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Update: Glory Wealth Shipping PTE Ltd v Flame SA

February 2016

1. The compensatory principle is that, as far as is possible, the innocent party is put by money into the same position that he would have been in if the contract had been performed. In a previous note on *Flame SA v Glory Wealth Shipping PTE Ltd (The Glory Wealth)* [2014] 2 WLR 1405 [link here] it was predicted that parties to arbitration and litigation would seek to extend the compensatory principle in respect of the assessment of damages and that the challenge for the courts would be to ensure that those limits and those assessments are kept within manageable and reasonable bounds.

2. This has turned out to be the case to a lesser or greater extent in both arbitrations and court proceedings – see e.g. *Bunge SA v Nidera BV* [2015] 3 All ER 1082. However, less predictably the issue arose again in another appeal under s.69 of the Arbitration Act 1996 in the same case this time under the inverted title *Glory Wealth Shipping PTE Ltd v Flame S.A.* [2016] EWHC 293 (Comm,) the reason being that this time it was the Owners, Glory Wealth, who were the appellants. It may be recalled that the case concerned a Contract of Affreightment (the "COA") dated 19 August 2008 providing for the carriage of 6 cargoes of coal in bulk in each of the years 2009, 2010 and 2011. The specific issue this time concerned Glory Wealth's claim for damages against Flame, the Charterers, in relation to six shipments in 2011. Glory Wealth became "deeply insolvent" by 2011. This led to substantial claims against Glory Wealth from other parties with the risk that Glory Wealth's assets in US dollars would be subjected to Rule B attachments in New York. In order to protect assets from Rule B attachments Glory Wealth used two companies, Evensource and First Goal, owned by two of Glory Wealth's directors, to receive all inward freight earned under the COA and to pay out all outgoing freight or charter hire on vessels used to carry nominated cargoes. This lead to the argument before the tribunal by Flame that Glory Wealth had not suffered any loss as the freight would not have passed through its hands.

3. The arbitration tribunal agreed with Flame holding that although Glory Wealth was deprived, by Flame's breach of the COA, of the right to receive freight, in the circumstance of the case that had caused no loss to Glory Wealth. This was because it would never have received the freight and the freight would never have been transferred to Glory Wealth by Evensource or First Goal, who the tribunal held were not agents of Glory Wealth. With the intention of applying the compensatory principle, the tribunal held that because Glory Wealth would never have received the freight a nil award of damages would place Glory Wealth in the position it would have been in had Flame performed its obligations under the COA.

4. However, the Court (again Teare J) held that this conclusion was wrong and that Glory Wealth had suffered a substantial loss. Glory Wealth had a contractual right to receive freight due under the COA of which it had been deprived. The value of that right was found by the tribunal to be worth in excess of US$3 million. This was not worth any less by reason of the fact that Glory Wealth had decided that the freight would be paid to other companies with the result that the freight would never have been transferred to it. The tribunal had erred in law by failing to hold that by being deprived by Flame's breach of its right to freight, Glory Wealth had suffered a loss. The tribunal did not take into account that the right to receive freight is not just limited to the right to receive it into one's bank account. Another limb of the right is the right to give it away. Flame's breach had deprived Glory Wealth of the benefits of ownership of the right to freight under the COA. Glory Wealth was therefore entitled to an award in excess of US$3 million.

Comment

5. The arbitral tribunal had reached its conclusion by reference to the compensatory principle. However, the Court was careful to look at the separate limbs of the right of a party to receive freight which extends to the right of disposal. Thus, holding that Glory Wealth had suffered no loss had not been the proper application of the compensatory principle by the tribunal since this took no proper account of the right a party has to dispose of the funds it is due. The fact that Evensource and First Goal were not the agents of Glory Wealth and would not have held the freight to the order of Glory Wealth did not affect the conclusion that Glory Wealth had indeed suffered a loss. The case was slightly complicated by the fact that Glory Wealth's actions in running the sums through Evensource and First Goal amounted to dishonest concealment and turpitude. However, ultimately these matters did not affect the question of law answered by the Court.

6. Thus, the case is a further illustration of the compensatory principle in action. The arbitral tribunal or court will look closely at the entitlement of a party under a contract to establish the value of contractual benefits that have been lost in order to establish as best it can the actual loss. No doubt if Evensource or First Goal had been made the claimants for the freight in the arbitration they would have been met with the argument by Flame that they were not parties to the COA, thus in effect allowing Flame to obtain a windfall in respect of an admitted repudiatory breach of contract, if its arguments had been correct.

We are grateful to Ishfaq Ahmed of Stone Chambers London for this article, which was first published on Stone Chambers' website in February 2016.