

# Soundings

## No guarantees: The Rubicon Vantage

**Is it necessary for a guarantor to pay even if the underlying liability is disputed? This was considered recently in *Rubicon Vantage International Pte Ltd v KrisEnergy Ltd (The “Rubicon Vantage”) [2019] EWHC 2012 (Comm)*.**

The claimant, Rubicon Vantage International Pte Ltd (“Rubicon”), owned a floating storage and offloading facility, which it chartered to KrisEnergy (Gulf of Thailand) Ltd (“Kegot”). Kegot was a wholly owned subsidiary of the defendant, KrisEnergy Ltd (“KrisEnergy”). KrisEnergy provided a guarantee to Rubicon for any sums owed under the charter by Kegot.

Rubicon sent a series of invoices to Kegot, four of which were disputed, together totalling just over \$1.8m. The disputed invoices remained outstanding and, on 3rd September, 2018 Rubicon made a demand on KrisEnergy

under the guarantee. KrisEnergy refused to pay, leading Rubicon to commence these court proceedings.

Rubicon contended that the guarantee was, at least in part, an on-demand instrument, that it had made compliant demands, and that KrisEnergy was therefore liable to pay, notwithstanding that the underlying claims against Kegot were in dispute and had not been adjudicated upon. KrisEnergy accepted that the guarantee was, in part, an on-demand instrument, but said that it was only an on-demand instrument where liability had been admitted by Kegot, even if quantum remained in dispute, and there had been no

such admission of liability. KrisEnergy also argued that the demands did not comply with the terms of the guarantee, so that no liability had arisen under it.

The relevant terms of the guarantee provided as follows:

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 stating as follows: (a) that the amount(s) demanded are properly claimed and due and payable in accordance with the terms of the Contract; (b) the calculation of such sums together with any supporting documentation reasonably required to assess such demand; and (c) that the Company was duly notified of the amount(s) demanded in accordance with the terms of the Contract.
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.
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 United States Dollars Three Million (US\$3,000,000) on demand notwithstanding any dispute between the Company and the Contractor [...] 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)."

### Types of guarantee

The judge began by considering the characteristics of guarantees. He distinguished between a "true guarantee", which on a proper construction merely imposes a secondary obligation on the guarantor to see to it that the obligations are met, and an "on-demand guarantee", or performance bond, which imposes an autonomous obligation on the guarantor to pay, irrespective of the actual underlying liability. On-demand guarantees are typically issued by banks, which are prepared to take on an obligation to pay against documents.

The judge found that the guarantee had hallmarks of both types of guarantee. On a proper construction of the wording, under clause 4, if the amounts demanded were not in dispute between Rubicon and Kegot, then KrisEnergy

must pay them within 48 hours of receipt of the demand. The operative wording, "where the amount(s) demanded are not in dispute," meant that KrisEnergy must pay under this clause only if and insofar as there was no dispute as to liability nor as to quantum.

Further, he found that clause 5 was directed to what was left over from clause 4. The opening wording, "In the event of dispute(s)... as to [Kegot's] liability in respect of any amount(s) demanded under this Guarantee," refers to disputes either as to liability or quantum. This clause was subject to the \$3 million cap.

Since the disputed invoices fell within the clause 5 cap, the question became whether a valid demand had been issued pursuant to clause 3 and, in particular, whether the demand complied with clause 3(b).

The judge applied the ordinary rules of contractual construction, holding that something had gone wrong with the wording of clause 3, because it did not make good grammatical sense. Accordingly, the literal meaning of the words could not be adopted (*The Rainy Sky S.A. & Ors v Kookmin Bank* [2011] UKSC 50) and it was for the judge to ascertain what a reasonable person would have understood was meant by the language. The judge had no doubt that a reasonable person would have understood the parties to have intended that any demand be accompanied both by the calculation of the sums demanded and by any supporting documentation reasonably required to assess the demand. The demand made on 3rd September, 2018 fulfilled those requirements. Accordingly, KrisEnergy was liable under the guarantee for the four disputed invoices, regardless of whether liability was admitted.

### Lessons learned

This case is a salient reminder of the importance of careful drafting of guarantees. The wording of a guarantee can determine whether it is construed as a "true" or "see to it" guarantee or an "on-demand" guarantee which, in turn, can significantly impact the beneficiary party's ability to draw down on it. Poorly drafted guarantees can result in an additional dispute, on top of the underlying dispute. The clause in this case is an interesting example of both types of guarantee being rolled into one and demonstrates the scope for uncertainty surrounding this type of clause. When drafting guarantees, parties should be clear about what it is they intend to achieve and use appropriate wording.

**If Members have any questions in relation to the above issues, they are invited to contact the Association for further information.**

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