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# SAFE PORTS, JOINT INSURANCE & LIMITATION OF LIABILITY - THE "OCEAN VICTORY" IN THE UK SUPREME COURT 2017

**By Gerard Hopkins, Partner, MFB Solicitors**

The UK Supreme Court in May 2017 handed down its much anticipated judgment in the case of the total loss of the *Ocean Victory* at Kashima, Japan in 2006.

**The facts**

The *Ocean Victory* was a modern cape-size bulk carrier owned by Ocean Victory Maritime Inc. ("OVM"). The vessel was bareboat chartered by OVM on an amended BIMCO Barecon 1989 charter dated 8 June 2005 to Ocean Line Holdings Ltd. ("OLH"), which was a company within the same group. OLH time chartered the vessel to China National Chartering Co Ltd. ("Sinochart") on an amended NYPE form dated 2 August 2006. The vessel was sub-chartered by Sinochart for a time charter trip on an amended NYPE form dated 13 September 2006 to Daiichi Chuo Kisen Kaisha ("DCKK") of Japan. All of the charters contained an undertaking by each of the charterers to trade the vessel between safe ports.

On 12/13 September 2006, DCKK ordered the vessel to load a cargo of iron ore at Saldanha Bay, South Africa for discharge at Kashima, Japan. The *Ocean Victory* arrived at Kashima on 20 October 2006 and berthed at the Sumitomo Metal Industries Raw Materials Quay, Kashima to discharge its cargo of iron ore. During the morning of 23 October, the discharge operations were suspended due to weather conditions associated with a low pressure and the vessel remained on the berth awaiting the resumption of discharge operations. Also during that morning the cape-size vessel, the *Ellida Ace*, berthed alongside the Raw Materials Quay.

On 24 October, on the basis of the forecasted weather conditions, the masters of the *Ellida Ace* and *Ocean Victory* decided to put to sea and so arrangements were made for tugs and pilots and the departures were scheduled for around midday. The weather conditions at Kashima deteriorated extremely rapidly and by 11 am the pilot advised the agents that it was unsafe to perform the pilotage services and the departures were suspended. At around 12.00 hours, a severe northerly gale was affecting Kashima and the *Ocean Victory* was subjected to swells resulting in some of its mooring ropes breaking: the Master requested tugs to keep the vessel alongside. Meanwhile, the *Ellida Ace* did not experience any problems with its mooring ropes. The tug boats came alongside the *Ocean Victory,* the vessel was safely held alongside the berth and the mooring ropes were reset.

The pilot came onboard the *Ocean Victory* at about 2 pm and indicated to the Master that since he had requested to leave port they should do so without delay. The *Ocean Victory* departed the berth with the assistance of tugs and proceeded up the Kashima fairway dropping the pilot off in the fairway. The vessel continued up the Kashima fairway into a northerly gale. Unfortunately, when exiting the Kashima fairway the *Ocean Victory* came into contact with the northern end of the south breakwater and after further contact with the breakwater the vessel grounded off the shore. Meanwhile, the *Ellida Ace* which had departed the berth about 30 minutes afterwards, experienced difficulties navigating within the Kashima fairway and eventually grounded within the fairway.

Efforts were made to salvage the *Ocean Victory* without success and it subsequently broke-up and the wreck had to be removed. The SCOPIC liability in respect of the attempted salvage amounted to about USD 12m and the wreck removal expenses were about USD 34.5m.

Following the payment of USD 70m in respect of the hull claim, one of the hull underwriters, Gard, took an assignment of the rights of action of OVM (registered owners) and OLH (the bareboat charterers). Proceedings were commenced by Gard in the UK Commercial Court against Sinochart alleging a breach of the safe port undertaking in the time charter. Sinochart, in turn, joined DCKK to the proceedings. Gard argued that OLH had incurred a liability to OVM in respect of the loss of the vessel of USD 88.5m and sought an indemnity in respect of this liability plus the liabilities for the SCOPIC expenses (USD 12mm, wreck removal expenses (USD 34.5M) and damages for loss of hire. Sinochart also had claimed loss of hire from DCKK.

Sinochart/DCKK disputed that they were in breach of their safe port obligations and also submitted that Gard, standing in the position of OLH, could not claim an indemnity in respect of the liability to OVM for the loss of the vessel and that they were entitled to limit their liability for the damage to ship relying on the 1976 Convention for the Limitation of Liability for Maritime Claims.

In July 2013, after a lengthy trial of nearly 5 weeks, the Commercial Court, in a judgment given by Teare J., held that the time charterers - in breach of their undertaking - had ordered the *Ocean Victory* to an unsafe port and were liable for the losses claimed.

In reaching this decision, Teare J. found, amongst other things, that the danger facing the *Ocean Victory* on 24 October was related to two of the characteristics of Kashima; the vulnerability of the Raw Materials Quay to long swells (making it necessary for vessels to leave the port) and the vulnerability of the Kashima fairway to northerly gales caused by low pressure systems (making it unsafe for cape-size vessels to transit the Kashima fairway). Teare J. found that it may have been rare for long swells and a northerly gale to occur at the same time at Kashima, but no-one in Kashima should be surprised if they did. He also found that the northerly gale affecting Kashima on 24 October 2006 may well have been one of the most severe storms to have affected the port in terms of its severity, rapidity of development and duration. He concluded, however, that the characteristics of the port giving rise to the danger

were not rare and even if the concurrence of these two features (long swells and northerly gales) was rare in the history of the port nevertheless since they flowed from the characteristics of the port the port was unsafe.

The Court of Appeal in 2015 allowed the time charterers' appeals finding that the conditions experienced at Kashima on 24 October 2006 were an abnormal occurrence and so the Charterers were not in breach of their safe port undertaking. The Court of Appeal also decided that the effect of the terms of the bareboat charter were to prevent Gard claiming from the time charterers for the loss of the vessel.

In 2016, the Supreme Court heard Gard's appeals in respect of the breach of the safe port undertaking (abnormal occurrence) and whether a claim could be made for the loss of the vessel and the Charterers' cross-appeal that the claims for damage to the vessel could be limited under the 1976 Convention on Limitation of Liability for Maritime Claims (the "1976 Convention"), as enacted under the UK Merchant Shipping Act 1995.

**Safe port (abnormal occurrence)**

The Supreme Court unanimously, in the leading judgment given by Lord Clarke, held that the Charterers were not in breach of their safe port undertaking and the conditions at the port of Kashima on 24 October 2006 amounted to an abnormal occurrence.

The Supreme Court repeated that the correct legal test was that in *The Eastern City* [1958] and the date for judging whether the Charterers were in breach of their safe port undertaking is the date on which they nominated the port (*The Evia (No. 2)* [1983]). It was emphasised that the charterers' promise is a prediction of safety when the ship will be at the port and which assumes normality when the ship arrives at the nominated port. The correct legal test requires looking at (1) what are the normal characteristics of the port; and (2) when the ship is at the port was the incident caused by the normal characteristics or an abnormal occurrence? The Supreme Court accepted that the expression "*abnormal occurrence*" was to be given its ordinary meaning – it was something well-removed from the normal – it was an event that was rare or unexpected. A theoretically foreseeable event is not sufficient to be a normal characteristic of the port otherwise the mere foreseeability of an event could lead to wholly unreal and impractical results and the legal test was not a test of reasonable foreseeability. The correct approach was to ask if the event causing the incident was normal or abnormal. It was necessary to look at the reality of the situation against the history of the port and ask if the event was normal or unexpected.

The Supreme Court agreed with the Court of Appeal's conclusion that in deciding whether the critical combination of long swells and the northerly gale affecting Kashima was a normal characteristic of the port or an abnormal occurrence the judge should have looked at the past frequency of such events occurring and the likelihood of them happening again as well as the exceptional nature of the storm affecting Kashima on 24 October and that the correct

conclusion on the evidence was that the conditions affecting the port on 24 October were abnormal.

As a postscript, the Supreme Court commented that a failure by the Kashima port authorities to carry out a risk assessment and put in place a proper system to deal with the two conditions might be relevant in some cases but the question was still whether the event causing the incident was abnormal or not.

**Loss of the vessel claim – joint insurance**

Gard claimed against the time charterers for an indemnity in respect of the liability of OLH to OVM for the loss of the vessel. The question in the appeal was whether the insurance provisions of the bareboat charter precluded the right of the registered owners and the subrogated hull insurers from claiming against the bareboat charterers for the loss of the vessel.

The bareboat charter contained, amongst other things, at clause 9 an obligation on the bareboat charterers to carry out repairs and at clause 12 an obligation on the bareboat charterers to insure the vessel for marine risks for the joint interests of the registered owners and the bareboat charterers. Clause 12 further provided that in the event of the total loss of the vessel the insurance proceeds should be paid to the mortgagees for distribution to the mortgagees, registered owners and the bareboat charterers according to their respective interests. Clause 13, which was an alternative insurance arrangement to those in clause 12, and provides for the registered owners to insure the vessel for their and charterers' joint interest and contained an express exclusion of the insurers' right to take subrogated actions against the bareboat charterers was deleted. Finally, the trading limits clause of the Barecon form was deleted and unusually there was a rider clause with a safe port undertaking by the bareboat charterers.

The Supreme Court, by a three to two majority, dismissed Gard's appeal holding that the wording of the amended BIMCO Barecon charter with its joint insurance provisions in clause 12 created an insurance-funded solution in the event of the total loss of the vessel and this had that the effect of making the hull insurance the sole route for the registered owners to recover from the bareboat charterers: since the insurance was the joint benefit of the assured there was no right of claim against each other. The result was that there was no liability of the bareboat charterer to the registered owners and thus there was no liability for which the bareboat charterer could, in turn, claim an indemnity from the time charterers in respect of the loss of the vessel.

The Supreme Court judges observed that Gard could have pursued their claim against the time charterers on some other legal basis, but declined to do so, and these alternative bases may have allowed for the recovery of loss of the vessel.

Lord Sumption (in the minority) made the point that the insurance law principle that where

there were co-assureds the subrogated insurer cannot claim against one of the co-insured parties to recover insurance payments does not address the question of how this principle affects claims by the insurer against a third party who is outside of the joint insurance arrangements and why a claim against the third party was excluded. In Lord Sumption's view, the bareboat charterers were under a liability for the total loss of the ship as a result of breach of the safe port undertaking in clause 29 and the insurers were also liable under the hull policy. The bareboat charterers' liability for the loss of the vessel was not excluded. Moreover, the insurance payment by the insurers would satisfy the bareboat charterers' liability to the registered owners and the bareboat charterer would have a claim over against the time charterers to which the insurers would be subrogated.

Lord Clarke (also in the minority) agreed with the reasoning of Teare J. that where there was an express safe port warranty by the bareboat charterers and clause 12 of the bareboat charter did not contain an express exclusion of the right of subrogation so the effect was that bareboat charterer was liable to the registered owners for the breach of the safe port undertaking notwithstanding the joint insurance arrangements.

**Limitation of liability**

The Supreme Court unanimously dismissed the Charterers' cross-appeal that they were entitled to limit liability for claims for the loss of the vessel and any consequential losses relying on the 1976 Convention and approved the earlier Court of Appeal decision in t*he CMA Djakarta* [2005]. It was held that Article 2(1)(a) of the 1976 Convention, where it provided for limitation in respect of claims for "*loss of or damage to property…in direct connexion with the operation of the ship*", did not include damage to the ship itself.

**Conclusions**

The Supreme Court's decision brings welcome clarity to the meaning to be given to the well-known expression "*abnormal occurrence*" in the context of the legal test for safe ports and also the allocation of risk under the important safe port undertaking in charterparties. It also emphasises the importance of tribunals of fact carefully examining the historical evidence of characteristics of the port in question when reaching conclusions about whether the events leading to the incident were the result of the normal characteristics of the port or an abnormal event.

The Supreme Court's *obiter* majority decision relating to the claim for the loss of the vessel underlines the importance of examining the effect of joint insurance provisions in contracts and also the correct legal basis for pursuing claims against third parties for losses they have caused. The widely-used BIMCO Barecon word is currently under review and it is anticipated that the insurance provisions will be changed in an effort to allow the insurers of bareboat chartered vessel to pursue subrogated claims against third party charterers for damage caused to the vessel.

The *obiter* decision of the Supreme Court to uphold the earlier Court of Appeal decision in *The CMA Djakarta* not permitting charterers to limit their liability to Owners for loss or damage to a chartered vessel relying on the 1976 Limitation Convention brings finality to this important question, but possibly calls into question whether the 1976 Convention remains fit for purpose in the 21st century given the substantial risks posed to the diverse chartering interests in the event of serious damage to a chartered vessel.

# BEING NOTICED

**By Lewis Moore, Partner, Hill Dickinson LLP**

Service of notice of arbitration on the correct party is an essential step. Sometimes notice has to be served without delay to avoid a claim being time-barred. If the notice is defective a claimant may be deprived of its right to pursue a claim. The three cases referred to in this article relate to this issue.

The scheme of the Arbitration Act 1996 (the "Act") in relation to the commencement of proceedings as in the NYPE charter party is simple.

> "*Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.*"[1]

These words are further defined in Section 76(3) of the Act which specifies that the parties are free to agree on the manner of service of any notice and, in the absence of agreement, service is to be by "*any effective means*".

In the latest version of the NYPE charter party[2] the wording is:

"*The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice…*"

A slightly more onerous term is contained in the ASBATANKVOY charter party which provides that proceedings "*may*" be commenced by "*service upon any officer of the party*" against whom a claim in arbitration is being made. Given the difficulty in identifying officers of corporations incorporated in some of the registries traditionally favoured by shipping, it may be very difficult to effect service in this way. However, this provision does not seem to override the wider terms of the Arbitration Act and the use of the word "*may*" in the ASBATANKVOY arbitration clause suggests that the requirement is not mandatory.

There is, of course, an easy answer to this apparent problem. In many forms of contract with which shipping people will be familiar, it is customary for the parties to stipulate addresses for service in the contract itself. If this practice were adopted for charterparties one potential area for dispute could be avoided. In the meantime, where the contracting party is not clearly identified in the charterparty the only safe course (apart from service at the registered office) is to obtain for the brokers details of a direct contact email address to send notice to as well as

[1] Section 14 (4) which is contractually applicable under LMAA Terms 2017

[2] NYPE 2015 s54 (b)

sending notice through the broking channel and requesting a copy of the email from the broker sending on the notice - a request with which brokers do not always comply and which they are not obliged to obey.

While on the topic of appointing arbitrators, it might also be helpful to mention the provisions of Section 17 of the Act which apply where the appointment is of a sole arbitrator. Where a party fails to appoint, a notice must be given requiring the party to appoint its arbitrator within seven clear days. The Act makes special provision for the situation where the period is a period of seven days or less. If that period includes a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded[3]. On that basis seven days become at least nine.

It often happens that parties leave the commencement of arbitration to the last minute and this is where problems can arise as regards whether or not the proceedings have been properly commenced. The Court does have a discretion to extend time under the Act[4].

As a preliminary to the exercise of the court's discretion, the party seeking an extension must have exhausted all arbitral remedies. The court can then extend time under Section 12, but only if it is satisfied:

a *that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time.*[5]

b *that the [party's] conduct makes it unjust to hold the other party to the strict terms of the provision in question.*

The first case concerns the exercise of the court's discretion under Section 12 of the Act.

In *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2006] 1 Lloyd's Rep 537 proceedings were commenced by the Owners' solicitors by email addressed to the Charterers. The email address used was not an address that had appeared on any previous communication from the Charterers. However, it appeared in the Lloyd's Maritime Directory 2005 and on the Charterers' website.

The emails had been received by staff in the Charterers' cargo booking department and had been ignored as unsolicited emails because the staff were under the impression that any serious legal correspondence would have gone through more appropriate channels. Unfortunately that was not a safe assumption.

Charterers made a Section 68 application to set aside the Arbitrator's final award in favour of the Owners on the basis that notice of the arbitration had not been effectively served.

[3] Section 78 (5)
[4] Section 12
[5] Section 12 (3)

The Judge considered that Section 76 was purposely wide and it contemplated that any means of service would suffice provided that it was a recognised means of communication effective to deliver the document to the party to whom it was sent at an address which was appropriate for the purpose of that means of communication. For this purpose, there was no reason why email should be regarded as essentially different from communication by post, fax or (for those who remember it) telex.

The Judge also considered that the provisions of the CPR (which only permit email service of proceedings in limited circumstances) were not an appropriate benchmark by which to judge whether service by email was effective in the context of an arbitration.

In dismissing the application to set aside the Award the Judge added:

- *I should be surprised if much junk email purports to [give notice of arbitration] or to emanate, as later emails did, from an LMAA arbitrator;*

- *If the emails never reached the relevant managerial and legal staff, that is an internal failing which does not affect the validity of service and for which Bernuth has only itself to blame;*

- *Having put info@bernuth.com into the current Lloyd's Maritime Directory as their only email address, they can scarcely be surprised to find that an email inviting them to agree to the appointment of an arbitrator in a maritime matter was sent to that address.*

The moral is, therefore, to make sure that your email address is properly monitored.

*Lantic Sugar Ltd v Baffin Investments Ltd (The Lake Michigan)* [2010] 2 Lloyd's Rep 141, was a case concerning service on a P&I Club just at the end of an extended limitation period for a cargo claim. In this case the Court's discretion to extend time was brought into play.

Owners, acting through their P&I Club, had granted Cargo Interests extensions of time for a wet damage claim. Cargo Interests served notice of arbitration on the Club immediately prior to the expiry of the time bar when the Club informed them that it was not authorised to accept service on the Owners' behalf. This caused something of a flurry of activity. Cargo Interests then served a notice on the Owners at their registered address in the Marshall Islands but due to the time difference missed the time bar by eight and a half hours.

The Court accepted that the Club (like Solicitors) did not have actual authority to accept service on the Owners' behalf. The fact that the Club had been authorised to deal with a wide range of matters, including letters of undertaking, settlement negotiations and extensions of time, did not give rise to a representation on the part of the Owners that the Club had authority to accept service of originating process.

However, the Judge also accepted that the Club had given the impression in a telephone conversation that it was taking instructions as to the substance of the notice rather than the procedural propriety of its service, and that conversation had taken the matter beyond mere silence.

The Judge considered that the Club's failure to indicate its lack of authority to accept service in the telephone conversation of 11 March was misleading. If it had indicated in the phone conversation that it lacked authority, it was at least probable that proper service would have been achieved in time.

Consequently, the conduct of the Club as agent for the Owners made it unjust to hold Cargo Interests to the time bar, which in the event they missed by no more than eight and a half hours. That conduct on the part of the Club contributed to, even if it was not the sole cause of, Cargo Interest's failure to comply with the time limit. Section 12 (3)(b) of the Act was satisfied. Time was extended to Cargo Interests' relief.

The final case in this trilogy is the recent decision in *Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore* [2016] 2 Lloyds Rep 97.

This case related to disputes under a COA where the Charterers had engaged an intermediary company to arrange contracts which would be concluded in the Charterers' name. The intermediary handled the day-to-day operation of the contract with the Owners.

When the disputes arose, the Owners served a notice of arbitration by emailing it to the intermediary. The Charterers took no part in the arbitration. A sole arbitrator was appointed who eventually made an Award in the Owners' favour which was then served on the Charterers.

About four months after service the Charterers challenged the Award under Section 72(1) of the Act on the basis that the intermediary had had no authority to accept service on its behalf and that it had therefore been unaware of the arbitration.

Under Section 72 a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question:
…

*b whether the tribunal is properly constituted, or*

*c what matters have been submitted to arbitration in accordance with the arbitration agreement by proceedings in court for a declaration or injunction or other appropriate relief.*

There was no claim that the intermediary had actual authority but the Owners raised a number of alternative arguments:-

1. *Implied Actual Authority*

The Owners said this could be inferred from the conduct of the parties and the circumstances of the case. The Owners pointed to the fact that the Charterers' brokers appeared to have passed the arbitration notice to the intermediary indicating that the intermediary had implied actual authority to receive the arbitration notice on the Charterer's behalf.

2. *Ostensible Authority*

The Owners argued that the Charterers had acquiesced in the intermediary holding itself out and therefore the notice was properly served.

3. *Ratification*

Finally, the Owners argued that the Charterers had silently ratified the Award retrospectively by not challenging it for four months after receiving it.

All of the Owners' arguments failed at first instance. In particular, as regards the Section 72 issue, the court held that there is no time limit stipulated for any application under s.72(1). Those who do not participate in the arbitral proceedings are entitled to wait until they face enforcement proceedings. To hold otherwise would open up a wide range of arguments that there had been a waiver, giving rise to considerable uncertainty and, no doubt, litigation.

Permission to appeal *The Sino Channel* has been given. The appeal is due to be heard in September. The outcome is very likely to impact on a number of agency issues.

# CHINESE SHIPBUILDING DISPUTES - TWO NOTEWORTHY LMAA AWARDS ON APPEAL

**By Mark Sachs, Partner, and Robert Shearer, Assistant Solicitor, Thomas Cooper LLP**

Many Chinese shipbuilding disputes have been determined in LMAA arbitration over the past decade and other disputes involving Chinese parties have likewise grown. This is the natural result of China's development of a significant modern shipbuilding industry and China's surging economic importance. However, the choice of London and the LMAA as the forum for resolution of disputes, at times, is sometimes questioned in China. One reason is geographic distance, there being other neutral arbitration centres closer by such as Hong Kong and Singapore. Another, perhaps, is a potential lack of cultural affinity. It is not intended here to debate the merits of those arguments *per se*, but it is suggested that there are good reasons why the LMAA and the legal and arbitration environment under English law are deserving of the support they receive from the international shipping community. It is the view of the author of this article that Chinese parties, who increasingly are subject to the competitive international commercial environment, will likely be subject to the same influences as the broader global shipping community and will continue to have good reason to agree to refer disputes to the LMAA.

One important factor quite unique in English law is the possibility of an appeal on issues of law to the courts under s. 69 of the Arbitration Act 1996. This is not available in other jurisdictions which adhere to the UNCITRAL Model Law which does not permit appeals. Rights of appeal are closely supervised by the English courts so that in relatively few cases will leave to appeal be successfully granted. However, the possibility of an appeal is an important factor in creating certainty and predictability in English law. Thus, awards in LMAA arbitration which may find their way to appeal on important questions and those affecting the industry as a whole assist in development of the common law. The possibility of an appeal also leads LMAA arbitrators to more closely adhere to a goal of writing awards in conformity with court-set precedent, and in cases where precedent is not clear, to assist in developing the law.

Two such cases are those discussed in this article. Both arguably are of general importance as they provide clarity to the many parties employing Chinese standard form shipbuilding contracts. As the forms adopted in China are often those used in Asia generally, the guidance from the courts is more far reaching. In this way, Chinese parties, by agreeing English law and arbitration, are avoiding future disputes by increasing clarity of understanding of the commonly employed forms and are assisting in the development of the common law.

The first, *Neon Shipping Inc v. Foreign Economic & Technical Corp Co of China [2016] EWHC 399,* recognises the breadth of the time-limited guarantee clause in the contract, and gives

welcome certainty to Chinese yards employing this contractual language. The second, *Zhoushan Jinhaiwan Shipyard Co. Ltd v Golden Exquisite Inc [2015] 1 Lloyd's Rep 283*, interprets commonly employed terms in Chinese shipbuilding contracts regarding delays and rights of cancellation and deals as well with a common problem of the role of the buyer's works superintendent or supervisor.

**Neon Shipping Inc v. Foreign Economic & Technical Corp Co of China**

*Background Facts*

The claimant buyers entered into a contract for the design, build and supply of a 57,000 dwt bulk carrier in a detailed contract form typical in the industry ("the Contract") governed by English law and containing an LMAA arbitration clause.

Upon completion, the buyer accepted the vessel without reservation. Article XI of the Contract provided for a guarantee period of 12 months. The salient parts of that clause were as follows:

> *Article XI Guarantee*
> *1. Guarantee*
> *Seller guarantees that Vessel, and all parts thereof that [are] manufactured or supplied by Seller, its sub-contractors and/or vendors under this Contract, will be seaworthy and contractual in all respects, and will be free from all defects which are due to defective design, construction, calculation, material or workmanship (collectively "Guarantee Defects"), upon delivery and for a period of twelve (12) months from the Date and Time of Delivery ("Guarantee Period").*
>
> *2. Notice of Defects*
> *Buyer shall notify Seller by telex or facsimile promptly after discovery of any Guarantee defects for which claim is made. Buyer's notice shall be followed by a letter setting forth, in so far as is reasonably possible, the full particulars as to the nature of Guarantee Defects and the extent of the damage. Except as otherwise provided below, Seller shall not be under any obligation for a Guarantee Defect unless notice of such Defect was sent to Seller not later than thirty (30) calendar days after the end of the Guarantee Period. Telex notice that a claim is forthcoming will be sufficient compliance with the notice requirements.*

The issue which formed the basis of the claim was that approximately three years after the expiry of the guarantee period, the buyer notified the yard of a claim for defects in the vessel's cranes.

*The Arbitration*

The arbitrators proceeded to determine two preliminary issues:

*First Question:*
On its true construction, did the Contract contain the implied term as to fitness for purpose as found in s. 14(3) of the *Sale of Goods Act 1979* ("SOGA")?

*Second Question*:
On the true construction of Article XI, did the 12 month time-bar provision excluding all of the Respondents' liability for claims notified later than 30 calendar days after the end of the guarantee period apply:

(a) to any and all claims whatsoever made after delivery of the Vessel (as the respondents contended); or

(b) only to claims for defective design, construction, calculation, material and workmanship but not to claims that the Vessel was not seaworthy or contractual in all respects (as the claimant contended)?

The arbitrators found that the answer to the first question was no; they doubted that s.14(3) of the SOGA applied to shipbuilding contracts and found there was no implied term of fitness for purpose as this was in conflict with an express term and thus contrary to the provisions of s. 55(2) of SOGA.

In answer to the second question, the arbitrators found that Article XI time bar extended to all claims.

The buyer was given leave to appeal in respect of both questions.

*The Appeal to the Commercial Court*

Burton J., decided to deal with the second question first. The buyer argued that Article XI created two forms of claim:

1 A claim in relation to the vessel being "*seaworthy and contractual in all respects*"; and

2 A claim that the vessel will "*be free from all defects which are due to defective design, construction, calculation, material or workmanship*".

The buyer submitted that only in respect of a category 2 would the time bar apply; they suggested that the placement of a comma broke the clause into two parts. The yard argued that to suggest that Article XI created two different types of claim with two different time limits was artificial.

Burton J. considered the normal meaning of the words, the context of the clause in the contract as a whole and commercial good sense. Considering these factors, he found in favour of the yard, dismissing the appeal on the basis that he considered it was wholly artificial to suggest two forms of claim were created by Article XI and that this suggestion was contrary to the commercial purpose of the clause.

Although the time-bar issue determined the appeal, Burton J. continued to consider the s.14(3) of SOGA (fitness for purpose) issue in *obiter*, on the basis that these questions were said to be of relevance to separate disputes under the Contract which were ongoing.

Burton J. considered the application of s.14(3) of SOGA which creates an implied term of fitness for purpose where the buyer makes known (expressly or implicitly) any particular purpose for which the goods are being bought. Burton J. began by stating it appeared to be common ground on the appeal that this clause did apply to shipbuilding contracts. Before the arbitrators, the sellers had relied on a passage from *the Law of Shipbuilding Contracts* (4th ed) by Simon Curtis that stated that s.14(3) would not normally be applicable in shipbuilding contracts with which the arbitrators appeared to agree. Burton J., relying on a number of prior cases, and indeed both parties' counsel on appeal were in agreement on this, found that s. 14(3) did apply in shipbuilding cases, contrary to Mr Curtis's text. Burton J. commented that perhaps the text writer only meant that reliance on an implied term in a shipbuilding contract was unlikely to be necessary.

Burton J. went on to find that the buyer's case was flawed because its submission had referred broadly to an implied term that the vessel would be fit to handle "heavy cargoes"; it had not limited the submission to the 30 tonnes SWL set out in the specifications in the Contract. The arbitrators had been entitled to find that such an implied term was inconsistent with the express terms of the contract and was consequently excluded under s.55 of SOGA. If an implied term had been formulated that was consistent with, and put into effect, the terms of the vessel's specification, the result would almost certainly have been different.

The case is of note (1) for providing a high level of certainty that shipyards will be able to rely on time-limited guarantee provisions in a wide sense and (2) for clarifying the way in which the implied term of fitness for purpose in SOGA is likely to apply in shipbuilding cases.

**Zhoushan Jinhaiwan Shipyard Co. Ltd v Golden Exquisite Inc and others**

*Background Facts*

This dispute concerned the cancellation of four separate shipbuilding projects on materially identical contractual terms. In each case the contract was made between Zhoushan Jinhaiwan Shipyard Co Ltd and a buying company specially created for that purpose related to the Golden Ocean Group.

Article III.1(c) gave the buyer a right to cancel the contract if the delay in the delivery of the vessel continued for a period of at least 210 days, being 30 days' allowance and 170 days of 'non-permissible' delays.

A further right to cancel the contract for delay in delivery of the vessel was provided in article VIII. Article VIII.1 provided that the builder would not be liable for any delay from certain causes such as war, Act of God, storms or other causes beyond its control and that the time for delivery would be extended without reduction in price. Article VIII.2 required the builder to give notice within seven days from the commencement of any permissible delay. Article VIII.4 provided that delays from such causes beyond the builder's control and for which it was not liable were 'permissible' delays, to be distinguished from 'non-permissible' delays (which led to a reduction in the contract price under art. III). The right to cancel under art. VIII.3 arose if the total permissible delay reached 225 days or if the aggregate of permissible and non-permissible delays reached 270 days.

If the contract was validly cancelled the yard was required to refund the price and to pay interest if the contract had been cancelled in accordance with art. III.1(c), but not if the cancellation was under art. VIII.

In each case the buyer purported to exercise a contractual right to cancel the contract on account of delay. In each case the yard sought to argue that the cancellation was wrongful on the ground that a relevant part of the delay was caused by the buyer's own breach of the contract.

*The Arbitrations*

There were four arbitrations but only two hearings. Both arbitrations substantially found as follows:

1 The buyer's cancellation of the contract in accordance with Article VIII.3 of the contract was valid and justified;

2 The buyer's cancellation of the contract in accordance with Article III.1(c) of the contract was not valid and not justified;

3 The yard was obliged to repay to the buyer or its assignee the full amount of the instalments advanced by the buyer;

4 The buyer's claim for interest failed.

*The Appeal to the Commercial Court – [2014] EWHC 4050 (Comm)*

The builder was granted leave to appeal on a number of questions including whether delays were "*permissible*" or "*non-permissible*"; whether a fourth category of delay existed; the consequences of the failure to give notice of all delays and whether builder's right of set off was excluded.

The buyers also appealed the decision that the buyers were not entitled on the assumed facts to cancel the contract under Article III and so were not entitled to interest on the sums to be refunded.

The builders argued that the buyer's supervisor had unreasonably delayed the inspections required giving rise to delays and that those delays amounted to breaches by the buyer which were a separate category of delay. However, the yard had not given notice within the notice provisions of the contract.

After considering the matter, Leggatt J., found as follows:

1 There was a tripartite classification of delivery delays; not four as argued by the Yard. Permissible and excluded delays could result in an extension of time for delivery without any reduction in the contract price, whereas non-permissible delays did not give rise to such extensions. Excluded delays were not counted as delays for the purpose of any right of cancellation.

2 The builder's case regarding buyers' breaches of contract was based on Art. IV, which did not contain any provision permitting an extension in the event of breach. The builder could not therefore rely on Art. III.1(d) to say that delay in delivery caused by a breach of Art. IV did not count as delay for the purpose of the provisions in Art. III which caused the contract price to be reduced after a delay in delivery exceeding 30 days, and which gave the buyer the right to cancel if the delay continued for 210 days.

3 The builder's contention that delays resulting from the buyers' breaches of Art IV was in a special category, which enabled it to be treated in the same way as excluded delays, was untenable. This was in part as a consequence of the fact the buyers' superintendents had no power to delay the construction of the vessels.

4 The only contention reasonably available to the builder to support a case that delays caused by breaches of Art. IV were capable of extending the time for delivery was that such delays were permissible delays. That contention, even if correct, would not make the cancellations unlawful, but instead entitled the buyer to cancel the contracts under Art.VIII.3, though not under Art.III.1(c).

5 Even if that were wrong, the builder would not be entitled to treat the delays as permissible delays when no notice had been given as required by Art.VIII.2.

6 The builder was not entitled to set-off its counterclaim for damages in respect of the buyers' alleged breaches against the contract price instalments repayable to the buyer.

The builder's appeal was thus dismissed and the buyers' appeal was allowed, allowing them a claim for interest. In interpreting these common provisions for cancellation, the Commercial Court. opted for certainty of application so that both parties would clearly know what events could give rise to delays and a clear cancellation date could be determined.

The case provides useful guidance to shipyards and buyers that cancellation provisions will be applied clearly and strictly. As well, shipyards are well-advised to document delays, variation orders and the like, in accordance with the contractual framework if they wish to rely on their contractual terms. The Court also noted that there were a series of other shipbuilding contracts with similar disputes and it is presumed that the Court's decision here will have assisted in resolution of those other cases. This again highlights the utility of both preliminary issues in arbitration and s.69 appeals in appropriate cases.

# PAYMENT OF HIRE: A CONDITION OR AN INNOMINATE TERM - HAVE WE HAD THE FINAL WORD?

**By Andrew Taylor, Partner, Reed Smith LLP**

An article in the LMAA Review 2013-2015 commented on the decisions in Kuwait Rocks Co v AMN Bulk Carriers Inc (*The Astra*) [2013] EWHC 865 (Comm.) and Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd [2015] EWHC 718 (Comm.). The respective judges Flaux J, as he then was, and Popplewell J took opposing views on the long standing controversy over whether the obligation to pay hire punctually in a time charter was a condition or innominate term. Flaux J, coming to the question first, bravely and with his customary elan, concluded that it was a condition; Popplewell J, being able to draw on Flaux J's analysis and heated academic debate that *The Astra* had generated, disagreed and concluded that it was an innominate term. The article concludes:

> *"Until the question is decided by a higher court, it is submitted that Popplewell J's decision is likely to be followed. However, this is unlikely to be the final word on the issue."*

Popplewell J's decision has indeed proved not to be the final word on the issue as his decision was appealed to the Court of Appeal. What this article considers is how the Court of Appeal answered the question and whether that will prove to be the final word on an issue which has entertained the commercial bar for many years and now the commercial judges both in the Commercial Court and in the Court of Appeal.

To recap, the underlying basis for Flaux J's original conclusion that the obligation to pay hire punctually under clause 5 of the NYPE charter was a condition was broadly as follows:

1 The express right to withdraw for non-payment of hire in clause 5 was a strong indication that failure to pay hire went to the root of the contract and was thus a condition.

2 Time is normally considered to be of the essence of a commercial contract which requires something to be done by a certain time.

3 The presence of an anti technicality clause, allowing charterers a grace period within which to remedy their breach, supports the view that the obligation to pay hire punctually is a condition.

1 Stocznia Gdanska SA v Latvian Shipping Co [2003] 1 CLC 282

2 Stocznia Gdynia SA v Gearbulk Holdings [2009] 1 CLC 134

4 Further, incorporating an anti technicality clause made time of the essence, by analogy with periods of grace for payment of instalments under shipbuilding contracts which are treated as conditions in, for example, the *Latco*[1] and *Gearbulk*[2] cases.

5 Treating timely payment of hire as a condition imports certainty into commercial contracts. Were it only an innominate term, Owners face uncertainty in a falling market whether to continue to deal with unreliable Charterers or withdraw the ship on the basis that the breach goes to the root of the contract.

It was through the refutation of those considerations that Popplewell J was able to support the innominate term theory. It was also the approach adopted by the Court of Appeal[3] where the leading judgment was given by Gross LJ. In favouring the innominate term theory, Gross LJ acknowledged that there were, as he put it, *"weighty dicta on both sides of the divide"*. Indeed, it might be said that it is a controversy upon which there are two analytically sound answers, the choice being principally one of policy. It is perhaps such questions of policy which emerge in Gross LJ's judgment. Thus, in referring to the decision of the House of Lords in *Bunge v Tradax*[4] he cites the following principle[5]:

> *"Unless the contract made it clear that a particular stipulation was a condition or only a warranty, it was to be treated as an innominate term; the Court should not be too ready to interpret contractual clauses as conditions."*

Clearly this was the direction of travel for Hamblen LJ, another experienced commercial judge, who in his very short judgment states[6]:

> *"The modern English law approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or a warranty – see, for example, …. Bunge Corporation v Tradax Export SA [1981] I WLR 711 …. As Lord Scarman stated at page 717":*
>
> *"Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances … that a particular stipulation is a condition or only a warranty, it is an innominate term, the remedy for breach of which depends upon the nature, consequences, and the effect of the breach."*
>
> *"In my judgment it cannot be said it is clear that the obligation to pay hire timeously is a condition of the charterparties in this case, or of time charter parties generally."*

3 [2016] EWCA Civ 982
4 [1981] IWLR 711
5 Paragraph 52
6 Paragraph 92

Whilst the predisposition of the Court of Appeal was perhaps to treat the payment of hire as an innominate term, that view is well supported by the more detailed treatment provided by Gross LJ of the various arguments. In this regard:

a The argument that the express right to withdraw is evidence that the payment of hire is a condition is met by suggesting that the reason for the introduction of the express right to withdraw was for clarity and to remove doubt as to the entitlement of the Owners to withdraw. As to this, Gross LJ said[7]:

*"As it seems to me, the history of the matter points to the development of withdrawal clauses to put beyond argument shipowners' entitlement to terminate the charterparty where Charterers had failed to make a timely payment. If that is right, then the argument that the punctual payment of hire is a condition because of the inclusion of an express withdrawal clause, begs the question as to the consequences intended by the parties to flow from the exercise of the contractual termination clause."*

Further, the logic suggested is that, as he put it[8]:

*"The simple and important point to keep in mind is that all conditions entitle the innocent party to terminate the contract – but not all contractual termination clauses are conferred for breaches of condition alone."*

b Starting from this place and having regard to the predeposition already noted above, Gross LJ seems to have had little difficulty in concluding that the payment obligation was an innominate term[9]. However, it was still necessary to answer Flaux J's argument based on the presumption that time was of the essence in commercial contracts, so that timely payment amounted to a condition. That argument was based on an analysis of *Bunge v Tradax* which the Court of Appeal also had to consider. In that case the Buyer's obligation was to give 15 days' loading notice but until that notice had been given, the Sellers could not nominate the loading port, which it was their entitlement to do. The two obligations were, therefore, interdependent with the performance by one party being the condition precedent to the ability of the other to perform another term which itself was a condition. However, payment of hire, whilst obviously an important obligation under the charter, was not a condition precedent to performance of any of the Owner's obligations. So concluding Gross LJ states[10]:

7 Paragraph 46

8 Paragraph 47

9 Notwithstanding his statement at paragraph 83 *"ship owners are not obliged to perform the services on credit; they do so only against advance payment"*.

10 Paragraphs 54 and 55

*"Put another way, it could not be said that any failure to pay hire punctually in advance, no matter how trivial, would derail* [Owner's] *performance under the charterparties. For present purposes, the most pertinent guidance from Bunge v Tradax is the need not to be "too ready" to interpret* [the hire payment clause] *as a condition – indeed only to do so if the charterparties, on their true construction made it clear that clause 11 was to be so classified."*

*"For my part, such clarity as to clause 11 being a condition does not emerge from the true construction of the charterparties. Thus clause 11 does not expressly make time of the essence. Nor does clause 11 spell out the consequences of breach …".*

It is worth noting that Gross LJ goes on to conclude that the general presumption that time is of the essence in commercial contracts does not apply to the time for payment, unless a different intention appears from the terms of the contract.

c The suggestion that the anti technicality clause strengthens the argument that timely payment of hire is a condition is also given short shrift. It was Gross LJ's view that anti technicality clauses are simply a mechanism for protecting Charterers from the serious consequences of withdrawal. It provides no guidance as to whether the provision as to the payment of hire is to be a condition or an innominate term.

d The final issue, of course, was the question of certainty. It was a principle which had influenced Flaux J, as clearly treating the payment of hire as a condition introduced certainty. Gross LJ acknowledged the desirability of certainty. However, his approach was that it is necessary to strike a balance between certainty, on the one hand, and commercial common sense, on the other. In this regard, in what are a revealing passages in his judgment, Gross LJ says:

*"Where, however, the likely breaches of an obligation may have consequences ranging from the trivial to the serious, then the downside of the certainty achieved by classifying an obligation as a condition is that trivial breaches will have disproportionate consequences. In a time charterparty, it is only necessary to contemplate a five minute delay in the payment of a single instalment of hire, for whatever reason not covered by an anti technicality clause. In Bunge v Tradax, Lord Roskill at page 27, expressed his concern as to balance as follows:*

*"… always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy.*[11]

11 Paragraph 59

> *Where the question arises as to the classification of an obligation breach whereof triggers a contractual termination clause, the achievement of the appropriate balance calls for a still more nuanced approach …*[12]

> *To my mind, the real question lies not between certainty and no certainty but as to the degree of certainty best likely to achieve the right balance of which I have already made mention and to which Lord Roskill referred in Bunge v Tradax. In company with Popplewell J, albeit reformulating his observations somewhat, I cannot conceive that the parties intended the withdrawal clause in clause 11 of the charterparties to operate so that a single payment of hire a few minutes late would entitle [the Owners] to throw up a five year or three year charterparty and claim loss of hire in damages".*[13]

The above is, in reality, the heart of the question and the principal basis for the approach of the court. With respect, Gross LJ is no doubt correct to say that certainty does not compel the conclusion that the relevant term must be a condition. A balance does need to be struck between the advantage of certainty and the disadvantage of disproportionate consequences arising from a potentially trivial breach.

The innominate term approach, however, does not satisfactorily answer Flaux J's question as to the Owners' remedies against an incalcitrant Charterer in a falling market. They face a dilemma of abandoning a profitable charter for an uncertain claim for damages. On the other hand it is fair to say, as with any innominate term, it is still open to the Owners to demonstrate that they are being deprived of substantial benefit of contract or that the Charterers have renounced the charter by their conduct. In practice, repeated failures to pay hire are often accepted as evidence that the charter has been renounced. Whilst there may still be many who would instinctively conclude that the payment of hire should be a condition, and in this regard it should be noted that the Tribunal in *The Astra* were of that view, the arguments advanced by the Court of Appeal and the modern context in which the question of the categorisation of contractual terms is viewed, suggests that their judgments are likely, indeed, to be the final word on this subject.

12 Paragraph 60

13 Paragraph 62

# THE COSTS CONSEQUENCES OF FAILING TO MEDIATE IN ARBITRATION

**By Camille Savinien and Glenn Winter, Winter Scott LLP**

## Introduction

Is it a truth universally acknowledged that a party who has failed to engage in mediation must be penalised in costs?

That appeared to be the position following the Court of Appeal's decision in *PGF II SA v OMFS Company 1 Limited* [2013] EWCA (Civ) 1288, in which it was held that a defendant should be penalised in costs for ignoring the claimant's proposal to mediate.[1] Litigants who failed to engage in the mediation process exposed themselves to 'sanctions', which would usually take the form, for the unsuccessful party, of an order to pay the successful party's costs on an indemnity basis or, for a successful party, of an order depriving it of all or part of its costs (or even, in exceptional cases, of an order to pay some of the unsuccessful party's costs).

However, it now appears that this 'truth' may not be so universally acknowledged after all.

Although in *Thakkar v Patel* [2017] EWCA Civ 117, the Court of Appeal vigorously applied (and extended) the principles set out in *PGF II*, a differently constituted Court of Appeal, subsequently refused in *Gore v Naheed* [2017] EWCA Civ 369 to penalise a party who had refused to mediate.

However, more importantly for maritime practitioners, it remains unclear whether these decisions should be of any relevance in arbitration proceedings.

## PGF II SA v OMFS Company 1 Limited [2013] EWCA (Civ) 1288

In *PGF II SA v OMFS Company 1 Limited* [2013] EWCA (Civ) 1288, the claimant freeholder brought proceedings against the defendant tenant for breach of repairing covenants. Both parties made Part 36 Offers and, subsequently, the claimant invited the defendant to refer the dispute to mediation twice. The defendant ignored both proposals. On the eve of the trial, the claimant accepted the defendant's Part 36 Offer, thereby settling the main action.

[1] This followed from its previous decision in *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002 to the effect that the Courts should use their power to support and encourage mediation.

A dispute ensued as to the issue of costs. The defendant would normally have been entitled to most of its costs from the date of its Part 36 offer until the date of settlement. However, the judge at first instance deprived the defendant of its costs for that entire period, on the basis that the defendant's silence in the face of the mediation proposals amounted to unreasonable conduct.

The Court of Appeal upheld the first-instance decision. Having reviewed the decision in *Halsey v Milton Keynes General Trust* [2004] 1 WLR 3002[2] and subsequent case law[3], and considered the publication of the *Jackson ADR Handbook* in 2013 (which followed Jackson LJ's *Review of Civil Litigation Costs*)[4], statistical data concerning the success rate of mediation[5] and relevant Court Guides[6], Briggs LJ held that:

> "*The time has now come for this court firmly to endorse the advice given in para 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds.*"[7]

Briggs LJ identified two policy reasons for his decision:

> "35… *The first is that an investigation of alleged reasons for refusal advanced for the first time, possibly months or even years later, at the costs hearing, where none were given at the time of the invitation, poses forensic difficulties for the court and the inviting party including, in particular, the question whether the belatedly advanced reasons are genuine at all… 37. Secondly, a failure to provide reasons for a refusal is destructive of the real objective of the encouragement to parties to consider and discuss ADR, in short to engage with the ADR process. There are many types of reasonable objection to a particular ADR proposal which, once raised, may be capable of being addressed.*"

The decision in *PGF II* may appear harsh: why should a successful party be penalised in costs for failing to respond to a mediation proposal, when that party was eventually vindicated? However, Briggs LJ did remind practitioners of the guidelines in the *Jackson ADR Handbook* as to the appropriate way of dealing with an unwelcome mediation proposal: litigants and their lawyers should still respond to such a proposal and set out their reasons for the refusal. Bearing

[2] At para. 22. Also see footnote 1, above.

[3] At para. 29.

[4] At para. 30, where Briggs LJ reviewed the advice given in the ADR Handbook as to how a party should decline to engage in ADR to avoid a cost sanction. Also at para. 34

[5] At para. 24 and 25.

[6] At para. 28.

[7] Para. 34.

in mind these guidelines, although costs sanctions for failing to engage in the mediation process should not be automatic, only in *"rare cases"* would *"ADR be so obviously inappropriate that to characterise silence as unreasonable would be pure formalism"*[8] and, therefore, only in rare cases should the silent party escape costs sanctions.

**Thakkar v Patel [2017] EWCA Civ 117**

In light of the Court of Appeal's decision in *PGF II*, practitioners were well advised to recommend to their clients that mediation proposals should not be rejected lightly and, in any event, should never be simply ignored.

Perhaps unsurprisingly in these circumstances, the Court of Appeal slightly expanded the *PGF II* principle in its decision in January 2017 in *Thakkar v Patel* [2017] EWCA Civ 117, where the defendants were penalised in costs for 'dragging their feet' in response to the mediation process.

*The Facts*

The case concerned a dispute for property disrepair and dilapidation, whereby the claimant landlords claimed £210,000 and the defendant tenants counterclaimed £41,875.

In July 2011, the defendants made an offer, expressed to be open for 21 days, to settle for £30,000 on the basis that the defendants would drop their counterclaim. The claimants did not accept the offer and instead, on 12 August 2011, made a Part 36 offer to accept £86,4000 inclusive of VAT in settlement of the claim and counterclaim. The defendants did not accept the counteroffer, nor did they make any further offer. Instead, by a letter dated 12 August 2011, they stated that their previous offer was withdrawn.

Both parties expressed a willingness to mediate. The claimants were proactive in that regard and identified possible mediators for consideration by the defendants. By contrast, the defendants were slow to respond to letters and raised various difficulties.

On 22 August 2012, the claimants wrote to the defendants summarising the parties' conduct in respect of mediation to date and advised that they no longer had confidence that mediation could be arranged. Thereafter, the parties pressed on with the Court proceedings.

On 24 February 2014, the claimants made a Part 36 Offer to accept £40,000 in settlement of the claim and counterclaim, which was not accepted.

[8] At para. 34.

After completion of the trial, the judge awarded £44,933.52 to the claimants and £16,750 to the defendants on their counterclaim, resulting in a balance to £28,183.52 due from the defendants to the claimants.

*The first instance decision on costs*

In November 2014, there was a further hearing on interest and costs.

As to the issue of costs, the judge noted that the defendants' offer of £30,000 was "*well judged*" but did not take effect under Part 36 because it had been withdrawn after 3 weeks. Nevertheless, the judge considered that it was still relevant if it was one which the claimants ought to have accepted within 21 days, although he noted the claimants' argument that they were unable properly to assess the defendants' offer at that stage of the proceedings.

As to the parties' conduct in relation to mediation, the judge summarised the position as follows:

> "*Both parties initially and superficially were willing, so it is not a case of simple refusal or rejection or silence. But looking at the matter overall…, the conclusion I reach is that the claimants were more proactive: The defendants or defendant, particularly, were to say the least apparently relatively unenthusiastic or lacking in preparedness to be flexible. It was… ultimately the claimants who closed matters down and decided to move forward. To some extent, they can be criticised for closing down the process, rather than continuing to press for mediation and going the extra mile and I accept that point. But it must be tempered by the finding already made that the reality is that it was the defendants who were the less keen to participate*."

The judge considered that there were real prospects of settlement had mediation taken place: the claimants' revised offer of £40,000 indicated a willingness to negotiate.

The judged ordered the defendants to pay 75% of the claimants' costs of the claim and ordered the claimants to pay the defendants' costs of the counterclaim.

*The decision of the Court of Appeal*

The defendants appealed the judge's decision on costs. The defendants argued that their offer of 21 July 2011 for £30,000 should have been accepted so that the judge should have ordered the claimants to pay the defendants' costs in relation to the claim from 12 August 2011 (when the offer expired) onwards, not vice versa. The defendants argued that the judge had failed to take into the fact that the claimants had failed to 'beat' the defendants' offer of July 2011.

The Court of Appeal found that the judge at first instance had indeed taken into account the fact that the claimants had failed to beat the offer of July 2011 and, on the facts of the case,

had decided that the claimants did not act unreasonably in failing to accept the July 2011 offer within the 21-day period.

As far as the mediation issue was concerned, the Court of Appeal held that the judge had been "*plainly correct*" in his finding that the case was suitable for mediation, "*for five reasons:*

i *The dispute between the parties was a commercial one. It was purely about money;*

*ii The defendants were willing to pay £30,000. The claimants were, or became, willing to accept £40,000;*

*iii The costs of the litigation were vastly greater than the sum in issue;*

*iv Bilateral negotiations between the parties had been unsuccessful;*

*v Any mediator would have had both parties in the room with him. He would have let them have their say. He would then have pointed out (a) the small gap between their respective positions, and (b) the huge future costs of the litigation. In those circumstances I would be astonished if a skilled mediator failed to bring the parties to a sensible settlement."*[9]

The Court of Appeal also pointed out that the total costs of the litigation were about £300,000, most of which were incurred after August 2012.

The Court of Appeal therefore dismissed the appeal and upheld the original costs order, commenting as follows:

> "*29. In* PGF II SA v OMFS Company 1 Limited *[2013] EWCA (Civ) 1288; [2014] 1 WLR 1386, the Court of Appeal held that silence in the face of an offer to mediate was as a general rule unreasonable conduct meriting a costs sanction. That was so even if an outright refusal to mediate might have been justified. The present case is different. The prospects of a successful mediation were good. The defendants did not refuse to mediate, but they dragged their feet and delayed until eventually the claimants lost confidence in the whole ADR process. The judge held that most but not all of the blame for the abortive mediation lay with the defendants.*
>
> *30. Against that background, the judge ordered the defendants to pay to the claimants 75 per cent of the costs of the claim whilst recovering their costs of the counterclaim. In my view, that was a tough order, but it was within the proper ambit of the judge's discretion. I would therefore dismiss this appeal.*

[9] At para. 27.

> *31. The message which this court sent out in PGF II was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fails but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present case, the costs sanction was severe, but not so severe that this court should intervene."*

Four years after *PGF II* and the publication the *Jackson ADR Handbook*, and 13 years after its decision in *Halsey*, the Court of Appeal confirmed once again that a mediation proposal should not be declined lightly and, in any event, should never be ignored: even when a party makes an offer early on that the other party fails to beat at trial, that will not provide protection for its subsequent failure to engage in the mediation process.

However, the correctness of this approach has been thrown into doubt by the Court of Appeal's decision in May 2017 in *Gore v Naheed* [2017] EWCA Civ 369.

**Gore v Naheed [2017] EWCA Civ 369**

*The facts*

The main action concerned a dispute over an alleged interference with a right of way between the claimant and his neighbours (the defendants).

The defendants offered to refer the dispute to mediation, but this proposal was ignored by the claimant. The matter eventually proceeded to trial.

*The decision at first instance*

His Honour Judge Harris found in favour of the claimant and granted him an injunction against the defendants as well as special and general damages.
The judge also awarded the claimant his costs, despite the fact that the claimant had ignored the defendants' proposal to refer the dispute to mediation. The judge's reasoning was apparently based on the fact the claimant's solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs, and that the case raised complex questions of law which made it unsuitable for mediation.

*The Court of Appeal's decision*

On appeal, the defendants contested, *inter alia,* the judge's decision to award the claimant his costs.

Most of the judgment is concerned with an extensive review of the authorities on the law of easement, but the Court of Appeal also briefly dealt with the issue of costs.

Dismissing the appeal, Patten LJ, giving the leading judgment, held:-

> "*49. Mr McNae* [for the defendants] *referred us to the decision of this Court* in PGF II SA v OMFS Company 1 Ltd *in which Briggs LJ emphasised the need, as he saw it, for the courts to encourage parties to embark on ADR in appropriate cases and said that silence in the face of an invitation to participate in ADR should, as a general rule, be treated as unreasonable regardless of whether a refusal to mediate might in the circumstances have been justified. Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated. But, as Briggs LJ makes clear in his judgment, a failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion.*
>
> *50. In this case the judge did take it into account but concluded that it was not unreasonable for Mr Gore to have declined to mediate. His solicitor considered that mediation had no realistic prospect of succeeding and would only add to the costs. The judge said that he considered that the case raised quite complex questions of law which made it unsuitable for mediation. His refusal to make an allowance on these grounds cannot in my view be said to be wrong in principle*."

Hence, in an apparent departure from its position over the preceding 13 years, the Court of Appeal held that, in circumstances in which a complex question of law was involved and one of the parties' legal advisers considered the dispute to have poor prospects of settling at mediation, it was not unreasonable for that party to ignore a mediation proposal.

**What is the position in light of Gore v Naheed?**

*Gore v Naheed* has no doubt taken many practitioners by surprise and there are many criticisms which could be levied against this decision:

- Firstly, it makes no mention of the *Jackson ADR Handbook* or of the policy reasons which have underpinned the Courts' increasing support for mediation over the past 13 years (including the reasons set out in *PGF II*).

- Secondly, it draws no distinction between the circumstances in which a party provides a reasoned refusal in answer to a mediation proposal, and the circumstances in which a party with legal representation simply ignores a proposal to refer the dispute to ADR.

- Thirdly, it does not deal with the facts that the Civil Procedure Rules encourage the parties to attempt to resolve their dispute through ADR, and also expressly warn litigants against ignoring ADR proposals[10].

- Fourthly, it does not make any reference to the decision of the Court of Appeal in *Thakkar v Naheed*.

- Fifthly, it does not attempt to deal with the fact that the costs of the litigation, on the limited information available, apparently vastly outweighed the damages awarded.

- Sixthly, the Court did not grapple with the obvious point that adversarial litigation was arguably not the way to resolve a dispute between neighbours who co-own a driveway and who must continue to live alongside each other.

- Last but not least, the Court of Appeal did not acknowledge the fact that its decision appears to be a stark departure from the previous 13 years of case law and judicial guidance given to litigants and practitioners as to the approach to adopt in case of an unwelcome mediation proposal. There is little attempt in *Gore v Naheed* to confine that decision to its facts and no recognition of the fact that, just a few months earlier, the Court of Appeal sent a completely different signal as to its approach to failures to engage in mediation. It is one thing for the Courts to change their approach; it is another to replace clarity with grey waters.

**What about arbitration?**

An added layer of difficulties for maritime practitioners is that, even prior *Gore v Naheed,* there were no clear guidelines as to how arbitrators should approach failures to mediate in dealing with the costs of arbitration proceedings. In fact, the LMAA itself appears to be keen to emphasise that the arsenal of cost sanctions available to the Courts to encourage the parties to settle their dispute amicably should not be blindly applied by arbitrators: the 2017 edition of the LMAA terms expressly states that Part 36 Offers are not applicable to LMAA Arbitrations[11].

The fact that arbitrators may take into account 'without prejudice save as to costs' conduct is not, of itself, problematic. It is right as a matter of principle that where, say, a claimant is successful on liability but fails to beat a respondent's settlement offer on quantum, the claimant should not be entitled to its costs from the date of that offer. This is because all costs incurred thereafter would have been avoided had the claimant judged the strength of its position correctly. This is, of course, reflected in the latest edition of the LMAA Terms, in which it is emphasised that arbitrators may take into account "*unreasonable and inefficient conduct*" and "*offers made without prejudice as to costs*" in exercising their decisions as to costs.[12]

[10] See paragraphs 11 and 14(c) of the Practice Direction - Pre-Action Conduct and Protocols for example.

[11] Para 19(b) of the Second Schedule to the LMAA Terms 2017.

[12] Ibid.

However, it is less clear that arbitrators should penalise parties in costs for failing to mediate.

Firstly, most of the policy reasons behind the Courts' support for mediation do not apply to arbitration proceedings. The Courts' support for mediation is part of a broader support for ADR. In this regard, the key consideration from the Courts' perspective is that, whether a dispute is resolved through mediation or arbitration, it does not go on to take up Court time.

Secondly, while the LMAA Terms entitle arbitrators to take into account conduct that is not "*cost effective*" in reaching their decision as to costs, mediation is not always more cost-effective than arbitration. Mediation requires preparation that is often as extensive as the work required to bring an arbitration to conclusion[13].

Thirdly, as arbitration is itself a form of ADR, it is difficult to see why, as a matter of principle, a party who has already agreed to refer a dispute to a structured form of ADR (arbitration) should be subject to cost sanctions if it refuses to entertain the dispute being referred to another structured form of ADR (mediation).

The position may, however, be different where the parties have agreed to an arbitration clause[14] which expressly refers to mediation and anticipates that a party may be penalised in costs in refusing to mediate.

**Conclusion**

In conclusion, there may now be a need for the Courts to clarify whether parties who refuse to engage in the mediation process should be penalised in costs.

Perhaps more importantly, it would also be helpful for maritime practisers to know whether such sanctions are likely to be applied in arbitration proceedings. For these purposes, a consistent approach would obviously be welcome.

The authors' own view is that, while it is generally appropriate for the Courts to punish parties for failing to reply to mediation proposals in Court proceedings, arbitrators should not adopt the same approach. This is subject to two exceptions: firstly, where there are contractual provisions which expressly envisage that either party may refer disputes to mediation (such as the BIMCO Arbitration clause); secondly, where there are exceptional circumstances (such that, for example, arbitrators are able to ascertain that mediation would have been successful and that this would have resulted in savings in costs).
That being said, the authors' experience is that mediation is an extremely successful form of dispute resolution which it is often in the best interests of the parties. By and large, mediation remains less expensive than a fully fledged arbitration, and new forms of mediation (such as

[13] This may particularly be the case where the mediation takes place when the arbitration is well advanced.

[14] Such as the BIMCO Arbitration Clause.

the CEDR and SeaMediation Early Intervention Procedures) make it a more viable option for smaller disputes. Therefore, although not always appropriate, mediation should, in the authors' view, generally be encouraged.

# ASSESSMENT OF DAMAGES FOLLOWING WRONGFUL TERMINATION OF A VOYAGE CHARTER - THE "MTM HONG KONG"

**By Fenella Tookey, Director, Mills & Co. Solicitors Limited**

In a judgment on an appeal brought pursuant to section 69 of the Arbitration Act 1996, Mr Justice Males has set out in the case of the *MTM Hong Kong* [2016] 1 Lloyd's Rep.197 the principles for the assessment of the damages due to an owner following a charterer's wrongful termination of a voyage charter.

**The facts**

The *MTM Hong Kong* ("the vessel") was chartered for the carriage of vegoil from 2 safe ports/berths within a range of load ports in South America to 1 safe berth at 1-4 safe ports in the Gibraltar-Rotterdam range. The vessel was delayed on the approach voyage, because her previous employment had taken her to Boma, a port on the River Congo, where she had suffered a grounding. The Charterers terminated the charter 2 days after the vessel started her approach voyage from Boma towards South America. The Owners commenced London arbitration, and claimed damages from the Charterers for wrongful termination.

**Arbitrators' findings of fact relevant to the issue of damages**

The arbitrators found:

- The vessel completed discharge at Boma and commenced her ballast voyage towards the charterparty loading range on 19th January 2011.

- The charterparty was terminated on 21st January 2011.

- Thereafter, the vessel continued to sail towards South America, which the owners considered to be the most promising area in which to find substitute business.

- The vessel arrived at Punta del Este in Uruguay on 2nd February 2011.

- However, the vessel was not fixed until 24th February 2011, when she was fixed to Glencore for a voyage from San Lorenzo in Argentina to Rotterdam. The vessel was re-delivered out of the substitute charter on 12th April 2011.

- If the contractual voyage had been performed, it would have taken 43.6 days, completing on 17th March 2011. The vessel would then have carried a cargo of

urea ammonium nitrate from the Baltic to the United States, followed by a chemical cargo from the United States to Europe.

– Following completion of the contractual voyage, the vessel would have been able to perform the 2 additional voyages by about the same time that the vessel was in fact re-delivered out of the substitute charter.

– The Owners' decision to direct the vessel to South America in an attempt to obtain a substitute cargo, and to wait there until the Glencore substitute fixture was concluded, was reasonable, even though the Owners had met with an unexpected delay in concluding a fixture. The arbitrators commented that even if a case of failure to mitigate had been pleaded, it *"could not get off the ground"*.

**Usual measure of damages awarded to an owner following a charterer's repudiation of a voyage charter**

The usual measure of damages for repudiation of a voyage charter, established by a sequence of decisions beginning with the decision in *Smith v M'Guire* (1858) 3 H&N 554, is the difference between a vessel's actual and hypothetical earnings up to the date when the vessel should have been re-delivered in accordance with the charterparty terms ("the *Smith v M'Guire* measure").

The object is to compensate the injured party so that so far as possible he is put in the (financial) position that he would have been had the contract been performed.

Accordingly, following a charterer's repudiation of a voyage charter, an owner will generally expect to recover as damages the amount of freight (less expenses) and demurrage which would have been earned from the contractual voyage less what the vessel was actually able to earn by way of substitute business in the period that the contractual voyage would have taken.

**The London arbitration**

Departing from the usual calculation of damages according to the *Smith v M'Guire* measure, the Owners claimed the difference between (a) the profit which the vessel would have earned if not only the contractual voyage but also the subsequent 2 voyages had been performed, and (b) the profit actually earned on the Glencore substitute fixture.

The Charterers argued that the correct approach was to apportion the earnings under the substitute charter so as to reflect the amount earned up to the date on which performance of the contractual voyage would have been completed.

**The arbitration award**

The arbitrators held that the charterparty had been wrongfully terminated by the Charterers, and that the Charterers were therefore liable in damages to the Owners.

As to the assessment of damages, and crucially for the decision in this case, the arbitrators found on the specific facts of the case that:

- the difficulties which can commonly arise in determining what a vessel's future employment would have been, had the contract not been terminated, did not arise in this case;

- the loss claimed had actually been suffered by the Owners.

Furthermore, the arbitrators "*…agreed with…Owners that there is no rule of law which requires that assessment of the damages due to an owner must be made simply by reference to what would have been earned under the repudiated charterparty and that* ***it is therefore permissible to look beyond the date on which the repudiated charterparty would have ended*** *if to do so enables an arbitration tribunal to more fairly judge the loss actually suffered by the innocent party for the purposes of applying the compensatory principle*" (paragraph 121 of the arbitrators' award; our emphasis).

The arbitrators determined that a fair application of the compensatory principle was to award additional damages to the Owners which would compensate them for the profit which would have been earned on the additional 2 fixtures which, if the contractual voyage had been performed, the vessel would have been able to fulfil by the time that the vessel was in fact re-delivered out of the substitute charter.

On the *Smith v M'Guire* measure of damages, the Owners would have been awarded US$478,386.80. However, the arbitrators awarded the Owners US$1,212,316.50.

**The appeal**

The Charterers did not challenge the arbitrators' decision as to liability.

However, they appealed pursuant to section 69 of the Arbitration Act 1996, with the permission of Mr Justice Eder, arguing that the arbitrators had made an error of law in failing to award damages in accordance with the *Smith v M'Guire* measure.

The question of law arising from the arbitrators' award, for which permission to appeal was given, was:

*"If a voyage charter is repudiated by charterers in circumstances where the substitute employment begins after the contract voyage would have begun, and ends after the contract voyage would have ended, should damages be assessed by reference to the vessel's (actual and hypothetical) earnings up to the end of the contract voyage, or such earnings up to the end of the substitute employment?"*

The Charterers contended that:

- damages should be assessed by reference to the vessel's actual and hypothetical earnings up to, but not beyond, the date when the contractual voyage would have ended;

- such was the usual measure, and there was no justification for departing from it on the facts of the case.

The Owners submitted that damages should be assessed so as to most fairly compensate them for the loss which they had suffered.

**Judgment of Mr Justice Males**

The judge found that the arbitrators had intended to compensate the Owners for:

- profit lost in consequence of the wrongful termination of the charterparty, by employing the usual measure of damages; and also

- losses suffered by reason of the vessel being delayed in returning to trade between the United States and Europe (which was a more profitable employment), such delay having resulted from the Owners' attempts reasonably to mitigate their losses by seeking a substitute fixture in South America.

In order to determine the question of law for which permission to appeal was given the judge reviewed:

- the decisions in *The "Concordia C"* [1985] 2 Lloyd's Rep 55, *The "Noel Bay"* [1989] (CA) 1 Lloyd's Rep 361 and[*The "Elbrus"* [2009] EWHC 3394 (Comm), [2010 ] 2 Lloyd's Rep 315; and

- leading textbooks, specifically paragraph 19-025 of the 22nd edition of *Scrutton on Charterparties,* 22nd edition and paragraphs 21.96-21.97 of the 4th edition of Cooke on *Voyage Charters*.

The judge considered the submissions made by the parties as to remoteness and assumption of responsibility. Thereafter, he set out the following principles for the assessment of damages due to an owner following a charter's wrongful termination of a voyage charter:

- The judge confirmed that the fundamental principle in assessing damages is the compensatory principle.

- The *Smith v M'Guire* measure represents the *prima facie* measure of damages for loss of the profit which would have been obtained in the performance of the contractual voyage.

- In most cases it will not be necessary, and indeed would be wrong, to look beyond the damages calculable upon the application of the *Smith v M'Guire* measure.

- The judge found that there was no legal principle articulated in previous decisions which prevented the arbitrators from making their award of additional compensation, holding that, on the facts of this case (as in *The "Elbrus"*), it may be necessary to go beyond the *Smith v M'Guire* measure in order to give full effect to the compensatory principle.

- The judge was careful to emphasise the need for caution in ensuring that losses should be sufficiently proved: "*If proof of such losses requires complex hypothetical calculations about the future employment of a vessel, the tribunal of fact is likely to conclude that they are too speculative to be recovered. The more complex the calculation, the less likely the claim is to succeed*".

The judgment makes plain that there were particular factors which were important to the Owners' success in this case (which would not necessarily be present in other cases):

- Even though the Owners had sought a substitute fixture in an area (South America) where the available employment was less profitable than the trade between the United States and Europe, and where in fact they were unable to obtain any employment for some time, factual findings were nevertheless made that the Owners' decisions were reasonable. Males J was satisfied that, in this case, the additional losses were caused by the Charterers' wrongful termination of the charterparty, rather than (as might have been the case) the Owners' failure to take reasonable mitigating steps.

- There had been no suggestion in the arbitration proceedings that the losses were too remote.

- It had been possible to predict with unusual certainty what the vessel's immediate future employment would have been if the contractual voyage had been performed.

– The arbitrators had also been able to find as a fact that if the 2 fixtures subsequent to the contractual voyage had been performed, they would have taken the vessel back to the same location at about the same time as completion of the actual substitute fixture.

**Comment**

It is crucial to remember that the judge decided that it was not possible to give an answer to the question of law posed in the appeal (quoted at paragraph 15 above) which would apply to all circumstances.

The judge held that the question could be answered only on a case-by-case basis in accordance with the principles set out in the judgment (summarised above).

Accordingly, although the case demonstrates that future trading losses may be taken into consideration when assessing damages for wrongful termination of a voyage charter, the assessment of compensatory damages is always going to be heavily fact-dependent.

# THE "GLOBAL SANTOSH" – AGENTS ON A LEASH

**By Brian Perrott, Partner, HFW**

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The 2016 Supreme Court decision in the *Global Santosh (NYK Bulkship (Atlantic) NV v Cargill International SA.)* was of some significance to the shipping industry, in which many contracts are governed by English law.

The decision brought finality to a dispute dating back to 2008, involving the mistaken arrest of a vessel in Nigeria and a delay in cargo discharge by third parties. The dispute revolved around the allocation of risk between the owners and charterers of the *Global Santosh* and how this was addressed in the charterparty.

As well as being a decision of importance to the shipping industry, it is also one of wider intrigue to the legal industry in general; being a case which began life in LMAA arbitration and progressed to the UK's highest court over four years later.

A lot can happen in four years, and this case was a glaring example of the ups and downs involved in bringing a case to a final resolution in the Supreme Court- the parties each prevailing and failing at some stage in the appeal process.

**Background**

NYK time-chartered the vessel to Cargill on an amended Asbatime form. The dispute arose out of a proviso contained in clause 49 of the charterparty. Clause 49 provided:

> *"Should the vessel be captured or seized [sic] or detained or arrested by any authority or by any legal process during the currency of this charterparty, the payment of hire shall be suspended until the time of her release,* ***unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the charterers or their agents*** *. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for owners' account."*

The factual matrix leading the dispute surrounding this clause is as follows. Cargill sub-chartered the vessel to Sigma Shipping Ltd ("Sigma"). The vessel carried a cargo of cement to Nigeria; being one of six cement shipments sold by Transclear S.A. ("Transclear") to IBG Investments Ltd ("IBG"). Although not entirely clear-cut, the majority of the arbitrators found it likely that Transclear were sub-sub-charterers of the vessel.

In accordance with the sale contract concluded as between Transclear and IBG, IBG were responsible for unloading the cargo, for which demurrage was payable to Transclear in the

event of delay exceeding the allowable laytime specified in that contract.

The vessel tendered NOR on arrival at Port Harcourt but was held at anchor for over two months as a result of congestion. This was in part caused by the breakdown of IBG's off-loader. When the vessel eventually did proceed to berth, she was rejected by the port authority because of an order made by the Federal High Court of Nigeria, which came about as a result of an application brought by Transclear to secure a demurrage claim against IBG. What should have been arrested was only the cargo, however, as a result of a mistake, the order additionally named the vessel as a subject of arrest.

Subsequently, Transclear and IBG reached an agreement with respect to the outstanding demurrage and the vessel eventually proceeded to berth and discharged the cargo.

Cargill withheld hire for the period of arrest, in reliance on clause 49. In response, NYK relied on the proviso contained therein, i.e: "*unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the charterers or their agents*."

NYK's reliance on the proviso was rejected by the majority of the Tribunal.

**The High Court**

NYK were given leave to appeal in relation to the proviso.

It was held that the proviso was only applicable where the act, omission or default of the agent arose with regard to a delegated task, in this case the discharging of the cargo.

It was held however that IBG's failure to unload the cargo within the allowed laytime, and to pay or secure demurrage, did occur in performing discharge and that, ultimately, this was something that had been delegated to IBG by Cargill. It was therefore held that IBG were agents of Cargill in accordance with clause 49.

The High Court remitted back to the Tribunal the question of whether IBG's failure to unload within the laydays occasioned the arrest.

**The Court of Appeal**

The Court of Appeal rejected the requirement for the act, omission or default of the agent needing to arise in the performance of a delegated task. It was held that it was only necessary for the third party to be acting as an agent.

The court found that both Transclear and IBG were Cargill's agents in the circumstances leading to the arrest. They found that Cargill were responsible for everything which arose from their trading arrangements concerning the vessel. This included their decision to sub-charter

the vessel to Sigma- which gave rise to the subsequent dispute between Transclear as sub-sub-charterer and IBG. Gross LJ stated:"… *the dispute between Transclear and IBG fell – and fell clearly – on Cargill's side of the line, with the result that hire continued to run over the relevant period*…"

Cargill appealed.

**The Supreme Court**

The Supreme Court (by a majority) agreed with the decision of the arbitrators, finding in favour of Cargill.

It was held that Tranclear and IBG would be agents of Cargill in some instances, namely if the acts or omissions leading to the arrest were "*by way of vicarious enjoyment of Cargill's contractual rights or vicarious performance of its obligations*."

However, it was also found that the arrest of the vessel was not occasioned by the parties when acting as Cargill's agents. This was a result of an insufficient "nexus" or connection between the occasion for the arrest, i.e. unpaid demurrage and delayed discharge, and the performance of functions by agents of Cargill.

Lord Sumption stated: "… *not everything that a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter.* ***There must be some nexus between the occasion for the arrest and the function which Transclear or IBG are performing as "agent" of Cargill***."

It was therefore found that the vessel was off-hire throughout the period of arrest.

**Comment**

The Supreme Court's decision provides welcome clarity, with previous decisions indicating that any party to whom charterers delegated an obligation, either directly or indirectly, could be potentially classified as agents at all times.

The Supreme Court's approach, i.e. focusing more on what actually occasioned the arrest and its connection to the functions performed under the charterparty- the "nexus" test, will no doubt be welcomed by the chartering community.

# THE TERM "ONE TIME CHARTER TRIP" CONSIDERED

**By Alex Askew, Partner, Jackson Parton Solicitors**

In the case of *the Wehr Trave* [2016] EWHC 583 the Commercial Court considered the meaning of the term "*one time charter trip*". After providing some useful general insights into the nature of a time charter trip, the Judge concluded that, ultimately, little guidance can be obtained from those words alone. The scope of any "trip time charter" will depend upon the particular terms agreed between the parties.

**The Charterparty**

The charterparty (an amended NYPE 1946 form) provided as follows:

> *"That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for one Time Charter trip via via [sic] good and safe ports and/or berths via East Mediterranean/Black Sea to Red Sea/Persian Gulf/India/Far East always via Gulf of Aden, with steels and/or other lawful/harmless general cargo, suitable for carriage in a cellular container vessel as described."*

**The Facts**

In brief, the vessel was delivered in the Black Sea where she loaded cargoes at three ports (Sevastopol/Avitla, Novorossiysk and Constantza/Agigea).

She then proceeded on her route, discharging at one port in the Red Sea (Jeddah), one port in the Gulf of Oman (Sohar), and three ports in the Persian Gulf (Hamriyah, Jebel Ali and Dammam).

After completion of discharge at Dammam, the Charterers ordered the vessel to proceed to Sohar (Oman) in order to load a project cargo for delivery at New Mangalore or Cochin (West Coast of India).

**The Question of Law**

The question of law for the purposes of the appeal was as follows:

On the true construction of the Charter, was the Charterer under a "*one time charter trip*" charter, after the vessel had discharged the entirety of all previous loaded cargo, entitled to order the empty vessel to another load port (Sohar) and discharge port to perform a further trip/voyage or only to order the vessel to proceed to the agreed charter redelivery place having

completed the agreed one time charter trip?

The arbitration tribunal concluded that Charterers were entitled to order the Vessel to load another cargo.

On appeal, the Owners submitted that the Charterers' were entitled to load in "eastmed/blacksea" (where in fact she did load - Sevastopol, Novorossiysk, Agigea) for a trip to "redsea/pg/india/far east" (where in fact she did discharge - Jeddah, Hamriyah, Jebel Ali, Dammam) but that the Charterers were not entitled to load in "red sea/pg/india/far east". The "trip", it was submitted, came to an end with the conclusion of the cargo carrying journey (i.e. at Dammam) and the entitlement to load cargo came to an end with that trip.

**Decision**

The appeal was refused. The Court agreed with the tribunal and held that the Charterers were entitled to order the vessel to load further cargo at Sohar. Specifically, that:

1 The Charterers were not (as a matter of language) restricted to loading the vessel at a single port; and

2 That the Charterers were, in principle, entitled to call at such ports as they wished provided that the calls were within the trading limits and the route was not inconsistent with the contractual route.

Although the Judge was emphatic that the question for the Court was a narrow question of construction of the specific charter and that it was not the place to perform an exhaustive analysis of the differences between the various types of charter, the following observations were made:

1 Time charters can be divided into two main categories: (1) term time charters where the charter period is agreed in advance, and (2) trip time charters where the charter period is defined by a trip within a geographical range. In both cases, the defining characteristic of the charter is that the vessel is under the directions and orders of the charterer as regards her employment for the charter period. The judge referred to observations of Popplewell J in *Martrade Shipping & Transport GmbH v United Enterprises Corporation (The Wisdom C)* [2014] 2 Lloyd's Rep 198 at paragraphs 29 and 29, and to the judgement of Lord Denning in *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia) [1963] 2 Lloyd's Rep 381*, for a general characterisation of a charterer's rights under a trip time. In the words of Popplewell J:

"*It is the charterer who determines what voyages the vessel is to undertake and what cargo it is to carry, within the geographical and other constraints contained in the particular charterparty clauses . . . What matters is that the charterparty is not in*

*nature an undertaking by the owner to carry goods, but an undertaking by the owner to make available to the charterer a vessel and crew for the latter to employ in transporting goods*".

2 From a charterer's perspective one of the advantages which a time charter (including a time trip time charter) has over a voyage charter is that voyage orders under a time charter do not constitute an irrevocable election. The Judge made reference to the comments of Donaldson J *in Segovia Compania Naviera SA of Panama v R Pagnan & F.lli of Padova* (*The Aragon*) [1975] 1 Lloyd's Rep 628 where he stated that it was "*wholly foreign to the whole conception of a time charter-party, which entitle[s] the charterer upon paying the hire to call upon the vessel to visit any port or ports which he wishe[s] within trading limits subject to any express agreement to the contrary*".

3 A charterers' entitlement to give orders may be restricted by agreement between the parties. For example, the period, the trading limits, the geographical route and even possibly the number and designation of loading and discharging ports or ranges may be delimited. However, it is clear that any such restriction would have to be specifically agreed and would require clear words. The words "one trip" or similar are not sufficient to restrain the number of load or discharge ports.

4 In general terms, the concept of a "*trip time charter*" may embrace any number of possible permutations of load and discharge ports all of which can be described as a single "trip". It is therefore not possible to provide a single definition of what constitutes a "trip".

5 Charterers are not permitted to give orders for the vessel to proceed outside any stipulated trading limits or to give orders which otherwise would be inconsistent with the contractual route (presumably this would include significant doubling back). Such trading limits and the defined contractual route prevent a time charter trip from being "open-ended".

**Comment**

In light of this judgement it is clear that when entering into a time charter trip owners and charterers should have in their mind the fact that a time charter trip is a form of time charter and, despite the label "trip", should not be thought of in voyage charter terms.

The fact that *one* time charter trip has been agreed (with the emphasis on 'one') does not, without more, prevent a charterer from loading and discharging more than one complete cargo.

It is necessary to consider carefully and expressly define the limits of the intended “trip”; not only the particular route or any geographical restrictions but also the number/permutation of permitted load or discharge ports and any other intended restrictions on charterers’ entitlement to give orders. It is from the express restrictions, rather than any epithet, that the nature and scope of a particular time charter trip can be ascertained.

# FREIGHT, HIRE AND HAPPENSTANCE - A DECADE OF CHANGE?

**By Carlo Sammarco, Director, Campbell Johnston Clark**

During the last ten years much has been written on the disadvantageous state of the maritime industry, with low soft commodity and now also oil prices, poor freight and hire rates, and excess tonnage forcing newbuilds directly into lay-up. This has been a regular theme for legal analysts in setting the context of numerous decisions, especially those concerning time-based contracts, as tribunals and courts have grappled with frontier thinking and shrill challenge to perceived settled law. However, a noticeable by-product of the depressed market has received surprisingly little commentary, and this article addresses that.

Since 2007 four cases in particular, all with similar factual bases and resounding names, exemplify but by no means capture a detectable trend that goes far beyond mere putting to strict proof and nit-picking points on title to sue. It is nothing more - and nothing less - than juridical *jiu-jitsu* practised on the compensatory principle, that damages should make it as if the contract had been performed. It turns defence almost into attack by persistent focus on what happened, or supposedly *would have happened*, after breach, and seeking to take advantage of that.

Judging only from published commentary, three of these cases are very well-known and the other - the third in date order - slightly less so. They are (i) *The Golden Victory* [2007] UKHL 12 (ii) *The Glory Wealth* [2013] EWHC 3153 (iii) Glory Wealth Shipping v Flame SA [2016] EWHC 293 and most recently (iv) *The New Flamenco* [2017] UKSC 43. I first look at (i) and then (iv), as many people think they are decisions along the same lines, though they are not.

**The Golden Victory**

This was the battle royal on whether events after a repudiatory breach can be considered in assessing damages. A narrow House of Lords' majority held that they can, and that upholding the compensatory principle outweighs long cherished notions of certainty and finality.

In familiar précis, a provision in a lengthy time charterparty allowed both sides to cancel if there was war between various countries. The Owners' large claim following the Charterers' wrongful redelivery succeeded on liability, but before damages could be assessed the Second Gulf War broke out.

The Charterers then said that if the charterparty had subsisted they *would have* invoked that clause and cancelled - at least a plausible position, if only as happily consistent with redelivery several years prematurely, but none can say for sure - so damages should be calculated on that

supposed basis. The majority agreed that damages are usually assessed at the time of breach, but said that was not an absolute requirement, and in applying the compensatory principle a relevant contingency that *would have arisen* should be taken into account. The Owners thus lost a substantial amount due entirely to happenstance. At the time of redelivery, a reasonably well-informed person would have considered war only a possibility. It cannot credibly have been a motive power when the Charterers handed back the vessel. They sought simply to jettison as much liability as possible in an unfavourable market. Later, an unconnected event luckily cropped up during the procedural life of the claim. It allowed the Charterers a windfall gain, founded on what could only ever have been an assumption of what their position would *really* have been at the relevant time.

**The New Flamenco**

One can perhaps understand some comparison with *The Golden Victory*, as this recent case sought to set the very same cat among the mitigation pigeons.

The case is considered in more detail elsewhere in this Review. In brief, the Owners sought unrecovered hire, less operating costs, after termination by acceptance of the Charterers' breach. But they sold the vessel soon after, getting more than (on what must have been an assumed or somehow agreed basis) they would have done following performance of the fixture. As such, the Charterers claimed credit for a capital value differential which - arguably entirely theoretically - arose only from market movement afterwards and would have extinguished the Owners' claim.

This time the Supreme Court rejected the argument, highlighting causation:

"*The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit [in issue] must have been caused either by the breach ... or by a successful act of mitigation*."

The Owners' sale was not an act in mitigation, and the price difference was not caused by the Charterers' breach but by the Owners' decision to sell when they did, and by a later drop in the market.

The decision itself is straightforward, but it offers no clear, guiding rationale. It does however sound another warning of the difficulties that can emerge from market or other changes after a claim arises but before it has been finally determined. As here, such might offer a defendant a hindsight chance to attach a gain (here, reverse-engineering avoidance of a *loss*) to his own breach. Plainly even the most meritorious claimant must now take great care in whatever he does following breach of a term contract.

**Glory Wealth**

The 2013 transit of this case from tribunal to High Court reveals another tale of much the same stamp. Here the Charterers had defaulted under a COA, again due to market difficulties. However, they sought to argue that, although the Owners' acceptance of their repudiatory breach ended the contract, nevertheless they could validly counter that (due to similar financial troubles) *as things would have turned out* the Owners would not have been able to perform anyway. So, applying the compensatory principle, they should not recover. In reply, the Owners cited settled law that where a contract ends as it did here the innocent party is excused further performance.

The judge followed *The Golden Victory* in holding that Owners were required to prove that, if there had been no repudiation, they *would have been able to perform* when called upon.

This case was considered in the LMAA Law Review 2013-2015 and is mentioned as a prelude to what followed, as probably the best example of challenge by reference to *what would have been* a counterparty's own position, and with the pointed caveat that, but for the tribunal finding that the Owners could have performed when necessary, the Charterers' argument would have succeeded.

**Glory Wealth Shipping v. Flame SA**

In 2016 the focus was again on what happened long after breach, but in a quite different way. This case likewise considered the compensatory principle, but this time with the boot very much on the other foot.

The Owners' financial difficulty, which had previously founded the Charterers' unsuccessful challenge to their ability to perform, continued. They became insolvent in 2009 and were described by the tribunal as "deeply insolvent" by 2011. Seeking to safeguard assets from creditors and avoid Rule B attachment in New York, the Owners used two companies, owned by some of their own directors. These received all inward freight under the COA and paid any related outward sums.

Now assessing damages, and applying the compensatory principle, the tribunal decided that a monetary award would give the Owners an unjustifiable gain. The Charterers' breach had not occasioned any loss, because under the purposive arrangements that the Owners had made they would not have received any freight - it would simply never have been transferred to them by either of the companies - so the award was nil.

The tribunal also found that what the Owners had done amounted to turpitude. There was dishonest concealment from creditors, and also from the Singapore Court when it approved a Scheme of Compromise and Arrangement for the Charterers. However, as this was merely incidental to the Owners' performance of the COA the Charterers' case on illegality failed.

There was no challenge to these findings, and it is perhaps surprising that naked fraud did not somehow wholly unravel the Owners' position.

On appeal the Owners argued that they had the right to receive the freight under the COA, and the Charterers' breach deprived them of that, hence they had suffered a loss readily quantifiable as the gross freight less the cost of earning it. The judge valued the net freight at about US$3m, and held that the Owners' rights included the right to dispose of the fruits of the right to receive the freight. The Owners had thus suffered a quantified loss and should be compensated.

It did not seem to matter that a structure whose sole rationale was to insulate these funds meant that the Owners could be duplicit in saying to creditors that they had never received them, yet claim them as a loss from the Charterers. Postulating, let alone pricing, entitlement *to dispose of the fruits of a right to receive freight* surely skates over the very thinnest logical ice when the whole idea was that the Owners would never acquire the cash - the only relevant subject of rights whose disposal was said to carry value. Furthermore, it is not usual to see a claim succeed against a background of turpitude and overt judicial lack of enthusiasm about unattractive arguments and dishonest concealment.

**Commentary**

Since 2007, and certainly 2008, the maritime market has been in difficulty. Some household names have disappeared, or are fast doing so, and many others are struggling. Increasingly one hears that, while peaks and troughs have come and gone, this time it is different, as there is no harbinger of recovery. Plainly this will give rise to continuing claims, in response to default or attempts to cut losses.

But another new feature is parties often seeking to engage hindsight in summoning the very spirit of the market that has caused them trouble, either arguing that all should be examined retrospectively in ways that none could have foreseen, or finding shelter behind devices, with the courts reacting sometimes with reluctance, but frequently with indulgence nevertheless.

Reference might be made at this point to Teare J.'s judgment in *The Elbrus* [2010] 2 LLR 315 - a decision which not only looked at *The Golden Victory* but was also referred to in the *New Flamenco*. All the other cases above involved to some extent or other an element of crystal ball gazing. Although *The Elbrus* appears on its facts to also involve some speculation – ie the reference to the Charterers' "permutations and schedules" – this was not, in reality, the case. *The Elbrus* involved an early redelivery. The tribunal found that the early redelivery had conferred a benefit upon owners (ie being able to drydock earlier than scheduled and thereafter be delivered under a more lucrative time charter with Navimed) and that this "benefit" should be factored in when assessing the losses claimed by the Owners for the breach. As the Navimed charter had been fixed prior to the breach (and may even have been a factor when the Charterers decided to redeliver earlier) the "permutations and schedules" did

not involve much speculative assessment. Instead they focussed on how quickly the vessel could be ready for delivery to Navimed having completed the 2 week drydock required by the Navimed charter prior to delivery at the least cost to the Owners (ie by way of lost hire during the vessel's downtime). The exercise was straightforward and was very much based on actual facts and figures. The tribunal was able to make an informed decision that on any "permutation" the Owners had benefitted financially as a result of the breach.

The tribunal were aided by some "loaded dice" in *The Elbrus* – it was easier to see where the losses would fall. Unfortunately, the assessment of loss will not always be as straightforward, the facts of *The Elbrus* being the exception rather than the rule. Certainly, from the view of a legal adviser, the job of accurately assessing the likely damages arising from a breach remains difficult and a hazard of such an unpredictable maritime environment.

With one possible exception it is not suggested that any of the above decisions are *wrong*. Nor is there suggested a fault line in English jurisprudence. It does however seem that the present market conditions have brought new thinking and different tactics, such that acting and advising after breach of a term contract is now difficult as never before. Certainty and finality have to some extent been usurped by what is sometimes puzzling indifference to artifice and sophistry, and enthusiasm for unpicking straightforward claims according to what later happened, or is alleged would have. There are obvious dangers, here.

*Hadley v Baxendale* remains good law. Its second limb confines recoverable damages to the parties' reasonable contemplation when the contract was made. But steadily, almost imperceptibly and certainly ironically, its reach has been shortened by increasing hindsight analysis of matters that nobody thought of at that time, or for long after, but which handily arose following breach and offered opportunity. In general life one can sometimes confidently predict how things would have gone in different circumstances, but few can reliably soothsay the outcome if - the touchstone, here - there had been performance rather than a breach. One day a loud halt will be called.

# BULK CARGO LIQUEFACTION AND THE RIGHTS AND OBLIGATIONS OF OWNERS AND CHARTERERS IN A TIME CHARTER

**By Nicholas Woo, Partner and Tom Hodges, Associate, Birketts LLP and Nevil Phillips, Barrister, Quadrant Chambers**

## 1 Introduction

1.1 This article considers the key legal issues arising in two situations:

1.11 Where a cargo tendered for loading or which has already been loaded is purported to be prone to liquefaction; and

1.12 Where a cargo loaded onto a vessel is purported to have liquefied resulting in the loss of the vessel or another form of serious incident (for example where the vessel develops a severe angle of loll and has to be escorted to port or beached).

1.2 Whether a cargo has liquefied or is prone to liquefaction is a question of fact to be determined by experts. The factual evidence is of course central to any legal action. Unfortunately, when a vessel is lost it is often very difficult to prove conclusively whether liquefaction was the cause and so a Tribunal will rely on expert opinion in order to determine whether, on the balance of probabilities, liquefaction was to blame. Where a purportedly 'dangerous cargo' has been tendered for loading or loaded and the vessel has not been lost, it will, self-evidently, be easier to establish the facts.

## 2 What is 'Dangerous Cargo'?

2.1 The term has a broad meaning both under the Hague Rules and in English law. Article 4 of the Hague Rules defines a dangerous cargo as "*goods of an inflammable, explosive or dangerous nature*".

2.2 It was held by the House of Lords in *The Giannis NK* [1998] A.C. 605 that the word 'dangerous' "*does not require the goods to cause or be capable of causing direct physical damage to persons, the ship or even to other cargo*". It refers "*to cargo which directly or indirectly causes some sort of physical damage to life, the ship or other cargo, or raises a threat of it, leading to delay and/or other expense for the carrier*".

2.3 In the vast majority of cases where a cargo poses a risk of liquefaction, there will be a direct risk to human life and the vessel, so the cargo will clearly be dangerous. It is therefore very important to determine, with a high degree of certainty, whether a liquefaction risk is present.

## 3 Obligations of the Charterer

3.1 In the absence of an express provision to the contrary in a charterparty, a charterer is under a strict liability to only load safe cargo onto a vessel, even if there is no positive requirement in the charterparty. Under English common law the "*shipper undertakes not to ship goods which are liable to cause damage to the vessel or other cargo shipped thereon without giving notice to the shipowner of the character of the goods*" (*The Giannis NK* [1994] 2 Lloyd's Rep 171). This obligation is absolute as is the liability of the charterer under Article IV Rule 6 of the Hague Rules.

3.2 However, it is well-established that, under the Hague Rules, cargo will only be "*dangerous*" where it poses a risk of *physical* damage to something other than itself; the mere risk of liability to a third party or delay will not suffice. Even at common law, cargo will not qualify as dangerous in any "legal" sense unless its loading, carriage, or discharge is such as to involve a violation of the law of the land of the place to which it was to be carried or the violation of or non-compliance with some municipal law of direct relevance to the carriage or discharge of the cargo (*The Darya Radhe* [2009] 2 Lloyd's Rep. 175).

3.3 The various charterparty forms impose further obligations on the parties in terms of their obligations relating to loading, stowage and discharge. Under the NYPE form, for example, the primary responsibility for loading, stowing and trimming the cargo lies with the charterer.

3.4 Any liability for improper stowage will also lie with the charterer as confirmed by the House of Lords in *Court Line v Canadian Transport* [1940] 67 Ll.L.Rep.161 in which it was established that the words "*under the supervision of the Captain*" do not prevent the charterer having primary responsibility under the New York Produce form for loading and stowage. However, if the Master actually supervises the loading/stowage and loss or damage is caused by that supervision, the owner will be liable despite the fact the primary responsibility is upon the charterer.

3.5 There will often be included in the riders to the charterparty a specific obligation for the charterer to provide the Master with any evidence he may reasonably require to show that the cargo is packed, labelled, loaded, stowed, carried and discharged in accordance with the International Maritime Organisation (IMO) International Maritime Dangerous Goods (IMDG) Code, requirements and recommendations including the International Maritime Solid Bulk Cargoes (IMSBC) Code. If the charterer fails to provide this evidence, the Master may be entitled to refuse to load the cargo, or if already loaded, to unload it at the charterer's risk and expense.

3.6 The primary aim of the IMSBC Code is to facilitate the safe stowage and shipment of solid bulk cargoes by providing information on the dangers associated with the shipment of certain types of solid bulk cargoes and instructions on the procedures to be adopted when the shipment of solid bulk cargoes is contemplated. The IMSBC Code entered into force on 1 January 2011 and was updated in 2012 and 2016.

3.7 The charterer is also responsible for obtaining any special documentation pertaining to the cargo for any cargoes covered by the IMO Codes. For example, under the IMSBC Code cargo information shall be confirmed in writing and by appropriate shipping documents (where required) prior to loading. The IMSBC Code includes an example of a form for use as a Cargo Information Sheet (CIS).

3.8 Section 1.2.1 of the Code sets out the Shipper's obligation to provide the owner, Master or owner's agent with certain information about the cargo, set out in section 4.2. This information should include "*current valid information from the shipper on the physical and chemical properties of the cargoes presented for shipment.*"

3.9 At section 1.2.2, reference is made to Appendix 1 which contains a list of common solid bulk cargoes which must be transported in accordance with the general provisions set out in sections 1 to 11, and the specific requirements set out in the individual schedule for the particular cargo. The individual schedules set out a description of the properties of the cargo in question. If the properties of the cargo fall outside the parameters described in the schedules, then this must be drawn to the owner's attention in the CIS and may affect the cargo's classification as a class A, B or C cargo.

3.10 Section 1.3 sets out the requirements for cargoes not listed in Appendix 1. For these cargoes, the shipper is required to provide the 'Competent Authority' of the port of loading with the characteristics and properties of the cargo in accordance with section 4. 'Competent Authority' is defined within the Code as, "*any national regulatory body or authority designated or otherwise recognized as such for any purpose in connection with this Code.*" The Competent Authority will then "*assess the acceptability of the cargo for safe shipment*". In doing so, it will consider whether the cargo should be classified as a group A, B or C cargo:

3.10.1 Group A cargoes are those which may liquefy if shipped at a moisture content in excess of their transportable moisture limit (or TML);

3.10.2 Group B cargoes are those which possess a chemical hazard which could give rise to a dangerous situation on board a ship; and

3.10.3 Group C cargoes are those which are neither liable to liquefy not to possess a chemical hazard.

3.11 For the purposes of this article, we are concerned with whether cargoes fall into Group A or Group C only. The process of determining whether a cargo is a Group A or a Group C cargo begins with the CIS, which is the form that the shipper gives to the owner, setting out the description of the cargo. It goes without saying that it must be filled out accurately.

3.12 If the properties of the cargo fall within the parameters set out in the individual schedule for that cargo set out in Appendix 1, then determining which group the cargo falls into is straightforward – it will be as set out in that schedule. However, if the properties (for example particle size or water content) fall outside those parameters, determining the classification of the cargo will be more difficult.

3.13 For Group A cargoes, a signed certificate of the cargo's transportable moisture limit (TML) (i.e. the level of moisture that it is considered can safely be present in a Group A cargo before liquefaction becomes a risk) and declaration of the moisture content must be provided in advance of loading, together with the CIS.

3.14 It is essential that the CIS provided by the charterer is accurate. If the cargo is typically in Group C (not prone to liquefaction) but the shipper issues an inaccurate CIS, the charterer may still be in breach of the charterparty and/or the IMSBC Code. For example, if the moisture content of a Group C cargo is stated on the CIS as being lower than it in fact was, the accusation will often be that the cargo was prone to liquefaction and should really have been classed as a Group A cargo. If the cargo should have been classed as Group A, the charterer will have loaded a dangerous cargo and will be in breach of the charterparty and/or the IMSBC Code.

3.15 However, moisture content is only one of a number of factors that indicate the propensity of a cargo to liquefy and the owner will need to convince a Tribunal that the inaccurate information on the CIS in respect of the moisture content was causative of any loss (either loss caused by delay or the loss of the vessel). This will be a challenge particularly when the vessel has been lost and adequate samples were not taken from the cargo before the vessel departed. In addition, there is nothing in the Code as it currently stands that suggests a Group C cargo can be re classified as a Group A cargo in certain circumstances.

**4 Owner's Right to Claim**

4.1 Where liquefaction is concerned, it is likely that any claim from the owner will fall into one of two main types:

4.11 A claim for time lost; or

4.12 A claim arising where the vessel is lost or capsizes.

4.2 The owner's prospects of success with both types of claim will turn upon the question of whether the charterer was in breach of the charterparty and/or the IMSBC Code and/or SOLAS 1974 in tendering for loading the cargo in question.

4.3 Claims based on time lost will arise where there has been a delay arising from a cargo that the owner perceives might pose a risk of liquefaction. The circumstances might arise where the charterer fails to accurately declare the cargo in the CIS, or perhaps where the cargo is accurately declared as a Group A cargo, where this was not allowed under the terms of carriage.

4.4 If the CIS is inaccurate, the Master may order that the cargo is discharged and a new cargo loaded to accurately reflect the CIS. In these circumstances, any time lost is likely to be for the charterer's account.

4.5 However, whether the CIS was accurate is a matter of fact and can only be determined by sampling and testing the cargo. If it transpires that the CIS was accurate, the charterer may be exonerated and the owner's claim may fail and/or the charterer may be entitled to off-hire or damages in respect of any time lost as a result of the owner's failure to follow legitimate orders.

4.6 If a cargo is found, as a matter of fact, to be dangerous after loading and this causes a delay, under a time charter, the owner will have a claim for hire and bunkers (under a voyage charter, the demurrage provisions will apply). In addition, there may be a claim for market losses in the event a vessel is re-delivered after its redelivery date

4.7 These claims can be significant. Once cargo is on board it can take weeks or even months to discharge (especially if the vessel is at anchorage and there are no sophisticated loading and discharging facilities). Customs formalities may cause issues, the vessel may have to go to the back of the berthing queue or the load port may not be able to receive/store the cargo. Any delay caused by a combination of these factors can be highly costly.

4.8 If the charterer fails to comply with its obligation to discharge the cargo and present a compliant cargo for loading, the owner is entitled to have the cargo landed, destroyed or rendered innocuous when and where the circumstances so require, without compensation. See article IV rule 6 of the Hague-Visby Rules above at 3.1. The owner will have a claim against the charterer for any loss, damage or expense which results.

4.9 There is a grey area that arises in relation to a Master's right to exercise his discretion to safeguard the safety of his ship and crew, in circumstances where he is perhaps not sure whether he is correct, or where he believes himself to be right on arguably reasonable grounds, but is later proved to have been wrong. On one hand, caution needs to be exercised so as not to put Masters under pressure to agree to a load a cargo about which they have legitimate reservations. However, on the other hand, it would seem unjust for a charterer who has presented a legitimate cargo to be penalised as a result of a Master's well-intentioned but incorrect call.

4.10 There is no decided law on this issue in the context of dangerous cargoes or cargoes that might be prone to liquefy and, as unsatisfactory as it is, whether the actual safety of a cargo was sufficiently marginal to justify a refusal to carry by a Master must fall for determination on a case by case basis.

## 5 Owner's Burden of Proof

**5.1** Where the claim is framed as one for breach of contract by the shipment of dangerous cargo, the owner has the burden of proving that:

5.11 the charterer did not comply with its obligations;

5.12 the cargo was in fact dangerous; and

5.13 the dangerous characteristics caused the loss.

5.2 Where time is lost and this forms the basis of the owner's claim, the owner must show that cargo would not have been safe to carry and therefore the charterer caused the loss by presenting a dangerous cargo.

5.3 Where a cargo is purported to have liquefied at sea and the vessel was lost or suffered a major incident, the owner must demonstrate the cargo carried caused this loss. Establishing this causal link will not be straightforward where there is no conclusive proof that liquefaction was responsible.

5.4 The owner has the burden of showing that:

5.4.1 They had an obligation to obey the order given by the charterer to load the cargo under the terms of the charterparty;

5.4.2 That the cargo tendered for loading/carried was indeed a dangerous cargo in breach of the charterparty terms and/or the IMSBC Code and/or SOLAS 1974;

5.4.3 That there is a causal link between the cargo tendered for loading/ carried and the owner's loss; and

5.4.4 That the loss claimed is reasonable.

5.5 Establishing whether the cargo was prone to liquefaction or liquefied will be a question of fact. Experts will be required to assess the available evidence and to advise a Tribunal on the likelihood that a cargo would have liquefied or did in fact, liquefy.

5.6 However, the owner may possibly have open to him/her an alternative head of claim – by way of implied indemnity. That may sometimes offer a simpler route to recovery, because it may avoid the need for the owner to prove (on the balance of probabilities) that the loss was caused by any particular danger posed by the cargo; it will suffice to show simply that the loss was caused by the cargo (somehow) and that the risk of such loss was not one which the owner had agreed to bear.

5.7 In this regard, indemnity provisions (depending upon their terms) provide for a right of indemnification as a matter of the simple allocation of contractual risk and responsibility. Thus, they are not concerned with (or dependent upon) proof of breach or any more complex aspect of causation. As such, they may give rise to a right of recovery in a dangerous cargo case in circumstances where a parallel claim for damages for breach of a charterparty will fail.

5.8 This is illustrated by *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277:

5.8.1 Here, Mustill J dealt with two casualties - *The Athanasia Comninos* and *The Georges Chr. Lemos*.

5.8.2 As regards the first, he concluded (i) that the cargo (of gassy coal) was not "unusual" (despite being more gassy than normal coal) (ii) that, accordingly, a claim for breach (as regards the alleged shipment of dangerous cargo) failed on the burden of proof and (iii) that negligence with respect to ventilation and other aspects of the management of the cargo was causative of the explosion.

5.8.3 In those circumstances, the question of a right to an implied right of indemnity coming to the aid of the owners did not arise. There could be no such indemnity where the cause of the damage was the owners' own actionable fault. The position was different, however, as regards the second casualty, involving *The Georges Chr. Lemos*.

5.8.4 In that case, there was no such actionable and causative fault on the part of the vessel. Thus, while the Judge observed that "*the plaintiffs' case on breach is the same as in respect of Athanasia Comninos, and must fail for the same reasons",* he went on to state "*This still leaves the question of causation, since the plaintiffs can make good their case against the first defendants without proving a breach, if they can establish that the shipment of the cargo caused he loss.*".

5.8.5 It is that analysis which underpinned his finding that, although "*I consider that the only conclusion which can properly be arrived at, on the evidence given at the trial, is that the cause of the explosion is unknown; and that is the result at which I have reluctantly arrived*", nevertheless:

> "*This leaves a question which has not, so far as I am aware, been discussed in any reported case. In most instances of this kind, a shipowner who succeeds in recovering an indemnity from his charterer will have established as part of his case that the cargo possessed some unusual and undeniable property. Indeed, proof of this fact will usually be an important, if not essential, part of his argument on causation, since it will go far to rebut a case that it was the shipowner's own fault which caused the loss. Mr. Tomlinson did, however, accept that this will not always be so: and I agree. It seems to me perfectly possible to have a loss which is caused by the shipment of a cargo having certain properties, even if the properties of the cargo in question are no different from those of other cargoes of the same description. In the present case, if one asks the question (eliminating the possibility of fault on the part of the shipowner) "Why was there an explosion?", the answer is - "Because there was methane in the hold". And if one goes on to ask "Why was there methane in the hold?" the answer is - "Because the Time Charterers called on the vessel to load coal". This answer is in my opinion sufficient to found an indemnity, without proof that the coal was in any way unusual.*"

5.8.6 Thus, Mustill J found, in the case of *The Georges Chr. Lemos*, that the owners' case for an indemnity succeeded, even though its case on breach failed. That was because (i) the implied indemnity founded liability simply upon the basis that the carriage of the cargo caused the damage; (ii) that was sufficient (whereas it was not in a case of breach); and (iii) there was no actionable fault on the part of the Owners to defeat the indemnity.

## 6 Charterer's Defence Against the Owner's Claim

6.1 Where there is a claim against the charterer for loss of time at the loadport, the charterer might have one or more of three main defences:

6.1.1 Prove that the cargo could not have liquefied:

6.1.1.1 If the charterer does so successfully then, in the case of the Master's refusal to load or requirement to discharge the cargo, in order for their case to succeed, the owner will need to persuade a Court or Tribunal that their actions were reasonable, notwithstanding that the cargo would not have liquefied. This will always be difficult to establish.

6.1.1.2 The charterer should take samples of the cargo to be analysed. If tests show that the conditions required for liquefaction were not present in the cargo, the owner's claim would be defeated on the basis the cargo was safe for carriage and there was no breach of the charterparty terms and/or the IMSBC Code and/or SOLAS 1974.

6.1.2 Demonstrate that, as a matter of course, the Master would usually carry a cargo with the same properties and characteristics as the cargo in hand. For example, where there has been a previous course of dealing between the owner and the charterer where the Master has carried similar cargo without expressing any reservation and without a problem arising at sea, or where he has been known to do so with other charterers. If this can be established then it may be difficult for an owner to argue that the cargo was unsafe or the Master acted reasonably in refusing to load.

6.1.3 Show that the Master was acting unreasonably by refusing to load the cargo. The charterer would need to show that the Master was unjustified in his concern based on the appearance of the cargo presented for loading or the CIS provided.

6.2 Where the vessel is lost or capsizes the charterer may have one or a combination of four main defences against the owner's claim:

6.2.1 Show that the vessel was unseaworthy in some way. Even if the unseaworthiness was only a contributing factor, it may be enough to break the chain of causation so the owner's claim fails. However, the burden is on the charterer to show this with some particularity.

6.2.2 Show that the cargo was treated negligently by the crew and that this mistreatment broke the causal link between the dangerous cargo and the loss;

6.2.3 Show that something was visibly and apparently wrong with the cargo such that no reasonably prudent Master would accept it for loading. To make the argument of intervening negligence on the part of the Master the Charterer would need to establish that:

6.2.3.1 The chain of causation was broken: "*…the conduct of the claimant has to constitute an event of such impact that it 'obliterates' the wrongdoing of the defendant and makes the true cause of the loss the conduct of the claimant rather than the breach of contract on the part of the defendant*"' (*Borealis AB v Geogas Trading SA* [2011] 1 Lloyd's Rep. 482);

6.2.3.2 The actions of the Master were at least unreasonable and preferably reckless; unreasonable conduct would not necessarily break the chain "*where the defendant's breach remained an effective cause of the loss, albeit in combination with the claimant's failure to take reasonable precautions on its own interest*"; and

6.2.3.3 The Master had "*actual knowledge of the breach, of the dangerousness of the situation…and of the need to take appropriate remedial measure*"'. If this is proven, "*…the greater the likelihood the chain of causation would be broken. Conversely, the less the claimant knows, the more likely it is that only recklessness would suffice to break the chain of causation*".

6.2.3.4 The above means that the cargo must have been obviously dangerous or potentially so to such a degree that a response was required from the Master. With a cargo prone to liquefaction, for example, this could mean obvious 'danger signs' such as the cargo being visibly very wet.

6.2.3.5 A claimant is generally entitled to act reasonably on the faith that his counterparty is performing his obligations without his act being regarded as breaking the chain of causation (see *Reardon Smith v Australian Wheat Board* [1956] A.C. 266, pp. 282-283). In light of this, it would be imperative for the charterer to show the Master had 'actual knowledge' of the potential dangers for the defence to succeed, and even then the natural reaction of a Tribunal may be that the shipper and charterer should bear the blame rather than the Master; or

6.2.4 Prove that the cargo could not have liquefied. Samples of the cargo should be taken prior to loading and retained for testing. If tests show that the conditions required for liquefaction were not present in the cargo the owner's claim would be defeated on the basis some other factor caused the loss.

6.2.5 Where the owner's claim is simply for an indemnity, however, the charterer's task is possibly more difficult and wide-ranging: they must then seek to show that the cargo was in no way the cause of the loss, or that (if it was) that was a risk which the owner had in any event agreed to assume. As illustrated by cases like *The Athanasia Comninos*, this may not be straightforward.

## 7 Master's Rights and Obligations

7.1 The loading operation should be monitored by the Master or his representative and should not begin until all requisite cargo information has been provided.

7.2 If the Master has doubts over the moisture content of the cargo the IMSBC Code suggests that a 'can test', as described in section 8 of the Code, should be conducted. However, this test is not meant to replace or supersede laboratory testing and is not considered to be representative of the entire cargo. Further, some scientists take the view that the can test is of no value whatsoever in determining the propensity of a cargo to liquefy.

7.3 Although the responsibility for stowage often does not lie with the Master, if a cargo in its stowage or characteristics renders a vessel unseaworthy, then the Master must intervene. Under SOLAS, the Master has overriding authority not to load the cargo and/or to stop the loading of the cargo if he has any concerns that the condition of the cargo may adversely affect the safety of the ship (see SOLAS Chapter XI-2 Regulation 8).

7.4 The Master must act reasonably when ordering that the loading operation is delayed. If he does not have a good justification for his order the charterer may bring a claim against the owner for damages due to loss caused by the delay.

7.5 As discussed above, the Master may be held to have acted reasonably in delaying the loading and/or departure of the vessel, even if the cargo subsequently turns out to be completely safe. For example, with a cargo potentially susceptible to liquefaction, it could be considered that a Master acted reasonably in refusing to load a very wet cargo, where subsequent tests show that as a result of the particle size distribution, the cargo could not have liquefied.

7.6 It was confirmed in *The David Agmashenebeli [2003] 1 C.L.C. 714*, that the Master need not possess any greater knowledge or experience of the cargo in question than any other reasonably careful Master. He was required to exercise his own judgement on the appearance of the cargo presented for loading and was entitled to qualify the bill of lading if it was not in apparent good order or condition. By analogy, this principle would apply when assessing the Master's decision to stop loading as a result of the appearance of the cargo and his concern that it may be prone to liquefaction.

7.7 On the other hand, the Master may not be liable if he allows loading to proceed and the cargo subsequently liquefies. He is entitled to rely on the charterer's obligation to provide a safe cargo for loading and there is a high threshold for any claim by the charterer that the Master's actions broke the chain of causation.

## 8 Conclusion

8.1 Although the science behind the process of liquefaction is reliable and well advanced, there is still widespread misunderstanding in the shipping industry with regard to the conditions which must be present for it to occur and which types of cargo are susceptible.

8.2 As discussed above a range of legal issues arise for owners and charterers in relation to cargo liquefaction and there are many variables determining which party will be held liable in the event of the delay/damage to/loss of the vessel. Whether a cargo was prone to liquefaction or liquefied is a question of fact to be determined by experts and this question will form the foundation of any legal action by the owner or Charterer.

# LONG TERM IMPACT OF THE COLLAPSE OF OW BUNKERS

**By Fionna Gavin, Partner and Catherine Earnshaw, Senior Associate, Ince & Co**

It is now nearly three years since one of the world's largest independent suppliers of bunkers, OW Bunker & Trading A/S, filed for bankruptcy, having a huge impact on the shipping industry internationally.

The events and multi-jurisdictional litigation that followed the OW Bunker Group collapse are well known to most and whilst the large majority of the legal actions and claims have been settled, a number of cases are still pending.

Many shipowners and charterers have had to pay for bunkers bought from an OW company twice and have had to pay considerable interest on the principal sums. Some physical bunker suppliers also remain unpaid, with courts in a number of jurisdictions finding that they have no right to payment for the bunkers from any party other than their direct OW contractual counterparty, their only recourse being to claim as a creditor in OW's insolvency.

Now may be a good time to reflect on what lessons can be learnt and what steps might be taken to protect against a similar event.

**Recap of events**

On 7 November 2014, OW Bunker & Trading A/S, the parent company of a network of traders and physical suppliers of bunkers worldwide ("the OW Group"), filed for bankruptcy protection in Denmark allegedly as a result of the discovery of a massive fraud and risk management failures which resulted in losses of around US$275 million. Nearly all of the OW Group's subsidiary companies globally also filed for bankruptcy protection in their respective jurisdictions.

Prior to the OW Group's insolvency, several of the OW Group companies had entered into an Omnibus Security Agreement ("the Security Agreement") with ING Bank NV ("ING"). The Security Agreement assigned and charged to ING its current and future rights and interests in its third-party and intercompany receivables. The Security Agreement was recognised by the majority of OW Group companies pursuant to a co-operation agreement and, for the most part, ING took control of recovering monies owed under the OW Group's contracts.

In the normal course of events the assignment would have simply meant that shipowners and other debtors would pay ING (rather than OW) for the bunkers supplied under their contract. However, because (i) there were other parties involved in the bunker supply chains, with OW having bought bunkers from physical suppliers or other intermediate traders who had not been paid by OW; and (ii) in some jurisdictions physical suppliers could claim directly against the vessel for the price of the bunkers, matters were not so straightforward.

**The Res Cogitans decision in the UK**[1]

The difficulties and multiple claims faced by shipowners and charterers ("Owners") following the OW Group collapse and the concern by Owners that payment to ING/the OW Group would not extinguish their potential liability to the unpaid physical suppliers led to a 'test case' on preliminary issues being brought to arbitration in London and ultimately to the Supreme Court.

The aim of the case was to determine whether Owners had to pay ING/the OW Group for the bunkers or whether they could safely make payment to the physical supplier instead. The Owners accepted that they had to pay for the bunkers, but did not want to pay twice.

*Brief facts of the case*

The facts in *Res Cogitans* are similar to many other disputes following the OW Group collapse.

On 4 November 2014, O.W. Bunker Malta Ltd ("OWBM") supplied bunkers to the *Res Cogitans* pursuant to a contract incorporating the OW Group's standard terms and conditions. Those terms include a retention of title ("ROT") clause under which property in the bunkers was not to pass to the Owners until they had made payment in full, coupled with a right to use the bunkers for the vessel's propulsion from the moment of delivery. The agreed credit period was 60 days.

OWBM arranged the bunker stem under a contract made with its parent company, O.W. Bunker AS ("OWBAS"), which had in turn contracted with Rosneft Marine (UK) Ltd ("RMUK") to supply the bunkers at the Russian port of Tuapse. RMUK in turn contracted with its Russian affiliate, RN-Bunker Ltd ("RNB"), to make the physical supply. The contract between OWBAS and RMUK incorporated RMUK's standard terms which were subject to English law, provided for payment to be made 30 days after delivery and also included a ROT clause. The RMUK terms did not, however, expressly allow the Owners to use the bunkers.

On 17 November 2014, RMUK (recognising that it was unlikely to be paid by OWBAS given their insolvency) sought payment from the Owners for the bunkers on the ground that it remained the owner of the bunkers. For the purpose of preliminary issues it was agreed that part of the bunkers supplied to the vessel had been consumed by the time the 30-day period of credit allowed under RMUK's terms expired and the whole of them had been consumed by the time the 60-day period of credit allowed under OWBM's terms expired.

In order to obtain clarity as to who Owners should pay, arbitration was commenced in London.

*The decisions of the arbitral tribunal and the Courts*

The issues in the *Res Cogitans* case essentially revolved around whether, as a matter of English law, the contract between the Owners and OWBM was a contract of sale governed by the Sale of Goods Act 1979 ("SOGA"). This was because the Owners relied in their defence of the claim for payment of the price on various provisions of SOGA, these being:

[1] The classic Dworkin v Hart debate of legal positivism and the Dworkinian critique thereof.

- The implied term under section 12(1), which provides that it is an implied condition of a contract for the sale of goods that the seller has the right to sell the goods or will have such right at the time when property is to pass. Because RMUK had retained title to the bunkers until payment by OWBAS, the Owners asserted that OWBM did not and would never acquire title to the bunkers, such that they were not entitled to payment from Owners.

- Section 49(1), under which the seller is entitled to maintain an action for the price where property in the goods has passed to the buyer. There was previous authority to the effect that it was not possible to maintain a claim for the price outside this provision, such that Owners contended an inability to transfer property in the goods prevented OW claiming the price[2].

The arbitral tribunal, the Commercial Court, the Court of Appeal and the Supreme Court all held that the bunker supply contract was not a contract of sale to which SOGA applied. Such a contract is defined in s.2(1) of SOGA as one by which the seller transfers or agrees to transfer the property and goods to the buyer for a money consideration, called the price. The contract contained an ROT clause and the parties to the contract contemplated that the bunkers, or at least part of them, would be consumed before the price became payable. It could not therefore have been their intention that property in the bunkers as a whole would pass on payment.

The Supreme Court considered the contract was in substance an agreement with two aspects: first to permit consumption prior to payment without any property in the consumed bunkers ever passing; and, secondly, if and so far as bunkers remained unconsumed, to transfer the property in those bunkers to the owners in return for the owners paying the price (of both bunkers consumed and remaining).

In view of these conclusions, the Supreme Court did not strictly need to consider the question whether, in the case of a contract of sale within SOGA, section 49 is a complete code that excludes any action for the price outside its terms. However, the Supreme Court found that if the contract had been subject to the SOGA provisions, it would held that section 49 was not a complete code of situations in which the price may be recoverable under a contract of sale.

The Supreme Court, in line with Court of Appeal, also rejected the Owners' argument that, even if the contract was not subject to SOGA, there was an implied term that OWBM had an obligation to pay its supplier timeously such it could pass title to Owners. The only implied undertaking as regards the bunkers OWBM permitted to be used was that OWBM had the legal entitlement to give such permission.

Although the decision of the Supreme Court in the *Res Cogitans* was a decision only on preliminary issues, as noted above, it was regarded by the industry as a 'test case'. Accordingly, although each case turns on its own facts, despite the potential exposure to the claims of physical suppliers, the decision likely resulted in settlement by many owners and charterers.

[2] FG Wilson (Engineering) Ltd –v- John Holt & Co (Liverpool) Ltd [2013] EWCA Civ 1232

**Lessons Learned**

Since the Supreme Court's decision in May 2016, attention in the industry has understandably turned to efforts to minimise the risk of such events in the future. While the global nature of the bunker supply industry, with claims subject to the law and jurisdiction of many different states, renders a universal solution impractical, a number of steps can be taken to give a level of protection.

In particular, there has been:

- An increased focus by both owners and charterers on the standard bunker terms of their suppliers, with revisions effected to:
    - deal with the issues arising under SOGA;
    - spell out that the sellers' entitlement to payment is conditional upon payment having been made to other suppliers in the chain; and
    - entitle the buyers to a right of set-off against the seller's claim for payment of the price (as is common this right was expressly excluded by OW's standard terms)
- A move by some buyers to contract, where practical, only with the physical supplier of the bunkers and without the involvement of intermediaries.
- Where it is not practical to stem bunkers without the use of traders/intermediaries, to agree with the trader a fixed profit/commission payment, with the trader acting as broker as opposed to principal.
- For owners, to include in their time charters more extensive protective provisions preventing charterers from purchasing bunkers on the credit of the vessel and entitling the master to refuse to accept bunkers purchased on such terms.
- Finally, it is understood that some insurers are offering insurance cover to protect against the risk of charterer or bunker supplier insolvency or the risk of a maritime lien being exercised which may be worth considering.

**Conclusion**

It is clear that the fallout from the OW Group's collapse has had far reaching consequences not only for the maritime industry but the many other industries which commonly operate on standard terms incorporating both credit periods and ROT clauses.

It is hoped, however, that lessons will be learned from the OW saga such that buyers will not be left paying twice the price in the future.