

Further Consideration of Contractual v. Common Law Termination Rights: *Digital Capital Limited v. Genesis Mining Iceland EHF* [2021] EWHC 2462 (Comm)

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PRACTICES Litigation, Europe, Middle East and Africa, Shipping Dispute Resolution, Offshore Oil and Gas Dispute Resolution

Many people dealing with English law commercial contracts will appreciate that in the event of deficient performance by the other party of their obligations under the contract, rights may exist not only as expressly provided for in the contract but also pursuant to the common law. In the drafting of commercial agreements, parties will commonly expressly provide that certain circumstances will allow for the termination of the contract by one or both parties to it. Often, such express rights of termination will arise upon particularly serious (e.g. “material”) breaches of the contract by a party to it with provision often made for the consequences of a termination pursuant to such terms. However, these express contractual rights/remedies will often co-exist with common law rights to damages upon a breach of contract, as well as in some circumstances the right under the common law to treat the contract as at an end upon a repudiatory breach.

A question that recurs in instances of seriously deficient performance of a contract by one party is whether the rights of the innocent party are solely as provided for by the contract or whether the common law provides greater or more valuable rights to that party.

When advising a party as to the extent to which the terms of a contract are effective to limit or define the rights of the innocent party otherwise arising under the common law to bring the contract to an end, it can be difficult to provide very firm guidance. Any consideration by the courts of the correct approach when faced with this issue is always therefore helpful and so the recent case of *Digital Capital Limited v Genesis Mining Iceland EHF* [2021] EWHC 2462 (Comm) is worthy of consideration.

Background

For the purposes of this note, it is not necessary to extensively detail the facts of the case. In very brief terms, the case concerned an agreement by which Digital Capital, the claimant, was to develop and maintain a platform for cryptocurrency which would encourage the spending of such assets in commercial transactions via the conversion of such currencies into standard commercial currencies. A dispute arose when the target completion date for the project was missed by Digital Capital. Genesis Mining withheld payment from Digital Capital contending that the system it had contracted for and as delivered by Digital Capital was not as required and that Digital Capital were either unwilling or unable to provide it. On that basis Genesis contended that it was entitled to terminate the contract.

The relevant contract contained a provision at clause 16.1 as follows:

“Either party may terminate this Agreement with immediate effect by notice to the other party on or at any time after:

(a) a material breach by the other of any of its obligations under this Agreement which (if the breach is capable of remedy) the other party has failed to remedy within thirty (30) days after receipt of notice giving particulars of the breach and requiring the other party to do so”.

The difficulty for Genesis was that all of the breaches it relied upon as having entitled it to terminate the contract were material and in principle remediable – and so were within the terms of clause 16.1, but, before purporting to bring the contract to an end, Genesis had not provided Digital Capital with the notice to remedy any breach which is required by clause 16.1. On account of the fact that Genesis had not provided any such notice, Genesis therefore contended it had rather been entitled to terminate the agreement under the common law for a repudiatory breach by Digital Capital – i.e. that it had a right to terminate at common law that was quite independent from clause 16.1 (and in such a case no notice to remedy was required before it terminated).

Digital Capital, however, contended that Genesis had had no such independent entitlement to terminate under the common law without the provision of notice specified by clause 16.1 (i.e. that clause 16.1 operated to define and circumscribe the common law right to treat the contract as at an end upon a repudiatory breach). As notice had not been given by Genesis, Digital Capital therefore contended that Genesis itself was in repudiatory breach – which breach Digital Capital purported to accept so as to bring the contract to an end at common law - because Genesis had purported to terminate the contract without being entitled to do so either under the contract or under the common law.

Judgment

Miss Julia Dias QC, sitting as a Deputy High Court Judge in the Commercial Court, was therefore required to consider whether clause 16.1 of the contract had the effect of limiting Genesis’ common law right to treat the contract as at an end upon a repudiatory breach by Digital Capital.

For assistance in determining the correct approach, the court looked back to the very well-known shipbuilding Court of Appeal case, *Stocznia Gdynia SA v Gearbulk Holdings Ltd [2009] EWCA Civ 75*, for guidance. That case related to six shipbuilding contracts under which the builder was late delivering the vessels. The shipbuilding contracts contained provisions requiring the builder to pay liquidated damages upon delay, with there also being an express contractual right to terminate the contracts upon delivery of the vessel being delayed beyond a certain date. This termination date passed without delivery of the vessels and the buyer terminated the contracts, so it contended at common law, and claimed damages in an amount that exceeded the sum payable by the builder by way of liquidated damages. The builder’s defence was that the provisions of the shipbuilding contract (as to the return of instalments paid and the right to terminate if the delivery of the vessel was delayed beyond a certain point in time) operated to *exclude* any common law right to treat the shipbuilding contract as at an end upon excessive delay. The builder’s case was therefore that the shipbuilding contracts each provided for a complete contractual code concerning delays in delivery which excluded any and all common law rights of termination – and therefore, contended the builder, the buyer had no right to claim damages at common law for repudiatory breach.

In the *Stocznia* case, Moore-Bick-LJ considered the potential interplay between contractual rights of termination under a contract and the common law rights. The Court of Appeal determined that the express contractual right of the buyer under the shipbuilding contracts to terminate them in certain circumstances (i.e. upon a certain amount of delay in delivery of the vessels) was in fact not the expression of a right to terminate that was alternative to the right existing under the common law to do so upon a repudiatory breach for delay, but rather that the contractual right and the common law right were *one and the same thing*. That being the case, the purchaser was not limited by the

provisions of the contract providing for liquidated damages in terms of recovering its losses, but was entitled under the common law to be compensated for the greater losses that it had actually suffered.

In *Digital Capital*, however, the judge emphasized that the *Stocznia* case indicates that there are no “hard and fast rules” as to the relationship between contractual and common law rights of termination in respect of a particular contract. Rather, the extent to which the common law right to treat a contract as repudiated is impacted by the terms of a contract will be a question of contractual construction in each case.

Ultimately, in the present case the judge relied in particular upon clause 16.5 of the contract which expressly preserved “*any other right or remedy of either party in respect of the breach concerned*” as having the effect of preserving (and leaving unaffected) any common law right or remedy that Genesis independently had under the common law in respect of material and remediable breaches falling within clause 16.1 of the contract. That being the case, she determined that clause 16.1 did not have the effect of requiring Genesis to provide a notice to remedy the breach, before Genesis was entitled to terminate the contract under the common law for repudiatory breach.

Comment

The case is important because it emphasizes that the right under the common law to treat a contract as at an end (which will often give rise to a valuable damages claim since the measure of damages will often include the loss of the bargain that the contract was to deliver) can be modified or even excluded entirely by the terms of a contract. However, whether this is so will depend on the construction of the contract, and so it highlights the need to exercise care in drafting to ensure that the impact of the contractual provisions is as intended.

In the context of shipbuilding contracts, it is common for shipyards to include provisions that limit the buyer’s rights upon excessive delay in delivering a vessel to termination of the contract in accordance with its terms with a return of instalments paid and any liquidated damages accrued (i.e. so excluding any right to treat the contract as at an end under the common law and so the right to damages in respect of the greater – loss of bargain - losses suffered by the buyer). Such provisions are commonly upheld by the English courts when drafted correctly, but the *Digital Capital* case demonstrates that careless drafting in seeking to achieve that outcome may nevertheless leave open the possibility of a termination at common law and a significantly greater damages claim.