RS SHIPPING BULLETIN

JANUARY 2011

REED SMITH

RS SHIPPING BULLETIN

1 ARBITRATION

1.1 COMMERCIAL COURT CONSIDERS THE CIRCUMSTANCES IN WHICH IT MAY GRANT SECURITY WHERE A PARTY IS CHALLENGING THE JURISDICTION OF THE TRIBUNAL

In *A v B* [2010] EWHC 3302 (Comm), the Applicant had been successful in a FOSFA arbitration against the Respondent. In the arbitration proceedings, the Applicant alleged that it had entered, as buyer, into two contracts with the Respondent as seller. The Applicant claimed damages for non-delivery under these contracts, while the Respondent argued that no binding contracts had been concluded. The Respondent also argued that the tribunal lacked substantive jurisdiction, and asked the tribunal to rule on its own jurisdiction. The first-tier arbitrators found in favour of the Respondent, while the FOSFA Board of Appeal held that the arbitrators did have jurisdiction and found that the Applicant's claim for damages succeeded.

The Respondent applied to the Court for orders under s.67 Arbitration Act 1996 (the "Act") that the awards of the Board of Appeal were of no effect because the tribunal did not have substantive jurisdiction. In the alternative, the Respondent sought permission to appeal under s.69 of the Act. Pending the determination of these applications, the Applicant applied for security under s.70(7) of the Act for the sums awarded to it by the FOSFA Board of Appeal.

The Court noted that it should be cautious in making orders under s.70(7) where a party was challenging the jurisdiction of the tribunal under s.67. Generally, there would be a "threshold requirement" that the party resisting the jurisdictional challenge (in this case the Applicant) prove that the challenge was flimsy or otherwise lacking in substance. As regards the matters relied on by the Applicant to prove this, the Court could only consider the various points raised to see if the threshold requirement had been met. It was not for the Court at this stage to consider the merits in too much detail, as there would be a full rehearing on the s.67 application and it would be for the judge at that hearing to determine the merits.

In this case, the Respondent's argument that there were no binding contracts was neither flimsy nor lacking in substance. The Applicant had therefore not met the threshold requirement, and the application for security failed.

Generally, it will not be appropriate to order security under s.70(7) unless an applicant can demonstrate that the challenge to the award will prejudice its ability to enforce that award. This will often involve an applicant proving a risk of dissipation of assets.

1.2 HIGH COURT RULES THAT AN ARBITRATOR DOES NOT AUTOMATICALLY CEASE TO HAVE JURISDICTION FOLLOWING A SETTLEMENT BETWEEN THE PARTIES

In *Dawes v Treasure and Son Ltd* [2010] EWHC 3218 (TCC), the Defendant was a contractor who had carried out construction works at the Claimant's estate. The contract between the parties provided that all disputes should be dealt with in arbitration governed by the Construction Industry Model Arbitration Rules ("CIMAR"). A dispute arose, which was duly referred to

arbitration. The dispute was subsequently settled, but the parties did not ask the arbitrator to terminate the proceedings and neither the parties nor the arbitrator drew up an order or award reflecting the terms of the settlement. Following settlement, the parties referred the issue of costs to the arbitrator, who made a series of costs awards.

The Claimant subsequently attempted to commence a new arbitration and to appoint a new arbitrator. The Defendant argued that all of the Claimant's new allegations were covered by the settlement. The original arbitrator ruled that he had jurisdiction to consider the scope of the settlement and that his jurisdiction had not ceased with the settlement agreement. He subsequently issued an award finding that the settlement did indeed cover the Claimant's new allegations. The Claimant appealed to the High Court, challenging the arbitrator's rulings.

The Court noted that it was necessary to examine the contract between the parties in order to determine what they had agreed, either expressly or impliedly, as regards when the arbitrator's jurisdiction came to an end. The settlement of a dispute after the commencement of arbitration but before the issue of a final award does not, neither generally nor necessarily, bring an arbitrator's jurisdiction to an end. Section 51 Arbitration Act 1996 suggests that following settlement, an arbitrator retains a jurisdiction to terminate the proceedings and to resolve issues of costs or any other matters still in dispute.

It was held that the arbitrator retained unqualified jurisdiction. He would have done so if there had been an issue as to whether there was a settlement, and nothing in s.51 suggested that an arbitrator's jurisdiction necessarily ceased following a settlement save only in respect of matters related to costs. Further, in this case, the parties did not proceed as if the arbitrator's jurisdiction had ceased with the settlement. They clearly considered that he had jurisdiction to deal with costs, and did not think it necessary to draw up a consent award or ask the arbitrator to formally terminate the proceedings. The CIMAR Rules entitle a party, after an arbitrator has been appointed, to refer another dispute to the same arbitrator who then has the right to consolidate it with the existing proceedings.

The Court agreed with the arbitrator's findings that the new claims were covered by the settlement agreement, and the claims were dismissed.

Although this case was very fact-specific, the judgment does confirm that an arbitrator will generally retain jurisdiction until he has made a final award disposing of all issues, including costs.

2 CONTRACT

2.1 COURT OF APPEAL CONFIRMS THAT EVIDENCE OF MARKET PRACTICE IS ADMISSIBLE AS AN AID TO CONTRACT INTERPRETATION

When interpreting a contract, a court may take into account the background knowledge which would have been available to the parties at the time that they entered into the contract. In *Thomas Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, an action involving a Claimant investment banker who was engaged by the Defendant stockbroker as a sub-broker, the Court was required to consider whether custom and practice in the City relating to the payment of sub-brokers meant that the Claimant was entitled to receive his fee regardless of whether the Defendant received its fee. The main issue was whether any such general market practice or understanding would be admissible as part of the factual matrix in which the contract was to be construed.

At first instance, the claim was dismissed and the Claimant appealed, arguing that a court could not consider expert evidence on "usual market practice", either for the purposes of construing express terms or to assist in interpretation of implied terms, unless it was asserted that there was a "trade custom or usage". The Defendant submitted that the court could take advantage of expert evidence on usual market practice in deciding on the construction of express terms, or on the existence and nature of implied terms.

The Court noted that the contract between the parties (which was partly written and partly oral) did not deal with the point in issue, and so the Court had to work out what the parties intended should happen as regards the Claimant's fee in the event that the Defendant was not paid its fee. This had to be considered from the point of view of the "reasonable addressee". In coming to a decision on this, the Court said that they should be entitled to hear independent expert evidence on "market practice", if such evidence was relevant background knowledge for interpreting the terms of the contract. What parties agree can only be judged against the factual background available to them, and this must include the practices of any particular market in which they operated at the time and in which the agreement was made. If the parties disagree on what market practice is, the judge must decide whether a particular market practice exists or not. If it does, then the judge must decide if it is useful background evidence against which to construe the contract.

However, despite finding that evidence of market practice was admissible, the Court found that on the facts no market practice had been established, and so allowed the Claimant's appeal.

2.2 COURT OF APPEAL STRESSES THE IMPORTANCE OF ESTABLISHING THE TERMS OF AN OFFER

Crest Nicholson (Londinium) Limited v Akaria Investments Limited [2010] EWCA Civ 1331 was an appeal from a decision of the High Court relating to a profit sharing provision in a development agreement. The main issue in dispute between the parties was whether the open market rent for certain un-let units had been agreed (as the Respondent, successful at first instance, argued), or

whether it had not been agreed and so remained to be agreed between the parties or determined by an expert to be appointed under the development agreement (as the Appellant argued).

The Court's decision was based heavily on the construction of various communications between the parties, however the Court did note the correct test for establishing whether a communication is a valid offer.

There is a distinction between seeking to ascertain parties' intentions under the terms of a contract which both accept has been made, and seeking to determine whether a contract has been made at all. In the former situation, the question to ask is: "what did the parties intend by the words used in the agreement which they made?". In the latter situation, it must be asked: "was there a proposal or offer made by one party which was capable of being accepted by the other?". If so, "was that proposal accepted by the party to whom it was made?". In determining the answer to the first of these questions, the court must ask whether a person in the position of the party to whom the proposal was made would, acting reasonably, understand that the other party had made a proposal to which he intended to be bound in the event of an unequivocal acceptance. This followed *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.

3 COSTS

3.1 HIGH COURT CONSIDERS FACTORS RELEVANT TO DETERMINING THE AMOUNT OF INTERIM COSTS TO BE PAID BY AN UNSUCCESSFUL PARTY

The facts of the underlying proceedings in *Linklaters Business Services v McAlpine Ltd and others* ([2010] EWHC 2931 (TCC)) and the facts relating to the costs judgment ([2010] EWHC 3123 (TCC)) can be found in the judgment texts on Westlaw.

One of the issues considered by the Court was the amount of an interim payment on account of costs that one of the parties was required pay to another. The Court referred to the principles set out in *Mars UK Ltd v Teknowledge Ltd* [2008] EWHC 226 (Pat) and set down the following guidelines:

1. The court should keep in mind that it will usually only have access to a summary assessment by the party seeking the interim payment. The final sum could be either more or less than this figure.

2. The court should decide whether it will order standard or indemnity costs, and should then form a view as to what the likely range of deduction from the final costs bill will be. This could be 66-75% (on a standard basis) or 10-15% (on an indemnity basis).

3. The court should make a reasonable assumption as to the final costs bill that the deduction will be applied to. This reflects the uncertainty surrounding the summary assessment figures referred to in point 1 above.

Another point of interest in this case was the order that indemnity costs should be paid not from the end of the 21 day period of one party's settlement offer, but from a date seven days later. This was to reflect the fact that it was acceptable for the party to whom the offer was made to wait until the exchange of expert evidence before deciding to accept the offer. The judge said that he had "no doubt" that the offering party would have extended the offer.

3.2 THAT A CASE INVOLVES A CLAIM AND COUNTERCLAIM WHICH MAY GIVE RISE TO SET-OFF DOES NOT PRECLUDE THE MAKING OF AN ORDER FOR SECURITY FOR COSTS

In *Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWHC Civ 1469, the Claimant disputed the Defendant's termination of the contract between them and brought proceedings claiming payment from the Defendant under the contract. The claim was for (a) work already performed, and (b) loss and damage by way of loss of profit under the contract. The Defendant denied that it was in breach and that it was obliged to pay the sums claimed. It also brought a counterclaim for (a) losses arising from the Claimant's alleged breach of contract, (b) an account of monies and materials provided by the Defendant in advance which were not used by the Claimant, and (c) either delivery up of the project qualification records or an indemnity for any losses that might be suffered as a result of the Claimant's failure to deliver these up.

The Defendant applied, under CPR 25.12, for an order that the Claimant provide security for costs. The judge at first instance made the order, stating that if the security was not provided, the claim would be dismissed. The Claimant appealed, submitting that while it was in a position to provide security, the judge was incorrect to order that it do so for several reasons. Firstly, the amount allegedly due to the Claimant from the Defendant exceeded the amount of security sought, and there was no reasonable basis for deciding that the Claimant would be unable to pay the Defendant's costs if ordered to do so. Secondly, it was unjust to make an order for security and, thirdly, the amount of security ordered was unreasonable.

The Claimant's appeal was dismissed. The Court found as follows on the three main strands of the Claimant's argument:

1. While set-off does provide a degree of security for the successful party, this is the case regardless of whether an order is made for security for costs. The court could not consider the sums in the Defendant's possession without taking into account the assets which the Defendant alleged belonged to it and which were in the Claimant's possession. In such circumstances, the sums being held by the Defendant could not be seen as offering any security for costs. The judge considered the scenario where an order for costs was made against the Claimant. In such a scenario it would be likely that the Defendant had established a counterclaim sufficient to eradicate the Claimant's initial claim. The court had to look at the reality of the situation: the Claimant would not have the benefit of the sums allegedly held by the Defendant, and it would also have had to pay its own costs of the litigation.

2. The aim of the rules relating to security for costs is to protect a party (whether a defendant or a claimant responding to a counterclaim) which is forced into litigation against the adverse costs consequences of that litigation. In this case, the Defendant did not commence the litigation, and its response to the Claimant's action of pleading the claims open to it did not amount to advancing counterclaims with an independent vitality of their own. The extent to which the Claimant would be limited in the continuing litigation if prevented from pursuing its claim had to be balanced against the fact that there might be no continuing litigation at all if the claim was dismissed in default of the provision of security for costs. In such circumstances, the judge at first instance had been correct to make an order for security.

3. The judge's decision as regards quantum was within the ambit of his discretion, although the figure was not arrived at by a precise investigation of the detail of the estimated costs. Fixing the appropriate figure for security is not an exact science.

This decision clarifies the point that even if a case involves a claim and counterclaim which give rise to a set-off, this does not mean that security for costs cannot be awarded. It also emphasises the point that a judge has a wide discretion on whether to order security for costs, and in what amount.

4 EU

4.1 EUROPEAN COMMISSION PUBLISHES PROPOSALS FOR THE REFORM OF THE BRUSSELS REGULATION

The European Commission has published proposals for the reform of the Brussels Regulation on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001/EC). The proposals, which include a draft amended Regulation, include the following suggested changes to the Regulation:

1. Arbitration and court proceedings which have arbitration as their subject matter are currently excluded from the scope of the Regulation. The new proposals retain this exception, but clarify it in two ways. Firstly, under a new rule, a court seised of a dispute would be required to stay proceedings if (a) its jurisdiction is contested on the basis of an arbitration agreement and (b) an arbitral tribunal has been seised of the case, or court proceedings relating to the arbitration agreement have been commenced in the Member State which is the seat of the arbitration. This rule will not prevent courts from declining jurisdiction where there is a prima facie arbitration agreement, if they are required by national law to do so. A further new rule specifies when an arbitral tribunal is deemed to be seised of a dispute.

2. Proposals are included aimed at simplifying the enforcement of Member State judgments within the EU. Currently, it is necessary for a party seeking to enforce a judgment to either have the judgment registered in the Member State in which enforcement is sought, or to have it declared enforceable. The proposals seek to abolish this intermediate stage, and to make a judgment of one Member State immediately enforceable in other Member States.

3. Currently, as regards non-EU defendants, a Member State applies the rules of its own private international law to determine whether it can assert jurisdiction over a foreign national. It is proposed that the jurisdiction rules in the Regulation be extended to non-EU defendants and that the existing national jurisdiction rules be removed. Two additional grounds are proposed for founding jurisdiction over non-EU defendants: (a) where the defendant has assets in a Member State and the dispute has another sufficient connection to that Member State; and (b) where there is no other forum available which would guarantee a fair trial and the dispute again has a sufficient connection to the relevant Member State. Another new rule is proposed which would allow the court of a Member State to stay proceedings where earlier proceedings have been commenced in the court of a non-EU country.

4. Currently, if a party brings proceedings in the court of a Member State which are in breach of a jurisdiction clause, any subsequent proceedings brought in the court of the Member State specified by the jurisdiction clause must be stayed pending the first-seised court's determination of jurisdiction. It is proposed that this provision essentially be turned on its head, and that the proceedings brought in breach of the jurisdiction clause be stayed pending the decision of the court of the Member State specified in the clause.

Full details of the proposed reforms can be found on the Europa website.

5 INSURANCE

5.1 COMMERCIAL COURT RULES ON THE BURDEN OF PROOF UNDER A CONTRACT OF INSURANCE INCORPORATING AN EXCLUSION FOR 'MYSTERIOUS DISAPPEARANCE'

In *AXL Resources Ltd v Antares Underwriting Services Ltd* [2010] EWHC 3244 (Comm), the Claimant metal trading company brought a claim against the Defendant underwriters, who carried on business at Lloyd's of London. The Claimant was insured by the Defendant against all risks of loss, under a Lloyd's Marine Open Cargo Policy which incorporated a clause excluding "mysterious disappearance and stocktaking losses". A cargo of cobalt cathodes owned by the Claimant went missing from a warehouse in Antwerp in unexplained circumstances. The Claimant made a claim under the insurance policy, and the Defendant refused to pay. The Claimant subsequently applied for summary judgment, by which time the Belgian police had gathered evidence of an organised theft. In response to the application, the Defendant submitted that the true construction of the "mysterious disappearance" clause was of interest to the market, and this was a compelling reason why the matter should go to trial.

The Claimant submitted that because the policy covered all risks, it had to prove no more than the fact of the cargo's accidental loss. It did not have to disprove "mysterious disappearance", nor did it have to prove that the exclusion did not apply. It was, the Claimant argued, for the Defendant to prove that the cause of the loss fell within the "mysterious disappearance" exclusion. The Defendant countered with the argument that the Claimant was required to prove that the disappearance was the result of a theft.

The Court granted summary judgment to the Claimant, on the grounds that it could be established that the loss was caused by theft. Although there was therefore no need to consider the relationship between the all risks cover and the "mysterious disappearance" clause, the judge did comment as regards the burden of proof that it was for the Claimant (as the assured) to prove a fortuitous loss. Thereafter, as is established law, the burden switched to the Defendant (as the insurer) to prove that the loss fell within the "mysterious disappearance" exclusion. The Defendant had no real prospect of being able to do this.

6 PRACTICE AND PROCEDURE

6.1 THE COURT'S POWER TO GRANT CONDITIONAL ORDERS UNDER CPR 3.1(3) CANNOT BE USED AS A MEANS TO CIRCUMVENT THE REQUIREMENTS FOR SECURITY FOR COSTS UNDER CPR 25

In *Brian Huscroft v P&O Ferries Ltd* [2010] EWCA Civ 1483, the Court of Appeal considered the circumstances in which an order may be made for the payment of money into court pursuant to CPR 3.1(3). One party had applied for an order under this part of the CPR requiring the other party to pay money into court "as security for costs with conditions".

CPR 3.1(3) gives the court the power to make conditional orders, stating that "when the court makes an order, it may (a) make it subject to conditions, including a condition to pay a sum of money into court; and (b) specify the consequence of failure to comply with the order or condition." CPR 25 sets out the rules dealing with security for costs.

The Court of Appeal did not allow the order requested. Various points were noted by the court, including the following:

1. CPR 3.1(3) gives the court a general power, pursuant to which it is entitled to make a conditional order requiring that money be paid into court as security for a party's costs.

2. However, this does not mean that CPR 3.1(3) can be used as a means of circumventing the requirements of CPR 25. The principles of the latter must be borne in mind by the court when it is considering making an order under CPR 3.1(3) which is, or amounts to, an order for security for costs.

3. CPR 3.1(3) does not confer on the court a general power to impose conditions whenever it is making an order. Any conditions should be expressed as part of the order granting the specific relief to which they relate, and the court should focus on whether the conditions specified are an appropriate price to pay for the relief being granted. The court should consider the purpose for which a particular condition is imposed, and should be satisfied that the condition is a proportionate and effective means of achieving that purpose.

This case makes it clear that the court is not able to make free-standing orders under CPR 3.1(3). The correct approach is for the court to attach specific conditions to a specific order, and for it to be satisfied that the condition imposed is appropriate to achieve a particular purpose. Parties should bear this in mind when drafting applications and orders. A draft order under CPR 3.1(3) should be expressed as a condition of some other order or relief, and the associated application should explain why the condition is necessary and appropriate.

6.2 HIGH COURT CLARIFIES ISSUES RELATING TO APPLICATIONS FOR ACCESS TO COURT DOCUMENTS BY NON-PARTIES

In *ABC Limited v Y* [2010] 3176 (Ch), the High Court considered an application for access to documents by a non-party. The documents in question concerned the disclosure and use of confidential information. The Court clarified the following points as regards such applications:

1. A non-party may obtain a copy of a judgment or order made in public, and the court has no power to order that a non-party should not be able to obtain such a copy.

2. Under the principle of "open justice", access should be granted to documents which have formed part of the decision-making process in a public hearing. This principle applies to both interlocutory and final hearings.

3. The court's power under CPR 5.4C(4) to restrict access to documents is confined to statements of case.

4. Where a party seeks the court's permission for access to documents under CPR 5.4C(2), and these documents were not part of the decision-making process at a public hearing, where restriction on access has already been ordered in relation to them, or where there has been a private hearing, it must be asked whether it is in the interests of justice that access to these documents be provided.

5. The court can make an order granting a non-party access to documents where the application is made for the purposes of collateral litigation. Such an order can also be made where there is no litigation in prospect.

6.3 COURT OF APPEAL CONSIDERS THE IMPORTANCE OF AN OMISSION TO SERVE A RESPONSE PACK WITH THE CLAIM FORM IN GRANTING AND SETTING ASIDE DEFAULT JUDGMENT

In *Rajval Construction Ltd v Bestville Properties Ltd* [unreported], the Respondent, claimant in the original action, had failed to serve with the initial claim form the documents required by CPR 7.8(1) (the so-called "response pack"). The claim form was served on the Appellant personally, and then some days later was forwarded to the Appellant's main director. Eight days later, the director forwarded the claim form to the Appellant's solicitors. This was done on the day before Christmas Eve, and no action was taken until the first working day of the next year. Evidence later emerged that at the time the claim form was served, the director had been in India due to the illness of a family member, who had returned with him to the UK and had been hospitalised for some time. This background information was central to the Court's decision-making process.

The Respondent subsequently obtained default judgment on the grounds that the Appellant had not acknowledged service in time. The Appellant successfully applied to have the default judgment set aside, but a condition was placed on this that the Appellant pay £75,000 into court. The Appellant was unable to comply with this condition and appealed.

The Court held that it was inappropriate to make the service of a response pack a condition that had to be fulfilled before default judgment could be obtained. However, the failure to serve a response pack was a factor to be taken into account when considering an application to set aside a default judgment. The breach of the CPR in failing to serve a response pack had to be given the weight appropriate to the facts of the case. Where a defendant's circumstances were such as the Appellant's had been in this case, it was appropriate for the court to exercise its discretion to set aside a default judgment regardless of whether it had been shown that there was a real prospect of the claim being defended.

The Court also noted that the setting aside of a default judgment should not be regarded simply as a matter of case management. The conditional setting aside of a default judgment could often be tantamount to a refusal, and thus amount to a final decision where a condition is imposed with which a party is unable to comply.

6.4 COURT OF APPEAL CONSIDERS THE GROUNDS FOR REOPENING AN APPLICATION FOR RECONSIDERATION OF A REFUSAL TO ALLOW PERMISSION TO APPEAL

In *Trevor Guy v Barclays Bank plc* [2010] EWCA Civ 1396 the Court of Appeal heard an application under CPR 52.17 for reconsideration of a refusal to grant permission to appeal a summary judgment decision.

The facts of the case involved the transfer of land belonging to the Appellant. This land was registered in the name of a company and used as security for a loan from the Respondent to another company. The Appellant submitted that the initial transfer was completed without his authority. The Court found that the Respondent had been validly registered as the proprietor of a charge, and as such was free to exercise its powers to sell the property. On this basis, the Respondent was granted summary judgment and the Appellant was refused permission to appeal this decision.

The Appellant applied to reopen the application for permission to appeal, on the grounds that the judges on the permission application were wrong to conclude that the appeal stood no prospect of success. The issue, on the facts, was whether the Appellant would be able to persuade the court to remove the registration of the Respondent as a chargee for the purpose of correcting a mistake.

The focus of the judges on the permission application had been whether the registration of the charge, rather than the transfer, was a "mistake". While it could be argued that the charge flowed from the mistake of registering the transfer, the Appellant had not advanced this argument very strongly in the permission application and it could not be considered an "exceptional circumstance" justifying reopening the application under CPR 52.17. The Court noted that if a party fails to advance a point, or argues that point ineptly, that will not, at least without more, justify reopening a decision of the court.

The Court also considered whether it was necessary to reopen the application in order to "avoid real injustice" (as required by CPR 51.17(1)(a)). While the application was important to the

Appellant (due to the high value of the land), it was also important to the Respondent. There were also issues of public interest to consider, i.e. the need for finality in litigation.

Under CPR 52.17, "appeal" includes an application for permission to appeal. The Court clarified that the criteria in CPR 52.17 should be applied just as rigorously to reopening an application for permission to appeal as to reopening an appeal.

7 SHIPPING

7.1 COMMERCIAL COURT RULES ON THE EXCLUSION OF A CARRIER'S LIABILITY UNDER A BILL OF LADING AND THE BURDEN OF PROOF AS REGARDS DAMAGE TO GOODS

In *Exportadora Valle De Collina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm), the Claimant shippers of a cargo of grapes brought an action against the Defendant owners and carriers for losses arising from damage to the cargo. The cargo had been packed at cold stores, carried by road to the terminal, and then loaded onto container vessels. It was on the outturn of the cargo that problems were encountered, although it was unknown at which stage of the voyage the damage occurred.

The clause entitled "Carrier's responsibility – multimodal transport" in the Defendant's standard bill of lading applied. The Defendant argued that any loss or damage to the cargo was caused by one or more matters which amounted to exclusions under this clause, namely insufficient or defective packing, bad stowage and/or inherent vice. The Defendant also submitted that the burden of proof was the same as that under the similarly worded article 18(2) of the Convention on the Contract for the International Carriage of Goods by Road 1956, i.e. that the carrier need only prove that it was plausible that the damage arose from an excluded cause of loss, and not that it did so on the balance of probabilities.

The Court found in favour of the Claimant. It had shown that, on the balance of probabilities, there was actual damage to the cargo and, again on the balance of probabilities, that this damage was not a result of any of the excluded causes advanced by the Defendant. This latter point rebutted the presumption as to the burden of proof relied on by the Defendant. Further, if none of the exclusions applied, the Claimant did not have to prove the actual cause of the loss and damage.

The judge declined to shift the burden of proof to the Claimant. He rejected the Defendant's argument that all permissible instances of lack of refrigeration of the cargo at loading or discharge were an aspect of the Defendant's duty as carrier, which the Claimant as shipper must prove that the Defendant had undertaken, as opposed to an excluded peril to be proved by the Defendant. The goods were received by the carrier in apparent good condition, but were delivered in a damaged condition, and so the burden of proof lay with the carrier to show what proportion of the damage was attributable to a cause for which it was not responsible. To the extent that it could not do so, the carrier was liable for the entirety of the damage.

The correct measure of damages was found to be the difference between the sound arrived value of the cargo and the sale price actually achieved, plus any expenses incurred in achieving that sale price which would not have been incurred but for the Defendant's breach.

7.2 BIMCO AND NORWEGIAN SHIPBROKERS' ASSOCIATION COMMENCE REVISION OF SALEFORM 1993

BIMCO and the Norwegian Shipbrokers' Association have decided to revise SALEFORM 1993, the industry's standard contract for the sale and purchase of second hand vessels.

The two organisations intend to complete the revision by autumn 2011. A review of the relevant amendments will be circulated in due course.

7.3 INTERNATIONAL GROUP OF P&I CLUBS REVISES ITS LETTERS OF INDEMNITY

The International Group of P&I Clubs (the "Group") has revised its Letters of Indemnity following the decision of the Commercial Court in *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max)* [2009] 1 Lloyd's Rep. 81. This case involved a dispute arising from the delivery of a cargo without production of the original bill of lading in return for a Letter of Indemnity ("LOI"). In such a situation, the Group recommends that its members take two precautions if they choose to accept a LOI.

1. As regards the identity of the party to whom delivery is to be made, it is recommended that the following phrase be inserted along with the name of that party: *"X [name of specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X"*. If such a phrase is not inserted, the Member may assume the burden of properly identifying the party to whom delivery is to be made. If this party is identified incorrectly, and delivery is made to another party, the Member may lose its entitlement to an indemnity. The suggested wording is aimed at ensuring that the Member can rely on the LOI if he believes that the party to whom delivery of the cargo is made either is X, or is acting on behalf of X.

2. The second precaution relates to the timing of demands under a LOI. If an allegation is made against a Member that it has delivered the cargo to the wrong party, together with a demand for security, the Member must immediately notify the issuer of the LOI of the following:

    a. that a claim has been notified to the Member;

    b. that security has been demanded from the Member; and

    c. that the Member requires to be secured by the issuer in accordance with the LOI.

    This must be done before the Member provides any security, otherwise the Member may prejudice its right to demand and receive security from the issuer of the LOI.

In relation to these developments, BIMCO has warned that owners should be wary of a LOI signed only by an owner and a charterer, as the charterer may not have enough assets to enable them to deal with the financial challenges involved.

7.4 COURT OF APPEAL CONSIDERS ISSUES OF CAUSATION ARISING OUT OF THE CARRIAGE OF DANGEROUS CARGO

In *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp (The Aconcagua)* [2010] EWCA Civ 1403, the Appellant Shipper appealed against a first instance judgment that it was liable for damages arising out of the shipment of a dangerous cargo of calcium hypochlorite. The cargo, which was known to be capable of self-ignition, was classified as dangerous and had to be stowed away from sources of heat. It was stowed in the vessel's hold surrounded on three sides by a bunker tank, which was not a source of heat at the time of shipment. The cargo exploded when the vessel was in tropical waters and so was subject to elevated ambient temperatures. Prior to the explosion, the bunker tank had been heated in order to facilitate a transfer of bunkers for fuel oil.

At first instance, the Respondent argued that, unbeknownst to them, the cargo was abnormally unstable, being prone to self-ignition at ordinary carriage temperatures. The Appellant argued that the heating of the bunker tank was the, or a, cause of the explosion, to which the Respondent countered that the stowage of the cargo next to a bunker tank which was heated on the voyage was of no causative significance. The judge at first instance found that the cargo experienced only ordinary ambient temperatures, without being affected by the bunker heating, but that the cargo nevertheless exploded in these ordinary conditions. The bunker heating was, therefore, not causative. The judge found the Appellant liable for shipping a cargo of "rogue material" with an abnormally low critical ambient temperature.

On appeal, the Appellant argued that the judge had incorrectly jumped straight from the conclusion that the explosion was not caused by excessive heating, to finding that the explosion was caused by rogue cargo, which made the Appellant liable. The explosion could, the Appellant argued, have been caused by some other unknown factor and to the extent that the judge relied on factors other than his rejection of the Respondent's primary case, this reliance was misplaced.

The appeal was dismissed. The first instance judge had used other evidence to reach his final conclusion, which was preceded by various other findings. He had preferred the evidence of the Respondent's expert, as was his entitlement. There was evidence before him which enabled him to conclude that the cargo shipped was likely to have an abnormally low critical ambient temperature and that it was of a dangerous nature of which the Respondent did not have, nor should have had, knowledge. Further, the Respondent had not knowingly consented to the shipment of cargo of such a nature.

The Appellant had relied on the proposition (set down in *The Popi M* [1985] 2 Lloyd's Rep 1) that if two possible causes of loss are put forward, the rejection of one cause does not necessarily lead to the conclusion that the loss must have been caused by the other. The Court of Appeal found that, contrary to the Appellant's argument, the first instance judge had not made this error.

At the end of his judgment, Longmore LJ noted that calcium hypochlorite is not a cargo whose nature is such that even the strictest compliance with accepted methods of carriage will not be enough to eliminate the risk of an accident. Rather, it has been carried safely for decades. In such circumstances, if the carriage by the shipowner (or, as in this case, time charterer) cannot be faulted, then the likelihood is that a claim by the owner or charterer for breach of contract in shipping dangerous cargo is likely to succeed.

7.5 SCOTTISH COURT OF SESSION CONSIDERS WHETHER A VESSEL CAN BE ARRESTED IN SUPPORT OF AN ACTION RELATING TO THE SUPPLY OF REMOTELY OPERATED VEHICLE EQUIPMENT TO THE VESSEL

In *Oceaneering International AG v Vessel "SARAH"* [2010] CSOH 161, the Outer House of the Scottish Court of Session considered an application to recall an arrest. The Claimant had supplied remotely-operated vehicle equipment ("ROV") to the vessel, but had not been paid and so commenced proceedings in England claiming monies owed. The vessel was arrested in support of these proceedings, and the arrest was granted by way of an order made under s.27 Civil Jurisdiction and Judgments Act 1982.

Under s.47 Scottish Administration of Justice Act 1956 (the "Act") a vessel may be arrested for, *inter alia*, "the supply of goods or materials to a ship for her operation and maintenance" and "the construction, repair or equipment of any ship". The Respondent argued that the ROV did not amount to "necessaries" as required by the authorities, and indeed had not been supplied to the ship itself, rather to the Respondent. Further, the ROV supplied was not necessary for the operation of the vessel: the Respondent could, in theory, have deployed the vessel without it. In any event, the ROV would be operated *from* the vessel rather than as part of her operation.

The Respondent's application for the recall of the arrest was dismissed. The important questions as regards the relevant sections of the Act were (1) was the relevant supply "to" a ship? and (2) if so, was that supply for her operation? (per Lord Brandon in *The River Rima* [1988] 2 Lloyd's Rep 193). In this case, no other vessel was involved in the contractual relationship between the parties and the "SARAH" was the point of delivery for all equipment and services provided under the contract. At least some of the installation of the supplied equipment involved interface engineering between this equipment and the vessel herself. In these respects, the contract was vessel-specific and it was not unreasonable to view the relevant supplies as having been made *to* the vessel and for her operation.

RS SHIPPING BULLETIN

This Bulletin is a summary of developments in the last month and is produced for the benefit of clients. It does not purport to be comprehensive or to give specific legal advice. Before action is taken on matters covered by this Bulletin, reference should be made to the appropriate adviser.

Should you have any queries on anything mentioned in this Bulletin, please get in touch with Sally-Ann Underhill or Alex Allan, or your usual contact at Reed Smith.

Reed Smith LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2RS
Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City / DX18 London
www.reedsmith.com

Email: sunderhill@reedsmith.com
aeallan@reedsmith.com

This Bulletin was compiled up to and including December 2010.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Richards Butler in association with Reed Smith LLP of Delaware, USA. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website www.reedsmith.com.