

## **UNDISCLOSED PRINCIPALS OF AGENCY**

Party A, the seller, enters into a contract with Party B, the purchaser, for the sale of a particular commodity. The purchaser takes delivery of the commodity and does not pay the purchase price to Party A and therefore is in breach of the contract. Party A institutes legal proceedings against Party B, as the contractual counterparty, for payment. The court hearing the matter grants an order in Party A's favor and party A receives payment of the purchase price.

How pleasant a place the world would be if trade disputes, and their resolution, were so simple?

The nature of trade, and particularly international trade, is such that the contractual chain is rarely this straightforward and there is often is a Party C involved (not to mention parties D, E and F!).

What makes trade disputes even more complex is the fact that often one or more of the parties are acting as an agent on another's behalf, frequently without disclosing this relationship. In such cases, where there is an undisclosed principal, what is the position with regard to the recovery of damages under the dispute? Against who does the claimant's case lie?

In the recent English decision in *Novasen SA v Alimenta SA* [2011] EWHC 49 (Comm) QBD, the court had to consider the "undisclosed principal" concept.

Novasen, a company based in Senegal and which traded in vegetable oils and crude groundnut oil, used to trade with Alimenta, a Swiss company which also traded in vegetable oils and groundnut oil; however, a fall-out between the two entities resulted in the parties ceasing to conduct business directly with each other.

Enter Sogescol a third party, willing to act as an agent for Alimenta in a deal for the trade of 2,000 metric tons of crude groundnut oil, to be bought from Novasen. A term of this agreement was that Sogescol would not disclose the identity of Alimenta to Novasen.

The subsequent trade recap between Novasen and Sogescol, negotiated by Sogescol, represented that Novasen was the seller and Sogescol was the purchaser. In the interim, Alimenta and Sogescol entered into an agreement on the FOSFA 201 terms for the product and Novasen was identified as the seller, Alimenta as the buyer and Sogescol as the “Agent acting for Buyers Account”.

The goods were never shipped and Alimenta commenced arbitration proceedings against Novasen and Sogescol. Novasen had claimed that it was not a party to a contract with Alimenta and that it would have refused to deal with Alimenta. The umpire held that Alimenta was the undisclosed principal of Sogescol and was a party to the contract with Novasen. Novasen appealed against this decision to the Queen’s Bench Division and their appeal was subsequently dismissed on the basis that, *inter alia*, Alimenta had established the existence of an agreement with Sogescol to act as its undisclosed agent.

The South African position is similar to the English position in that there are circumstances in which an undisclosed principal may sue the third party on the contract made by an agent acting on the undisclosed principal’s authority. Similarly, there are circumstances where the undisclosed principal will be liable to the third party in circumstances where an “agent” entered into the contract with the third party in its own name. The liability of the undisclosed either principal, or the “agent”, is therefore alternative and not cumulative; however, there are exceptions.

Whilst the anomalies of the “undisclosed principal” are generally not favorable, the South African law of contract is based on the common law and common law rights and obligations can expressly be limited by the terms of a contract. It is therefore important that, when entering into trading arrangements which involve agents or undisclosed principals, the parties consider their rights and responsibilities carefully to prevent potential difficulties should a dispute arise in the future.