Feature

KEY POINTS

- Some instruments, here called on-demand instruments, impose liability which is not contingent upon liability under another contract.
- If an instrument is entered into outside the spheres in which on-demand instruments are generally found and is not expressly described as one of the types of on-demand instrument, there is a strong presumption that it is not an on-demand instrument.
- The Commercial Court has recently held that no similar presumption operates in relation to the extent of an on-demand liability, where it is apparent that a form of on-demand liability has been entered into, but its extent is in issue.

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On demand bonds and the ambit of the Marubeni presumption

The decision in *Rubicon Vantage International Pte Ltd v Krisenergy Ltd* [2019] EWHC 2012 (Comm) that the Marubeni presumption does not fall to be applied by analogy in determining the extent of an admitted on-demand liability is considered, as is the Marubeni presumption. It is suggested that the decision in *Rubicon* may not be the last word on the issue

RUBICON v KRISENERGY

Rubicon (a Singaporean company) sued Krisenergy (a Cayman Islands company) under a "Charterer Guarantee", governed by the laws of England and Wales, which had been provided by Krisenergy to Rubicon in relation to a bareboat charter pursuant to which Rubicon chartered a Floating Storage and Offloading Facility (the Vessel) to a wholly owned subsidiary of Krisenergy ("Kegot", another Cayman Islands company).

The terms of the Charterer Guarantee included, in addition to terms under which Krisenergy guaranteed the observance by Kegot of its obligations and undertook to perform in the event of default:

> "3. Any demand under this Guarantee shall be in writing and shall be accompanied by a sworn statement from the Chief Executive Officer or the Chief Financial Officer of the Contractor [ie, Rubicon] stating as follows …
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> 4. In circumstances where the amount(s) demanded under this Guarantee are not in dispute between the Company and the Contractor, the Guarantor shall be obliged to pay the amount(s) demanded within forty-eight (48) hours from receipt of the demand.
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> 5. In the event of dispute(s) between the Company and the Contractor as to the Company's liability in respect of any amount(s) demanded under this Guarantee:
> (a) the Guarantor shall be obliged to pay any amount(s) demanded up to a maximum amount of … $3,000,000 … on demand notwithstanding any dispute between the Company and the Contractor;
> (b) the Guarantor shall be entitled to withhold and defer payment of the balance of the sum demanded in excess of … $3,000,000 …; and
> (c) the Guarantor shall be entitled to withhold and defer payment of any other disputed amounts claimed under this Guarantee,
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> until a final judgment or final non-appealable award is published or agreement is reached between Company and contractor as to the liability for the disputed amount(s).
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> 6. In the circumstances described in Clause 5 the Guarantor shall not make any payment in excess of … $3,000,000… under this Guarantee unless the Contractor obtains a final judgement or final non-appealable award in its favour or the Company and the Contractor agree that an amount is payable by Company to Contractor. … In circumstances where the final judgment or non-appealable award is given in favour of the Company … the Contractor shall refund to the Guarantor the sums paid by the Guarantor to the Contractor pursuant to clause 5(a) of this Guarantee to the extent that it is found that the Contractor was not entitled to the sums demanded and paid. …
>
> 10. Save as set out in Clause 3, in no circumstances whatsoever shall Guarantor's liability hereunder vis-a-vis Contractor be greater than that of Company vis-a-vis Contractor under the Contract [ie, the charter]. The Guarantor shall have all the limitations rights and defences of the Company under the Contract."

Purportedly under the charter, Rubicon claimed payment from Kegot for the costs of certain works to the Vessel, totalling $1,827,901. Kegot refused payment and raised a dispute which was not resolved.

Ultimately Rubicon demanded payment from Krisenergy under the Charterer Guarantee, alleging that the Charterer Guarantee was so far as relevant an on-demand instrument, and Krisenergy was liable to pay even where there was an unresolved dispute as to Kegot's liability to pay. Krisenergy also refused payment. Whilst Krisenergy accepted that the Charterer Guarantee was in part an on-demand instrument (so that Krisenergy could in certain circumstances become liable to pay sums to Rubicon even though Kegot's obligation to pay those sums had not been established), it contended that this was only where Kegot had admitted liability and no more than quantum was in dispute.

Krisenergy relied upon the presumption referred to by Carnwath LJ (as he then was)

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in *Marubeni Hong Kong Ltd v Mongolian Government* [2005] 1 WLR 2497, at [30], that, in respect of an instrument which is not a banking instrument, and is not described in terms appropriate to an on-demand bond or similar instrument, there is a "strong presumption" that it does not impose obligations which are not contingent upon a third-party liability. Krisenergy argued that the presumption should be applied by analogy and accordingly, it argued, the scope of Krisenergy's on-demand obligations should be construed restrictively.

The judge (Mr Nicholas Vineall QC, sitting as a deputy judge of the High Court) rejected this ([2019] EWHC 2012 (Comm), at [18]), holding that the Marubeni presumption applies only in relation to whether a particular instrument should be construed as imposing obligations which are not contingent upon a third-party liability. The judge reasoned that, if it is accepted that to some extent an instrument imposes autonomous liabilities, the fact that the obligor under the instrument is not a bank (or similar institution) is in general unlikely to assist in determining the extent of the liabilities.

Accordingly, the judge determined the issue by interpreting the relevant language of the Charterer Guarantee without the application of any presumption, or reliance upon the commercial sphere in which the Charterer Guarantee was entered into. The judge determined the issue against Krisenergy, holding (at [19] to [27]) that, if a demand complying with cl 3 is made for a sum up to $3,000,000, but there is a dispute either as to liability or quantum between Rubicon and Kegot, nonetheless Krisenergy is obliged to pay the sum demanded. Because the judge held that valid demand had been made, Krisenergy was held liable to pay the sum demanded (at [54]).

THE MARBUENI PRESUMPTION

One of the more difficult questions which the courts sometimes face in the guarantee context is whether an instrument is what may be called a true guarantee (ie an instrument under which liability is contingent upon breach of a primary contract), or what may be termed an on-demand instrument (ie an instrument imposing an obligation which is not conditional upon breach of another contract, but is generally conditioned only upon the making of a valid demand). Not infrequently the language of a document provides pointers in each direction: see for example the discussion of Longmore LJ of the instrument at issue in *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2013] 1 All ER (Comm) 1191, at [23]-[24]. It is, however, generally recognised that on-demand instruments, in addition to containing an obligation to pay expressly "on demand", are usually entered into in relation to international transactions, and are usually issued by a bank or other financial institution (or, indeed, an insurer or professional bond issuer).

The Marubeni presumption can be seen to be an attempt by the court, in reliance upon such features, to provide greater certainty. On the basis of the presumption, if parties intend an on-demand instrument to be created outside of the typical spheres for such instruments (as expressed by Carnwath LJ, "outside the banking context"), the onus is upon them to make this clear.

The presumption is a *prima facie* presumption, and gives way to clear language within the operative clauses of the instrument which demonstrates that the parties did indeed intend it to be an on-demand instrument, even though they did not label it as such and the instrument was not entered into in one of the spheres where such instruments are typically found: see *IIG Capital LLC v Van der Merwe* [2008] 2 All ER (Comm) at 1173, at [30], per Waller LJ. This is inevitable: the general approach to the interpretation of contractual documents, requiring a focus upon the language of the document and its relevant context, apply in this area. It is suggested that the presumption is best analysed as a general rule as to the weight, in the interpretation of an instrument where the presumption applies, which it is appropriate to give to the considerations that parties typically enter into on-demand instruments only in certain spheres and it has not been indicated by an express description that an on-demand instrument is intended.

THE DECISION IN *RUBICON v KRISENERGY*

It appears to follow from the decision that, where in a context outside the recognised spheres for on-demand instruments, it is established that an instrument imposes liability where a third-party liability is not *fully* established, the extent to which the third-party liability must be established in order for liability under the instrument to arise falls to be considered without any presumption for a narrow rather than broad liability under the instrument, or (following the approach of the judge) without taking into account the facts that on-demand instruments are not typically entered into in the relevant sphere, and that there is no description of the instrument in terms appropriate for a full on-demand instrument.

The application of a "strong presumption" in favour of a narrow liability in this situation is no doubt going too far. However, it is respectfully suggested that these matters are of some relevance to the construction of the extent of the on-demand liabilities, and that they should accordingly be given some consideration by the court. On this basis, to what extent they may affect the answer to the question would depend upon the strength of the indications provided by the language of the instrument, and of any other relevant background circumstances. ■

Further Reading:

- When is a guarantee a performance bond? (2017) 6 JIBFL 364.
- Guarantees and performance bonds: problems of drafting and interpretation (2013) 10 JIBFL 614.
- LexisPSL: Banking & Finance: Performance bonds and guarantees: what is needed to rebut the Marubeni presumption?