

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT**

Before Mr Justice Butcher

26 May 2021

**Kreditanstalt Für Wiederaufbau -v- Azov-Don Shipping Company JSC
[2021] EWHC 1406 (Comm)**

CASE SUMMARY

Butcher J granted summary judgment on the claim, finding that it was not premature to determine the effect of accession under Russian law in circumstances where the defendant had first put Russian law in issue, but failed to provide any evidence on this critical issue.

Background

Kreditanstalt Für Wiederaufbau (“**KFW**”) entered into a loan agreement with Roststar Shipping Company Limited (the “**Borrower**”) on 16 January 1996 (the “**Loan Agreement**”). The Borrower’s parent company, Volgo-Don Shipping Company (“**VDSC**”), was also a party to the Loan Agreement, as guarantor, and issued a guarantee, under which it agreed to indemnify KFW and guarantee the obligations of the Borrower under the Loan Agreement (the “**Guarantee**”). Both the Loan Agreement and Guarantee were governed by English Law. On 30 April 2015, KFW declared all outstanding indebtedness under the Loan Agreement due and payable following an Event of Default; however, payment was not forthcoming.

In 2019, KFW commenced proceedings against Azov-Don Shipping Company JSC (“**ADSC**”), on the basis that, following its merger with VDSC, ADSC had assumed the obligations of the guarantor under the Loan Agreement by virtue of: (a) a letter dated 12 December 2011 from ADSC’s General Director which recorded that VDSC had merged with ADSC and confirmed that ADSC had assumed VDSC’s obligations by operation of Russian law (the “**Accession Letter**”); (b) the 7th Supplemental Agreement to the Loan Agreement dated 15 December 2011, which identified ADSC as the new guarantor (the “**7th Supplemental Agreement**”); and (c) an addendum to the Guarantee dated 15 December 2014, which identified ADSC as the guarantor and legal successor to VDSC (the “**Addendum**”). Each of these documents was governed by English law. KFW, therefore, relied exclusively upon English law in its claim, but reserved its right to contend that the ADSC was also liable on the Guarantee by virtue of Russian law.

ADSC served its Defence on 2 September 2019, in which it admitted that it had merged with VDSC but denied that it was bound by the terms of the Guarantee, advancing four arguments as to why, on its case, the Accession Letter was not binding upon it as a matter of English law. KFW served its Reply on 29 October 2019, in which it addressed each of these arguments, and issued an application for summary judgment on the claim on 16 October 2020.

On 4 February 2021, ADSC filed its response on the application, supported by a legal opinion on Russian law from Mr Zaystev, which suggested ADSC was not bound by the Accession

Letter as the General Director had exceeded his authority in signing this, meaning the transaction may “*be recognized as null and void by the court*”. In its reply dated, 29 March 2021 KFW, supported by a legal opinion on Russian law from Ms Makarova, argued that ADSC had succeeded to all of VDSC’s rights and obligations by operation of Russian law by virtue of its accession with VDSC on 12 November 2010, such that arguments as to authority were moot. Further, among other things, it argued that the Accession Letter was binding on ADSC, as no steps had been taken to invalidate the document and the fact that the General Director had exceeded his authority only rendered the contract voidable, not void *ab initio*. Finally, on 26 April 2021, ADSC applied to amend its Defence to reflect the defence of want of authority which it had raised in its response to the application.

At the hearing, ADSC indicated that the only live issues were those first raised in the course of the summary judgment application. Namely, whether the ADSC had a real prospect of establishing that: (1) it had not become liable under the Guarantee upon its merger with VDSC under Russian law on accession; (2) the Accession Letter was void because the General Director had exceeded his actual authority; (3) the General Director had not had ostensible authority to enter the Accession Letter, 7th Supplemental Agreement, or the Addendum; and (4) none of the agreements had been ratified so as to render ADSC liable under the Guarantee.

The Accession Issue

Ms Makarova’s evidence on the nature and effect of accession in Russian law was cogent, supported by reference to legislation, founded upon undisputed facts and was, critically, uncontradicted (at [32] to [33]). In light of this, Butcher J rejected ADSC’s assertion that it would be premature to grant summary judgment on the basis of the evidence before the court.

In this regard, Butcher J noted that it was ADSC that had put Russian law in issue when it elected, in its response to the application, to advance a previously unpleaded defence based on lack of authority. At this point, the court would have expected ADSC to address the impact of accession under Russian law, as this was a logically prior issue (at [37(a)]). Further, even if ADSC had not addressed this in its response in February 2021, Butcher J observed that ADSC could have sought consent or permission to put in further evidence from Mr Zaystev once it had been served with Ms Makarova’s opinion (at [37(c)]). However, ADSC had not done so. In the circumstances, Butcher J found that ADSC had presented no answer to KFW’s case on accession and concluded that there was no reason to believe that material which might provide an answer was likely to be available at trial (at [38]). Butcher J therefore found that KFW was entitled to summary judgment on its claim.

Other Issues: Actual Authority, Ostensible Authority and Ratification

In light of his finding on the accession issue, Butcher J noted that it was not strictly necessary for him to address the other issues raised and declined to address the question of ostensible authority, which was potentially complex. However, he indicated that, even if ADSC had not been bound by the Guarantee by accession, he still would have found that ADSC’s defence did not have a realistic prospect of success.

This is because, he noted, Ms Makarova’s unchallenged evidence was that a lack of actual authority of the General Director under Russian law would only have rendered the Accession Letter potentially voidable, not void *ab initio*, and no steps had been taken to invalidate this. As such, the Accession Letter he remained binding on ADSC despite this (at [41]).

Further, Butcher J observed that the signing of the 7th Supplemental Agreement by the General Director of ADSC had been expressly approved via a resolution of ADSC's sole shareholder. Butcher J held that this was clear evidence that ADSC had adopted or recognised the Accession Letter whereby ADSC had assumed liability under the Guarantee, therefore ratifying the prior transaction (at [44]).

Disposal

Butcher J, therefore, granted the application to adduce expert evidence, granted summary judgment on the claim for €9,742,663.46, and refused ADSC's cross-application to amend its defence, finding that, even as amended, the Defence as a whole disclosed no defence with a realistic prospect of success (at [50]).

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm>