INSOLVENCY BULLETIN

1st September 2017

Reliance on Standard Terms

African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845

In this case, the three claimants had lent $150 million to the first defendant. The first defendant defaulted and the claimants issued proceedings against it and two guarantors and applied for summary judgment. The defendants claimed to have counterclaims amounting to $1 billion which they purported to set off against the sums claimed by the claimants notwithstanding a prohibition against set-off contained in the loan agreement.

The defendants contended that the loan agreement was in fact on the claimants' standard terms of business and, as such, was subject to section 3 of the Unfair Contract Terms Act 1977 which provides that an exclusion clause contained within *'written standard terms of business'* can only be relied upon if it is reasonable. Presumably, although it does not form part of the Court of Appeal judgment, the defendants would have contended that the exclusion clause, or reliance upon it, was somehow not reasonable.

Longmore LJ held that the defendants (as the party seeking to rely upon s.3 UCTA) had to show that the clause in the loan agreement:

i) was written;
ii) was a term of business;
iii) formed part of the claimants written standard terms of business and
iv) that the claimants dealt on those terms.

i) and ii) need no consideration. The case, however, turned on iii) above and the defendants alleged that the loan agreement was on the claimants' standard terms of business.

In order to succeed the defendants would have to show that the terms in question were those habitually used by the claimants and that they had been incorporated into the loan agreement substantially unaltered.

The evidence showed, however, that the terms were in fact based upon an LMA syndicated facility agreement which the LMA's owner User Guide stated could not be relied upon without substantial amendment. Furthermore, it was clear that, as a matter of fact, the terms of the loan had been the subject of substantial negotiation between the parties and that the claimants were three different banks – one Egyptian and two Nigerian – so the terms of the loan agreement *cannot* have been any party's written standard terms of business.

As the defendants had failed to establish iii) above, the issue of whether the exclusion clause was or was not reasonable did not arise; it is not clear how the question of unreasonableness would have been sustained if it had.

If you have any queries in relation to this, or any other, matter, please do not hesitate to contact us – *office@amblaw.co.uk* or 020 3651 5646.

AMB Law
46 New Broad Street
London
EC2M 1JH

T: +44 (0)20 3651 5646
F: +44 (0)20 3651 5554
office@amblaw.co.uk

18 Epsilon House
West Road
Ipswich
IP3 9FJ

T: +44 (0)1473 276103

Alistair Bacon
Principal

T : 020 3651 5647
M: 07881 554062
E: *abacon@amblaw.co.uk*

Nick Bowman
Associate Partner

T : 01473 276154
M : 07824 861598
nbowman@amblaw.co.uk

Stephen Carter
Consultant

T : 020 7329 4242
scarter@amblaw.co.uk