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EXCLUDING LIABILITY FOR UNSEAWORTHINESS AND NEGLIGENCE FOR DECK CARGO - "THE ELIN"

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The case of *The Elin* [2019] EWHC 1001 concerned the carriage of a consignment of steel equipment from the Port of Leam Chabang, Thailand to the port of Djen-Djen in Algeria. During the voyage, the Vessel encountered heavy seas and some of the steel equipment cargo was lost and/or damaged. It was agreed between the parties for the purpose of a preliminary issue that some of the cargo was in fact carried on the deck.

The key wording on the bill of lading was "*Freight as Per Booking Note (of which 70 pckgs as per attached list loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel* ***being not responsible for loss or damage howsoever arising****)"* (emphasis added).

It was assumed for the purposes of the preliminary issue considered that the packages stated in the Bill of Lading as "*loaded on deck*" were in fact carried on the deck of the *Elin* and therefore neither the Hague Rules nor the Hague-Visby Rules applied.

The preliminary issue before Stephen Hofmeyr QC (sitting as a Judge of the High Court) was as follows:

"*Whether, on a true construction of [the Bill of Lading], the Defendant is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or the Defendant's negligence*."

The competing authorities - Owners' arguments

The Owners contended that the correct interpretation of exclusion clauses was to construe them in the same way as any clause and that there was no basis on which the words on the bill of lading should be construed narrowly or be artificially constricted. The Owners argued that this interpretation was in line with recent decisions such as the *Persimmon Homes Ltd v One Arup & Partners Ltd* [2017] EWCA Civ 373 and *Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57.

The wording *"howsoever arising"* was particularly relied upon by Owners. The Owners also relied on the decisions in the *The Danah* [1993] 1 Lloyd's Rep 351*, The Imvros* [1999] 1 Lloyd's Rep 848 *and The Socol 3* [2010] 2 Lloyd's Rep 221. They argued that these cases provided authority for the proposition that as long as the wording used in a bill of lading is clear then the Court should give effect to the wording actually used and not rewrite the parties' bargain. The Owners further contended that even if Owners' loading and/or stowing of the deck cargo was so negligent as to make the vessel unseaworthy there was no reason as to why this could not be covered by the exclusion clause.

The competing authorities - Cargo-interests' arguments

The Cargo interests made a number of arguments which can be summarised as follows:

- The implied obligation of seaworthiness was so fundamental to the contract of carriage that it could only be excluded by express wording

- The effect of the bill of lading was to place responsibility for loading etc on the Owners

- The bill of lading did not expressly exclude liability for either negligence or unseaworthiness

- The obiter decision in *The Imvros* had been forcefully criticised academically and by the Singapore Court of Appeal and the cases relied upon in *The Imvros* did not support the conclusion of Langley J.

They also relied upon *Canada Steamship Lines Limited v R* [1952] AC 192 which set out a three stage test for construing exclusion clauses. The test was summarised in that case as follows:

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in The Glengoil Steamship Company v Pilkington (1897) 28 S.C.R. (Can) 146.

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.

(3) If the words used are wide enough for the above purposes, the court must then consider whether "the head of damage may be based on some ground other than that of negligence", to quote again Lord Greene in Alderslade v Hendon Laundry Ltd [1945] KB 189. The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

The Court's Decision

The Court held that as a matter of commercial sense and plain language the Owners' interpretation of the exclusion clause was to be preferred over the Cargo-Interests' interpretation. The Court held that there was no reason why the words "*howsoever arising*" could not cover liability caused by negligence or unseaworthiness. The Court found that the "*words of exemption which are wider in effect than "howsoever caused" are difficult to imagine and, over the last 100 years, they have become "the classic phrase" whereby to exclude liability for negligence and unseaworthiness.*"

The Court dismissed the academic criticism of the *Imvros* decision. The Court held stated that the extension of the words "*howsoever caused*" to cover seaworthiness was not inconsistent with *The Galileo* [1949] P 9 and *Steel v State Line SS Co* (1877) 3 App Was 72 as the former case centered on the wording *"at… shipper's risk"* and not *"howsoever caused"*. The Court held that the exclusion clause in the *Steel v State Line SS Co* case only covered loss or damage during transit and therefore could not be extended to unseaworthiness which occurred before the start of the voyage. The Court also found that *Joseph Travers & Sons, Limited v Cooper* [1915] 1 KB 73 remains good law and that it had not been put into doubt by the *Aldersdale* and *Canadian Steamship* decisions. Thirdly, the Court held that *The Imvros* was not inconsistent with the *Belships v Canadian Forest Products Ltd* (1999) A.M.C 2606.

Whilst the Court acknowledged that the English court has paid signification attention to the three stage test in the *Canada Steamship* case, it cited a number of cases that had held that the test is not to be applied rigidly. The Court held that English law had eschewed applying the test rigidly in an overly formulaic manner and that it was simply an aid to construction and was not a complete code as argued by Cargo-Interests.

Comment

The decision by the Court brings much needed clarity to the interpretation of exclusion clauses in the context of deck cargo. It brings welcome certainty to owners and operators issuing bills of lading for deck cargo. The carriage of deck cargo is inherently more risky than the carriage of cargo in the holds and owners will naturally try to exclude liability for cargo damage in this context. Owners and operators can now rest assured that the words "*howsoever arising*" mean exactly that.

There had been some doubt as to the soundness of the *Imvros* decision which has now been emphatically answered by the Court in this case. There had also be some uncertainty as to whether the decision would cover instances where it was shipowners themselves that had made the vessel unseaworthy as on the facts of *The Imvros* it was the claimant who had made the vessel unseaworthy. This uncertainty has now been resolved as the Court found it did not matter who had caused the vessel to be unseaworthy as the words "*howsoever caused*" did not concern themselves with which party was responsible.

The decision reflects the more modern approach to contractual clauses as held in cases such as *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *; Arnold v Britton and others* [2015] AC 1619 *and Wood v Capita Insurance Services Ltd* [2017] AC 1173.

PASSAGE PLANNING & UNSEAWORTHINESS - WHERE THE LINE IS DRAWN?

THE "CMA CGM LIBRA"

By Konstantinos Bachxevanis, Counsel / Master Mariner, Reed Smith LLP

In *The CMA CGM Libra* the Admiralty Court ruled that a defective or inadequately prepared Passage Plan, if causative of a loss during the relevant voyage, would not only render the vessel unseaworthy but, at the same time and without more, will also constitute a failure by the owner/ carrier to exercise "*due diligence*" before and at the commencement of the voyage to make the vessel seaworthy under the Hague/Hague-Visby Rules. This would be owner's/carrier's actionable fault barring recovery in General Average ("GA") from cargo. By the same token, a cargo owner claiming under a Bill of Lading would be able to recover its loss. The *CMA CGM Libra* shows that where a line is (literally) drawn on the navigational chart may turn out to be crucial as a shift of a cable's difference on the chart may shift a liability between cargo and owner/carrier of many millions of dollars.

Introduction

On 8 March 2019, the Admiralty Court handed down its decision on a claim by the owners of the *CMA CGM Libra* ("Owners") for recovery in GA of GA contributions due by certain cargo interests who denied any GA liability on grounds of causative unseaworthiness and lack of "*due diligence*" by the Owners to make the vessel seaworthy before the commencement of the voyage.

Facts

Just after midnight of 17/18 May 2011, the *CMA CGM Libra* ("the Vessel"), a 131,235 mt DWT 2009-built container laden with 5,983 containers, departed from Xiamen, China destined for Hong Kong. After she dropped pilot, she sailed outbound the dredged channel marked by buoys and shown on the relevant BA Chart by a magenta pecked line. Buoy 14-1, which was the next in order after Buoy 15 outbound and before Buoy 14, was marking a shoal in the middle of, and extending along more than a half of the width of the lane marked by the magenta line on the chart.

After passing Buoy 15, the Master decided not to follow the route marked on the chart as set out in his approved Passage Plan and which would bring the Vessel to the starboard of Buoy 14-1 but to alter course to starboard, leaving Buoy 14-1 a cable or so to port and sailing through an area showing adequate water depths with the intention to return to his original

1 *Alize 1954 & another -v- Allianz Elementar Versicherung AG & Others (The CMA CGM LIBRA)* [2019] EWHC 481 (Admlty)

route immediately afterwards. That was a split-second decision by the Master and it was accepted that, despite the falling tide and Master's safety concerns, there was enough water for the Vessel to sail within the dredged channel as provided for by the Passage Plan. Following the starboard manoeuvre, the Master, during his attempt to alter to port, realised that the Vessel would not be able to return back to his original route in time between Buoys 14-1 and 14 and changed his manoeuvre. In the event, the Vessel ran aground a few cables away from her intended route within an area identified as a "Former Mined Area". The charted depth though at the grounding location was 35 metres and, as it transpired by a block chart correction issued by British Admiralty a couple of months later, there was an extensive shoal which was not shown on the Chart at the material time. The equivalent Chinese Chart, issued a few months before the grounding, was showing the shoal but there had been an apparent delay by a few months in the promulgation of this update.

Also, although the Vessel was equipped with a fully integrated Electronic Chart ("ECS") in preparation to switch to paperless mode and its officers were using it, it was not an approved ECDIS as this was not mandatory at the time and the Owners' SMS was to the effect that the SOLAS "carriage of charts" requirement was complied with by paper charts. The Vessel was to be navigated by reference to paper charts only, and ECS was to be used only to improve situational awareness. What turned out to be key feature of the case (although held not to be causative) was the fact the whilst the official British Admiralty paper chart did not show the relevant shoal (as the Vessel's ECS provider's updates did not) the relevant ENC cell for use in ECDIS did.

Salvage under LOF terms followed which was financed by the CMA CGM ("Owners") who then sought to recover in GA. About 92% of the cargo interests settled their contribution but about 8% refused alleging Owners' fault, namely causative unseaworthiness before the commencement of the voyage and lack of due diligence by Owners in this respect.

Issues & Allegations

The Owners said that the Vessel ran aground on an uncharted shoal and/or alternatively the grounding resulted from Master's error in navigation.

The Cargo denied liability on grounds of unseaworthiness raising the following points:

- The Master was incompetent in that no competent master would have attempted tonavigate the way the Master of the Vessel navigated.

- As there was a breach of the crew "rest periods" requirement of the then applicable ILO 184 (now MLC) in that the Master allegedly had 7 hours less than the minimum 7-day rest period for the week before the grounding, the Master was fatigued and that impaired his decision making.

- The relevant British Admiralty paper chart was not properly updated to show the latest correction as promulgated by the relevant Weekly Notice to Mariners before the grounding which showed a 4.8 metre and 1.2 metre soundings close to the area of the grounding.

- Reliance by the navigating officers on the ECS which was not approved ECDIS in that the Vessel was not supplied with an official electronic chart showing the shoal on which the Vessel grounded.

- The Vessel was not supplied by the relevant Chinese chart showing the shoal on which the Vessel grounded. This allegation was dropped by the Cargo before the trial.

- The Passage Plan was defective in that, among others, it did not :

  - provide a record of a Preliminary Notice to Mariners (which was permanently marked on the chart) that warned mariners that "*numerous depths less than the charted exist ithin and in the approaches to Xiamen Gang*", listing the "*most significant*", none of which however was in the fairway. The same Preliminary Notice informed mariners that the dredged channels had been deepened; and

  - properly mark on the chart "*no go areas*".

- Lack of a proper system by Owners in place to ensure proper Bridge Management was maintained on board and that the Master had sufficient rest periods. Such 'systemic failure' was the cause of the grounding.

In addition, the Cargo alleged that the Master's decision to leave the fairway channel constituted a "*deviation*" in the legal sense which would deprive the Owners, in any event, of the right to rely on the exemptions in the Hague Rules.

Further, the Cargo, relying on the Supreme Court's recent decision in *Volcafe*, tried to shift the burden on to the Owners to prove that the Vessel was seaworthy (rather than the Cargo to prove she was unseaworthy) by extending further the bailment principle decided in *Volcafe* under Article III, Rule 2 of the Hague Rules to the Owners' due diligence and seaworthiness obligation under Article III, Rule 1.

Decision

The Admiralty Judge, Mr. Justice Teare, held in favour of the Cargo on only one of the above issues, namely that of Passage Planning and the causative effect of the specific defects, but that was enough for the Cargo to win the case.

He decided that there was no deviation. He also held that the obligation under Article III, Rule 1 of the Hague Rules does not relate to Article III, Rule 2 and that the burden of proving

causative unseaworthiness must lie on Cargo as this is implicit in Article III, Rule 1, whereas the Owner has the burden of proving the exercise of due diligence.

The Judge also held in favour of Owners that the Master was competent overall and was not fatigued. Whilst the finding on human fatigue is *obiter*, it is significant for owners in that a mere breach of the statutory requirement for rest hours periods cannot by itself raise a presumption of fatigue and impairment in the decision making of the seafarer. He also found that the paper chart was corrected, there was a proper Bridge Management and that the Vessel was not unseaworthy because she was not supplied official ECDIS charts on board.

Thus, the only finding of unseaworthiness related to Passage Planning. The Judge found the Passage Plan was defective as it did not refer expressly to the Preliminary Notice (re: N.M. 6274(P)/10) which in turn referred to the prospect of less water outside of the channel [*para 73*]. He found that a defective Passage Plan, even if a one-off, amounts to unseaworthiness. The Judge also found that had the Master written a warning on the chart and "no go" areas were properly marked on the Vessel's working chart he would not have done what he did. Hence, that defect in the Passage Plan was found to be causative of the grounding, i.e. there was a causative unseaworthiness.

As the Master accepted in cross-examination that it was never his intention to sail in the "Former Mined Area" and/or in an area which would have been hatched out as a "no go" area, the crucial issue turned out to depend on where the "no go" line should have been drawn (in the event, an expert issue). If the "no go" line should have been drawn, as Cargo asserted, along the fairway's magenta pecked lines or, as the Judge accepted, along the notional line connecting the channel buoys, the Vessel would be causatively unseaworthy. If, however, the proper marking of the "no go" line was, even by a cable, to the east of Buoy 14-1 the non-marking would, most probably, not have been held to be causative and the Vessel would have been seaworthy.

Teare J. accepted that there was no previous case in which it had been held that a defective passage plan rendered the vessel unseaworthy. However, "… *just as the standard of seaworthiness may rise with improved knowledge of shipbuilding …*", he held, "*…. so may the standard of seaworthiness rise with improved knowledge of the documents required to be prepared prior to a voyage to ensure, so far as reasonably possible, that the vessel is safely navigated*". Therefore, he assimilated the situation to that of an uncorrected chart and, in applying the *McFadden* test of unseaworthiness, he found that the Vessel was unseaworthy. In doing so, the Judge rejected the Owners' submission that Passage Planning is part of navigation and not in itself an aspect of seaworthiness (a point on which the case has been appealed).

The Judge also held that, although the Owners themselves had exercised due diligence in the sense that their systems were adequate, the (negligent) failure of the Master/ Second Officer to prepare a proper Passage Plan amounts to lack of exercise of "*due diligence*" by the Owners because seaworthiness under the Hague Rules is a non-delegable duty of the carrier.

2 *Volcafe Ltd. -v- Cia Sud American de Vaporesi SA* [2018] 3 WLR 2087

Comment

As the Passage Plan should be prepared before departure, i.e. before the commencement of the voyage, the decision means that a defect on the paper plan or a plotting mistake on the chart before departure of not only where the course line is or should be drawn but also where the "no go" line is drawn, may have an impact on Owners' liabilities under the Hague and Hague-Visby Rules. Whilst prudent seamanship would determine where a line on the chart should be drawn, the question of whether in each case a vessel is or is not seaworthy may be, applying Teare J's approach, dictated by differences of opinion as to where such a line should be drawn. For example, the Master's discretion in deciding to plot a course on the chart through a specific route and navigate his vessel accordingly may be open to an attack by Cargo's expert arguing that that route was mistakenly selected and the vessel accordingly was unseaworthy. The decision blurs the boundaries between *seaworthiness* and *error in navigation*.

This is a novel point and there are no cases directly relevant. The Judge treated the Passage Plan in the same way as a 'nautical publication' or 'instrument' on board the Vessel. By application of the classic *McFadden* seaworthiness test *any* defect would render the Vessel unseaworthy. This did not, however, take into account Owners' argument that Passage Planning *per se* is an act of navigation and does not relate to the Vessel's (physical) seaworthiness. It does not, for example, distinguish between supplying the ship with Tide Tables and the misreading of the Tide Tables by the navigating officer before the departure. Whilst of course the opposite position is arguable (indeed, the Judge adopted this position), the Judge's finding on "*due diligence*" would seem to overturn the commercial understanding of the allocation of responsibilities on the carrier under the Hague Rules. A carrier would never be able to discharge its "*due diligence*" obligation for any navigational mistake attributed to a defective Passage Plan. The Owner/Carrier effectively would warrant that there will never be a defective Passage Plan and will always be deemed to be in breach even with a perfect system in place.

Arguably, the impact of this decision is an increase in the standard of seaworthiness which creates a perverse outcome: the Owner/Carrier appears to be better off where the defective preparation of Passage Plan was prepared by an incompetent officer than where there is a one-off lapse in judgment by a competent officer. In both instances the vessel would be unseaworthy but it seems it would be easier for the carrier to escape liability by showing that he exercised due diligence in properly selecting, recruiting, training, instructing and appointing the incompetent officer.

3 *McFadden -v- Blue Star Line (1905) 1 KB 697; "A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it ... If the defect existed, the question to be put is: Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking."* per Channel J. at 706.

The issue is crucial for the industry. There has been no case relating to a Passage Plan rendering a vessel unseaworthy before now. If indeed it is the case that an inadequate Passage Plan renders a vessel unseaworthy then every grounding or cargo loss at sea will result in an allegation of an inadequate Passage Plan being causative. If found, then Owners' defences of due diligence will be, automatically, lost, thereby shifting liability from the cargo insurer to the Owners' P&I Club.

Looking ahead and, particularly, with ECDIS and today's paperless navigation, careful attention should be given when a Passage Plan is prepared to each and every detail as everything may be investigated by cargo interests unwilling to pay GA or claiming recovery of their losses.

Leave to appeal has been granted to Owners and the case is to be heard by the Court of Appeal in February 2020.

THE "ALPHA HARMONY" – WHY OWNERS MAY NEED THE VESSEL TO ARRIVE THE DAY BEFORE THE CANCELLING DATE

By Glenn Winter, Winter Scott LLP

Introduction

Where a Voyage Charterparty provides for a cancelling date of 10th May, the Owners might expect that they have until 10th May to deliver the vessel.

Not so, according to the Commercial Court in *The Alpha Harmony* [2019] EWHC 2522 (Comm). In order to avoid cancellation the vessel should have arrived and tendered her NOR by 11:00 hours on 9th May.

The Reasons

At first sight, this seems an odd decision. However, the reasoning of Teare J cannot be faulted as a matter of legal construction.

The vessel had been chartered by ADM International Sarl to Bilgent Shipping Pte Ltd on the Baltimore Form C Berth Grain form for a voyage from Brazil to China. Under the charterparty the laycan spread was to be narrowed. It was duly narrowed to 1st – 10th May (2015). 10th May happened to fall on a Sunday.

Clauses 14 and 16 of the charterparty (which were on the standard form wording) provided, *inter alia*:

Clause 14: *Notification of the vessel's readiness to load at the loading port must be delivered….between 0800 hours and 1700 hours from Monday to Friday, between 0800 hours and 1100 hours on Saturday…."*

Clause 16: *Should the Notice of Readiness at loading port not be delivered as per Clause 14 by twelve o'clock on [10th May], the Charterers or their Agents shall at said hour and at any time thereafter, but not later than the presentation of Notice of Readiness…., have the option of cancelling this Charter Party*.

1 With thanks to Sophie Li of Skuld (Hong Kong) Ltd.

2 The original cancelling date was 31st May but this was amended by the laycan narrowing provisions to 10th May.

The vessel arrived at the loadport and tendered her NOR at 07:04 hours on (Sunday) 10th May. ADM assumed they were 'safe' from cancellation as the vessel had arrived (and tendered her NOR) before 12:00 hours on the cancelling date.

However, Bilgent nevertheless cancelled the charterparty later that day.

They argued that the vessel was too late. Clause 16 entitled them to cancel if a NOR had not been delivered *"as per clause 14"* by 12:00 hours on 10th May. Although ADM had delivered the NOR at 07:04 hours on (Sunday) 10th May, that was not *"as per clause 14"* because clause 14 provided that the NOR was to be delivered between 08:00 hours and 17:00 hours on Monday to Friday or between 08:00 hours and 11:00 hours on Saturday.

Consequently, Bilgent argued the NOR tendered on Sunday was ineffective and Bilgent were entitled to cancel.

The Arbitrators disagreed. They found it *"difficult to accept"* that a charterer who had agreed 12:00 hours on 10th May as a cancelling time/date could cancel, even if the vessel had arrived in a ready condition and tendered a NOR by that time. This would be a "*commercially and legally unattractive solution*".

Bilgent appealed and Teare J had no hesitation in determining that the Arbitrators were wrong and that Bilgent had been entitled to cancel.

The language of clause 14 and clause 16 was clear. Clause 16 provided that Bilgent could cancel unless a NOR had been delivered *"as per clause 14"* by 12:00 hours on 10th May: clause 14 required any NOR to be delivered during working hours on Monday to Friday and on Saturday mornings. That had not been done before 12:00 hours on 10th May and Bilgent were therefore entitled to cancel.

In other words, in order to prevent cancellation, ADM needed to ensure that the vessel arrived and tendered her NOR by 11:00 hours on (Saturday) 9th May, even though the agreed cancelling date/time was 12:00 hours on 10th May.

In *The Alpha Harmony*, ADM found themselves in a particular unfortunate position because they were themselves chartering the vessel under a Head Voyage Charterparty (for the same voyage) which had been sufficiently amended to sever the link between a valid NOR and cancellation. Consequently, whilst Bilgent were entitled to cancel the sub-charterparty, ADM were not entitled to cancel the head charterparty. They therefore lost both appeals.

The Consequences

Not every charterparty links the right to cancel with the delivery of a NOR but surprisingly many do.

In addition to the Baltime Form C Berth Grain form, similar provisions appear in:

- The Amwelsh 93 form (clauses 5 and 6)
- The BIMCO Graincom form (clauses 4 and 18)
- The Cementvoy 2006 form (clauses 3 and 5)
- The Norgrain form (clauses 4 and 17)
- The Norgrain 89 form (clauses 4 and 18)
- The Synacomex 90 (clauses 6 and 8)
- The Synacomex 2000 form (clauses 6 and 8).

Under each of these charterparties (unless amended) Owners must ensure that, if the cancelling date falls on a Sunday, the vessel must arrive a day early.

It would clearly make sense for Owners to amend charterparties to avoid this result. There is no commercial reason, particularly in the 24/7 environment in which shipping companies operate, to require ships to arrive 'early' because the cancelling date falls on a weekend.

LMAA Arbitration –v- Court

The Alpha Harmony is perhaps a good example of LMAA Arbitrators adopting a more commercial approach and the Court adopting a more legalistic approach. It will be left to the reader to decide which approach was correct.

THE OBLIGATION TO PROCEED WITH UTMOST DESPATCH - THE "PACIFIC VOYAGER"

By David Bennet, Partner, Clyde & Co., LLP

Introduction

This article reviews the important decision of the Court of Appeal case of the "*Pacific Voyager*" [2018] EWCA Civ 2413 which considered the allocation of risk for delay in commencement of an approach voyage before a vessel enters into its chartered service, particularly where Owners have agreed to take on, or are already engaged in, a preceding fixture.

The question has often been posed whether the *Monroe v Ryan* [1935] 2 KB 28 authorities apply when there is neither a loadport Expected Ready to Load Date ("ERTL"), nor Estimated Time of Arrival date ("ETA"). Perhaps the better question may be what degree of dispensation should be given to an Owner for performance when the Owner enters a charterparty requiring that the vessel shall proceed to a certain port, there load a full cargo and perform her service with utmost dispatch? This is on the basis that where the contract is silent a judicially accepted starting point is that the obligation to sail is either immediate, ie. the vessel will forthwith sail to the loadport, or must be done "*within a reasonable time*".

When understood in these terms the question is not so much about whether there is a qualifying formula present, for example an ERTL plus an obligation to sail/proceed with dispatch equals an absolute obligation to commence an approach voyage on time. Rather the question is, if the obligation to proceed is not one the Owner has to fulfil forthwith on entering the charter, what then constitutes a reasonable time for the Owner to fulfil the obligation to start sailing to the load port.

Judicial reasoning in this area touches also upon what the appropriate allocation of risk for delay is between Owner and Charterer in the commencement of an approach voyage when such commencement is only postponed to permit Owners to take on preceding fixtures. As this is for the convenience of Owners, it seems reasonable that it is Owners who take on the risk of delays.

In the "*Pacific Voyager*" the Court of Appeal has affirmed that the duty to commence the approach voyage arises even without the ERTL/ETA, and the parties should look to the full terms of the charter to determine what the reasonable expectations of the parties in relation to the time of commencing the approach voyage.

Background

It is established law that where a voyage charterparty contains an obligation on an Owner to proceed with *"utmost despatch"* (occasionally framed in terms of proceeding "*with all convenient speed*)", there is an absolute obligation on the Owner to commence the approach

voyage by a date when it is reasonably certain that the vessel will arrive at the loading port on or around the ERTL or the ETA. The usual charterparty exceptions thus only apply once the approach voyage is commenced and cannot protect an Owner prior to this point.

The fundamental principles underlying this body of case law originated with the case of *Monroe v Ryan* and have been consistently upheld and elaborated upon ever since.

The question raised in the *"Pacific Voyage*r*"* case is whether, in the absence of an ETA or ERTL at the loading port, the above obligation would still attach.

Facts

The "*Pacific Voyager*" was chartered for a voyage from Rotterdam to the Far East. At the time of the fixture, the vessel was carrying cargo under a previous charter under which it was to discharge a part of the cargo at Ain Sukhna in Egypt, thereafter go to Alexandria, and thence proceed to Antifer, Le Havre for final discharge before the charter service.

The charterparty terms were contained in a fixture recap which adopted the Shellvoy 5 form subject to amendments. The relevant terms of the charterparty include:

(i) clause 3, which provided that "*…the vessel shall perform her service with utmost despatch and shall proceed to [loadport]…and there…load a full cargo"*; and

(ii) clause 11, which was a cancelling clause entitling the charterers to cancel the charterparty at 23.59 on 4 February 2015 if the vessel failed to meet the laycan.

Of particular note was that the charterparty contained no provisions relating to ERTL/ETA dates although the terms in the fixture recap gave ETAs at the intermediate ports on the previous voyage with 25 January 2015 provisioned for final discharge of previous cargo at Antifer.

On its way to discharge this cargo, the vessel hit a submerged object in the Suez Canal and suffered rapid water ingress into no 1 starboard ballast tank. This incident was attributed to contact with an underwater obstruction connected with dredging operations being undertaken nearby.

There was no suggestion that the vessel or the Owners was in any way at fault or could have avoided the incident. An underwater survey confirmed that the vessel had to discharge its cargo and enter drydock for repairs, which the Owners anticipated would take in the order of "*months*".

The Charterers terminated the charterparty and claimed damages accordingly. Quantum was agreed and the issue in the proceedings was whether, in these circumstances, the Owners' failure to commence the approach voyage by a specific date was a breach of the charterparty.

Arguments

The Charterers submitted that the laycan window identified the time at which the parties expected the vessel to arrive at the loading port and was therefore equivalent to an ETA for the purposes of the *Monroe* obligation. The cancelling date therefore provided the date by reference to which there was an absolute obligation on the Owners to commence the approach voyage. The Owners were accordingly in breach of charter in failing to commence the approach voyage by the cancelling date.

The Owners asserted that a cancelling date was not, and was not equivalent to, an estimate on their part of an arrival date at the load port. It was merely a contractual option afforded to the Charterers if the vessel should not arrive by that date. Where, as here, no ETA had been contracted it followed that the only relevant obligation on the Owners was an implied term that they would exercise due diligence to get the vessel to the loading port by the cancelling date.

First instance decision: duty held to arise within a reasonable period of time

At first instance in the High Court, Popplewell J found that the duty to proceed to loadport arises at a particular point of time, which is within a reasonable period of time, to be determined as a matter of construction of the charterparty terms. Taking this as the starting point, Popplewell J found that on the particular wording of the charter, the ETA which provided for the vessel's final discharge at Antifer under the previous charter could be used to derive the time at which the vessel could be expected to commence its approach voyage (namely, following anticipated discharge at Antifer). As the Owners did not commence the voyage on or around that date, they were in breach and the Charterers were entitled to damages accordingly.

Popplewell J noted, *obiter*, that if there had been no ETA for the previous port, the Owners would have been obliged to commence the approach voyage by a date when it was reasonably certain that the vessel would arrive at the loading port by the cancelling date.

Court of Appeal decision: no magic in ERTLs

In challenging the first instance decision, the Owners alleged that the obligation to proceed only attached when the vessel departed from its last discharging port under its previous charter. As the vessel never departed from the last discharging port, the obligation did not arise.

The Owners sought to distinguish the previous authorities as being decisions which turned upon each charterparty's own wording. In the charterparty in question, the Owners maintained that there were three key differences to the previous authorities:

(i) there was no ETA or ERTL, but instead the relevant Part 1(B) of Shellvoy 5 stated an itinerary in respect of the prior fixture,

(ii) the ETA which related to the discharge at Antifer under the previous charter was expressly qualified by the wording "*bss iagw/wp*" (basis if all going well weather permitting), and

(iii) the obligation of utmost despatch was expressly made *"subject to the terms of this charter"*.

The Court of Appeal unanimously upheld Popplewell J's decision at first instance.

Longmore LJ acknowledged that every charterparty must be construed on its own terms, but noted that the shipping world required authoritative guidance in the interests of business certainty. As such, the general principles of policy which underpin the previous decisions (such as *Monroe vs Ryan*) should be regarded as "*helpful guides*" against which the contractual terms ought to be construed.

It was noted that the obligation of utmost despatch was an important one and was intended to give comfort to the Charterers. Such an obligation would be meaningless if some time for sailing was not put in. This meant that the vessel must either proceed "*forthwith*" at the date of the charter or "*within a reasonable time*". In this instance, the inclusion of the itinerary in the form of ETAs from the previous charter meant that "*forthwith*" could not have been meant. Instead, one had to look at the terms of the charterparty to ascertain what a reasonable time would be. Whilst in some charters this could be ascertained by reference to the ERTL, Longmore LJ held that *"there is no particular magic in the concept of a date of expected readiness to load"* and that this was simply a guide to working out what a reasonable time would be. In this case, the itinerary was the best guide.

Longmore LJ echoed the observations of Devlin J in the *North Anglia [1956] 2 Lloyd's Rep 449* in holding that the Owners would have had to have used very clear words if they had sought to make the beginning of the chartered service contingent on the conclusion of the previous voyage.

In finally disposing of the Owners' case, Longmore LJ noted that the rubric "*bss iagw/wp*" merely served to underscore what was already implicit in the estimates given in the itinerary, namely that they were estimates given honestly and on reasonable grounds. Similarly, the Owners could derive no assistance from the words "*subject to the provisions of this charter*", as these words did not add anything of significance to the normal rules of construction. In any event, it had been accepted by the Owners that the exceptions could not apply to events which occurred before the chartered service, particularly in this instance where the vessel was performing obligations under a previous charter which the Charterers had no control over.

In contrast to Popplewell J's decision, Longmore LJ shied away from expressly stating that the cancelling date in this charter would also have sufficed for the purposes of ascertaining the moment the obligation attaches. He noted that if, contrary to the Court of Appeal's decision, it were impermissible to rely on the itinerary for the previous charter, he would have difficulty in saying that the cancellation date would do instead. In order to decide this point, it would be necessary to know why it was that the itinerary could not be relied on and, if it was because there was no ETA Rotterdam that might apply equally to any argument about the cancelling date. If there were no itinerary, however, the position might be different.

In so saying, it is likely that the Lord Justice had in mind the Owners' qualification argument; namely, if it were found that the qualification to the ETAs ("*iagw/wp*") meant that there was no effective ETA in Rotterdam, then that reasoning might apply equally to any other means of defining the relevant date. Were there no qualified itinerary, that problem does not arise and the laycan may still constitute good evidence.

Conclusion

The effect of this important decision is that the application of the *Monroe v Ryan* general principles remains the same, irrespective of whether the charterparty contains an ERTL, ETA or other provision: the duty arises either "*forthwith*" or within a "*reasonable period*" of entering into of the charter. If a charter contains an ETA/ERTL for the loadport, then a "*reasonable period*" will be the date the vessel must leave to allow her to arrive at the loading port on or around the ERTL or ETA. If a charter contains an ETA for the previous discharge port (as was the case for the "*Pacific Voyager*"), the reasonable time would be such time as it is reasonable to suppose the vessel would, having met that ETA, leave for the loadport once a reasonable time for discharging had elapsed at the previous port.

ENFORCEMENT OF NEGATIVE OBLIGATIONS IN COMMERCIAL CONTRACTS - THE CASE OF A VESSEL SOLD FOR DEMOLITION ONLY

By Chris Kidd, Partner, and Ben Moon, Legal Director, Ince

In the recent case of *Priyanka Shipping Limited v Glory Bulk Carriers Pte Ltd* [2019] EWHC 2804 (Comm) the English High Court has made it clear that injunctions can be obtained to enforce agreements not to trade vessels sold only for demolition when a buyer ignores the agreement and trades a vessel after the sale. Recovering damages is however more difficult. Those using BIMCO's DEMOLISHCON should take note.

Glory Bulk Carriers Pte Ltd ("Glory") sold the Capesize bulk carrier, *CSK Glory,* to Priyanka Shipping Limited ("Priyanka") for demolition. Priyanka guaranteed that they would not trade the vessel further nor sell the vessel to a third party for any purpose other than demolition. In terms similar to BIMCO's DEMOLISHCON, Clause 19 of the sale agreement provided

> "*19. The vessel is sold for the purpose of demolition only and the Buyers hereby guarantee that they will not trade the Vessel further nor sell the vessel to a third party for any purpose other than demolition and will, on completion of demolition, furnish to the Sellers a certificate stating that the vessel has been totally demolished*."

After delivery of the vessel, however, the price of scrap fell and freight and charter rates for Capesize vessels rose dramatically. Priyanka began trading the vessel, despite Glory declining to give permission to do so, performing two voyages and fixing a third voyage on the eve of the trial, which took place on an expedited basis.

Glory sought a final injunction from the High Court in London to enforce the negative covenant to prevent further trading of the vessel and damages on an equitable basis for breach of contract.

Priyanka did not dispute that it was in breach of the sale agreement but asserted that the breach was immaterial because it would cause Glory no recoverable loss on a restitutionary basis. Priyanka sought a declaration to that effect and argued that an injunction should be refused.

Glory submitted that if Priyanka could demonstrate that it would suffer undue hardship if an injunction were granted, such that no injunction should be granted, Glory should instead be awarded damages in lieu of an injunction on a negotiating damages basis (*One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353).

Injunction

The High Court decided that this was an appropriate case where the Court could grant a final injunction to enforce the negative undertaking not to trade the vessel. The judge identified the following principles:

(i) negative covenants will ordinarily be enforced by injunction;

(ii) the injured party does not have to prove that it would otherwise suffer damage;

(iii) being a discretionary remedy, an injunction should be refused if the grant of an injunction would be unconscionable or oppressive (inconvenience or hardship to the defendant is not enough) but the burden of so proving lies on the party bound by the negative covenant;

(iv) in determining whether it would be unconscionable or oppressive, the consequences of the grant or the refusal of an injunction for both parties will be relevant, and that may include consideration of whether damages would be a sufficient and appropriate remedy;

(v) it is also for the party bound by the negative covenant to prove that it would be oppressive not to award damages in lieu of an injunction;

(vi) even if oppression is made out, there may be circumstances in which an injunction should still be granted, for example where a defendant acted "in blatant and calculated disregard of the plaintiff's rights of which they were aware" (*Jaggard v Sawyer* [1995] 1 WLR 269) or where a defendant hurries up (to complete the infringing activity) in advance of a hearing in the hope of avoiding or minimising the effect of an injunction (*Shelfer v City of London Electric Lighting Company* [1895] 1 Ch. 287).

Applying those principles to this dispute, there were three obvious and undisputed breaches of the negative covenant not to trade the vessel, the third of which concerned a fixture concluded very shortly before the commencement of the trial in the knowledge that a final injunction was being sought. This being so, the ordinary position was that Glory was entitled to an injunction.

The judge held that Glory had a commercial interest which could be protected by an injunction, accepting that an injured party's commercial reason for insisting on adhering to the terms of its bargain does not have to be overpowering. In this instance, a unilateral scrapping policy was sufficient even if that meant the oversupply of Capesize tonnage was reduced by only a single vessel: a term in the sale agreement to implement that policy could be enforced, unless Priyanka could satisfy the Court that, in the exercise of the Court's discretion, an

injunction should be refused because it would be unconscionable or oppressive for an injunction to be granted. Similarly, if the question was whether the Court should award damages in lieu of an injunction, it was for Priyanka to show that it would be oppressive not to do so.

The judge concluded that Priyanka came nowhere near surmounting this hurdle, holding that there was no evidence that the financial consequences for Priyanka of an injunction would be so extraordinary as to be unconscionable or oppressive. All that had happened was that the market price for scrap had fallen and a bad bargain was not enough to relieve a party from the terms it had agreed voluntarily. Further, Priyanka was not forced to trade the vessel but could instead have laid up the vessel pending an improvement in the scrap market. Instead, the judge inferred, Priyanka *"preferred to try to avoid making any loss at all"*.

The judge held that Priyanka's breaches were deliberate and not inadvertent, that "*the conclusion of the Third Fixture, very shortly before the hearing, [was] … regarded as cynical*" and that Priyanka only had itself to blame for any difficulties caused by an injunction preventing further trading in circumstances where Priyanka chose to conclude the third fixture less than a day before the hearing. There was no good reason to allow Priyanka to load a further cargo nor award damages in lieu of an injunction to enable Priyanka to do so.

The judge also concluded that it would not be just to leave Glory to a likely limited and difficult remedy in damages and, as such, damages would not be an adequate remedy.

Damages

The general principle of damages is that they are restitutionary in nature – to compensate an injured party and put it in the same position as if the contract had been performed, not punish a contract breaker nor deprive the wrongdoer of profit.

Here, however, Glory had sold the vessel and had no right or ability to profit from the vessel's use. Priyanka asserted that Glory had suffered no loss, in the conventional sense. Glory, instead, asserted that it had lost the value of its right under clause 19 of the sale agreement and sought "*negotiating damages*" to reflect a notional bargain for a reasonable release fee for the relinquishment of that valuable right.

The judge observed that the availability of damages or otherwise in such circumstances had been comprehensively reviewed in *One Step (Support) Ltd v Morris-Garner* [2018] 2 WLR 1353. In *One Step*, Lord Reed JSC identified that "*negotiating damages*" can be awarded where "*… the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed*". The judge's analysis of *One Step*, however, indicated that negotiating damages were not available for breaches of *any* contractual right in such circumstances but only where "*the defendant has taken something for which the claimant was entitled to require payment*" as it was put by Lord Reed JSC in *One Step*. Lord Reed JSC went on to identify restrictive covenants over land or intellectual property agreements as specific examples where negotiating damages might be available.

Glory sought to argue that the right requiring the vessel not to be traded was analogous to a restrictive covenant on the sale of land the release from which might attract negotiating damages (*Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798). The judge disagreed, identifying that a restrictive covenant was specific to land and that in the case of an intellectual property agreement there is property which the agreement protects.

The judge, instead, concluded that Priyanka's breaches "*did not involve [Priyanka] taking or using something in which the Seller had an interest, a valuable asset, for which the Seller was entitled to require payment*" because Glory had no proprietary or financial interest in the vessel once it had been sold. The judge, therefore, decided that the nature of the Glory's right was more analogous to a non-compete obligation for which, the Supreme Court in *One Step*, decided, negotiating damages were not available.

Buyers' Application for a Declaration

Glory was therefore entitled only to nominal damages in respect of the first two voyages. Having determined that, the judge issued a declaration to that effect for Priyanka but refused to extend the declaration to any future breaches beyond those first two voyages because the judge had no knowledge of the effect that such breaches might have on Glory. It was not the Court's function to assist a party to commit a deliberate breach of contract.

DEMOLISHCON

The wording of clause 19 of the sale agreement was materially similar to the wording of clause 16 of DEMOLISHCON which states

> "*16.Purpose of Sale*
>
> *The Vessel is sold for the purpose of demolition and recycling and the Buyers undertake that they will neither trade the Vessel for their own account nor sell the Vessel to a third party for any purpose other than demolition and recycling. The Buyers shall procure that this obligation is made a term of any and every subsequent agreement for the resale of the Vessel.*"

In the explanatory notes BIMCO say:

> "*When selling a vessel for recycling, the sellers want to make sure that the vessel is sold for recycling only and that the buyers do not continue trading the vessel for their own account and thereby become competitor to the sellers, or resell the vessel to a third party for further trading.*
>
> *The provisions of Clause 16 are aimed at protecting the sellers against such events. Should the buyers decide to continue trading the vessel or resell to a third party this will amount to breach of contract against which the sellers will have a claim for damages*"

BIMCO's notes suggest that such wording will be sufficient to give rise to a claim in damages if the buyer trades the vessel in breach of the no-trading undertaking. As will be seen from the commentary above, however, breach of the non-trading undertaking in DEMOLISHCON or similar wording is unlikely to give rise to a claim in damages automatically and such claims are not straightforward. Sellers using the DEMOLISHCON form, or similar wording, might wish to give further thought to how their rights and commercial interests could be protected through alternative wording.

LETTERS OF INDEMNITY FOR DELIVERY OF CARGO WITHOUT PRODUCTION OF BILLS OF LADING – IS BLOCKCHAIN THE ANSWER?

By Ingolf Kaiser, Partner, Stephenson Harwood LLP

The practice of delivering cargo without production of an original bill of lading, in return for a letter of indemnity (LOI), has a long history. Standard LOI wording has become well established, as have charterparty clauses that allow the charterer to require the owner to deliver against an LOI.

Delivery against an LOI avoids delays at the discharge port, and can have benefits for all concerned. But it can also leave a seller or bank unpaid, with the goods long gone. In such cases, the holder of the bill of lading will claim against the carrier under the bill of lading, who in turn will claim under the LOI. For containerised cargo, there is often a single LOI, provided to the carrier by the person to whom the goods are released. On the other hand, in bulk cargo trades where there is a chain of charterparties, the request will come to the owner through the charterparty chain, and there will also be a chain of LOIs.

This article looks at issues that have arisen under LOIs, most recently in *The Songa Winds* [2018] 2 Lloyd's Rep 57 and [2018] 2 Lloyd's Rep 374 (CA), and then considers how the use of an electronic bill of lading using blockchain technology could avoid the need for LOIs in future.

The Songa Winds is the most recent in a series of cases in which a question arose as to whether the cargo was delivered to the (or 'a') party identified in the LOI. The case involved considering, amongst other things, (i) whether discharging cargo to party A would amount to delivery to party B named in the LOI, or (ii) whether the owner believed that party A was representing or acting on behalf of party B named in the LOI. If not, then the indemnity under the LOI would not be triggered.

The MT Songa *Winds* was time chartered by Songa Chemicals AS (Songa) to Navig8 Chemicals Pool Inc (Navig8). Navig8 sub-chartered, on voyage charter terms, to Glencore Agriculture BV (Glencore). Both charterparties permitted the charterer to require delivery without original bills of lading, against an indemnity on the standard terms of the owner's P&I Club: the sub-charter required an LOI to be issued, and under the head charter the LOI was deemed to be issued, on the agreed terms.

The cargo of sunflower seed oil was sold by Glencore to Aavanti Industries Pte Ltd (Aavanti), who in turn sold to Ruchi Agritrading (Pte) Ltd, a subsidiary of Ruchi Soya Industries Ltd (Ruchi). Ruchi was named as the notify party on the bills of lading.

1 See Also *The Bremen Max* [2009] 1 Lloyd's Rep 81 and *The Zagora* [2017] 1 Lloyd's Rep 194.

Aavanti paid Glencore for the goods, financed by Societe Generale (SocGen). But Aavanti was not paid by its buyer. Despite not having been paid, Aavanti agreed that the cargo could be delivered to Ruchi, apparently in accordance with a well-established pattern of trading between them. By two LOIs addressed to Glencore, Aavanti requested delivery without production of the bills of lading, to *Ruchi* or to such party as Glencore believed to be, to represent, or to be acting on behalf of, *Ruchi*.

Glencore in turn issued LOIs requesting Navig8 to deliver to *Aavanti* or to such party as Navig8 believed to be, to represent, or to be acting on behalf of *Aavanti* (the reason for naming *Aavanti* rather than *Ruchi* was not clear). Navig8 made the same request under the head charterparty, ie naming *Aavanti* rather than *Ruchi*.

The cargo was delivered to *Ruchi*. However, *Aavanti* remained unpaid and eventually SocGen claimed under the bill of lading. This led to claims under the chain of LOIs. Glencore argued that liability under its LOIs to Navig8 was not triggered, because delivery to *Ruchi* was not delivery to *Aavanti,* or to such party as was believed to be, to represent, or to be acting on behalf of *Aavanti*.

Baker J held that Ruchi was acting for Aavanti when it took delivery. Although it might not be an obvious starting point that Aavanti – as unpaid seller – intended and requested Ruchi to take delivery on its behalf, this was the only sensible conclusion on the facts. He took into account, amongst other things, that Aavanti had no presence in India (where the cargo was discharged), no right to import the cargo itself, and had not appointed anyone to receive the cargo on its behalf unless this was Ruchi.

It was therefore unnecessary (and would not on the available evidence have been possible) to answer the further question of whether the shipowner *believed* that Ruchi was, or represented or was acting for, the named receiver – which would have been a further alternative under the LOI wording, as mentioned above.

Baker J also briefly considered a clause in the LOI under which delivery was deemed to be made to the correct party if the requested place of delivery was a bulk terminal. This did not apply, because the LOIs requested delivery at a named port and not a particular terminal.

The last main issue was a time bar argument raised by Glencore, based on a clause in the voyage charter. This charterparty clause provided that "…*The period of validity of any letter of indemnity will be 3 months from the date of issue. This period may be extended, as necessary, upon owners written request for further extension and confirmation… that 1/3 original bills of lading have not been surrendered to owner. In absence of extension requests the indemnity will expire at the end of initial three month period, or any further extension period"*. There

2 The words 'believed to be, to represent, or to be acting on behalf of' had been added to the standard P&I Club wording following the decision in *The Bremen Max* [2009] 1 Lloyd's Rep 81.

was no similar provision in the LOIs themselves, which provided (without any time limit) that as soon as the original bills of lading came into Glencore's possession, they would be delivered to Navig8, whereupon Glencore's liability would cease.

Navig8 did not ask to extend the LOIs after the initial three month period. Glencore argued that the three month period required a claim to be made during that period and that, therefore, there could be no liability under the Glencore LOIs. Baker J held that the three month period was intended to cover any *deliveries* during the relevant three months (whenever the claims might be made), rather than claims made during that period. This part of the decision was later overturned by the Court of Appeal, which held firstly that the charterparty clause was not relevant because it was not incorporated into the LOIs, and secondly that if it had been relevant, the three month period referred to claims made during that time.

Electronic Bills of Lading

It has been said that electronic bills of lading remove the need for LOIs, and in many cases this will be so. But before considering this in more detail, it may be helpful to look at how an electronic bill of lading works, taking the example of the WAVE blockchain electronic bill of lading product, which received approval from the International Group of P&I Clubs in December 2019.

WAVE uses blockchain technology to connect users directly with each other over the internet, using (amongst other options) a software program installed on a user's computer or company server. The carrier can use its normal bill of lading with minor amendments, prepared and signed by the carrier or its agents in pdf format. Once uploaded to the WAVE software, the carrier sends the bill of lading – together with an electronic token – to the shipper or other person entitled to receive it.

The electronic token identifies the bill of lading as 'original', and is transferred from one user to another, together with the bill of lading and any endorsements. The WAVE network is designed so that there is no central 'title registry'.

Rights and liabilities under the bill of lading contract are transferred using a contractual framework that is included in user terms – and it is quick and easy to become a user by accepting terms at the time of installing the software application. The procedures that are used involve transferring possession of, and endorsing, the bill of lading, and very closely follow the English Carriage of Goods by Sea Act 1992 (which applies only to paper documents). For example, rights can be transferred to: a named consignee who has obtained possession of the bill; an endorsee who has obtained possession of the bill; a user with possession of the bill, if the consignee on the bill is named as 'bearer'.

3 The author of this article has advised WAVE on the legal structure for this electronic bill of lading product.

Once the carrier has transferred possession of the WAVE bill of lading, neither he nor the system provider will know who has possession until it is surrendered at the end of the process. This is of course also the case for a paper bill of lading.

The WAVE system also allows other documents such as certificates, invoices, packing lists etc to accompany the bill of lading, so that in theory all documents can travel together and will not delay each other. Where original documents are required, they can be identified as "original" in the same way as the bill of lading itself.

Are LOIs still needed with Electronic Bills of Lading?

Since transfer is almost instantaneous, there should be little or no delay in sending the bill of lading and other documents from one user to another. Where a letter of credit is involved, banks will still need time to review the documents, deal with potential discrepancies, etc. and it is conceivable that in a transaction involving a chain of contracts, each with its own letter of credit, delays could occur. However, these will be much reduced compared to sending the bill of lading by courier, and in many cases the electronic bill of lading would be expected to be surrendered well before the ship arrives at the discharge port.

So does the much-increased speed of transfer put an end to the need for delivering cargo against an LOI? Although in theory the answer should be yes, in practice it will depend on the reason for the bill of lading being *"delayed"*.

Delays caused simply by the time taken to transfer documents between the various parties involved should disappear in all but cases involving extremely long sale contract chains. But the ritual incantation that "*original bills of lading have not arrived"* (routinely used when requesting delivery against an LOI) gives nothing away about the reason for the delay. It could be entirely innocent or, at the other end of the scale, it could be that a fraud is being committed on an innocent seller or financing bank. For example, if a buyer does not have funds to pay for the goods, he may still (wrongfully) try to obtain delivery against an LOI – perhaps in the hope of using funds from an on-sale of the goods to pay his own seller.

With electronic bills of lading, such a practice should be more difficult, but can still not be completely ruled out. The carrier will be aware that an electronic bill of lading is being used, and could be transferred almost immediately, so may ask more questions as to why the electronic bill cannot be surrendered. However, the decision as to whether to accept an LOI will, as with a paper bill of lading, involve balancing various risks and commercial pressures, and will ultimately rest with the carrier.

The answer therefore seems to be that LOIs may still be *wanted* even though the legitimate reasons for doing so will be fewer. But they are much less likely to be *needed*.

THE "AMITY" – SERVICE AND SERVANTS

By Steven Wise, Partner, Lau, Horton & Wise LLP

Party autonomy is an important feature of arbitration, and is generally a good thing, but it does sometimes give rise to problems that do not occur in the more strictly controlled Court environment.

One such difficulty that arises from time to time is ensuring the effective service of notices, in particular notices to do with the commencement of arbitration and appointment of arbitrators. This arises especially when a respondent to a claim takes no part in proceedings and a sole arbitrator is appointed and/or an award is made by default. It is sometimes only after the award is made and sought to be enforced that the respondent appears and denies any knowledge of the arbitration.

In line with the principle of party autonomy, the Arbitration Act 1996 (the "Act") takes a permissive approach to service of notices. Section 76 provides that:

"(1) The parties are free to agree on the manner of service of any notice or other document required to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post -

…

(b) where the addressee is a body corporate, to the body's registered or principal office,

it shall be treated as effectively served."

Unlike many other commercial contracts, most charterparties do not contain express notice provisions. Unless relying on the 'deeming' provision in sub-section (4), the claimant must therefore ensure service by an *"effective means"* under sub-section (3).

What is *"effective"* can be difficult to ascertain in the particular charterparty context. This is for several reasons.

First, the identity of the parties is not always as clear as it should be.

- Fixture recaps often do not contain full company names, omitting "Limited", "Inc", and the like. This leads to confusion when there are a number of related companies with very similar (sometimes even identical) names.

1 See, for example, the LMAA Law Review 2015-2017, p.7, *"Being Noticed"*

2 An exception is the NYPE 2015 form (clause 55), although it does not expressly refer to arbitration notices, and this form has not (yet) been widely adopted

- Fixture recaps often state a "care of" or "operations" address which has no connection with the company's place of incorporation.

- Many shipowning and chartering companies are incorporated in jurisdictions where corporate information is not readily available, meaning the above points cannot easily be checked.

Secondly, even when it is clear who the parties are, in many cases they have no direct communication with each other.

- Most charterparties are made through agents (brokers) rather than between the parties directly. In many cases, this will be the first (and only) time they do business.

- Operational correspondence is often conducted through brokers or by other parties. For example, voyage orders may be given by sub-charterers directly to the Master, with notices of cargo shortage or stevedore damage being sent directly back the other way.

- Even after a dispute has arisen, correspondence may be conducted first through brokers, then through P&I Clubs, and eventually through lawyers. Throughout all of this the principals involved may well never correspond directly.

- It is well-established (although often forgotten) that, as a general rule, neither brokers nor P&I Clubs nor lawyers have authority to accept service of originating process.

Against this background, the surprise is perhaps that disputes about service do not arise more often.

When they do, however, it is not just small or obscure companies that can be involved. In *The Amity* [2018] 1 Lloyd's Rep. 233, shipowners brought a modest detention claim against Glencore Grain BV. When it came to commencing arbitration, the Owners' claims adjusters wrote to an individual employee of Glencore Grain, a Mr Oosterman, at his personal company e-mail address. Mr Oosterman had been involved in some early correspondence about a delay in berthing, which had given rise to the claim. For whatever reason, however, he never replied to any of the claims adjusters' e-mails about the arbitration.

Consequently, a sole arbitrator was appointed, claim submissions served, and an award eventually published. All correspondence was sent by e-mail to Mr Oosterman only (albeit addressed to Glencore Grain), save for the award which was sent to Glencore Grain by post. Glencore Grain said that it was unaware of the proceedings until it received the award by post, whereupon it applied to set aside the award under section 72 of the Act.

Section 72, entitled *"Saving for rights of person who takes no part in proceedings"*, provides insofar as relevant as follows:

"(1) 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, …

by proceedings in the court for a declaration or injunction or other appropriate relief."

There was no dispute that the notices commencing arbitration and relating to the appointment of the sole arbitrator were sent to Mr Oosterman. The question was whether that was service by "*effective means*" on Glencore Grain.

On the evidence, Mr Oosterman was a relatively junior employee who handled documentation and execution matters with contractual counterparties. In this case at least, he also had a modest operational role which involved him sending a total of three e-mails regarding the need for the vessel to wait at anchorage before berthing.

The dispute raised two main legal issues: first, whether the question of service was governed by principles of agency; and, secondly, if so whether Mr Oosterman had actual or ostensible authority to receive notices relating to arbitration.

The Owners contended that agency principles were irrelevant because the notices were sent to a Glencore Grain e-mail address, and so service was effected on the company itself. Thus the case was on all fours with *The Eastern Navigator*, in which the Court held that sending an e-mail to a general corporate address identified on a company's website was good service.

The Judge disagreed. *The Eastern Navigator* could and should be distinguished because the e-mail address in question there was held out to the world on the company website as the only e-mail address of the company. However, sending an e-mail to an individual employee's e-mail address was quite different. Since the Owners conceded (sensibly) that service could not have been effected on *any* Glencore Grain e-mail address, it was necessary to ask what role Mr Oosterman played (or was held out as playing) within the organisation. This raised questions of agency because:

"companies can only act by natural persons and whether a company is bound by notification to an employee should depend upon the authority which the company has granted to that employee to receive the notification (actual authority, express or implied); or is estopped from denying because of what it has represented to the third party about the employee's authority to receive the notification (ostensible authority)."

The Owners advanced three further arguments of principle, all of which were rejected by the Judge:

3 See, for example, *The Lake Michigan* [2010] 2 Lloyd's Rep. 141, at [44].

- That it was sufficient to send the notice to anybody who was reasonably believed (by the sender) to be a person dealing with the dispute. Such a subjective test, however, would be illogical and unfair because it ignored the internal arrangements between employer and employee. In any event, even if correct, it would not have assisted owners in this case as there was no reason to believe that Mr Oosterman had conduct of the dispute.

- That it was sufficient to serve somebody who had "been involved in" the dispute. There was no principled basis for this argument, and again it would not have helped the Owners because Mr Oosterman was not involved at any stage after the dispute had arisen.

- That it was sufficient if the addressee was involved in the operations which gave rise to the dispute. That would have covered Mr Oosterman. However, it was wrong in principle because it conflated the role of operational employees and those employed to deal with disputes.

Nor was the Judge impressed by the argument that this was the only reasonable course for the Owners to have taken because Mr Oosterman's was the only e-mail address they had. As the Judge pointed out, the Owners could have asked through broking channels to whom a notice of arbitration should be sent. Alternatively, they could have served the notice by post on Glencore Grain's registered or principal office, taking advantage of the deeming provision under section 76(4) (see above).

Having determined that agency principles applied, the Judge was able to deal shortly with the question of whether Mr Oosterman had actual or ostensible authority to receive notice of arbitration on behalf of Glencore Grain. The negative answer followed clearly from Mr Oosterman's relatively junior position and limited involvement in the matter.

There was nothing in Mr Oosterman's employment contracts or personnel file to show that he had *express* actual authority. While a finding of *implied* actual authority would not be as rare in the case of an employee as in the case of a third party, it was still necessary to keep in mind that authority to accept service of originating process was a serious matter distinct from general authority to conduct business. It could not be implied from Mr Oosterman's limited operational involvement with the performance of the charterparty that he also had authority to handle disputes.

For the same reasons, there was no basis for finding that Glencore Grain had held Mr Oosterman out as having such authority.

4 [2006] 1 Lloyd's Rep. 537
5 *The Amity*, op. cit., at [28]

Accordingly, Glencore Grain had not been properly served and the award was set aside.

This case and others like it are a reminder to parties and their legal advisers that, when it comes to service of notices relating to arbitration proceedings, a "*belt and braces*" approach is best. In particular, where it is known or can easily be discovered, good service may always be effected by post on the respondent's registered or principal office.

That is unless the parties have had the foresight to adopt the LMAA Arbitration Notice Clause. The clause is designed to (and, used properly, will) avoid exactly this type of dispute by making express provision for one or more e-mail addresses to which notices relating to arbitration should be sent. According to the clause:

"Any notice and communication sent by e-mail pursuant to this clause shall be deemed to have been served, and become effective, from the date and time the e-mail was sent."

However, care must be taken, in particular in long-term contracts, to keep the e-mail address(es) up to date.

Given the extract from the clause quoted above, it will not be sufficient to say that a notice was not received because the particular individual had left the company and their e-mail address was deactivated or not forwarded. Accordingly, it would be prudent to include from the outset at least one individual e-mail address and a generic e-mail address (provided this is monitored).

6 See *Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore* [2018] 1 Lloyd's Rep. 17, at [43]-[45]

OBJECTIONS TO A TRIBUNAL'S JURISDICTION – ISSUES IN COMMENCEMENT OF INSTITUTIONAL ARBITRATION

A v B

By Mark Sachs and Jamie Cawthorn, Penningtons Manches Cooper LLP

Arbitration can, despite its apparent informality, be a black tie event depending on who is hosting the party. The case of A v. B [2017] EWHC 3417 illustrates the difference between the relative informality of commencement of arbitration in ad hoc arbitrations, such as those brought on LMAA Terms, and secretariat based systems such as the LCIA. The case also provides further important judicial interpretation of the Arbitration Act 1996 provisions concerning challenges to a tribunal's jurisdiction and the timing of such challenges.

The facts of the case are not atypical of many trade disputes. Party B in the court proceedings was the seller (the "Seller") of two lots of 950,000 barrels of crude oil under two separate but identical contracts. A (the "Buyer") on-sold to C (the "Sub-buyer") on identical terms (save as to price). Both sets of contracts specified arbitration under LCIA rules.

The Sub-buyer failed to pay the Buyer under the sub-contract who, in turn, did not pay the Seller. The Seller brought arbitration proceedings against the Buyer. The Buyer, no doubt wishing to maintain a back-to-back position, commenced arbitration down the line against the Sub-buyer. The LCIA appointed a tribunal of three QCs.

Unlike ad hoc arbitration, the LCIA rules, like those of the ICC (and other similar rules such as the SIAC and HKIAC) require a formal request for arbitration addressed to the secretariat and the payment of a registration fee.

When commencing arbitration the Seller brought one claim against the Buyer (and paid one registration fee) despite there being two contracts and the Buyer as onward seller did likewise against the Sub-buyer. In the sub-reference, the Sub-buyer disputed the validity of combining the two separate contractual claims in one proceeding and the LCIA tribunal in that reference found that the commencement was invalid. The Buyer, acting somewhat later (by 2-3 months), and likely reacting to what had occurred in the sub-reference, brought a similar application in the initial reference. However, the tribunal in that reference dismissed the Buyer's application on the grounds that it had been brought too late.

The Buyer brought an application before the High Court under section 67 of the Arbitration Act 1996 objecting to the tribunal's jurisdiction. The questions for determination were:

1 A case reported with the party names anonymised under the Arbitration Act 1996.

2 To avoid confusion in the analysis, seller, buyer and sub-buyer are used rather than A, B and C since A was the middle party in the chain.

(i) whether the commencement of a single arbitration in respect of both contracts was a valid commencement under the LCIA rules, and

(ii) whether the Buyer's application was timeous.

1. The validity of the Buyer's Request for commencement of arbitration in the sub-reference

Philips J began by considering section 14 of the Arbitration Act 1996 concerning the commencement of arbitral proceedings, which provides at section 14 (1) "*that the parties are free to agree when arbitral proceedings are to be commenced*". The two contracts were subject to LCIA arbitration and so it was the LCIA rules that were to govern the manner of commencement.

Article 1 of the LCIA rules provides:

"1.1 Any party wishing to commence an arbitration under the LCIA Rules (the "Claimant") shall deliver to the Registrar of the LCIA Court (the "Registrar") a written request for arbitration (the "Request"), containing or accompanied by:

…

(ii) the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates;
…

(vi) Confirmation that the registration fee…has been or is being paid to the LCIA, without which actual receipt of such payment the Request shall be treated by the Registrar as not having been delivered and the arbitration as not having been commenced."

In addition, Article 1 provides that the claimant is to submit a "*statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant"* (Article 1.1 (iii)).

Although the Seller accepted that an arbitration could only encompass a dispute under a single arbitration agreement, it contended that the request had validly commenced two separate arbitrations relating to two disputes under the two contracts.

In support of this argument, the Seller sought to rely on section 61 of the Law of Property Act 1925, which provides:

"61. In all deeds, contracts, wills, orders and other instruments, made or coming into operation after the commencement of the Act, unless the context otherwise requires
…
(c) The singular included the plural and vice versa."

The problem, as Philips J pointed out, was that this line of argument correspondingly would require the Buyer to argue that (i) it was only required to pay one arbitration fee to commence multiple arbitrations and (ii) that the tribunal was appointed in respect of both arbitrations and had made the award in both. Describing this argument as having "*no merit whatsoever*", Philips J explained that in respect of (i) it was "*inconceivable*" that the LCIA rules could be read as permitting a party to pay only one fee when commencing multiple arbitrations, whilst in respect of (ii) it was "*impermissible*" to read the LCIA rules as giving rise to consolidated proceedings without the respective parties' consent having been given.

In submitting that it was the substance of the request (for arbitration) and not its form that should be considered, the Buyer sought to rely on *The Biz* [2011] 1 Lloyd's Rep 688, in which Hamblen J held that a single notice for arbitration given by cargo interests in respect of claims under 10 bills of lading was valid and effective to commence 10 separate arbitrations. That case, however, was an *ad hoc* arbitration under a typical charterparty arbitration clause.

Whilst entirely accepting the approach of Hamblen J as correct in that case, Philips J distinguished *The Biz* as arising from *ad hoc* proceedings. In any event, on an objective assessment of the request for arbitration in the present case, it was held that the reasonable person would have concluded that the intention was to commence a single arbitration. This was because, as Philips J explained in his judgment, the request made no reference to the commencement of more than one arbitration but referred throughout in the singular to "*the Arbitration Agreement*", "*the seat of the arbitration*" and, "*the governing law of the Arbitration Agreement*". The request also referred to "*the fee prescribed by the schedule of costs*" which was a reference to the fee for a single arbitration.

When the above was considered in light of the provisions of the LCIA rules, Philips J concluded that the "*request was an ineffective attempt to refer separate disputes to a single arbitration. It was accordingly invalid*".

2. Loss of the right to object to the Tribunal's jurisdiction

Turning to the second issue, the Seller relied on Article 23.3 of the LCIA Rules which provides:

"*23.3 An objection by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be raised as soon as possible but not later than the time for its Statement of Defence;*"

In reaching its decision to dismiss the Buyer's original application before it, the tribunal had held that the words "*as soon as possible*" should be given their natural meaning. Following that reasoning, the tribunal decided that meant, save in exceptional circumstances and provided the respondent was aware of an objection from the moment it received the request for arbitration, that the Buyer had until the service of the response (due 28 days after the request) within which to raise an objection to jurisdiction. It should be noted that the tribunal did not regard the fact that the mirror objection was not raised by the Sub-buyer against the

Buyer in the sub-reference until after the Buyer had served its response to the request for arbitration in the head reference as justifying the delay in raising the objection.

The tribunal considered that such reasoning was consistent with section 73 - loss of right to object - of the Arbitration Act 1996, which provides.

"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

(a) that the tribunal lacks substantive jurisdiction,

…

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

In his judgment Philips J reasoned that the correct approach in the determination of whether the Buyer had lost the right to object was to begin not only with an analysis of section 73 but also of section 31 – objection to substantive jurisdiction of tribunal - of the Arbitration Act 1996. Section 31 (1) provides as follows:

"(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction. A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised."

This was the correct approach, Philips J explained, not just because of the mandatory nature of section 31 and section 73, but also because it is highly unlikely that that LCIA rules were intended to materially diverge from those provisions. It was notable that section 31 does not impose a requirement that an objection (to the substantive jurisdiction of the tribunal) be raised as soon as possible. This was in "*stark contrast*" to section 31 (2) which did have such a requirement. The Court considered the reason for the distinction was obvious: an objection during the course of proceedings, or even in the middle of a hearing, that a tribunal is exceeding its authority must be made at once in order that the concern can be addressed and amendments made if appropriate. By contrast, objections as to the jurisdiction of the tribunal at the outset are less likely to have immediate consequences that cannot be remedied and thus need not be raised with such urgency.

In determining what was to be meant by "*the first step in the proceedings*" taken by the respondent, Philips J, referring to the UNCITRAL Model Law of International Commercial Arbitration Article 16 (2) (the equivalent provision to section 31(1)) and the *Departmental Advisory Report on Arbitration Law 1996: Report on the Arbitration Bill*, held that this was to be considered as the submission of the statement of defence (or where the respondent "*first contested the merits*" in circumstances where formal pleadings are not required). The Seller's argument that the Buyer had first contested the merits on serving its response and therefore that the Buyer's time for making the objection expired on service of that predominantly formal document was "*not seriously arguable*".

Following that reasoning, the question that remained was whether the words "*as soon as possible*" in the LCIA rules (revised in 2014) introduced a far stricter requirement on the Buyer in respect of the time within which it had to raise its objection than those of sections 31 and 73. Philips J found the idea that the LCIA had intended some new and stricter regime that deviated dramatically from section 31 and that required a jurisdictional challenge to be raised without that party having taken any steps in the arbitration or even having appointed an arbitrator to be "*inconceivable*".

Accordingly, although having failed before the tribunal, the Buyer ultimately succeeded before the court in maintaining the same objections on which the Sub-buyer had succeeded in the sub-reference.

Commentary

It is perhaps unfortunate that questions of formalities of commencement were at the forefront in this case when the overarching goal of arbitration is to get to the merits of a dispute in a speedy and cost-effective fashion. The claims do not appear to have been time-barred and so could be recommenced, however that will often not be the case, particularly in cases where short time limits apply. Considerable time and costs will have been expended on an invalid commencement in both the head and sub-reference. Be that as it may, given that arbitration is at its heart a matter of agreement, parties do need to be mindful to follow what has been agreed in the contract or arbitration procedural rules that have been adopted.

The case seems to have largely turned on the terms of the initial request for arbitration which had referred to only one arbitration and the payment of a single fee. If the request for arbitration had been couched in terms of multiple proceedings albeit set out in one document, then it appears the result would have been different. It is noteworthy that the LCIA secretariat had accepted the commencement of the proceedings in the singular and had not required the payment of an additional fee. The Seller might then reasonably have expected, when commencing proceedings down the line, to follow the same path. It is common to commence arbitration in multiple references in a single document or submissions such as occurred in *The Biz* where there were 10 bills of lading, presumably raising the same issues and involving the same parties.

Under the LCIA rules consolidation of multiple proceedings is indeed contemplated: see Article 22.1 (x) which states:

"*22.1 The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:*

…

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is (are) composed of the same arbitrators;"

Section 16 of the LMAA Terms, which provides that tribunals have the power to direct that two or more arbitrations raising common issues of fact or law be conducted and, where an oral hearing is directed, heard concurrently is also to similar effect.

The court's interpretation of how section 31 and 73 of the *Arbitration Act 1996* work together and that the right to object to the jurisdiction of the tribunal was not lost even before a defence was required to be filed is reassuring. In particular, where the Buyer was attempting to maintain a back-to-back position, losing the right to object even before it had been raised in the sub-reference would have been a harsh result. LMAA tribunals often deal with string contract arbitrations, as do many trade tribunals, and impediments to such cost-effectiveness and stream-lining of proceedings should be avoided where they can be.

3 This interpretation was supported by the case AIG Europe (Ireland) Ltd v Faraday Capital Ltd [2006] EWHC 2797, which concerned the interpretation of a similarly worded clause in a reinsurance contract: "*as soon as reasonably practicable, and in any event within 30 days*". It being held that the time at which the sanction for non-compliance applied was on the expiry of 30 days.

PROBLEMS OF PIRACY: TEN YEARS ON - THE "ELENI P"

By David Wartski, Partner, Mays Brown Solicitors

Although the facts giving rise to the recent decision of the High Court in *The Eleni P* [2019] EWHC 910 transpired some 10 years ago, the Court's judgement comes on the back of a significant increase in piracy related activity around the West Coast of Africa with particular prevalence in the Gulf of Guinea, Nigeria and Togo.

The case serves as a timely reminder of the importance of ensuring that charterparty clauses are drafted clearly and unambiguously, particularly when there are potentially large sums at stake.

In giving judgment, Mr Justice Popplewell also provides a useful comment on the approach to questions of construction, recognising that time charters give rise to particular considerations because of the inherent allocation of risk in such contracts.

Background Facts

The vessel owners ("the Owners") brought a claim against the charterers ("the Charterers") for alleged unpaid hire of around US$4.5 million.

The m.v. *"Eleni P"* (the "Vessel") was ordered to load a cargo of iron ore in the Ukraine and to discharge it in China, requiring it to sail through the Suez Canal and the Gulf of Aden.

The Vessel sailed through the Gulf of Aden without incident but was attacked and captured by pirates in the Arabian Sea on 12 May 2010.

The pirates released the Vessel around 7 months later. After undertaking emergency repairs and resupplying fuel and necessaries, the Vessel proceeded to China to discharge its cargo and thereafter was redelivered to the Owners on 18 January 2011.

The parties disagreed about whether the Vessel was off hire for the period during which she was under the control of the pirates and as a consequence, the Owners brought a claim against the Charterers for unpaid hire.

Arbitration decision

The arbitration tribunal rejected the Owners' claim for hire for the entirety of the period whilst the Vessel was under the control of the pirates. It found that the Vessel was off hire as a result of two additional typewritten clauses in the charterparty - clauses 49 and 101.

These clauses provided as follows:

> "*Clause 49 – Capture, Seizure and Arrest*
> *Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost…*
>
> *Clause 101 – Piracy Clause*
> *Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound."*

The Owners appealed the tribunal's decision to the High Court, on the basis that the tribunal had misconstrued the clauses.

High Court decision

With regard to clause 49, the Owners argued that each of the words listed in the clause - "*captured*", "*seized*", "*detained*", "*arrested*" - were dependent and qualified by the following phrase in the clause - "*by any authority or any legal process*".

In contrast, the Charterers argued that the phrase "*by any authority or any legal process*" applied only to "*arrested*" and did not qualify the word "*captured*", which stood on its own. The Vessel could therefore be captured due to any cause, including pirates.

The majority of the arbitrators had agreed with the Charterers' position but the High Court ruled that the Owners' interpretation of the clause was correct, for the following reasons:

(i) The phrase "*any authority or any legal process*" must apply to the whole preceding list of events - if it applied only to arrest it would be superfluous, and the drafting would be "*surprisingly inept*".

(ii) The Charterers' construction of the clause was inconsistent with the terms of the general off hire clause (clause 15), which only put the Vessel off hire for detention "*by average accidents to ship or cargo*".

(iii) The Tribunal were wrong in finding that the "*capture*" of a vessel is not something which an "*authority*" could be involved in. As Popplewell J whimsically put it: "*capture does not necessarily connote the use of force… My wife may capture my heart*".

As to clause 101, the Owners argued that it only put the Vessel off hire if the threat by piracy occurred "*during transit of the Gulf of Aden*", which they contended was a finite geographical area capable of definition.

Conversely, the Charterers argued that it applied wherever the Vessel was threatened in the Gulf of Aden "*or as an immediate consequence of her transiting or being about to transit the Gulf*".

The Tribunal had agreed with the Charterers' argument and the Court also preferred Charterers' interpretation of the clause, for the following reasons:

(i) As a matter of fact, the Gulf of Aden was not capable of being given a geographical definition in this context (this was the finding of the Tribunal and could not be challenged).

(ii) The principal purpose of Clause 101 was to enable the Charterers to trade the Vessel through the Suez Canal. The clause allocated to the Owners the risk of delay from detention by pirates as a consequence of the first sentence, which entitled the Charterers to give instructions to Owners for transit through the Gulf of Aden.

(iii) It was well known in the shipping community that transiting the Gulf of Aden exposed vessels to the risk of piracy in the Arabian Sea generally and not only in a particular area. With this in mind, the natural construction of the allocation of risk was that the Vessel should be off hire if it was detained by reason of piracy as an immediate consequence of the transit.

(iv) The war risk and kidnap ransom premiums were not defined by reference to a single geographic area and there was no basis for reading the off hire provision any differently.

The Court therefore concluded that although the Owners succeeded on clause 49, the appeal ultimately failed due to their interpretation of clause 101. Hire was therefore suspended during the period of the detention by pirates by virtue of clause 101.

Approach to construction

In the course of handing down his judgment, Mr Justice Popplewell made the following

useful comments in relation to the court's approach to construction at paragraphs 9-11: "*9. There is no shortage of recent high authority on the principles applicable to the construction of commercial documents. …*

10. In Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune) [2018] 1 Lloyd's Rep 654, I endeavoured to summarise the principles to be derived from those cases as follows. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

11. These principles are applicable to all contracts, including charterparties, but time charters give rise to particular considerations because of the allocation of risk which is inherent in their nature. Under a time charter the risk of delay is fundamentally on the charterer who remains liable to pay hire in all circumstances unless exempt from doing so under an off-hire provision. Accordingly the burden lies on a charterer to bring himself within the plain words of an exception from the obligation to pay hire; and, all other things being equal, doubts as to the meaning of such exceptions are to be resolved in favour of owners. This approach, described as long ago as 1948 as a cardinal rule, has been articulated and applied in many cases both before and since the recent House of Lords and Supreme Court cases on the approach to construction generally…. This is the fulfilment of recent guidance on the approach to construction of contracts generally because, to adopt the words of Lord Hodge in Wood v Capita at para 10, the nature of such contracts requires the court to give weight to such considerations as part of the wider context."

Comment

This case is a reminder that Commercial Courts are willing to examine not only clear and obvious errors in law by arbitration tribunals, but also the manner in which clauses are interpreted.

It is also demonstrates the willingness of tribunals and Courts, when construing charterparty clauses, to keep in mind not only the applicable legal principles but also the commercial purposes behind a clause. In this case, specific consideration was given to the prevalence of piracy and the extent to which the shipping industry was aware of its increase in and around the Gulf of Aden.

The Court's interpretation of clause 49 in particular is a warning to charterers that unless piracy is expressly listed as a specific off hire event, they run the risk of a tribunal or Court finding that hire will accrue even where the vessel has been captured by pirates.

Careful consideration should therefore be given to off hire wording in the context of piracy, particularly in circumstances where charterers are entitled to order the vessel to West Africa, which has seen a significant rise in piracy attacks in the last few years.

"ALWAYS ACCESSIBLE" MEANS THE VESSEL MUST BE ABLE TO ENTER AND LEAVE A BERTH

By Alex Davey, Partner, Birketts LLP

The words "*reachable on arrival*" and "*always accessible*" are commonly used in charterparty warranties to transfer to charterers the risk of delay in entering a berth. However, until now, there has been some debate about whether the phrase "*always accessible*" also transfers to charterers the risk of delay (after completion of cargo operations) in leaving the berth. In *London Arbitration 11/97*, the Tribunal decided that the warranty did not extend to "*leaving*" the berth. However, this decision has been treated with some caution by the leading textbooks, and the BIMCO Laytime Definitions (2013) and the Baltic Code (2014) considered that the words "*always accessible*" mean that a vessel must be able to both enter and depart from a berth.

The dispute arose in the case of *The Aconcagua Bay* [2018] EWHC 654 (Comm) when the mv *Aconcagua Bay* was trapped on her berth after loading cargo for 14 days due to a broken lock. The claimant vessel owners claimed detention from the Charterers, relying on the "*always accessible*" warranty in the charterparty. The two appointed arbitrators could not agree, so the matter went to an umpire. The umpire found in favour of the Charterers, sharing their view that "*always accessible*" did not infer that the vessel must be able to leave the berth.

This judgment by Mr Justice Knowles has now provided the judicial authority needed by the market. In allowing the Owners' appeal on this point, he has confirmed that for a berth to be "*always accessible*", the vessel must be able to enter *and leave* the berth. He considered that the word "*accessible*" could mean "*usable*" and that the word "*always*" was also important.

This means there is now a distinct difference between a warranty by charterers that a berth will be "*reachable on arrival*" (which only refers to arrival) and a warranty that the berth will be "*always accessible*" (which refers to arrival and departure).

This clarity is also important bearing in mind that, even if a berth or port is described as "*safe*", charterers are not normally responsible for delays (or even lengthy delays) in leaving, unless the delays are so long as to frustrate the charter (see, for example, *The Hermine*). If the parties have agreed to add the words "*always accessible*", however, the risk of delays is likely to transfer to charterers.

IS A PLEDGEE BANK HOLDING BILLS OF LADING BOUND BY THEIR TERMS, INCLUDING THE ARBITRATION CLAUSE?

By Nicholas Parton, Partner, Jackson Parton

In his judgment in *Sea Master Shipping Inc v Arab Bank (Switzerland)* [2018] EWHC 1902 (Comm), in proceedings under section 67 of the Arbitration Act 1996, Popplewell J dealt with the above issues, arising out the common occurrence in international trade and trade financing, of the financing bank holding bills of lading.

He was being asked to review a decision by London arbitrators who had answered both questions "no".

The FOB buyer had sold the cargo of soyabean meal on the *Sea Master* CIF, and had voyage chartered the *Sea Master* for discharge in two Moroccan ports. During the voyage to Morocco it lost its sale but found another buyer in a different port in Algeria. New switch bills of lading were issued by authorised agents in Dubai, but the second sale also fell through. A third buyer was eventually found in Lebanon. This time the necessary new switch bills of lading were switched at the bank's office in Zurich. The bills of lading, and the previous switch bills of lading, were returned to the ship owners' representative in Zurich. The bank then retained full control of the new switch bills of lading at all times. Some 9 months after it was loaded, thanks entirely to the professionalism and forbearance of the shipowners and their crew, the cargo was eventually discharged undamaged in Lebanon.

Prior to discharge completing the Charterers had ceased trading. The Owners, however, had substantial claims for demurrage and damages for detention.

Did the bank become an original party to the bills of ladings or otherwise incur liability for those claims under them?

Was the bank bound by the arbitration clause incorporated into the bills of lading from the charterparty?

Having heard extensive argument, on the first question, Popplewell J held that the question of whether the bank became an original party to the bills of lading due to the Zurich switch, and thereby incurred liabilities to the shipowners, was a matter for the arbitrators and not the court to decide on a section 67 application. He also held that it was a matter for the arbitrators to decide whether or not the bank had incurred liabilities under the bills of lading pursuant to section 3 of the Carriage of Goods by Sea Act 1992 i.e. whether the bank either took or demanded delivery from the shipowners or made a claim under the contract of carriage against the shipowners.

Popplewell J then dealt with the second question as to which he found there was no previous binding authority. He rejected the Bank's argument that *Primetrade AG v Ythan Ltd* (*The Yytan*) [2006] 1 Lloyd's Rep 457 was binding authority for the proposition that, unless a party took on rights and liabilities pursuant to sections 2 and 3 of COGSA 1992, that party was not bound by the arbitration clause in a bill of lading. He held that Aitkens J's finding to that effect was obiter, was not therefore binding and that Aitkens J had not had the benefit of proper argument on the point.

He held that the Bank was bound by the London arbitration clause and reversed the arbitrators' decision that they were not, with heavy costs consequences for the bank.

IT'S ALL IN THE CONSTRUCTION: FORCE MAJEURE AND THE COMPENSATORY PRINCIPLE

By Ian Short and Kaan Polat, Campbell Johnston Clark Ltd

In *Classic Maritime Inc v. Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102, the Court of Appeal handed down a judgment in June 2019 which looked at two key issues, namely (1) whether it is necessary to show a causal link between an exception or force majeure event and a failure to perform and (2) the correct approach to applying the compensatory principle to actual breaches of contract when assessing the level of damages to be awarded. Since leave to appeal to the Supreme Court has been refused, the Court of Appeal decision is the final word in this case.

Commentary on the decision has suggested that it is important to differentiate between force majeure and exception clauses as well as suggesting that there are now potentially two strands to the compensatory principle when it comes to assessing damages: one for measuring the consequences following an anticipatory breach and another for assessing losses flowing from an actual breach. However, in the authors' view, whilst there are useful issues arising from the case of which it is important to be aware, the decision primarily highlights the importance of construction of contractual clauses.

Factual Background

The case concerned a contract of affreightment ("COA") between Classic Maritime ("the Owners") and Limbungan ("the Charterers") for the carriage of iron ore from Brazil to Malaysia. The Charterers failed to perform two shipments in 2015 (the consequence of which were not disputed) but thereafter, on 5 November 2015, the Fundão dam at the iron ore mine of the Samarco Mariana Mining Complex suffered a catastrophic failure and halted production at the mine. A further five shipments could not be performed under the COA thereafter.

The COA included a clause, clause 32, which stated as follows:

> *"Exceptions*
>
> *Neither the Vessel, her Master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting From: Act of God, act of war….accidents at the mine…or any other causes beyond the Owners', Charterers', Shippers' or Receivers' Control; always provided that any such events directly affect the performance of either party under this Charter Party. If any time is lost due to such events or causes such time shall not count as laytime or demurrage…"*

The Charterers sought to rely on the exceptions to excuse themselves from liability in respect of the five remaining shipments after the dam burst.

Popplewell J then dealt with the second question as to which he found there was no previous binding authority. He rejected the Bank's argument that *Primetrade AG v Ythan Ltd* (*The Yytan*) [2006] 1 Lloyd's Rep 457 was binding authority for the proposition that, unless a party took on rights and liabilities pursuant to sections 2 and 3 of COGSA 1992, that party was not bound by the arbitration clause in a bill of lading. He held that Aitkens J's finding to that effect was obiter, was not therefore binding and that Aitkens J had not had the benefit of proper argument on the point.

He held that the Bank was bound by the London arbitration clause and reversed the arbitrators' decision that they were not, with heavy costs consequences for the bank.

The first instance decision

Teare J accepted that the dam burst made the performance of the remainder of the COA impossible. However, he held that Charterers could not rely on the exception in Clause 32 as they could not prove that they would have performed but for the collapse of the dam. Looking at the Charterers' efforts to secure cargo and the production output and sales of the unaffected mines, he found that they would not have performed anyway and were thus in breach of an absolute obligation to provide cargo. In other words, there was no causal link between the dam burst and Charterers' failure to comply with their absolute obligation to provide cargo for shipment.

However, the judge also held that Owners were not entitled to substantial damages as this would put them in a better financial position than if the Charterers had not defaulted; damages in this case being claimed at close to US$20 million. The judge determined that it would be contrary to the compensatory principle, when assessing damages, to ignore what the Owners' position would have been had the Charterers been willing and able to perform their obligations but for the dam burst. The judge therefore awarded Owners nominal damages of US$1 per shipment.

Owners appealed on the issue of damages. Charterers appealed on the issue of liability.

The Court of Appeal decision

Lord Justice Males handed down the leading judgment and dealt with the "*but for*" causation issue first.

Liability: the "but for" causation

The "but for" issue was whether it was necessary for the Charterers to prove that, but for the dam burst, they could and would have performed the contract or, to put it another way, that the dam burst was causative of the failed shipments.

Males LJ was quick to establish that the answer to this question lies in the construction of clause 32 and he performed a thorough examination of the wording of that clause. He accepted that neither party's construction would be particularly uncommercial nor surprising.

The Charterers submitted that it would be harsh to hold them liable for failing to supply in circumstances where, whatever their intentions, there was never any possibility that they would be able to supply any of the five shipments once the dam had burst. On the other side of the same coin it is hard to see why the dam burst should make any difference to the Charterers' liability when they were never going to perform those shipments in any event. There was already an established failure by the Charterers to supply cargoes to which the dam burst made no difference. Accordingly, the judge approached the construction of clause 32 without any predisposition as to the constructions which should be adopted and without any need to avoid what are said to be the unfair consequences of adopting one or other of the constructions – *"it was simply a matter of construing the words of the clause"* he said.

Males LJ's analysis of clause 32 included the fact that the clause was headed as an "*exceptions*" clause and that the clause applied to a particular cargo, namely the particular cargo that would have been supplied were it not for the event in question. However, particularly instructive was the fact that the words "*resulting from*" together with the requirement that the events in question "*directly affect the performance of either party*" import a causation requirement. He went on to say that:

"It is a valid use of language to say that a failure to supply the cargo (or even a cargo) does not "result from" an event if in fact the event makes no difference because the charterer was never going to supply a cargo anyway. Similarly, the proviso refers in my view to the performance which would have been rendered if the event or cause had not occurred. If the accident at the mine did not cause the charterer to do anything different because it had no intention of supplying a cargo anyway, it is fair to say that its performance was not "directly affected"."

This is not to say that in all cases such a causative aspect must exist but, as Males LJ was keen to point out throughout his judgment, "*all must depend upon the wording of the particular clause*". As such, clauses such as the Prohibition clause 21 of GAFTA 100 referred to, operated in a different way. A critical distinction is that a "contractual frustration" clause such as clause 21 brings the contract to an end once an event occurs thereby relieving both parties from any further obligation to perform under the contract. An exceptions clause, such as clause 32, simply operates to relieve a party from paying damages after a breach has occurred.

Neither does clause 32 provide for any automatic cancellation of the contract (or of individual shipments) and, accordingly, the reasoning of the House of Lords in *Bremer v Vanden Avenne* relied on by the Charterers cannot apply to it said the Court. It was not a "contractual frustration" clause. However, the Court of Appeal was keen to emphasise that putting labels on clauses was not particularly helpful, rather it was the wording of the clause that is most important:

"*Ultimately, however, in deciding whether the charterer can rely on clause 32 in circumstances where it would not have performed its obligation anyway, what matters is not whether the clause is labelled a contractual frustration clause, a force majeure clause or an exceptions clause, but the language of the clause. As with most things, what matters is not*

the label but the content of the tin."

Labelling clauses as "force majeure" or "exception" clauses is not particularly instructive, rather it is the wording of the clause that is key and here clause 32 operated in a way that provided for a causal link to be proved between the listed event and the failure to provide cargo.

Quantum: Assessing damages and the compensatory principle

The compensatory principle which applies to the assessment of damages for breach of contract involves putting the innocent party in the position it would have been in if the contract had been performed. The issue here was whether Teare J in the High Court had misapplied the compensatory principle by assessing damages on the basis that Charterers were ready and willing to supply.

Males LJ discussed the *Golden Victory* [2007] UKHL 12 and *Bunge v Nidera* [2015] UKSC 43 decisions, highlighting that these were concerned with the assessment of damages for anticipatory breach by renunciation which required the court to value the innocent party's right to future performance. In both cases, the innocent party's claim for damages was reduced because the value of the performance to which that party was entitled was adversely affected by events which occurred after the acceptance of the repudiation, such as a later right to lawfully cancel that would have otherwise been exercised.

However, the present case, the Court said, was not concerned with an anticipatory breach, but with actual breaches as a result of the Charterers' failure to supply cargoes for each of the five shipments in issue. Since it was common ground that, subject to clause 32, the Charterers' obligation to supply cargoes was an absolute obligation, the performance to which the Owners' were entitled was the supply of cargoes and the value of that performance was the freights which the shipowner would have earned if the cargoes had been supplied less the cost of earning them. Males LJ disagreed with Teare J in that the Charterers' obligation was not to be ready and willing to supply a cargo in each case, but actually to supply one.

As such, the Court of Appeal ruled that the Owners were entitled to just short of US$20 million in damages in respect of the five failed shipments.

Comments

Once a finding was made on liability that the Charterers could not rely on the clause 32 exception in view of the fact that they could not prove that the exceptions being relied upon were causative of the failure to supply cargo which, as a finding of fact, was never to be supplied in any event, it would be paradoxical to subsequently allow the Charterers to rely on the very same clause (or the sentiment contained within it) to limit quantum. This was not a case of anticipatory breach involving the assessment of, in effect, future losses: rather the COA continued. The analysis of each failed shipment would therefore have gone along the following lines:

1. Are the Charterers in breach of their absolute obligation to supply cargo? Yes.

2. Can the Charterers rely on the exceptions in clause 32? No, because the wording of the clause provides that there must be a causal link between the exception and the failure to perform and the Charterers cannot show this.

3. Damages thereafter are to be assessed in the usual way putting the Owners in the position that they would have been in but for the breach, namely by compensating them for their lost freight earnings less the costs that they would have incurred in the process.

Whilst commentary has suggested that the above approach means that the compensatory principle is applied differently depending on whether one is looking at an anticipatory breach scenario or an actual breach, the authors of this article are not entirely convinced that a different result would have been reached had, in this case, the Owners had a right to treat the contract as coming to an end earlier and claim damages; in circumstances where it was decided that the Charterers had no right to cancel in view of the dam burst, the Owners may well have been compensated for their lost future earnings under the COA in much the same way as they were here.

Key to this case overall, therefore, was, simply put, the construction of clause 32 and whether it allowed the Charterers to rely on it to escape liability for the failed shipments or whether they had to show that the exception was causative of their failure to perform. Once this was decided against them, they were faced with an uphill struggle to avoid having to fork out substantial damages. A differently worded clause, such as a force majeure clause enabling the contract to be cancelled upon the happening of certain defined events, would have produced a different result: construction was key.

THE "RENOS" – AN EPILOGUE?

By Lewis Moore, Partner, Hill Dickinson LLP

In April last year Lord Sumption returned to the Supreme Court to hear the appeal in *The Renos* [2019] 2 Lloyd's Rep. 78, a case of great interest to the shipping and insurance market.

The *Renos* was a Handysize bulk carrier, with an agreed value of US$12m plus Increased Value of US$3m. The Vessel suffered a serious engine room fire on 23 August 2012. LOF was signed and SCOPIC was invoked. There then followed a lengthy period during which Insurers and the Owners debated the cost of the repairs. Eventually Notice of Abandonment ("NOA") was served on 1 February 2013. This was rejected by Insurers who accepted that there was a partial loss, but denied that the Vessel was a CTL. Insurers said that the NOA was given too late and disputed the Owners' costs. They also argued that costs incurred prior to NOA should not be taken into account when assessing whether the Vessel was a CTL.

At first instance Knowles J held that the Owners succeeded in proving a CTL. He did not review the entire repair account, but he took into account the SCOPIC payment to Salvors. In addition, he did not accept Insurers arguments that the declaration was too late or that only post-NOA costs should be taken into account.

The Court of Appeal upheld Knowles J on all points. So, just under six years from the casualty, the case came before the Supreme Court who gave permission to appeal on the post-NOA expenses and SCOPIC points only.

Lord Sumption gave the judgment of the Court.

Post-NOA Expenses

The post-NOA expenses turned on section 60(2) of the Marine Insurance Act 1906 which provides that the vessel must be:

> *(ii) …so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.*
>
> *In estimating the cost of repairs…account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.*

It was common ground that the costs of repair were those faced by the prudent uninsured. Insurers argued that the test was exclusively "forward-looking" from the date of the NOA, and that the time for assessment must be when the NOA is tendered, pointing, particularly, to the use of the word "future".

The Owners argued that the test must look at the damage as occurred as at the date of the casualty, and that there was no logical or statutory reason why the costs of repair already incurred as at the date of NOA should be discarded. The word "future" was an inclusive term, not an exclusive term.

The Supreme Court agreed with Hamblen LJ in the Court of Appeal where he said that there was no reason why the costs should be separated in the way Insurers alleged and that salvage costs could be incurred before NOA was given.

Lord Sumption explained that a constructive total loss occurs at the point of the loss, namely from the date of the casualty when the "damage" occurred and did not accept the forward looking test the insurers favoured. The damage referred to under s. 60(2)(ii) was the damage arising from the moment the casualty happened. On Insurers' analysis salvage costs would be excluded in many cases.

Lord Sumption said:

> *"The rule that the loss is suffered at the time of the casualty applies notwithstanding that the loss developed thereafter, unless it developed as a result of something that can be regarded as a second casualty, breaking the chain of causation between the first one and the loss."*

SCOPIC

Paragraph 15 of the SCOPIC clauses provides as follows:-

> *"any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 14 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel."*

The Insurers case was that SCOPIC remuneration was and should never be intended or considered as a "cost of repair" under a hull policy, being closely related to potential environmental damage/pollution issues, and usually covered by P&I.

The Owners' position was that the SCOPIC expenses formed part of the "cost of repairing the damage" because they were an integral part of the salvor's remuneration. Owners said that the test was whether a prudent shipowner would contract with salvors on terms including SCOPIC.

Lord Sumption found for Insurers. SCOPIC charges were not part of the cost of repair. They did not relate to the reinstatement of the Vessel. He said:

> *"The objective purpose of SCOPIC charges was different. It was not to enable the ship to be repaired, but to protect an entirely distinct interest of the shipowner, namely his potential liability for environmental pollution. That purpose has nothing to do with the subject-matter insured, namely the hull. It was no part of the measure of the damage to the ship, and had nothing to do with the possibility of repairing her."*

Comment

The case demonstrates that the Court will look at all the facts when deciding what "reasonable time" should be allowed to Owners to give NOA (the point on which permission to appeal to the Supreme Court was refused). As with Notice of Readiness it may be advisable to give NOA at the earliest time and give subsequent notices when further information regarding repair costs is ascertained if there is a dispute.

Otherwise, the position as regards SCOPIC charges and pre-NOA expenses to a CTL is now authoritatively decided, or is it…?

Is the position still uncertain where there is a GA Adjustment?

At paragraph 8 of the Judgment, Lord Sumption, referring to MIA 60(2)(ii), made the obiter statement that:

> *"Its effect is that in computing the owner's cost of repairs (i) no account is to be taken of general average contributions receivable by him from other interests such as cargo or freight, whereas (ii) account is to be taken of future general average contributions payable by him to other interests."*

Could it be argued that all GA expenses are a cost of repair which should rank towards a CTL or should they be disregarded if payable by a third party?

What if cargo interests successfully defend a GA claim on the basis of unseaworthiness so that the Owners' P&I Club picks up those expenses; are the unrecovered GA expenses still excluded from the calculation of a CTL?

Would the Owners' share of forwarding costs (allowable in GA but which are not costs of repair) also rank towards calculating a CTL?

Given the length of time it may take for an Average Adjustment to be completed, does the decision on whether there is a CTL have to be delayed awaiting the Adjuster's calculation of what recovery the Owner will make in GA?

If SCOPIC is not invoked or is not payable, do expenses incurred to protect the environment have to be separately accounted for, or if the hull has a low salvage value, should the Owners avoid LOF and negotiate a commercial deal without SCOPIC to increase their chances of proving a CTL?

While the question of whether SCOPIC counts towards a CTL is definitively decided, there may still be scope for argument on other issues.

DON'T GET BIT BY THE TIGER – RECENT CASES ON THE PITFALLS OF TIME-BAR AND CLAIMS NOTIFICATION CLAUSES

By Brian Perrott, Partner, and Prashant Kukadia, Associate, HFW LLP

The Predicament

Imagine the everyday scene in the context of charterparties. You as an owner have a simple demurrage claim against the charterer. The claim is a routine calculation, and to make it easier, the calculation is undisputed. You present your demurrage invoice for settlement, expecting payment to be forthcoming. However, instead of a SWIFT confirming payment, you see the following message from the charterer: "*Apologies, your claim is time-barred*." Your heart sinks – you have failed to comply with the relevant clause that you agreed in the charterparty, costing your company hundreds of thousands, even potentially millions, of dollars. This may be because you have not submitted your claim in time in accordance with the time-bar clause or not submitted your claim accompanied by the required "*supporting documents*" in accordance with the claims notification clause. Either way, the rug has been pulled from what should have been a routine claim.

Of course, such a predicament does not only affect an owner – consider a charterer with a despatch, off-hire or even a return of an advanced payment claim.

Historic Case Law

Such issues have long been considered in arbitrations and by the Courts. Indeed, there is a rich history of cases around the topic which uphold that such clauses must be adhered to.

What has been the approach of the Courts with such clauses to date?

- **Purpose**: "*The commercial intention underlying this clause seems to me plainly to have been to ensure that claims were made by the owners within a short period of final discharge so that the claims could be investigated and if possible resolved while the facts were still fresh…*" Bingham, J in *The Oltenia* [1982] 1 Lloyd's Rep 448.

- **Unambiguous**: "*… if there is any residual doubt about the matter, the ambiguity is to be resolved in such a way as not to prevent an otherwise legitimate claim from being pursued….*" That being said, the "*ordinary and natural meaning*" of the clause should be applied and "*the contra proferentum rule is only invoked as a last resort if the meaning of the words is so finely balanced that the contra proferentum rule*

should be applied in favour" of the party whose claim is being barred; Gloster, J in *The Sabrewing* [2008] 1 Lloyd's Rep 286.

- **Certainty – but not necessarily strict compliance**: the "*touchstone*" of the approach to time-bar clauses should be "*a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results…*" Tomlinson, LJ in *The Abqaiq* [2012] 1 Lloyd's Rep 18.

Latest Case Law

Although a dispute as to whether a claim has been submitted in time is relatively easy to decipher, a more complicated issue arises when a clause requires a claim to be submitted in time accompanied with "*supporting documents*". It was this issue which was considered in two recent cases[1].

1. *The Tiger Shanghai* [2]

Clause

The time-bar clause in question in this case stated that the defendant would be "*discharged and released from all liability in respect of any claim*" which the claimant may have under the charterparty and "*such claims shall be totally extinguished unless such claims have been notified in detail to [the defendant] in writing accompanied by* ***all available supporting documents (whether relating to liability or quantum or both)*** *and arbitrator [is] appointed within 12 months from completion of the charter*" (our emphasis).

Facts

The claimant charterers made an advance payment of hire in relation to the time charter in question. The Charterers wished to cut new cement feeder holes at the loadport in order to assist loading and relied on a clause in the charterparty which the Charterers said allowed them to do so subject to the approval of the master / owners, with such approval not to be unreasonably withheld. The defendant disponent owner refused. The Charterers instructed marine surveyors to prepare a report on the feasibility of cutting the holes – the report was not sent to the disponent owner. When the disponent owner advised that their position as to refusing permission was final, the Charterers terminated the charterparty on the basis that the refusal of the disponent owner was unreasonable. The disponent owner accepted the termination of the Charterers as repudiatory. The disponent owner deducted its calculated losses for the Charterers' repudiatory action and returned the remaining advance payment to the Charterers. The Charterers wanted the entire advance payment back, without deduction.

The Charterers commenced arbitration proceedings by appointing an arbitrator within the 12

[1] HFW were involved in both cases

[2] *The Tiger Shanghai* [2019] EWHC 3240 (Comm)

month time limit. Along with the notice of arbitration, the Charterers attached various documents, including a final hire statement, but they did not attach the survey report.

A year after commencing arbitration, the Charterers served claim submissions. Along with the claim submissions, they attached a number of the same documents as they did when commencing arbitration, but this time they also attached the survey report. This was attached to show that the disponent owner could have reasonably permitted the cutting of the feeder holes.

The disponent owner relied on the time bar clause arguing, *inter alia*, that the failure to send the survey report within the required time was a failure to comply with the time-bar clause as it was an "*available supporting document… relating to liability or quantum or both….*"

The arbitral tribunal by majority agreed with the disponent owner, holding that the survey report was a supporting document and so should have been provided to the disponent owner within time. Accordingly, the Charterers' claim was therefore time-barred.

The Charterers obtained permission to appeal the arbitration award pursuant to section 69 of the Arbitration Act 1996 (an appeal based on a question of law), and the matter reached the English High Court for determination.

Findings

Although an all "*cards on the table*" approach was not strictly necessary, the Court highlighted that "*… the clause combines both specific reference to "all" and specific reference to "liability and quantum", while not confining itself to any particular sort of claim."* It was thus described as a "*wider*" clause than that usually analysed in the authorities, which in this case required the survey report to be presented in time.

Further, the Charterers' claim depended on proving the "*unreasonable refusal on the part of the Owners*" and as such, "*the [survey] report was on its face within the ambit of the claim that [the charterer] advanced and supportive of it*".

The arbitration award was therefore affirmed and the Charterers' claim was held to be time-barred for failing to comply with the claims notification clause.

2. Amalie Essberger [3]

Clause

The time-bar clause in consideration here stated that any claim for demurrage would be "*considered waived unless received by the Charterer… in writing with all supporting*

[3] *"Amalie Essberger" Tankreederei GmbH & Co KG v Marubeni Corporation* [2019] EWHC 3402 (Comm)

calculations and documents, within 90 days after completion of discharge… Demurrage… must be submitted in a single claim at that time, and the claim must be supported by the following documents: A. Vessel and/or terminal time logs; B. Notices of Readiness; C. Pumping Logs; and D. Letters of Protest."

Facts

A cargo was loaded in Netherlands and proceeded to Spain for discharge. Upon commencement of discharge operations at the disport in Spain, contaminated cargo was discovered which meant that the Charterers were unable to discharge the cargo. The Charterers then arranged for the cargo to be discharged at an alternative disport in Spain. As a result of the delays in discharging the cargo, around 11 days of demurrage accrued.

The Owners presented their demurrage claim by email to the Charterers on 22 December accompanied by a number of documents. They did not include the loadport pumping log or loadport letter of protest, however such documents were provided previously along with the loadport cargo documents (but not as part of a demurrage claim) on 1 December.

The Charterers claimed the Owners' demurrage claim was time-barred for failing to submit all the necessary documents in one single claim, as required by the clause. The Owners argued that the two missing documents were unnecessary and in any event had been provided previously and so did not have to be provided again.

Findings

The Court had little difficulty in agreeing that the missing loadport pumping log and loadport letter of protest were supporting documents. In any event, as the second half of the clause contained "*mandatory language*" (i.e. "must be supported") with regards to the provision of the missing documents, the Court held that: "*… I consider it to be clear… that the four listed categories of documents must be provided in support of the demurrage claim…even if they are strictly irrelevant to the demurrage claim*."

This then left the question of whether the missing documents had to be provided in <u>one single</u> claim, even though they had been provided before. The Court held not.

The reference to a "*single claim*" was held to mean that the Owners could only submit one demurrage claim, which in this case they did.

All that was required by the clause was that the supporting documents were provided within 90 days of completion of discharge – in this case, the missing documents were provided well before this. Further, as the clause specifically listed the four categories of documents which

"*must be*" provided, within which categories the missing documents fell, it should have been obvious to the Charterers that the documents were supporting and already in their possession. The Owners did not have to draw the Charterers' attention to the documents when submitting its single claim.

Therefore, the Owner's claim was not time-barred, as it was held that the Owners complied with the claims notification clause.

Learning points

1) *Where there is an "**all** supporting documents" clause, you do not need to send everything relevant to the claim.*

One must only send supporting documents. In the *Amalie Essberger*, upon analysing the previous case law on this point, the Court held that a supporting document was a document that when "*taken at face value establishes the validity of the… claim*"[4].

Cockerill, J provided some helpful commentary in *The Tiger Shanghai* to this regard: "*What is supportive is dictated by the claim which is being advanced.*" Accordingly, in *The Tiger Shanghai*, the Court determined that the claim "*depended on the date of termination and the date of termination depended on being entitled to terminate, which itself depended on unreasonable refusal on the part of the Owners. As such, the report was on its face within the ambit of the claim that [the charterer] advanced and supportive of it*".

Therefore the key takeaway is that the wording still requires an analysis of the documents in your possession and to consider whether they are supportive of your claim – if you are unsure, it is always better to serve the document, especially if there is a potential risk of your entire claim being time-barred.

2) *There is a difference between a "supporting document" and a "relevant document"*

Note that "'*supporting*" and "*relevant*" documents were distinguished in the *Amalie Essberger* in that if the clause stated that "*all relevant documents*" had to be provided, then this is a wider obligation and may also include the requirement to provide potentially adverse documents as well.

3) If you require certain documents to be provided along with a claim then list them expressly within your claims notification clause.

[4] Note that the Court also discussed, albeit in the context of demurrage claims, that a 'supporting document' would be a document which the owner (a) relied on in support of its claim, (b) is an essential or primary document which promotes or advances its claim, or (c) is an objectively relevant or essentially relevant document [30].

They will then be considered as "*mandatory documents*" which need to be provided regardless of their relevance. Remember, ambiguity will be held against the party relying on the time-bar clause.

4) *If you want all documents relating to a claim served at the same time, "single claim" wording will not suffice.*

You need to add wording which makes it clearer. Consider using wording such as: "*All supporting documents must be submitted along with a single claim, whether such documents were previously provided or not*".