

Promises, promises: *Charles Shaker v VistaJet* - English court confirms agreement to negotiate in good faith and to use reasonable endeavours to agree in letter of intent for an aircraft purchase is unenforceable

Background to the dispute

This was an application for summary judgment regarding the return of a US\$3.55m deposit paid by the claimant to the defendant company pursuant to a Letter of Intent ("LOI") for the purchase and operation of an aircraft.

Under the LOI, the deposit was to be applied towards the purchase price, subject to termination of the LOI by a specified Cut-Off Date. The claimant, as Buyer, agreed to proceed "**in good faith and to use reasonable endeavours to agree, execute and deliver**" the relevant transaction documents by such date. The LOI also provided that:

"Expiry

In the event that the Guarantor (the defendant company, VistaJet), the Seller (a VistaJet subsidiary) and the Buyer, **despite the exercise of their good faith and reasonable endeavours**, fail to reach agreement, execute and deliver the Transaction Documents on or before the Cut-Off Date (subject to any extension of such date by written agreement of the parties):

- (a) this Letter of Intent shall automatically terminate following the Cut-Off Date without penalty or claim by either party and shall be void and of no legal effect; and
- (b) the Guarantor shall within five (5) business days following the Cut-Off Date refund the Deposit to the Buyer's nominated account.

Non-binding

Other than the provisions relating to the application, payment and refund of the Deposit...it is specifically understood and agreed that **this Letter of Intent does not constitute a binding agreement** upon the Guarantor, Seller and Buyer to enter into the Transaction Documents..."

The parties extended the Cut-Off date several times but did not reach agreement on the transaction documents. The final amendment to the LOI included an acknowledgment that "**notwithstanding the exercise of good faith and reasonable endeavours by all relevant parties...**", agreement had not occurred by the relevant date, thus the Cut-Off date was extended.

The Buyer sued for refund of the deposit. The defendant, VistaJet, refused on the basis that the Buyer did not proceed in good faith nor use reasonable endeavours to complete the deal. The Buyer contended that its obligation to proceed in good faith and to use reasonable endeavours was unenforceable in law, thus VistaJet's objection was irrelevant. In the alternative, the Buyer contended that VistaJet was contractually estopped under the terms of the final LOI extension from denying that the Buyer had not proceeded in good faith and used reasonable endeavours.

Agreements to agree

The court held that the Buyer's agreement to proceed in good faith and to use reasonable endeavours to agree the transaction documents was not enforceable in law. Firstly, the non-binding provision expressly stated that the LOI was not a binding agreement (other than in relation to the deposit). Secondly, an agreement to negotiate or to agree is unenforceable in law (leading authority *Walford v Miles [1992] 2 AC 126*).

Accordingly, agreements (or obligations or duties) to use reasonable endeavours to agree or to negotiate in good faith are unenforceable. The court referred to the recent case *Barbudev v Eurocom Cable Management Bulgaria EOOD [2012] EWCA Civ 548*. A duty to negotiate in good faith is inherently inconsistent with the position of a negotiating party. There are no objective criteria by which the court can decide whether a party has acted reasonably or unreasonably. The court distinguished *Petromec v Petroleo Brasileiro [2006] 1 Lloyd's Rep* where the court considered that an obligation to negotiate in good faith could be enforceable, on the basis that the *Petromec* case involved objective criteria which could be used in the absence of agreement.

Deposit terms

Further, the court dismissed the defendant's submission that the

expiry clause was drafted so that the exercise of good faith and reasonable endeavours by the claimant was a condition precedent to return of the deposit, holding that such condition precedent is unenforceable in law for the same reasons that an obligation to exercise reasonable endeavours to agree or to negotiate in good faith is unenforceable. The court considered that was the case notwithstanding that the particular terms regarding the application and refund of the deposit were the subject of a binding agreement, unlike the rest of the LOI. Consequently, the effect of the enforceable remainder of the expiry clause was that, once the Cut-Off Date arose without the parties agreeing the transaction documents, VistaJet was required to refund the deposit.

Contractual estoppel

The court also accepted the claimant's argument that the defendant was contractually estopped from denying that the claimant had acted in good faith and used reasonable endeavours. As held in *Raiffeisen Zentralbank Ostereich AG v Royal Bank of Scotland PLC [2011] 1 Lloyd's Rep. 123*, "parties can agree that their dealings shall be conducted on a particular basis of fact (including as to what has or has not occurred) even if the true facts are different and that, if they do, a contractual estoppel will arise." In the present case, it was clear that, when executing the final amendment to the LOI, the parties acknowledged a state of affairs which was that, up to such date, both had exercised good faith and reasonable endeavours to agree the transaction documents, and this was the factual

basis on which they agreed to another extension.

Lessons learnt

Obligations to negotiate in good faith and to use reasonable endeavours to agree are often seen in letters of intent, commitment letters or term sheets. Parties should bear in mind that such obligations (even if they are included in transaction agreements) are unlikely to have binding effect under English law. Letters of intent may be unenforceable as a whole, on the basis that they are agreements to agree. However, this does not mean that such letters may not be drafted to include certain provisions which are binding upon the parties. In the present case, VistaJet's obligation to refund the deposit under the LOI as drafted was held to be enforceable, notwithstanding the court's conclusion on the other disputed terms.

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