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SHIPPING

“Time thereby lost” under the NYPE off-hire clause: Court of Appeal reinstates conventional approach

Minerva Navigation Inc v. Oceana Shipping AG; Oceana Shipping AG v. Transatlantica Commodities SA (M/V Athena) [2013] EWCA Civ 1723

The Athena was a dispute about the meaning of the familiar NYPE off-hire clause (clause 15).

The Commercial Court decision gave rise to a lot of controversy. It went against conventional principles for determining whether a vessel is off-hire. The talking point of the decision was the meaning given to the words “time thereby lost”, allowing Owners to defeat an off-hire claim on the basis that there had been no loss of time on the “charter service overall”. This treated the claim akin to one for damages, whereas the off-hire regime is different from damages; it operates irrespective of fault or breach.

However, the Court of Appeal has rejected this approach, set aside the Commercial Court decision and restored the award of the arbitrators. The award follows the usual way of assessing loss of time, namely in terms of the “time thereby lost”, allowing Owners to defeat an off-hire claim on the basis that there had been no loss of time on the “charter service overall”. This treated the claim akin to one for damages, whereas the off-hire regime is different from damages; it operates irrespective of fault or breach.

The background facts
The vessel loaded cargo for Syria. Bills of lading were issued. The vessel sailed to Syria, but the cargo was rejected. The Charterers nominated a port in Libya instead (Benghazi). They ordered the vessel to the anchorage at Benghazi port roads to await further instructions before berthing and discharging. The change in destination, however, gave rise to a difficulty with the bills of lading that took nearly two weeks to resolve.

Meanwhile, instead of proceeding to the port road anchorage as ordered, the vessel proceeded to a position about 50 miles off Libya. There she began a period of drifting that lasted for 11 days, until the problem with the bills of lading was resolved. The vessel then proceeded to port to discharge her cargo.

Charterers claimed that the vessel was off-hire for the full drifting period. The off-hire provision read:

“...in the event of loss of time from ... default of Master ... or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...”

The arbitration award
The arbitrators agreed. They ruled that the failure to proceed to the port roads anchorage when ordered to do so constituted a “default of Master”. Additionally, their view was that it resulted in a loss of time in performing the service immediately required of the vessel. They ruled that this was sufficient for the off-hire claim to succeed, despite their finding that the same amount of time would have been lost (due to the problem with the bills of lading) even if the vessel had anchored in the roads as ordered.

The Owners appealed.

The Commercial Court decision
The issue on appeal was whether a ship is off-hire under the NYPE clause merely because she is not efficient for the service then required, or whether the charterer also has to show a net loss of time resulting from that inefficiency.

Mr Justice Walker reversed the arbitration award and ruled in Owners’ favour. He held that the ship remained on-hire while she was drifting.

The Judge started by formulating the same tests as the arbitrators. First, whether the off-hire event was one of the listed causes, which it was. Second, whether the cause resulted in a loss of time, i.e. whether the vessel could work as required.

The arbitrators said that she could not. The Judge said, however, that she could. He stated that the test depends on whether the words “time thereby lost” mean loss of time in performance of the charter service overall, not just the service immediately required. The service immediately required was to sail to the roads and to anchor there, waiting for discharge orders. She had not done so. The Judge looked further, however, extending the enquiry about lost time to the discharge operation and potentially beyond.

The Judge said that on that test, there was no loss of time. The vessel would have had to wait anyway because of the problems with the bills of lading. The ship was therefore on-hire for the drifting period.

Industry reaction
The Commercial Court decision gave rise to a modest commotion. The authors of Wilford (the bible on English law time charters) wrote to the London Maritime Arbitrators Association, urging a full review of the meaning of the NYPE off-hire clause, and pressing for recognition of the usual interpretation, namely that you look at whether the vessel can perform the service required at the time, not spread over some longer period.

The decision was subsequently appealed to the Court of Appeal.

The Court of Appeal decision
The Court of Appeal reversed the Commercial Court decision and found in Charterers’ favour. The vessel was held to be off-hire.

All three Appeal Judges said that the arbitrators were correct in their ruling and also in their reasoning. Loss of time is assessed in terms of the “service immediately required of the vessel”. The service immediately required of this vessel during the drifting period was to proceed to the anchorage in the Benghazi roads and to await further instructions there. She did not go. Whether the same amount of time would have been lost for other reasons (the bill of lading issue) was not (said the
In other words (in our words), the shipowner wants to know if he can call for the hire to be paid or not. If he cannot, he does so at his risk. If he can, however, and the hire is not paid, then most time charters give him a range of remedies: withdrawal, termination, liens and a suspension of performance. If he has to wait to see what happens down the line, he may lose those remedies.

Comment
We suggest that the Court of Appeal’s decision is the right one. On the facts, the Charterers won – the vessel was off-hire. Next time, the application of the same reasoning to different facts could result in the Owners successfully arguing that the vessel is on-hire. The point is to have a simple practical test which fits the words of the off-hire clause; words that owners and charterers have used for decades in the standard time charters.

On one view, the reasoning of the Commercial Court is perfectly justified and sensible. Time would have been lost in any event. The Charterers had the same use of the vessel as if the off-hire event had not taken place. The Court of Appeal, however, pointed out commercial reasons for preferring the traditional reading. Further, as we stated at the beginning, there is the main legal reason. The off-hire clause is written as an independent code. It is supposed to apply without any questions of fault or breach. To that extent, it is mechanical and the parties know where they stand. If X happens and Y results, then the vessel is off-hire. If not, then she is not. In the Athena, the Court of Appeal confirmed that off-hire should be dealt with at a fairly simple operational level.

As always, English law provides for freedom of contract. Owners and charterers are free to amend future off-hire clauses in the light of the Athena decision. By and large, however, we doubt that they need to.

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Assessment of damages for breach of contract of affreightment

Flame SA v. Glory Wealth Shipping Ltd [2013] EWHC 3153 (Comm)

It is a fundamental principle of English law that, when assessing damages for breach of contract, any damages awarded should compensate the innocent party for the loss of its contractual bargain. In other words, the innocent party should be put in the same position that it would have enjoyed had the contract been performed.

The Commercial Court has now clarified that, when assessing damages for repudiatory breach of contract, it is necessary for the innocent party to prove its damages by showing that, had the other party performed its obligations, the innocent party would have been able and willing to perform its side of the bargain. An innocent party, who at the time the repudiatory breach would have been unable to perform its side of the bargain – and therefore would have been unable to earn the contract price – is not entitled to be placed in a better position by an award of damages than it would have been in if the contract had not been repudiated.

The background facts

The parties agreed, under a contract of affreightment (“COA”), that the Owners would carry cargoes of coal between 2009 and 2011. The Charterers failed to provide laycans for some of the shipments and the Owners accepted the breach as a repudiatory breach, terminated the COA and sought damages from the Charterers in arbitration proceedings.

The Charterers submitted that the Owners were only entitled to substantial damages if the Owners could prove that, had the Charterers declared any of the laycans in question, the Owners would have been able to perform the corresponding voyages by going out into the market and chartering in a vessel at the relevant time. They argued that, as a result of the market’s collapse in 2008, the financial position of the Owners had so deteriorated that, had the Charterers declared the laycans, the Owners would not have been able to provide the required vessels.

The arbitration panel rejected Charterers’ submission and awarded Owners damages of over US$ 5 million (the quantum being so great due to the sudden collapse of the freight market in 2008 which caused an exceptional difference between the COA and market rates).

The Commercial Court decision

The Court held that the arbitration panel had been wrong in law and that, when assessing the level of damages for anticipatory breach (the acceptance of which had terminated the contract), it was necessary for the innocent party to prove damage by demonstrating that, had there been no repudiation, it would have been able to perform its obligations under the contract.

The reasoning behind the decision is that an assessment of loss requires an assessment of what would have happened but for the repudiation. If the Court assumes that an innocent party would have been able to perform, the Court might put the innocent party in a better position than it would have been in.
had the contract been performed. This would be a breach of the compensatory principle that underlies the assessment of damages.

In so finding, the Court had regard to the importance the majority of the House of Lords attributed to the compensatory principle in the Golden Victory (which was not binding on the facts of this case). The background facts of the Golden Victory meant that, if damages were assessed at the date of breach, the Owners would have lost a charterparty that would be quantified as having slightly less than four years to run. If damages were assessed at the date of the subsequent arbitration hearing, the loss would be quantified as being considerably less because at that stage war, a specified event under the charterparty, had broken out, pursuant to which the Charterers would have been entitled to terminate. The majority of the House of Lords considered that what was known at the date of the hearing of the arbitration had to be taken into account. In other words, where a contract gives the party in breach the right to cancel the contract on the occurrence of a specified event, and such an event occurs even after the innocent party has accepted a repudiatory breach as terminating the contract, then the possibility that the party in breach would have exercised his right to cancel can be taken into account when assessing the damages caused by the repudiatory breach. In that case, Lord Scott referred to the compensatory principle as follows:

“The lodestar is that damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more”.

Comment
The Court’s decision in Flame SA v. Glory Wealth is a reflection of the English law compensatory approach to the assessment of damages. In practical terms, it means that in circumstances where a party is assessing whether or not to accept a repudiatory breach and terminate a contract, that party will have to consider whether, but for its acceptance of the repudiatory breach, it would be able to perform its obligations under the contract.

Court orders rectification of Charter Restructuring Agreement

In this recent decision, the English Court repeated the principles that it will apply when asked to construe commercial contracts. The decision also serves as a rare example of an instance in which the test for rectification of a contract was met.

The background facts
Following the collapse of the market at the end of 2008 and beginning of 2009, the Charterers of a fleet of eight VLCCs found themselves in financial difficulty and fell behind on their hire payments. Following discussions with the Owners, the parties eventually signed a Charter Restructuring Agreement (“CRA”) in March 2010. Unfortunately, in January 2011 the parties fell into a dispute over the meaning and effect of certain clauses of the CRA, which then became the subject of litigation.

In the discussions leading up to the CRA, the Owners explained to the Charterers that they needed to receive US$ 22,000/day per vessel in order to operate the vessels, as well as service the loans taken out to finance them. The CRA accordingly provided for hire to be paid monthly in advance at the higher of the Floor Rate (US$ 22,000/day per vessel) and the Market Rate. This Market Rate for each month was to be calculated by taking 3.35% off the Clarkson Index for the previous month. In addition, a semi-annual adjustment exercise was to be undertaken in order to factor in that the actual market rate in a given month might vary significantly from the Clarkson Index for the previous month.

Unsurprisingly, it was not long before the Clarkson Index fell below the Floor Rate of US$ 22,000/day. At the next semi-annual adjustment, the Charterers contended that “the average of the Market Rates for the previous period of 6 months” (for the purpose of the adjustment) was simply the average of 3.35% below the Clarkson Index rate for each month, even if this was less than US$ 22,000/day. Owners contended that the daily rate input for each month for the purpose of the adjustment should be the higher of (i) US$ 22,000/day and (ii) 3.35% below the Clarkson Index. At the trial, the Owners argued that the Charterers’ construction changed the agreement from one in which the parties agreed to track the Clarkson Index, subject to a floor of US$ 22,000, into a simple agreement to track the Index.

Construction of the contract
Mr. Justice Hamblen repeated the test for construction of commercial contracts. This is to consider what a reasonable person, having the background knowledge available to the contracting parties, would have understood themselves to be agreeing by using the language they used in their contract.
He cited with approval BMA Special Opportunity Hub Fund Ltd v. African Minerals Finance Ltd [2013] EWCA Civ 419 (see, Shipping E-Brief Autumn 2013) and repeated that there exists a principle of construction that commercial parties who agree a contract intend the words used to mean what they say. It is only where there are two possible constructions that a court is entitled to prefer the construction which is more consistent with “business common sense”.

The Judge held that whilst the Owners’ construction made far more commercial sense than the Charterers’ construction, he was unable to, and did not, accept that a reasonable person would have understood the words used to mean “Market Rate or Floor Rate as applicable” when they in fact only said “Market Rate”, in the semi-yearly adjustment clause (as the Owners contended). Thus, Mr. Justice Hamblen concluded that the true construction of the CRA was as contended for by the Charterers. He therefore went on to consider the Owners’ claim for rectification of the CRA on the ground of common mistake.

**Rectification**

The law on rectification of contracts on the grounds of common mistake was summarised in *Chartbrook v. Persimmon* by the House of Lords. The party seeking rectification must show that:

1. The parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the document to be rectified;
2. There was an outward expression of agreement;
3. The intention continued at the time of the execution of the instrument sought to be rectified; and
4. By mistake, the instrument did not reflect that common intention.

Applying the law to the facts of the case, Mr. Justice Hamblen found that it was made clear to the Charterers at the outset, and acknowledged by them, that each Owner required sufficient income to meet its financial commitments. In fact, the Charterers’ first proposal, and the Owners’ subsequent counter proposal, made reference to a “Floor Rate” (referred to as such), below which the hire not deferred (and payable monthly) would never fall. By the time the parties met in December 2010, it was agreed that the Floor Rate would be US$ 22,000/day. The point of difference between Owners and Charterers was whether the US$ 22,000 per vessel per day would be paid to Owners directly, via a minimum monthly cash-flow, or indirectly (after the fact) as a guaranteed minimum average over 12 months. At the meeting in December 2010, it was agreed that the Floor Rate would be paid upfront, and that it was not subject to any downward adjustment. Mr. Justice Hamblen thus found that there was an accord that was outwardly and objectively expressed. He also found on the facts that there was no evidence to suggest any change of mind on the part of the Charterers, still less any attempt to persuade the Owners to resile from what had been agreed. Yet, by mistake, the CRA did not reflect this common intention. In light of these findings, the Judge held that the Owners’ claim for rectification would succeed.

**Comment**

The case demonstrates that whilst the English Court is generally inclined to hold parties to the exact terms of their bargain, it remains pragmatic in its approach to commercial contracts and will, in the right circumstances, be willing to order that a contract should be rectified to reflect the true intention of the parties. It is also worthwhile to note that although the CRA contained an entire agreement clause, this did not prevent the Court from ordering rectification of the contract.

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Incorporation of charterparty clause into bill of lading: arbitration or court jurisdiction?

_Caresse Navigation Ltd v. Office National de L'Electricité and others (Channel Ranger) (2013) EWHC 3081 (Comm)_

In this case, the bill of lading incorporated the “law and arbitration clause” (our emphasis) of a charterparty identified in the bill of lading. The dispute resolution clause in that charterparty, however, provided for English law and court jurisdiction, rather than arbitration. The Court held that although a mistake had been made in the words of incorporation used in the bill of lading, this mistake could be rectified to give effect to the parties’ intentions. The Court’s view was that the parties had intended for the words “law and arbitration” in the bill of lading to incorporate the law and court jurisdiction clause from the charterparty, despite the reference to “arbitration”.

The background facts

The Claimants (Owners of the vessel) sought a declaration of non-liability from the English Commercial Court regarding salt-water damage to the cargo at the discharge port in Morocco. The Defendants (cargo receivers and their insurers) challenged the English Court’s jurisdiction under the English Civil Procedure Rules, Part 11. The insurers also commenced proceedings in the Moroccan Court against the Owners in relation to the cargo damage. The Owners applied for an anti-suit injunction from the English Court to restrain pursuit of the Moroccan proceedings on the ground that this was a breach of the exclusive jurisdiction clause in the charterparty which the Owners argued was incorporated into the bill of lading.

The Owners chartered the vessel to U-Sea Bulk A/S (U-Sea) for a one-time charter trip with a cargo of coal in bulk. In turn, U-Sea had concluded a voyage charterparty with Glencore International AG. The voyage charterparty contained the following clause:

“This Charter Party shall be governed by English law, and any dispute arising out of or in connection with this Charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales.”

The vessel loaded the cargo at Rotterdam and the local agents signed a bill of lading on behalf of the Master. The bill of lading was negotiable, naming Glencore as the shipper but consigned to the order of the first defendant.

The bill of lading was concluded on the Congenbill 1994 standard form. The front of the form included the following typed clause:

“Freight payable as per Charter Party. All terms, conditions, liberties and exemptions including the law and arbitration clause, are herewith incorporated.”

The reverse of the bill of lading further provided that:

“All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated.”

In this case, the Court found that the words “law and arbitration clause” were sufficiently specific and that the issue was one of construction of those words, rather than an issue of incorporation. The Court took the view that the “real question is what the parties should reasonably be understood to have meant by the words ‘law and arbitration clause’ which plainly contemplates the incorporation of at least one kind of ancillary clause”.

The Court held that only the clause in the charterparty that the parties could have intended to refer to was the law and court jurisdiction clause. The Court took the view that construing the clause in this way did not offend against the need for clarity and certainty. The consignee would know from the specific words of incorporation that the incorporation of charterparty terms extended to at least some ancillary clauses related to choice of law and dispute resolution.

On this basis, the Court held that the Defendants were bound by the court jurisdiction clause in the charterparty. The Judge
Destruction by fire not a mechanical breakdown under a laytime exclusion clause: Court of Appeal confirms Commercial Court decision

E.D.& F.Man Sugar Ltd. v. Unicargo Transportgesellschaft GmbH (Ladytramp) [2013] EWCA Civ 1449

This was a dispute as to whether destruction by fire was a “mechanical breakdown” under Clause 28 (laytime exclusion clause) of the charter. The Tribunal and the Commercial Court applied a narrow construction of the laytime exclusion clause and concluded that fire was not “mechanical breakdown”. The Court of Appeal upheld both the Tribunal’s award and the Commercial Court’s decision and, once again, ruled in favour of the Owners and found that they were entitled to demurrage.

The background facts

The Ladytramp was chartered on the Sugar Charter Party 1999 form for the carriage of bulk sugar from “1-2 safe berth(s), 1 safe port (intention Santos) but not south of Paranagua to the Black Sea (intention Odessa)”. On 9 June 2010, the day of the fixture, the Charterers declared Paranagua as the loading port. On 14 June 2010, a week before the vessel arrived at the load port, the parties were informed that a fire had occurred at the terminal where they had initially scheduled the vessel to load the cargo. The fire had destroyed the conveyor belt system linking the terminal to the warehouse.

On 20 June, the vessel arrived at Paranagua and tendered notice of readiness. In the absence of an available berth, the vessel remained off the port until 14 July, when she entered the inner roads of the port awaiting berthing instructions. Loading commenced on 18 July and was completed at 1300 hours on 20 July. The vessel subsequently sailed for the discharge port in the Black Sea.

The Owners claimed demurrage and contended that time began to count at 1400 hours on 21 June 2010 and that laytime expired at 2353 hours on 25 June. Thereafter, the vessel was on demurrage continuously up to the time of completion at 1300 hours on 20 July. The Charterers disputed the claim, relying upon the laytime exclusion clause (Clause 28) of the charterparty, which provided:

“In the event that whilst at or off the loading place ... the loading ... of the vessel is prevented or delayed by mechanical breakdowns at mechanical loading plants, government interferences ... time so lost shall not count as laytime”

The Charterers sought to rely upon Clause 28 on the basis that the loading of the vessel was prevented by “mechanical breakdown” (caused by the destruction of the conveyor belt system by fire) and also by “government interference” (resulting from the local port authority's refusal to allow loading by reason of the fire).
The arbitration award
The arbitrators found that the Owners were entitled to demurrage and made the following rulings:

1. The safe berth point: When the terminal intended to be used by Charterers became unusable as a result of the fire, the Charterers were still under an obligation to nominate “1-2 safe berths”. The Charterers could have discharged their obligation to nominate a safe berth by nominating an alternative berth.

2. The fire and mechanical breakdown point: The inoperability of the conveyor belt was the result of the physical damage due to the fire rather than any mechanical breakdown.

3. The government interference point: The refusal of the port authority of Paranagua to permit vessels to load at the terminal in the light of the fire was not “governmental interference”. The meaning of governmental interference in Clause 28 related to such things as embargoes and export bans rather than administrative decisions.

The Commercial Court decision
The Charterers appealed to the Commercial Court on the basis that the Tribunal had erred on all three points.

In relation to the “safe berth” point, Mr Justice Eder held that the Tribunal had asked the wrong question, i.e. whether the Charterers had a relevant legal obligation to nominate an alternative loading berth when the intended loading terminal became unusable by fire. This was not a case about berth nomination. It was about whether there was prevention or delay in loading caused by an excepted peril. There was no reason in principle nor in the charterparty wording that required the Charterers to nominate a berth as a precondition to the operation of Clause 28.

Most of the Commercial Court’s judgment was focused on the mechanical breakdown point. The Judge upheld the Tribunal’s decision. The Charterers argued that the Tribunal’s finding was contrary to the Court of Appeal decision in the Afrapearl where it was held that the cause of the breakdown is immaterial and that there is a breakdown if the equipment does not function or if it malfunctions. The Court rejected this argument and held that as a matter of ordinary language and common sense, the destruction of an item was not within the scope of the term “breakdown”, still less within the term “mechanical breakdown” (the Thanassias A (unreported) 22 March 1982, referred to in the Afrapearl). The inclusion of the word “mechanical” had the effect of restricting the scope of the “breakdown”. What was required was a breakdown of a mechanical nature.

The “government interference” point was also upheld by the Judge. The Judge held that there was no finding that the port authority in Paranagua was a government entity or that the permission to berth at the intended terminal was suspended by the port authority. The Judge also agreed with the Tribunal that, as a matter of construction, the wording “government interference” requires more than an ordinary administrative act performed by a port authority as part of the day-to-day management operations.

The Charterers’ appeal was dismissed but they continued with a fresh appeal to the Court of Appeal.

The Court of Appeal decision
The point of law before the Court of Appeal was whether the delay in loading the vessel at Paranagua was caused by “mechanical breakdown”. The Charterers submitted that the Afrapearl led to the conclusion that there was a “mechanical breakdown” of the conveyor belt system, simply because as a result of the fire the machinery no longer functioned as a conveyor belt system. The Court of Appeal dismissed the appeal.

Lord Justice Tomlinson held that the clause under consideration in the Afrapearl (and in the Thanassias A) was concerned simply with “breakdown of machinery or equipment in or about the plant of the charterer, supplier, shipper or consignee of the cargo”. In the present case, the clause under consideration was concerned with “mechanical breakdown at mechanical loading plants”. It was not sufficient that the mechanical loading plant no longer functioned, or malfunctioned. The nature of malfunction had to be mechanical in the sense that it was the mechanism of the mechanical loading plant which ceased to function, or malfunctioned and caused the prevention of or delay to loading and the consequent loss of time. This connotes an inherent mechanical problem. Destruction of machinery by fire did not amount to a mechanical breakdown as “fire” was not an excepted peril under Clause 28.

Comment
This case demonstrates the degree of scrutiny that the English courts are prepared to exercise when looking at exception clauses. Just because clauses are similarly drafted does not necessarily mean that they will be similarly interpreted. The Court of Appeal judgment in the Ladytramp emphasises this approach. Here, focus was placed upon the word “mechanical” to conclude that the nature of the breakdown is relevant. In addition, the cause of any delay must be capable of being brought within the ordinary meaning of the charterparty clause without any need to extend the meaning or imply additional wording. However, if the wording is ambiguous, the courts will apply the contra proferentem principle and will construe the clause against the party seeking to rely upon it.

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Buyers beware: sellers’ right to claim for an unpaid deposit

Firodi Shipping Ltd v. Griffon Shipping Llc (Griffon) [2013] EWCA Civ 1567

In a judgment handed down in December 2013, the Court of Appeal upheld the decision of Mr Justice Teare in the Commercial Court in Griffon Shipping LLC v. Firodi Shipping Limited. The decision confirms that the sellers’ remedy under clause 13 of the Norwegian Sale Form 1993 (NSF 93) where buyers fail to pay the deposit is a claim for the unpaid deposit and they are not limited to a claim for damages based on the difference between the market and contract price of the vessel. This has the effect of dramatically increasing the quantum of the sellers’ claim in such circumstances and heralds a departure from the previously held view regarding the operation of clause 13.

The background facts
Clause 13 of the NSF93 provides as follows:

“13. Buyers Default

Should the deposit not be paid in accordance with Clause 2, the Sellers shall have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.

Should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement, in which case the deposit, together with interest earned shall be released to the Sellers. If the deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest.”

Clause 2 of the Memorandum of Agreement (MOA) for the sale of the Griffon provided for a 10% deposit (US$2,156,000) to be paid within three banking days from signature of the MOA. The deposit was not paid within time and the Sellers cancelled/terminated the MOA.

The dispute was referred to arbitration in London and the Tribunal held that the Sellers were not entitled to recover the full deposit but were limited to a claim for damages in the amount of approximately US$275,000.

The Commercial Court decision
Leave to appeal was granted and Mr Justice Teare considered the various contradictory decisions made by maritime arbitrators on the true construction of clauses 2 and 13 of the NSF. He concluded that as clause 2 made provision for payment of a deposit as “security for the correct fulfilment” of the MOA, the right to payment of the deposit had accrued under common law before the contract was terminated and had accrued unconditionally. Although the first limb of clause 13 of the NSF 93 does not expressly refer to a seller being able to claim the deposit and merely refers to a claim for “compensation” in circumstances where a deposit is not paid, due to the legal nature of a deposit, liability for which accrues before the termination of the contract, a seller has the right to claim the deposit in addition to a claim for any additional compensation under clause 13.

The Court of Appeal decision
The Buyers appealed to the Court of Appeal. The leading judgment was delivered by Lord Justice Tomlinson and confirmed the decision reached by Mr Justice Teare concerning the nature of a deposit and the accrual of rights under common law before termination of the contract.

“The rights unconditionally acquired by the Sellers prior to termination survive termination. Accordingly, I agree with the judge that the Sellers retain the right to sue for the deposit as an agreed sum which they may simply recover as a debt. Alternatively, the Sellers have an accrued right to sue for damages for breach of the obligation to pay the deposit, the measure of which is the amount of the deposit.”

Comment
This decision is contrary to the decision of the Singapore Court of Appeal in the Anna Spiratou (1998) and the view contained in the published text on ship sale and purchase.

Buyers who now choose not to proceed with a purchase of a vessel after signature of an MOA should appreciate that they will likely face a claim for the full amount of the unpaid deposit which may dramatically increase the quantum of any claim.
Damage to fruit in reefer unit due to alleged delay?

Univeg Direct Fruit Marketing and others v. MSC Mediterranean Shipping Company S.A. (MSC Stella) [2013] EWHC 2962 (Comm)

A cargo of clementines shipped in containers on a liner service from South Africa to the Netherlands arrived five days “late”. Cargo Interests alleged that this delay significantly damaged the fruit. The claim failed because (a) Cargo Interests did not prove that the cargo was shipped in good order and condition; and (b) pursuant to the terms of its bills of lading, the Carrier was not obliged to load the cargo by any particular time or on any particular ship. This judgment demonstrates how difficult it is to recover damages in respect of deterioration of perishable cargoes shipped on liner services that experience delays.

Background facts

The Carrier issued booking confirmations that referred to the vessel MSC Lesotho. However, due to the effects of industrial action at South African ports, the Carrier advised subsequently that the entirety of the cargo could not be accommodated on MSC Lesotho, and that the balance would “obtain priority for loading” on another vessel, MSC Stella, which was to depart Cape Town several days later.

MSC Lesotho and MSC Stella arrived at Rotterdam on 26 June and 1 July 2010 respectively. The claim concerned the condition of the cargo discharged from MSC Stella only. The Claimants argued that the Carrier was obliged to carry the cargo on MSC Lesotho, and that the additional five days of transit time pushed the condition of the cargo over a “tipping point” from having a commercial life to being fit only for salvage sale.

The Commercial Court decision

The Court found that:

1. There was insufficient evidence of the condition of the cargo upon shipment, in particular as regards pre-shipment treatment and handling, for Cargo Interests to discharge the initial burden of proving that the cargo was shipped without inherent vice and in good order and condition and able to withstand the ordinary incidents of carriage between the ports concerned. In this regard, export certificates alone were insufficient. Further, the condition of the cargo on outturn (in particular, given the expert evidence of certain varieties of rot) suggested that the cargo was not free from deterioration at the time of shipment. Therefore, the Court was unable to conclude that the cargo was in good order and condition upon shipment.

2. Whilst it was clear that shipment on MSC Lesotho was envisaged initially, the booking confirmations were subject to the terms of the Carrier’s bills of lading, which provided that the Carrier could use any vessel. As such, Cargo Interests did not contract for any particular ship or loading time.

3. An argument that the Carrier failed to use reasonable despatch was rejected.

4. The Court accepted expert evidence that the cargo would have been close to the end of its commercial life even if it had been shipped on MSC Lesotho and did not suffer material further deterioration during the additional five days in transit, finding that there was no “tipping point” in the ripening process.

Comment

Many cargo interests in the fruit trade try to claim that a clean on board bill of lading is evidence that the fruit was shipped in good order and condition, but this is not correct. Fruit cargoes ripen and/or deteriorate from the time of harvest. This process can be controlled if the cargo is picked at the right time and handled appropriately (for example, by treatment to protect against disease and maintenance of the optimal temperature) and in accordance with first class practices prevailing in the trade for that particular cargo. If the cargo is not handled correctly from the time of harvest, then the ripening/deterioration process will occur more rapidly than cargo interests would want or expect. This judgment demonstrates that, in order for claims of this nature against a carrier to succeed, evidence of pre-shipment handling and condition is imperative. In our experience, it can be costly, difficult and time-consuming for cargo interests (especially cargo receivers) to gather this evidence, often disproportionately so.

Furthermore, save in unusual circumstances where a carrier has undertaken specifically and unequivocally to carry cargo on a particular vessel or within a particular time, if the usual terms of the bills of lading applicable in this reefer trade are incorporated, then it is cargo interests, rather than the carrier, who bear the risk of delay unless the delay is due to clear fault on the part of the carrier.

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Limited scope for challenging English maritime arbitration awards

Primera Maritime (Hellas) Ltd and others v. Jiangsu Heavy Industry Co. Ltd [2013] EWHC 3066 (Comm)

In this case, the Commercial Court reminded unsuccessful arbitration parties that appeals under s.68 Arbitration Act 1996 are only for extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. The Court will not assist an appellant if the Tribunal reaches a conclusion on facts that the appellant does not like.

The background facts

The dispute arose out of the Claimant Buyers’ termination of the contracts for two bulk carriers to be built at the Defendant’s yard in China. The Claimants claimed that the Builder was in anticipatory repudiatory breach of the shipbuilding contract by refusing to deliver the ships by the contractual delivery date. Following nearly three weeks of an arbitration hearing, the Tribunal issued its Award supported by 84 pages of Reasons. The Tribunal dismissed the claim; it found that the Builder renounced the contracts in an email and at a meeting, but that the Claimants subsequently affirmed the contracts.

The Claimants applied to set aside the Award under s.68(2)(d) Arbitration Act 1996, which allows a party to challenge an Award for serious irregularity. The Claimants claimed that the Tribunal had failed to deal with two issues named by the Claimants as follows:

i. That the Builder’s renunciation was a continuing renunciation; and
ii. That if the Builder had not renounced the contracts, the Claimants would have “flipped” the shipbuilding contracts, or sold them to a third party at a profit.

The Commercial Court decision

Mr Justice Flaux rejected these arguments. He approved the authorities directing him to read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies; in Pace Shipping v. Churchgate Nigeria Ltd, Mr Justice Teare had specifically deprecated a minute textual analysis.

In dealing with the Claimants’ appeal, there were four questions for the Court:

i. Whether the relevant point or argument was an “issue” within the meaning of the sub-section;
ii. If so, whether the issue was “put” to the Tribunal;
iii. If so, whether the Tribunal failed to deal with it; and
iv. If so, whether that failure has caused substantial injustice.

The Court was not persuaded that the Tribunal had failed to deal with either of the Claimants’ issues.

First, the Judge dismissed the claim that the Tribunal did not deal with the continuing repudiation issue as frankly hopeless. The Court reviewed several passages in the Reasons that dealt with the renunciation and, whilst conceding that the conclusion was not as clearly spelt out by the Tribunal as it might be, a perfectly reasonable and explicable conclusion emerged. A tribunal does not have to set out each step by which they reach their conclusion, nor does a tribunal fail to deal with any issues that it decides merely because it does not give reasons or adequate reasons. The Judge rejected the submission made by the Claimants’ counsel that the Tribunal’s conclusion was so perverse that the Tribunal cannot have dealt with the issue. Once it is recorded that the Tribunal has dealt with an issue, s.68 does not involve a qualitative assessment of how the Tribunal has dealt with it. The Judge considered that the Claimants’ real complaint was that the Tribunal had rejected the Claimants’ argument on the facts. That finding of fact by the Tribunal was not susceptible to review by the Court.

The claim that the Tribunal failed to deal with the Claimant’s alleged plan to flip the contracts was also dismissed as an impermissible attempt to go behind the Tribunal’s findings of fact. The Judge referred to four paragraphs in the Reasons where the Tribunal considered the issue and pointed to the Tribunal’s conclusion on the facts that this head of claim failed. The Judge criticised this part of the application as a scarcely veiled attempt to challenge the findings of fact, which was not an appropriate use of s.68.

Comment

If the right of appeal under s.68 has not been expressly excluded, it will generally remain open to disappointed parties to challenge arbitration awards on the basis that the tribunal has erred at law. That said, this case is a clear statement from the Commercial Court that matters of fact and evaluation of the evidence are for arbitrators and the courts should not intervene. S.68 is concerned with due process, not the correctness of a tribunal’s decision. This judgment will provide some comfort to successful parties to an arbitration of the certainty of London arbitration and the robust approach of the English Court to appeals.

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SHIPPING REGULATION

Contractual pitfalls relating to the Ballast Water Management Convention

With the Ballast Water Management Convention 2004 (the “Convention”) likely to enter into force in the near future, the industry has understandably been focused on meeting its practical requirements. Nonetheless, the importance of considering the impact of the Convention on contractual arrangements should not be forgotten.

Introduction

The Convention will enter into force 12 months after ratification by 30 States representing at least 35% of world merchant shipping tonnage. As of 2 December 2013, 38 states equalling 30.38% had signed up. The imminent entry into force of the Convention has been announced somewhat prematurely on more than one occasion in the past few years. Nevertheless, it would be prudent to expect the above requirements to be met in the not so distant future.

As such, interested parties should consider reviewing and amending key contracts that are likely to be impacted by the various requirements of the Convention. This article explores some examples.

Charterparties

The potential for the provisions of the Convention to impact the contractual division of liability under charterparties is clear. For example:

Compliance

Strictly speaking, it is arguably unnecessary for charterers to push for express contractual provisions whereby shipowners warrant that the various requirements of the Convention will be met. This is because owners will, in any case, need to comply in order to pass the various surveys required by the Convention and avoid detention.

That said, prudent charterers are nevertheless likely to desire the additional protection granted by such clauses. Owners, on the other hand, may well argue that a reasonable endeavours obligation is more appropriate.

Another important point to consider during charter negotiations is whether owners warrant only that a chartered vessel meets the requirements of the Convention at the time of entering into the contract, or that it will continue to do so for the duration of the charter.

Ultimately, subject to commercial bargaining power, most parties are likely to agree on compromise clauses. Various model clauses have been produced that attempt to deal with this issue. For example, Ince & Co assisted with the drafting of the pro forma Intertanko ballast water management clauses, which seek to strike a fair balance between charterers and owners.

Laytime and demurrage

Dealing with the simple but important example of laytime and demurrage, it may be prudent for owners and charterers to make provision for the changes introduced by the Convention. For example, the ASBATANKVOY tanker voyage charterparty 1990 provides that:

“7 ... Time consumed by the vessel in moving from loading or discharging port anchorage to her loading or discharge berth, discharging ballast water or slops, will not count as used laytime.” (our emphasis)

Whilst this clause deals with discharging ballast water and cargo tank slops, it is worth bearing in mind that, under the Convention, ballast water tank sediments must be discharged into suitable facilities. Whether time should continue to run during such discharge is worth agreeing at the start of the charter, in the interests of avoiding unnecessary dispute in due course.

Port state control

Article 9 authorises port state control inspections for the purposes of determining whether a ship is in compliance with the requirements of the Convention. Under Article 12(1), all possible efforts are to be made to avoid undue detention or delay. In the event that a vessel is nevertheless unduly detained or delayed, it shall be entitled under Article 12(2) to compensation for “any loss or damage suffered”.

Owners and charterers may wish to consider appropriate charter amendments in light of the above. For voyage charters, should any time lost due to an inspection count towards laytime/demurrage? For time charters, should the vessel remain on hire? In the case of both, should the answer depend on whether owners have fully complied with the requirements of the Convention?

Trading limits

Close attention needs to be paid to local and regional rules concerning ballast water.

For example, whilst the situation remains in a state of flux, in future all vessels operating in US waters will need a ballast water treatment system that has been approved by the US Coast Guard. Approval will be required regardless of whether or not the system in question has been type-approved by another maritime administration. There is of course no guarantee that systems approved by another flag state and installed on vessels will pass the US requirements.
Another risk factor to bear in mind is the possible introduction of local rules requiring the treatment of ballast water to standards higher than that mandated by the Convention. For example, New York had been due to bring in rules for the start of 2012 stipulating that owners must purify ballast water to 100 times the standard required by the Convention. This was pushed back due to a recognition that the requisite technology was not yet available, but may still be introduced if and when this is no longer an issue.

Trading limits clauses need to be carefully considered prior to the signing of relevant charterparties, and then regularly reviewed in light of the changing patchwork of international, regional, national, and state regimes.

From the point of view of owners, subject to questions of bargaining power, perhaps the optimum solution is to include a bespoke clause whereby charterers agree to only order the chartered vessel to suitable ports.

**Leasing agreements**

In the current constrained lending environment, some shipowners are facing difficulties in persuading their lenders to extend finance to cover the sizeable sums required to purchase and install ballast water treatment systems. Increasingly, the potential for third-party leasing companies to provide finance is being explored. However, such deals must be carefully structured in order to avoid potential difficulties arising.

The central issue relates to the status of a ballast water treatment system after installation in a vessel’s engine room. Does it remain a chattel i.e. an item of personal property separate to and distinct from the vessel? Or does it become a fixture i.e. part of the vessel?

Whilst much of the case law concerning the annexation of chattels is concerned with land, it is generally accepted that the rules set out in the case law apply where one chattel is attached to another. As such, it is necessary to consider in each case the following questions:

- What is the degree of annexation i.e. can the item be physically severed and, if so, how difficult would that be?

This is likely to depend on the type of system installed. Those treatment systems that fit inside a container and are designed to be self-contained should be capable of being relatively easily removed from a vessel. At the other extreme, systems that have been specially designed to fit a particularly crowded engine room may well be difficult to remove.

- What was the purpose of the annexation?

In this respect, it is necessary to consider why the treatment system is being installed. Is the intention to permanently and substantially improve the vessel, or simply for a temporary purpose? In the case of specialised vessels used in the offshore oil industry, for example, equipment is often installed by charterers for the duration of a charter and removed at the end of the charter period. The better view in such a case is that, subject to the terms of the specific charterparty in question, the equipment is likely to remain a chattel.

In the case of ballast water treatment systems, the likely answer is that they are intended to provide ballast water treatment for the remainder of the lifetime of the vessel, a factor suggesting they may be classified as fixtures.

Lessor contemplating financing ballast water treatment systems need to take into account the above. In an ideal world, they would wish to protect their position through a mortgage or similar security over the system itself. However, not only is this likely to be barred under the terms of the loan agreed between the shipowner and its finance banks, difficulties arise if the system has become part of the vessel itself.

In our experience, assuming that it is not possible for the leasing company to take security over assets unrelated to the vessel, the safest course of action available to it is to negotiate with the lending banks as to whether the lessor’s interest can be adequately secured.

**Manufacturers’ liability**

It might be imagined that once a ballast water treatment system has been released onto the market, it is guaranteed to work. However, caution should be exercised in this regard. According to trade press reports, at least one system has been withdrawn from the market after it failed an evaluation test, despite the fact that it had already been installed on a number of newbuildings.

In terms of attempting to avoid being left in a similar situation, shipowners and their managers will be aware of the need to work closely with Class in order to identify which of the 30+ type-approved systems is suitable for the particular vessel in question. Nonetheless, the question remains whether a manufacturer might be liable for the supply of defective equipment.

In short, the answer very much depends on the terms of the supply contract i.e.:

- What guarantees is the manufacturer prepared to give concerning the performance of the equipment?; and
- Is the manufacturer offering a contractual warranty covering the repair or replacement of defective parts?

 Needless to say, in most cases, the manufacturer’s standard terms are likely to exclude many of the types of loss and damage that a shipowner might expect to suffer in the event that a treatment system fails to operate as advertised, for example loss of hire and other consequential losses such as drydocking costs. Owners may, in certain circumstances, be able to fall back on a claim in tort, although the position in this regard varies significantly depending on the applicable national law.

In this case, prevention is definitely better than cure and well-advised shipowners will concentrate on selecting good quality treatment systems from top-quality manufacturers. Nevertheless, it is at least worth bearing in mind that the terms on offer from manufacturers in respect of the limitation/exclusion of liability, as well as the value of repair warranties, are likely to be variable. Furthermore, in a buyers’ market, with
many manufacturers vying for trade, and bearing in mind the high cost of some of the treatment systems on offer, shipowners should not discount the potential to negotiate more favourable terms in respect of manufacturers’ liability.

Newbuilding contracts
From a legal point of view, the most important point to be emphasised in relation to newbuilding contracts and ballast water treatment systems is the need for planning, clarity and certainty.

For example, owners need to consider whether they want a treatment system installed during the newbuilding process, or whether they want to leave their options open and carry out installation at a later date. If the latter, points to be aware of include:

> The need to ensure sufficient space is left in the engine room to allow installation of a treatment system in due course; and
> The engine room plans must take into account the likely need for retrofitting of a treatment system in the future, and should be designed with sufficient flexibility to make this possible.

Ince has reviewed draft clauses in some shipbuilding contracts that indicate an apparent failure on the part of owners (or their advisers) to properly get to grips with the requirements of the Convention. For example, clauses that simply require a vessel to have installed on board a fully functioning Ballast Water Treatment System that complies with the requirements of the Convention, and that is approved by a Class Society. Left unamended, such a clause is arguably inadequate as owners need to make an informed choice regarding which treatment system is most suitable for the vessel, with the help of technical managers and Class. This choice should take into account a long list of factors such as cost, the vessel’s intended trading pattern, ease of operation and maintenance requirements.

Conclusion
The challenge posed by the Ballast Water Management Convention is primarily one of ensuring compliance with the new obligations it imposes on vessels, their managers, owners and crew. However, the potential for significant claims for loss and damage to arise out of the areas highlighted above, amongst others, should not be underestimated. The introduction of the Convention will undoubtedly affect the balance of risk and reward in relation to various types of contract, and contracting parties should be alive to this.

Maritime Labour Convention: are you a “shipowner” under your charterparty?

The Maritime Labour Convention 2006 (MLC) has been in force internationally since August 2013 and, in that time, it has become clear that it has received widespread ratification, that enforcement is a reality, and that ships run the risk of detention if they are not compliant. However, there has also been a good deal of confusion over the question of “who is the ‘shipowner’?” under the MLC. The answer to the question is important, since it is that person who has the principal burden of ensuring MLC compliance.

In the MLC, the “shipowner” is defined to mean the owner of the ship or another organisation or person who has assumed responsibility for the operation of the ship from the owner and who in doing so has agreed to take over the duties and responsibilities imposed on shipowners under the MLC. This is the case even if another organisation carries out some of the duties of “shipowner” on its behalf. Therefore, the owner and the “shipowner” may well be different persons or organisations.

The MLC definition gives as an example the bareboat charterer as one type of person who may assume the mantle of “shipowner” from the owner. This accords with the charterer’s significant responsibilities under bareboat charterparty agreements whereby typically the charterer provides the crew and operates the vessel. By way of illustration, Barecon 2001 imposes extensive responsibilities on the bareboat charterer for the ship’s operation and her navigation, maintenance, repair and manning.

By contrast, the charterer under a time or voyage charterparty agreement would not owe the same duties and responsibilities and thus day-to-day is unlikely to be the “shipowner”. Rather, responsibilities for the ship’s operation are likely to reside with the owner who on that basis will be the “shipowner”.

As “shipowner”, the owner of a ship on time charter has prima facie responsibility for ensuring the MLC compliance of all seafarers’ employment on board the ship. For example, the requirement that every seafarer has a seafarer employment contract containing certain minimum terms. Under the MLC, this is the case even if some of the seafarers on board are legally employed by a different organisation such as the charterer (e.g. in respect of a supertug).

This raises a potential difficulty for the owner; how can he be expected to ensure that the charterer’s employment of seafarers on board is MLC compliant? Furthermore, how can the owner avoid a scenario where the charterer asserts that the ship is off-hire on the basis that she has been detained for MLC non-compliance, for which default the owner as “shipowner” is prima facie responsible, but where non-compliance is in reality the charterer’s fault?

An answer is to draft the charterparty so that responsibilities for MLC compliance do not reside solely with the owner as “shipowner” but are apportioned between the owner and the charterer in order that liabilities attach where the responsibilities truly lie. For example, the charterparty could provide that it is the charterer’s duty to ensure that its
The recast Brussels Regulation: reinforcing the arbitration exception

The Brussels Regulation governs the jurisdiction and enforcement of judgments in civil matters in the EU. The basic rule is that a defendant should be sued in the courts of the EU Member State in which it is domiciled. The jurisdictional rules of the Brussels Regulation are stated to apply to court proceedings only and not to arbitration. Conflicts of jurisdiction have, however, arisen where proceedings are commenced in an EU Member State, contrary to a contractual arbitration clause providing for arbitration in another Member State. Recent revisions to the Brussels Regulation, due to come into force in January 2015, seek to address these conflicts. Our article considers the revisions relating to the “arbitration exception” in the Brussels Regulation and the practical effect they might have for parties agreeing to arbitrate their disputes in an EU country.

Introduction

Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation) governs jurisdictional issues between EU courts and provides for the mutual recognition of court judgments within the EU. The cross-border recognition and enforcement of arbitration awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) rather than the Brussels Regulation; as a result, the Brussels Regulation expressly excludes arbitration from its ambit.

Since it came into force in March 2002, however, a number of concerns have arisen in relation to the practical application of the Brussels Regulation, not least the meaning and scope of the arbitration exception and whether court proceedings related to arbitration were governed by the Brussels Regulation.

As a result, a number of revisions to the Brussels Regulation were approved by the Council of the European Union in December 2012. Whilst the revised Regulation (EU Regulation 1215/2012) came into force on 9 January 2013, the majority of the reforms will only take effect as of 10 January 2015.

The key changes are aimed at:

1. Reinforcing the arbitration exception and making it clear that it extends to court proceedings surrounding or in support of arbitration;
2. Reinforcing jurisdiction agreements and preventing so-called “torpedo” actions, by requiring a Member State court to stay its proceedings where there is an exclusive jurisdiction clause in favour of another Member State’s court;
3. Streamlining the process of enforcing Member State court judgments across the EU; and
4. Extending the rules relating to jurisdiction agreements to non-EU parties in certain cases.
This article deals only with the revisions relating to the arbitration exception (point 1 above) and how they might work in practice. A future article, to be published in our Spring 2014 Shipping E-Brief, will consider the practical implications of the other key changes.

**The arbitration exception**

**The case law**

The uncertain relationship between arbitration and the Brussels Regulation has been highlighted in at least four cases, the *Atlantic Emperor*, *Van Uden*, the *Front Comor* and the *Wadi Sudr* (the latter two Ince shipping cases).

In a sale contract dispute in 1992, the *Atlantic Emperor*, the Italian defendant commenced proceedings in Italy for a declaration of non-liability, notwithstanding a London arbitration clause in the sale contract, and refused to participate in London arbitration proceedings. Pursuant to an application by the claimant to the English Court to appoint an arbitrator in view of the defendant’s lack of co-operation, an application that would have required the English Court also to consider the validity of the arbitration agreement, the matter was referred to the European Court of Justice (ECJ). The ECJ considered whether the arbitration exception in the Brussels Regulation applied to court proceedings concerning the appointment of an arbitrator and the arbitration process. It held that by excluding arbitration from the scope of the Regulation on the ground that it was already covered by the New York Convention and other international conventions, the Regulation excluded arbitration entirely, including court proceedings in which arbitration is the subject matter.

In 1998 in *Van Uden*, the ECJ endorsed the *Atlantic Emperor* and concluded that the subject matter of court proceedings is arbitration, if the proceedings serve to protect the right to have the dispute determined by arbitration.

Then came the *Front Comor*. In broad terms, the *Front Comor* involved a collision in Italy of a vessel under charter to the (oil refinery) owners of the jetty with which the vessel collided. Although the charterparty provided for disputes to be referred to London arbitration, the jetty owners’ subrogated underwriters commenced court proceedings in Italy. In 2009, the ECJ held that, notwithstanding the London arbitration agreement in the charterparty, the English Court could not grant an anti-suit injunction to restrain the Italian proceedings in favour of London arbitration as this would be incompatible with the Brussels Regulation. Rather, it was for the Italian Court to rule on its own jurisdiction because “a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within the scope of application” of the Brussels Regulation.

Also in 2009, in the *Wadi Sudr*, the claim was for damages for delivery of cargo short of destination. The bills of lading provided for English law and London arbitration but nonetheless, the cargo interests commenced court proceedings in Spain. The Spanish Court held that, as a matter of Spanish law, no arbitration agreement was validly incorporated into the bills of lading. The English Court of Appeal subsequently held that the Spanish Court judgment was within the scope of the Brussels Regulation and that it was bound to recognise it.

**The problems**

Notwithstanding the arbitration exception, therefore, conflicts have arisen between upholding a party’s right to arbitrate pursuant to a contractual arbitration agreement and the obligation to permit courts in EU Member States to rule on their own jurisdiction.

In particular, there has been scope for parallel proceedings, with one party bringing arbitration proceedings pursuant to an arbitration agreement and the other party (very often for purely tactical reasons) challenging the existence or validity of the arbitration agreement in the courts of another Member State. In some instances, it could take many years for those court proceedings to produce a judgment either on the validity of the arbitration agreement and/or on the merits of the case.

Furthermore, while a party could continue with its arbitration proceedings even though court proceedings were also underway, there has been a clear risk of the arbitration award being inconsistent with the court judgment. In that event, a Member State court would face a conflict between enforcing the judgment under the Brussels Regulation and enforcing the arbitration award under the New York Convention.

A major concern has been that the effectiveness of arbitration in the EU might be undermined as a result.

**The solutions?**

The recast Regulation seeks to reinforce and clarify the arbitration exception by expressly confirming that the Regulation does not apply to any court actions or proceedings ancillary to arbitration. This means that the arbitration exception would extend to, for example, court proceedings relating to the constitution of an arbitral tribunal, the powers of the arbitrators, the conduct of the arbitration, as well as any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award. Also covered by the exception will be proceedings seeking or resisting the enforcement of an arbitration agreement, including disputes over the validity or enforceability of an arbitration agreement.

In addition, a Member State court retains the right to rule on the validity and scope of an arbitration agreement even if another Member State court has been asked to consider the issue first and is so considering it.

Finally, it is made clear that the New York Convention takes precedence over the Brussels Regulation. This appears to mean that a Member State court can in principle recognise and enforce an arbitration award even if it is inconsistent with another Member State court’s judgment.

**What does this mean in practice?**

First, an EU Member State court will not be bound by the decision of another Member State court on the validity and scope of an arbitration agreement. Rather, each court can decide that issue independently and according to its national law. So, for example, in the *Wadi Sudr*, the Court in England would not be bound to recognise the Spanish Court’s decision that the arbitration clause in the bills of lading was invalid under Spanish law but could instead consider for itself whether it was valid and enforceable under English law.
Furthermore, where a party commences court proceedings in a Member State contrary to an arbitration clause and the other party subsequently commences proceedings in the Member State court of the arbitral seat seeking a declaration that the arbitration agreement is valid and binding, the court of the arbitral seat does not have to wait for the decision of the court first seised on the validity of the arbitration agreement before itself making a decision on that issue and referring the parties to arbitration, if appropriate.

At first blush, these are positive changes. Certain difficulties can, however, still be envisaged. There may still be conflicting Member State court decisions on whether an arbitration agreement is valid and binding. A party that is faced with an unfavourable court decision in one Member State may (subject to rules about *res judicata* and issue estoppel) seek a different decision from the courts of another Member State. Neither court’s ruling will take precedence over the other, meaning there will continue to be the risk of parallel, even multiple, proceedings and a question mark over which decision will prevail.

There also remains the possibility of a conflicting court decision and arbitration award on the issue, for example where a Member State court decides the arbitration agreement is invalid but the arbitrators decide it is valid and that they have jurisdiction. A party seeking to enforce the arbitration award in that Member State may find the court reluctant to enforce an arbitration award that conflicts with its own decision.

Furthermore, a third Member State court, if asked to enforce the conflicting award and/or judgment, will have to choose between the two. It is likely then to have to consider for itself whether the arbitration agreement is null and void or valid and binding. If that were to happen, there will then potentially be three separate findings on whether the arbitration agreement stands or falls. Given the recast Regulation emphasises that the New York Convention takes precedence over the Brussels Regulation, arguably the third Member State should enforce the arbitration award. Whether it will do so, however, remains uncertain because under the recast Regulation, Member State courts remain bound to enforce judgments on the merits of a dispute found not to be subject to a valid arbitration agreement by the courts of another Member State. In addition, the New York Convention sets out certain limited grounds for refusing to enforce an arbitration award e.g. that it would be contrary to public policy to do so, and a third Member State court may choose to rely on one of these exceptions to refuse enforcement. Until such time as a scenario of this type is played out in a Member State court, however, it is difficult to judge what the outcome might be.

**Comment**

Some commentators have suggested that these changes go some way to reversing the impact of the ECJ decision in the *Front Comor*. Clearly, the will is there and the problem is recognised. However, this solution for the present looks to be a partial one.

The recast Regulation does not directly address anti-suit injunctions and they appear to remain unavailable to restrain court proceedings brought in another EU Member State. The EU’s dislike of anti-suit injunctions is well known but they are liked by practitioners for good reason and it remains to be seen if anything short of such a measure will provide an effective solution to the problem.

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CARRIAGE OF GOODS BY ROAD

Carriage of Goods by Road: Court of Appeal clarifies jurisdiction provisions of the CMR Convention

British American Tobacco Switzerland S.A. and Others v. (1) Exel Europe Ltd; (2) H Essers Security Logistics B.V. and others; British American Tobacco Denmark A/S and Others v. (1) Exel Europe Ltd; (2) Kazemier Transport B.V. [2013] EWCA Civ 1319

The Court of Appeal has held that a cargo owner who had entered into a CMR contract of carriage with a carrier based in England, and who had agreed exclusive English jurisdiction for disputes arising out of the contract of carriage, could bring proceedings in England not only against that carrier, but also against successive carriers to whom the primary carrier had delegated the responsibility of the carriage in question. Those proceedings could be brought in England notwithstanding that the successive carriers were not parties to the contract of carriage between the cargo owner and the primary carrier, and notwithstanding that they had no connection with England, and notwithstanding that the cargo had no connection with England.

The background facts

The Claimants/Appellants were British American Tobacco Switzerland A/S and British American Tobacco Denmark A/S (together “BAT”). BAT contracted with Exel Europe Limited (“Exel”) to carry cargoes of tobacco around Europe by road. In the present case, BAT Switzerland A/S contracted with Exel to move tobacco from Switzerland to Rotterdam, and BAT Denmark A/S contracted with Exel to move tobacco from Hungary to Denmark. The agreement contemplated that the CMR would apply to the movements. The agreement further provided that Exel – although primary carriers – could subcontract some or all of the movements to approved sub-contractors (or “successive carriers” using the wording of the CMR). Finally, the agreement expressly provided that all disputes arising out of the agreement would be subject to English law and to the jurisdiction of the English High Court.

In the event, Exel did subcontract both movements. The Switzerland-Rotterdam movement was sub-contracted to H Essers Security Logistics B.V. and subsidiaries (together “Essers”), and the Hungary-Denmark movement was subcontracted to Kazemier Transport B.V. (“Kazemier”). The Switzerland-Rotterdam tobacco was loaded in Switzerland on 2 September 2011, and was allegedly stolen in an armed robbery on a motorway in Belgium the next day. The Hungary-Denmark tobacco was loaded in Hungary on 15 September 2011, and 18 pallets were stolen while the vehicle was parked overnight (it is alleged that instructions had been given that drivers were not to use overnight parking areas).

BAT duly commenced proceedings in the English High Court against Exel and Essers for losses suffered as a result of the Switzerland-Rotterdam movement robbery, and against Exel and Kazemier for losses suffered as a result of the Hungary-Denmark theft. BAT duly accepted proceedings, not least because of the English High Court jurisdiction provision contained in the BAT/Exel agreement. However, both Essers and Kazemier – although accepting that the CMR gave BAT the right to sue them directly – challenged the jurisdiction of the English High Court, on the basis of the jurisdiction provisions of the CMR.

In particular, Essers and Kazemier challenged jurisdiction on the basis of Article 31 of the CMR, which provides as follows:

“1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory:

(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated.”

Essers and Kazemier argued that in accordance with Article 31, BAT could sue them either where they were present (both in Holland), or where the goods were taken over (Switzerland or Hungary respectively), or where the goods were due to be delivered (Holland or Denmark respectively), but nowhere else, and in particular not in England. The Commercial Court agreed with Essers’ and Kazemier’s argument.

The Court of Appeal Decision

BAT made two arguments against the position adopted by Essers and Kazemier, which found favour with the Court of Appeal. The first was that Article 31 had to be read together with Article 36, which provides as follows:

“Except in the case of a counterclaim or a setoff raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred, an action may be brought at the same time against several of these carriers.” [our emphasis]

BAT argued that the effect of the two Articles when read together was that – once jurisdiction had been established over one of the carriers in accordance with Article 31 – then an action could be brought at the same time (and in the same place) against the relevant successive carriers also, in accordance with Article 36. Lord Justice Rix, who gave the leading Court of Appeal Judgment, agreed with BAT.

Lord Justice Rix’s starting point was that it was necessary to consider the Convention as a whole and give it a purposive interpretation, rather than to give each Article a narrow and literal interpretation. With the purposive approach in mind, Lord Justice Rix noted that the concept of “successive carriers” had not yet been introduced into the Convention by Article 31, and
that the concept was only addressed from Article 34 onwards. As such, Lord Justice Rix took the view that Article 31 was silent on how successive carriers should be dealt with, and that the successive carrier articles were required to understand how the jurisdiction of successive carriers should be dealt with. On the basis that the successive carrier articles allowed one carrier to sue multiple other carriers in any jurisdiction where they were able to establish jurisdiction over one of the carriers, Lord Justice Rix held that the same principle should apply to cargo owners suing multiple carriers.

The second argument run by BAT which found favour with the Court of Appeal was that the Convention should be interpreted to promote rather than to undermine the principles of the European “Judgment Regulation” (the regulation dealing with rules regarding the jurisdiction of courts in civil and commercial matters). One of the principles of the Judgment Regulation is that dual proceedings in more than one jurisdiction should be avoided in order to avoid potentially inconsistent judgments.

After reviewing the authorities, His Lordship held that the CMR (or any specialist convention for that matter) should be construed purposively to bring it as far as possible into line with the Judgment Regulation principles, and that in the event of a conflict between the CMR principles and the Judgment Regulation principles, the CMR must give way to the Judgment Regulation. On the basis that he found that the CMR should be construed to allow multiple carriers to be sued by a cargo owner in any place where the cargo owner is able to establish jurisdiction (in accordance with the rules of Article 31) over any one of them, Lord Justice Rix held that the CMR could be construed in accordance with the Judgment Regulation principles.

Comment
Cargo owners have always been entitled to sue the party they contracted with to carry their cargo by road in the jurisdiction agreed between the parties (i.e. the primary carrier), even where that party did not actually cause the loss or damage to the cargo. This case provides the welcome clarification for cargo owners that if, for whatever reason, they consider it to be advantageous to also sue one or more of the successive carriers at the same time as the primary carrier, then they can sue those successive carriers in the same jurisdiction as the primary carrier.

NEWS AND EVENTS
Two Ince & Co partners named in Lloyd’s List Top 100, 2013
Two Ince & Co shipping partners, Faz Peermohamed and Stephen Askins, were named as category leaders for law, in the Lloyd’s List Top 100, 2013 published last month.

The Top 100 list is an annual review of the most influential people in shipping and Ince partners have been listed in the Top 10 for Law every year since its inception in 2010.

Global Head of Admiralty Faz Peermohamed was ranked at number six and recognised as an authority on all types of shipping casualty, and for assisting and supporting clients in the highly charged atmosphere that often surrounds maritime emergencies. This follows his recent award as Lloyd’s List Global Maritime Lawyer of the Year 2013, and further reinforces his reputation in the market.

Stephen was ranked joint number five and is recognised for his expertise in piracy incidents, vessel hijackings and issues surrounding the use of armed guards as well as his wider expertise in casualty response and investigation, when he acts for both owners and their insurers.

Paul Herring, Ince & Co’s Global Head of Shipping commented:
“We are delighted that the industry continues to recognise our shipping partners in the Top 10 in law. Both Faz and Stephen have exceptional knowledge and expertise and are rightly regarded as leaders in their fields.”

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This month partner Jonathan Elvey, who was head of Ince’s Piraeus office, has returned to our London office after spending 17 years advising clients at the heart of the Greek shipping market. Partner Nick Shepherd, who spent five years in Greece in the 1990s and returned to Piraeus in 2010, takes on the role of head of the office.

In 2013 our Piraeus office celebrated its 20th anniversary. During this time it has grown to 35 people. It includes a dry shipping and admiralty practice led by Jon, Nick and Antonis Lagadianos; a ship and asset finance practice led by Robin Parry; and a Greek law practice led by George Iatridis.

Jon Elvey commented:

“I have been privileged to call Greece my home for so many years. It is a magical country full of wonderful people, among whom I am lucky to count many good friends. For family reasons, I am moving back to England at this time, and I am relocating to our London office. Though it is a huge wrench for me to leave Piraeus, I will be returning regularly. My practice will continue to focus on the Greek shipping market and I will be in communication daily with my clients.”

Jon continued:

“I am very proud of the reputation this office has built. So much of it is due to the support and loyalty of our clients, and we appreciate it enormously. We have a dedicated partner team in Piraeus. In May, Evangelos Catsambas was promoted to partner, and last year partner Jamila Khan joined us from London. They work alongside my longstanding and respected colleagues Nick, Antonis and Robin.”

Nick Shepherd said:

“I am very pleased to have the opportunity to lead our Piraeus team, continuing and building on Jon’s work. Ince & Co has a long tradition of working with the Greek shipping community. We are all committed to continuing that tradition and to providing our clients with effective commercial advice.”

Legal Week’s Client Satisfaction Report 2013 awarded Ince & Co first place in the City firm ranking for its cost/billing practice, providing clients with ‘serious value for money’. The firm took first place amongst all firms in the survey for its flexible workforce; and was in joint first place in the City firms category for its service and delivery/responsiveness.

The firm was also recognised by clients for the quality both of the legal and the commercial advice it provides, whilst respondents said that they were most impressed by the firm’s industry knowledge. The firm scored highly in the personal/partner relationships category.

Ince & Co was awarded second place for City law firms and was in third place amongst all the firms included in the survey.

A total of 1,363 in-house lawyers and other company executives responded to the client satisfaction survey, carried out between September and October 2013. All respondents were involved in decision making about the law firms that provide external legal advice.

Senior partner James Wilson commented:

“The questions asked in surveys such as this are important. Understanding our clients and improving on what we offer are key to developing and maintaining effective business relationships in our chosen markets.”

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Deal of the Year win for Ince & Co at Lloyd's List Awards Asia 2013

Ince & Co recently won the Deal of the Year award at the Lloyd's List Asia Awards 2013 in Singapore. The firm was recognised for its work for three major Asian banks in relation to the financing of three 13,200 teu container vessels for a major Hong Kong shipowner under a Japanese operating lease structure with the aggregate loan amount of USD310,800,000.

Ince's success was due to the complexity and innovation of the deal, which was led by Hong Kong partners, David Beaves and Gary Wong. It involved Japanese operating lease documentation that has evolved from Japanese tax leasing involving aircraft, including an overlay of standard ship financing documentation, and is one of the first such transactions to be used for vessels. The transaction was completed within a very short period of time and involved numerous parties and their legal advisors across different jurisdictions.

“The ship finance landscape has changed considerably in recent years as traditional sources for ship financing in the market have reduced, despite demand,” David Beaves commented. “With our extensive team knowledge of shipping and financing we were able to help our clients with an innovative structure.”

Gary Wong said:

“As the demand for alternative financing by sophisticated borrowers continues, we are able to assist in developing new and effective structures for our clients.”

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