

Can a party's silence alone result in an enforceable contract? A successful challenge to an arbitration award on jurisdiction under s67 of the Arbitration Act

Simon Rainey QC

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In a rare example of an arbitration award being successfully challenged in the Courts, HHJ Pelling QC's judgment in **MVV Environment Ltd v NTO Shipping**, was handed down today.

Simon Rainey QC, instructed by Jonathan Spencer and Rebecca King at Simmons & Simmons, represented the claimant, MVV, and successfully persuaded the court that a final award on jurisdiction issued in an LMAA arbitration was incorrect; MVV was not a party to the arbitration agreement evidenced by a bill of lading.

Background

MVV is a company specialising in the conversion of waste products into energy. A waste management company in turn collected a waste product from MVV known as "*unprocessed incinerator bottom ash*" (UIBA). for transport to a recycling plant in the Netherlands.

Each shipment of UIBA from MVV's Plymouth facility to the Netherlands was evidenced by shipping documents, including a bill of lading for each shipment naming MVV as 'shipper'. Two on board explosions in January 2017 caused damage to the ship and injury to a member of the crew, and were alleged to have been caused by the UIBA.

The vessel's owner (NTO) commenced an LMAA arbitration against MVV claiming damages caused by the two explosions. The bill of lading for the shipment incorporated a law and jurisdiction clause from a charterparty which provided for a London seated arbitration. MVV immediately challenged the jurisdiction of the arbitration Tribunal on the grounds that MVV was not the "shipper", was not a party to the contract of carriage, and, therefore, not a party to any arbitration clause with NTO. The Tribunal held that MVV was the shipper, and a party to the contract of carriage, and that the Tribunal did have jurisdiction to hear the dispute. Shortly after receipt of the Award, MVV brought a s67 challenge in the Commercial Court.

The Issues

The key issues in the case were:

- » Whether the bill of lading contained or evidenced the terms of the contract of carriage;
- » Whether the naming of MVV as "shipper" in a bill of lading was decisive as to the identity of the parties to the contract of carriage; and
- » Whether the ship's agent who prepared the bill of lading, or the waste management company, had express or implied authority, or whether the ships agent had ostensible authority, to enter into a contract with the shipping company on behalf of MVV.

HHJ Pelling QC found that it was unhelpful to rely on MVV being named as shipper; the persons named in the bill of lading as shipper and carrier are only the starting point to determining the parties. The contract of carriage is concluded before the bill of lading evidencing its terms is issued, and it is open for a party to show that it has been wrongly identified as a party to the contract of carriage in the bill of lading. The court could not infer assent from MVV's silence in not having corrected earlier bills of lading on which it was named as shipper.

Given this, the case turned on the third issue, and the court found that the ship's agent did not have actual express or implied authority from MVV, and that in fact the waste management company should at all times have been described as the shipper. As a result, MVV was not a party to the contract of carriage and, therefore, not a party to the arbitration agreement either. The arbitration award was set aside.

Comment

This case makes clear that, while bills of lading have a number of functions and are vital tools in international trade and shipping, insofar as they contain or evidence a contract of carriage they follow the same rules as any other contract. The

quirks and curiosities of bills of lading should not distract from the application of ordinary contractual principles.

It is also clear that in order for an individual or company to confer authority to another, unconnected and unrelated party, there must be an action conferring that responsibility as authority cannot arise from silence alone.

This is a rare example of an award being successfully challenged. It is one of the strengths of English law arbitrations that Courts are generally slow to interfere where parties have chosen to have their disputes determined in arbitration. It is only proper, though, that questions of jurisdiction can be challenged.

Representatives

MVV was represented in this case by Simon Rainey QC of Quadrant Chambers and Thomas Steward of The 36 Group. Simon Rainey said:

“This was a robust and welcome reaffirmation by the Commercial Court that, while possessing some special features as to negotiability, a bill of lading is a contract like any other. The mere naming of a party as ‘Shipper’ on the face of the bill by a person with no actual or ostensible authority to do so creates no contractual effect. There is no ‘special rule’ because of the status of a shipper under a bill of lading. Rigorous contractual analysis must still be applied.”

Simon was instructed by the Simmons & Simmons team which included Jonathan Spencer, a Partner in the firm’s Insurance and Construction Group, and Rebecca King, an Associate in the Litigation and Arbitration Group.

Commenting on the decision, Jonathan Spencer (Partner) said:

“We are delighted with this result for MVV, which is testament to the hard work of the team over a two year period. We were unsure how effective the virtual hearing would be, given that we had two factual witnesses giving evidence, but we were impressed with how smoothly it went.”

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Simon Rainey QC



“Truly a super silk - devastatingly sharp and exceptional on his feet.” (Legal 500 UK, 2020)

Simon Rainey QC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis (“fantastically intelligent and tactically astute”). He is acclaimed for his advocacy skills (“a stunning advocate”) and his cross-examination (“excruciatingly superb”). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care (“incredibly user friendly” and “lovely to work with”).

Winner: International Arbitration QC of the Year 2020, Legal 500 (and shortlisted 2017 and 2019). Winner: Shipping and Commodities QC of the Year 2017, both Chambers & Partners and Legal 500 (and shortlisted 2018; 2019; 2020). Winner: Top 10 Global Maritime Lawyers of 2017 (Lloyd’s List); and again in 2019.

[> View Simon’s full profile](#)

simon.rainey@quadrantchambers.com