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10th April 2012

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Corporate

Email negotiations leading to an enforceable guarantee

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Introduction

It has long been the case under English law that, in order for a contract of guarantee to be enforceable, the guarantee (or a memorandum or note of it) must be in writing and signed by the guarantor or by a person lawfully authorised by the guarantor. This requirement can be found in section 4 of the Statute of Frauds 1677 which, despite its antiquity, remains in force to this day.

In most commercial transactions, a guarantee will be either an easily identifiable stand-alone document or provided for as part of the terms of a formally executed document. However, in the recent case of *Golden Ocean Group Limited v Salgaocar Mining Industries PVT Ltd and another* [2012] EWCA Civ 265, the Court of Appeal found that there is no reason why a guarantee whose terms are identified in a sequence of negotiating emails should not be regarded as an agreement in writing for the purposes of the Statute.

The facts

Golden Ocean Group Limited ("Golden Ocean") entered into negotiations with Salgaocar Mining Industries PVT Ltd ("SMI") for a 10-year charter of a vessel to SMI with an option to purchase the vessel at the end of the charter period. The negotiations proceeded on the basis that the charterer of the vessel would be Trustworth Shipping Pte Limited (which was in effect the chartering arm of SMI) and that the charterer's obligations would be "fully guaranteed" by SMI. Negotiation of the terms of the charter and the option to purchase continued by email until final terms were agreed. The email which confirmed final agreement of outstanding terms did not expressly refer to the guarantee.

As the date for delivery of the vessel approached, the charterer refused to take delivery. Golden Ocean brought a claim against SMI under the guarantee on the basis that, by failing to take delivery of the vessel, the charterer had failed to honour its obligations under the charterparty. SMI contended that, since the guarantee was not contained in a single document signed by the guarantor, the requirements of the Statute of Frauds had not been satisfied and that the guarantee was therefore unenforceable.

Was there an agreement in writing for the purposes of the Statute of Frauds?

In the High Court, Clarke J concluded that it was highly desirable that the law should give effect to agreements made by a series of email communications (particularly, as was the case here, in circumstances where the email exchange followed the sequence of offer and counter-offer culminating in final acceptance of terms). Accordingly, the judge ruled in favour of Golden Ocean and concluded that it was "well arguable" that the agreement on which the guarantee claim was based (namely, the email exchanges) was an agreement in writing which satisfied the Statute of Frauds. SMI appealed the decision.

The Court of Appeal dismissed SMI's appeal and confirmed the High Court's ruling that an enforceable guarantee could be found to exist in a series of negotiating emails. In particular, the Court held that the agreement in writing which was required to satisfy the terms of the Statute of Frauds did not have to be contained in a single document; indeed, there was no limitation on the number of documents in which the agreement could be found. The Court recognised that it was commonplace for the negotiation of commercial contracts (and, in particular, charterparties) to proceed by means of the exchange of emails in which the terms agreed early on in the process were not repeated in subsequent emails; this process would lead to the conclusion of a contract by which the parties intended to be bound when the final email in the chain was sent agreeing outstanding terms. Against this background, the Court found that reference could be made to a sequence of negotiating emails for the purpose of identifying a contract of guarantee and there was no reason why the contract of guarantee so identified should not be regarded as an agreement in writing for the purposes of the Statute.

Had the agreement been signed?

As outlined above, the Statute of Frauds also requires that a contract of guarantee must be signed by the guarantor (or a person lawfully authorised by the guarantor). It was common ground before the High Court and the Court of Appeal that an electronic signature would suffice.

In this case, the document which was taken to confirm the conclusion of the charterparty and the related guarantee was an email from the chartering brokers. The email bore only the forename of the sender. SMI contended that this was no more than a salutation and not a signature effective to authenticate a contract of guarantee. However, notwithstanding the apparent informality, the Court of Appeal took the view that, by putting his name to the email, the individual concerned was indicating that the email came with his authority and that he took responsibility for its contents. Accordingly, the Court concluded that, assuming that the sender had the requisite authority, his signature on the email could properly be regarded as authentication of the contract of guarantee contained in that email and the other emails in the sequence.

Comment

To an extent, the decision in the Golden Ocean case flowed from the pattern of contract negotiation and formation which is commonplace in the world of ship chartering. However, the case does make it clear that, where parties conduct negotiations by email intending to be bound when the final points have been agreed, the final email in the chain bearing only a relatively informal salutation can bring into effect an enforceable contract of guarantee. To guard against this risk, parties who do not wish to find themselves bound when email negotiations reach a conclusion should take care to make it clear that they are negotiating subject to contract and that they do not intend to be bound until such time as a formal document incorporating the terms agreed during the email exchange has been drawn up and formally executed.

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