



HOW HAS THE RUBICON VANTAGE CHANGED EXISTING THINKING ON WHEN A PARENT COMPANY IS LIABLE AS GUARANTOR FOR ITS SUBSIDIARY UNDER A CHARTER OBLIGATION?

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# FUNDAMENTAL DIFFERENCES BETWEEN AN ORTHODOX “SEE TO IT” GUARANTEE AND AN AUTONOMOUS “ON DEMAND” GUARANTEE

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**CASE LAW PRIOR TO THE RUBICON VANTAGE AND THE ROLE OF PRESUMPTIONS**

- Chitty 33<sup>rd</sup> ed, Vol 2 para 45-009
- Benjamin 10<sup>th</sup> ed, para 25-005
- Andrews, The Law of Guarantees, 7<sup>th</sup> ed, para 16-002
- *Marubeni Hong Kong and South China Ltd v Govt of Mongolia* (Court of Appeal) [2005] 1 WLR 2497, esp. at para 30
- *IIG v Van Der Merwe* [2008] EWCA Civ 542, esp at para 8
- *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2011] 2 All ER (Comm) 307, esp at paras 28-30
- *Spliethoff's Bevrachtungskantoor BV v Bank of Chian Ltd* [2015] 2 Lloyd's Rep 123 at paras 82-83
- *Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Ltd* [2020] EWC 803 (Comm)

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THE RUBICON VANTAGE: [2019] EWHC 2012 (Comm)

**Key Clauses in the Parent Company Guarantee**

Clause 5:

*In the event of dispute(s) between the Company and the Contractor as to the Company's liability in respect of any amount(s) demanded under this Guarantee:*

*(a) the Guarantor shall be obliged to pay any amount(s) demanded up to a maximum amount of United States Dollars Three Million (US\$3,000,000) on demand notwithstanding any dispute between the Company and the Contractor;*

*(b) the Guarantor shall be entitled to withhold and defer payment of the balance of the sum demanded in excess of United States Dollars Three Million (US\$3,000,000); and*

*(c) the Guarantor shall be entitled to withhold and defer payment of any other disputed amounts claimed under this Guarantee,*

*until a final judgment or final non-appealable award is published or agreement is reached between Company and contractor as to the liability for the disputed amount(s).*

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**THE RUBICON VANTAGE: [2019] EWHC 2012 (Comm)****Key Clauses in the Parent Company Guarantee**

Clause 6:

*In the circumstances described in Clause 5 the Guarantor shall not make any payment in excess of United States Dollars Three Million (US\$3,000,000) under this Guarantee unless the Contractor obtains a final judgement or final non-appealable award in its favour or the Company and the Contractor agree that an amount is payable by Company to Contractor. ... In circumstances where the final judgment or non-appealable award is given in favour of the Company ... the Contractor shall refund to the Guarantor the sums paid by the Guarantor to the Contractor pursuant to clause 5(a) of this Guarantee to the extent that it is found that the Contractor was not entitled to the sums demanded and paid. ...*

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## THE RUBICON VANTAGE: [2019] EWHC 2012 (Comm)

### Key Clauses in the Parent Company Guarantee

Clause 7:

*In order to illustrate how Clause 5 and Clause 6 are intended to work, reference is made to the worked examples set out in Appendix 1 to this Guarantee.*

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**Approach to construction and limited role of the Marubeni presumption:****Judgment paragraph 18:**

There is also a dispute as to how I should approach this question of construction. Mr Eaton QC, for Krisenergy, submits that I should apply the Marubeni presumption, and that that should lead me to construe restrictively the scope of Krisenergy's autonomous on-demand liabilities. Although he accepts that Marubeni is directed to the question of whether an instrument is an autonomous on demand instrument or a see-to-it instrument, he submits that I should apply it by analogy. I am unable to accept this submission. The Marubeni presumption is directed to the question of whether a particular instrument should be construed as imposing autonomous obligations, or merely as a see-to-it guarantee. Once it is accepted, as it is in this case, that a particular instrument operates, to some extent, to impose autonomous liabilities, it seems to me that the role of the Marubeni presumption is spent.

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## PRACTICAL TAKE AWAYS

- Presumptions of limited utility in a hybrid guarantee
- Paramount importance of careful drafting
- Utility of worked examples to minimise risk of unintended consequences