” (a calendar day ending at midnight, local time). Commercial certainty required that, for any contractual deadline, one should be able to say whether a day has started or has ended, and therefore one must assume both a time and a place. The time, unless otherwise stated, is midnight (as held in The Afovos [1983]) and “the usual and common-sense view” is that the place is to be found by considering where the act in question is to be performed. He compared the situation with the giving of notice: if notice were given in New York at 16:00 on 2 September, it would not make sense to argue that the notice should be treated as being given on 3 September because that day has already begun in the UAE.

Having established that the last day for the release of payment under the MOA was 8 September 2022, and that the place for the release of that payment was Norway, the proper conclusion as a matter of law was that the obligation to release the payment fell to be performed before midnight in Norway. This approach provided more commercial certainty than the Buyers’ construction that the deadline was midnight Hawaii time, which would result in “Banking Days” overlapping with each other.

COMMENT

It is common for contracts to provide for deadlines to be calculated by a period of days, rather than specifying a date and time, and in the majority of cases such contracts are performed without incident. However, this decision highlights a confusion that can arise with deadlines calculated in this way, particularly where the relevant obligation can be performed in one of a number of jurisdictions, and therefore time zones, around the world.

The decision reminds us of helpful aids to construction of such clauses, and also underscores the value that the English courts place on commercial certainty. However, commercial certainty will not take precedence over a clear agreement between the parties. The Judge noted that “provisions which are designed to achieve rigid certainty may sometimes pay a price in commercial logic”, commenting that if the provision had clearly stated that the applicable time zone should be Hawaii, then he would not have construed it otherwise.

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