# GUARANTEES – NOT GUARANTEED TO WORK?

An outline:

Timothy Young QC (20 Essex Street)

**Different types of guarantee**,

(1) The Refund Guarantee / Performance Bond / Demand Bonds or Performance Bonds – Petrosaudi Oil Services Venezuela v Novo Bank and PDVSA

(2) The "see to it" guarantee.

(a) The straight guarantee – described as such

(b)The "shall remain responsible" agreement.

4 main advantages of the latter

1. The formal requirements of s.4 the Statute of Frauds do not have to be satisfied
2. X is indisputably bound by the arbitration of jurisdiction clause in the main contract
3. One single arbitral or judicial determination binds both X and Y.
4. X necessarily admits his authority to be bound by effecting a nomination. - how can someone who is not a party to a contract make a nomination under it?

- *London Arbitration 11/08* (2008) 749 LMLN 2

With one word of caution: *The Aconcagua* [2018] EWHC 654 (Comm). And sections 69(8) and s.67(4) of the Arbitration Act 1996

The standard "see to it" form of guarantee ranges from the fully drafted letter to the simple "guaranteed by" subscription.

But remember just because you may get an award or a judgment against the debtor (the SPV), unless the guarantee prescribed otherwise, it is of no binding value or even evidential use in the claim against the guarantor

*Young v Kitchin* (1881) 3 Ex D. 127

*The Vasso* (1979) 2 Lloyd's Rep.

*Sabah Shipyard v Islamic Republic of Pakistan* (2007) EWHC 2602 (Comm)

The guarantor's traditional friend was Section 4 of the Statute of Frauds 1677

*Noe Action shall be brought . . . whereby to charge the Defendant upon any speciall promise to answere for the debt default or miscarriages of another person . . . unlesse the Agreement upon which such Action shall be brought or some*

*Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized.*

- "a memorandum or note"
- "signed"

The age of the fixture concluded entirely by email.

*Golden Ocean v Salgaocar Mining Industries* [2012] EWCA (Civ) 265

But the broker is usually the 'signing' party -

But even when you have a signature in the "guarantor" box – is it the guarantor? or more importantly has he or she been "lawfully authorised" by the guarantor

*Jiangsu Shagang Group v Loki* [2018] EWHC 330 (Comm)

NB the foreign law on corporate capacity to contract.

Whether a company can conclude, and has validly concluded, a contract may depend critically on compliance with formal requirements under the national law of the place of incorporation of the party - *Integral Petroleum SA v SCU-Finanz* AG [2015] 1 Lloyd's Rep. 54

The broker's Warranty of authority – '*caveant brokeres'*

<u>Lessons:</u>

1. Get the "guarantor" to be an irrevocable "remain liable" party
2. If there is to be a "guarantee" – before you get any distance into a fixture, get the authority of the broker and/or the person with whom he is dealing to prove their authority in a documentary form.
3. If there is any doubt about the ability of the principal debtor to pay, do not waste your time proceeding against the principal debtor – go straight against the guarantor
4. Preserve your rights to proceed against the broker for a breach of his warranty of authority – and do not allow 6 years to pass from the making of the contract.