ReedSmith

# SHIPPING GROUP MONTHLY BULLETIN

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## ARBITRATION

- **The Commercial Court considers the exceptional circumstances in which the English court may grant an injunction restraining an arbitration with a foreign seat**

***Excalibur Ventures LLC v Texas Keystone Inc and others* [2011] EWHC 1624 (Comm)**

The Claimant, a US company, entered into a collaboration agreement with the First Defendant (also a US company) in relation to bidding to develop petroleum blocks in Iraqi Kurdistan. That agreement referred to the Second Defendant, the First Defendant's parent company, and envisaged that it might become a party to the agreement and/or a participant in any consortium bid. In due course, the First Defendant and others entered into a product sharing contract (the "PSC").

The Claimant brought proceedings alleging breaches of the collaboration agreement, on the basis that it had been wrongfully shut out of the PSC. The Defendants argued that the Claimant did not, and could not, meet the statutory requirements of Kurdistan law for participation in a PSC, and so it could not comply with its part of the bargain under the collaboration agreement. The Claimant also commenced ICC arbitration proceedings in New York, under the collaboration agreement, against the Defendants, arguing that the Second Defendant and its subsidiaries were parties to that agreement, even though they had not signed it.

The Second, Third and Fourth Defendants applied for an injunction restraining the Claimant from pursuing the New York arbitration. The Claimant, in turn, applied for the English court proceedings to be stayed pending the determination of jurisdictional challenges in the New York arbitration proceedings.

The Court held that under s.37 of the Senior Courts Act 1981, it has the power to grant an injunction restraining arbitration proceedings even where the seat of that arbitration is in a foreign jurisdiction. The Second Defendant had not submitted to the jurisdiction of the arbitrators in New York, and indeed had made it clear that it challenged the ICC's jurisdiction to determine the dispute. The English court had jurisdiction to decide whether it should resolve the issue of whether an arbitration agreement existed.

In this case, the circumstances (including the chronology of the litigation, the conduct of the Claimant, and cost and case management considerations) pointed to the English court as being the correct forum for determination of whether the First Defendant was a party to the arbitration agreement contained in the collaboration agreement. The continuation of the arbitration proceedings by the Claimant would be unconscionable, oppressive, vexatious, or otherwise an abuse of process. Further, the granting of an injunction was necessary to protect the First Defendant's legitimate interest in continuing the proceedings in England, which was the natural forum for the litigation.

As regards the Claimant's application for a stay, as it had voluntarily commenced two sets of proceedings, the Court could only grant a stay in exceptional circumstances. The burden of proof was on the Claimant to show that such circumstances existed, and it was unable to do so. If a stay were granted, the First Defendant would be required to contest both the issue of arbitrability and the substantive claim. It would have to do this before a tribunal whose jurisdiction it did not accept and/or before the New York courts with which it had no connection and to whose jurisdiction it did not wish to submit. The burden that this would place on the First Defendant outweighed any benefit which the Claimant might obtain from a stay.

❖ **Commercial Court confirms that factual issues can be determined in the context of an application under Section 66 of the Arbitration Act 1996**

***Sovarex SA v Romero Alvez SA* [2011] EWHC 1661 (Comm)**

The Applicant alleged that it had agreed a contract, by telephone and e-mail, with the Respondent for the sale of sunflower seeds. The Respondent denied that a contract had ever been concluded. When disputes arose, the Applicant commenced FOSFA arbitration proceedings in London, unaware that the Respondent had already commenced court proceedings in Spain seeking a declaration that the contract did not exist. The Spanish court held that Spanish law did not allow such a remedy, but it also dismissed the Applicant's application for a stay of the Spanish proceedings in favour of the FOSFA arbitration. The Spanish proceedings continued, and the Court held that the validity of the contract would be determined in Spain.

The tribunal found in the Applicant's favour, and the Applicant applied to the Commercial Court to enforce the award under s.66 of the Arbitration Act 1996 (the "Act"). The Applicant argued that, by corresponding with both FOSFA and the tribunal, the Respondent had lost its right to raise objections to enforcement as a result of s.73 of the Act. The Respondent argued that s.66 provides a summary procedure which is unsuitable for the trial of issues of fact, and that the Applicant should commence fresh proceedings by way of action on the award.

Alternatively, the Respondent argued, the court should either decline jurisdiction or stay its proceedings because (a) the English proceedings would interfere with the Spanish court's jurisdiction and (b) the English court was bound by Article 33 of the Brussels Regulation to recognise the Spanish court's dismissal of the Applicant's application for a stay, including its finding that the validity of the contract would be determined in Spain.

The Court held that:

(1) The Respondent had not lost its right to raise objections under s.73. This issue turned on whether the Respondent had taken part in the arbitration proceedings, which was to be determined objectively. There is a distinction between protesting that the tribunal has no jurisdiction, and asking the tribunal to consider the issue of jurisdiction. In this case, the Respondent had done no more than the former, and had not recognised that the tribunal had jurisdiction. As a result, it had not lost its rights under s.73.

(2) Section 66 allows all applications to be addressed, provided that they can be dealt with without a trial, and this includes disputed issues of fact. By way of the proviso in s.66(3), the issue of whether the tribunal lacked substantive jurisdiction could be dealt with under the s.66 procedure. That section was meant to deal with enforcement generally, and there

was nothing either in that section or in the CPR which required an alternative procedure to be adopted in the event of the application being challenged on the facts. The burden of proof under s.66 is on the party resisting enforcement, but this is not contrary to principle and is in line with both the New York Convention 1958 and the UNCITRAL Model Law.

(3) A determination of the validity of the arbitration agreement by the English court (as the court of the seat of the arbitration) did not amount to an interference with the Spanish proceedings. The existence of the contract was not a live issue before the Spanish court, and so there was no duplication of proceedings. As a result, the Respondent's argument that the court should either decline jurisdiction or stay its proceedings failed.

## CIVIL PROCEDURE

### ❖ Court of Appeal considers whether it has the power to extend time and grant relief from sanctions in relation to a consent order

***Pannone LLP v Aardvark Digital Ltd* [2011] EWHC Civ 803**

The parties had reached an agreement that the Respondent's reply and defence to counterclaim submissions would be served by a particular time and date. A consent order had been signed to this effect, stating that if the submissions were not served by that time and date, then the claim would be struck out. The Respondent's solicitor signed the consent order, but commented that its terms were "draconian and way more than the court would have ordered". In the event, the Respondent's solicitor was a few minutes late in filing and serving the submissions, although the process of filing by fax and serving by email was commenced before the deadline.

The district judge extended the time for filing and service of the Respondent's submissions, and gave the Respondent relief from the specified sanctions in respect of its failure to file and serve in time. This decision was upheld in the High Court, and came before the Court of Appeal.

The appeal was dismissed. Under the CPR the court has the power to extend the time for compliance with a court order (CPR 3.1(2)(a)) and to grant relief from sanctions (CPR 3.8). This is the case even where the order in question is expressed to have been made by consent.

While the fact that an order is made by consent is one of the factors to be taken in to account by the court when considering whether to exercise these powers, the weight to be given to that consideration will vary according to the nature of the order and the agreement between the parties. Where, as in this case, the agreement related to a procedural case management matter, the weight accorded to the fact of the parties' agreement as to the consequences of non-compliance would be less, and rarely decisive. By contrast, where a consent order compromises a substantial dispute, its existence is likely to have significant weight and may well persuade the court not to exercise its discretion.

The Court noted that it is not necessary to impose any further gloss on the CPR in relation to the factors that the Court must consider, as the Rules are already adequately drafted so as to ensure that all proper considerations are taken in to account.

### ❖ Court of Appeal considers whether it is appropriate to stay proceedings concerning the interpretation of an agreement pending expert determination under that agreement

***Barclays Bank PLC v Nylon Capital LLP* [2011] EWHC Civ 826**

The Appellant and Respondent had entered in to a partnership agreement which contained an expert determination clause. That clause stated that in the event of a dispute relating to profits, a party could refer the matter to an accountant for determination, including determination of any dispute relating to the interpretation of the agreement. Any such reference could be made up to 30 days after an allocation of profits under the agreement. No such allocation had been made.

Such a dispute did arise, but the Respondent also issued proceedings against the Appellant for a declaration that it was not under any obligation to pay profits to a particular fund manager.

The Appellant submitted that the Respondent's claim should be stayed pending determination of the dispute by an expert, as provided for by the agreement. The Respondent argued that the Court should first determine the jurisdiction of the expert, and further that the expert had no jurisdiction because profits under the partnership agreement had not yet been formally allocated.

The Court of Appeal found in favour of the Respondent, stating that it was ultimately for the Court to determine the jurisdiction of the expert. Further, an expert determination clause should not be approached in the same manner as an arbitration clause. While arbitration is usually an alternative to court proceedings for resolution of all disputes between the parties, an expert determination clause presupposes that the parties intend certain types of dispute to be resolved by an expert, and other types by the court.

The Court first had to determine whether the dispute before it was either real or hypothetical. If it was real, as the Court found that it was in this case, it was then necessary to consider whether it was in the interests of justice and convenience for the court to determine the matter rather than allowing an expert to determine it first. The Court noted that any determination by an expert would not be final, and would be open to challenge. As such, issue could well come before the Court in any event. It was, therefore, in the interests of both justice and convenience for the court to determine the issue of jurisdiction.

It was also noted that the agreement between the parties made it clear that an allocation of profits was a condition precedent to the appointment of an expert. The expert had no jurisdiction to determine any issues at all until an allocation had been made, as it had not in this case.

- **Court of Appeal allows a party to rely on an argument on appeal which was pleaded, but not relied on, at first instance**

***Lowe and another v W Machell Joinery Ltd* [2011] EWCA Civ 794**

The Appellant and Respondent had entered in to a contract for the sale of goods. The Appellant paid for the goods, but when they were delivered they took the view that the goods did not comply with the Respondent's obligations under the contract. The goods were rejected, and the Appellant issued proceedings to recover the price of the goods. Shortly before trial, the Appellant introduced a new point as an additional justification for its rejection of the goods.

At first instance, the judge found that the Respondent was in breach of contract, but that the breach did not justify rejection of the goods. On appeal, the Appellant argued that the court could not hold that it was not entitled to reject the goods in a situation where the Respondent had been found to be in breach of contract.

There was an issue on appeal as to whether the Appellant was entitled to rely on the implied terms in s.14 of the Sale of Goods Act 1979 on appeal. This point had been pleaded at first instance, but had not been relied on at trial.

The majority of the Court of Appeal (Rix LJ dissented) held that the Appellant was entitled to rely on this point. It had been pleaded, and there was nothing to suggest that it had been abandoned. Such an abandonment would require either an express statement to that effect, or conduct at trial which was incompatible with reliance on the point in question.

In reaching this conclusion, the Court considered various of the authorities on the issue of whether parties should be permitted to raise issues on appeal which were not raised at trial.

## CONTRACT

### ❖ High Court considers the contractual duty of good faith

***Horn v Commercial Acceptances Ltd* [2011] EWHC 1757 (Ch)**

The Claimant and Defendant had entered in to a loan agreement which provided that "each party shall act in absolute faith towards the other". The Claimant argued that, by bringing in another financier and not providing all of the required funds itself, the Defendant had breached the express duty of good faith contained in the contract.

Although it was not necessary for the Court to decide the exact meaning of the clause requiring good faith, as the Claimant succeeded on other issues of interpretation, the judge did set out what he would have held, had he been required to decide the issue.

An express duty of good faith requires the parties to disclose all material facts to each other. In this case, the Defendant's decision to bring in a third party financier was material, as it deprived the Claimant of the opportunity to make a fully informed decision as to how it would participate in the funding. It was not necessary to consider whether full disclosure would have caused the Claimant to alter its decision to proceed with the transaction.

The judge stated that there is no requirement of dishonesty for breach of a contractual duty of good faith. In this case the Defendant had acted honestly, but he had still acted in breach of contract. The judge also noted that, where a contract contains an express duty of good faith, there is no need for a finding of an overriding fiduciary duty.

It should be noted that the judge's comments on the contractual duty of good faith are not binding. They may, however, be persuasive in future cases.

### ❖ High Court rules that a side letter was not enforceable as a legally binding contract, rather it was an agreement to agree

***Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm)**

The Claimant had been a shareholder of a cable television and internet company (the "Company"), which was acquired by the First Defendant. The First Defendant was, in turn, owned by the Third Defendant, and both companies were party of an international group whose UK business was run by the Second Defendant.

Prior to the acquisition of the Company, the First Defendant sent a side letter to the Claimant stating that in consideration for him signing the transaction documents, he would be offered the opportunity to invest in the First Defendant. Certain terms relating to this investment were set out in the side letter. The Claimant executed a share purchase agreement (the "SPA") with the First Defendant, and the Company was sold.

The Claimant argued that the side letter was evidence of a partly oral and partly written binding agreement that he had the right to an ongoing investment in the entity which was formed by way of the acquisition, and that that agreement had been fundamental to him proceeding to execute the SPA.

The Court found in favour of the Defendants, finding that the side letter did not amount to a legally enforceable contact. The issue as to exactly what agreement was contained in the side letter depended on a construction of that letter. On the facts, the letter constituted only an agreement to agree, which was unenforceable. Even though some key terms had been included in the letter, and although the parties had agreed in principle, there was no finality. Further, some essential terms had not been addressed by the side letter.

The judgment in this matter provides a useful guide to the application of the now well-established legal principles on the formation of a binding contract.

- **Where a Defendant has agreed to indemnify a Claimant in respect of actual liabilities, the Defendant is not estopped from challenging the existence or amount of the Claimant's liability to a third party**

***Rust Consulting Ltd (In Liquidation) v PB Ltd (formerly Kenndy & Donkin Ltd)* [2011] EWHC 1622 (TCC)**

The Claimant was engaged by a company to provide engineering services for buildings which subsequently sustained substantial damage. The company contended that this was due to negligent advice provided by the Claimant. By this time the Claimant had ceased trading, and its business and assets had been taken over by the Defendant. By way of the asset purchase agreement, the Defendant assumed responsibility for the "satisfaction, fulfilment and discharge" of all outstanding liabilities of the Claimant's business.

When the company brought a claim against the Claimant, the Claimant went in to liquidation and the Defendant took over the defence. Judgment was entered by consent in favour of the company, and the Claimant sought an indemnity from the Defendant in respect of its liability under that judgment. The Claimant submitted that as the judgment had been entered at the instigation of the Defendant, the Defendant was estopped from challenging the existence and amount of the Claimant's liability to the company and was required to provide the indemnity sought.

The Court found in favour of the Defendant, stating that the indemnity in the asset purchase agreement did not operate without the Claimant establishing that it was liable to the company for the damages claimed. The Claimant could not recover under the indemnity simply because a judgment by consent had been entered.

Further, the Court held that for an estoppel to arise as contended by the Claimant, the indemnifier had to be notified that a claim was being made under the contract of indemnity, so that the indemnifier was acting in the knowledge or expectation that a claim would be made against him. Knowledge on the part of the indemnifier that a claim had been made against the party entitled to claim under the indemnity would not be sufficient, if he was unaware that he was under an obligation to indemnify, or positively believed that there was no such obligation.

In this case, at no point prior to the entering of the judgment by consent did the Claimant or its liquidators know that there was or might be a right of indemnity under the asset purchase agreement. The concept of estoppel was developed to meet the demands of fairness and justice, and there was nothing unfair about requiring the company to prove its claim.

## COSTS

### ❖ Court of Appeal considers the relevance of set-off of a foreign judgment against an English costs order in an application for security for costs

***Relational LLC v Hodges* [2011] EWCA Civ 774**

The Claimant had sued the Defendant in the United States, and had obtained a default judgment which it sought to enforce in England.

The Defendant applied for security for costs in the sum of £100,000, and it was agreed between the parties that the Claimant satisfied the relevant conditions for security for costs in CPR 25.13. The Claimant offered security of £25,000, arguing that the Defendant was not entitled to security over and above the estimated extra costs which would be incurred as a result of having to enforce a judgment for costs abroad.

The Defendant argued that, if he was successful in England and sought to enforce any costs order in the United States, than the Claimant would ask the US court to set off its default judgment against those costs. That judgment would almost certainly exceed the amount of the costs order, and so the Defendant would come away empty handed. In such circumstances, the Defendant submitted, he would be prevented from recovering his costs even though he had been successful before the English court. As such, the availability of set-off would be an obstacle to the enforcement of any costs order and the existence of that obstacle made it just for the court to order security for the full amount of his costs.

The Court of Appeal found in favour of the Claimant, stating that the discretion to order security for costs should be exercised on objectively justified grounds relating to obstacles to or the burden of enforcement. Access to the court should not be restricted on the grounds of residence of a claimant, and the discretion to order security for costs should not be exercised in such a way as to discriminate between EU and non-EU residents.

In this case, the availability of set-off in the US was not an obstacle to the enforcement of any costs order. An EU litigant with a US judgment in his favour would not be required to put up security, and if a US litigant was required to do so then that would amount to discrimination prohibited by the ECHR.

The Court also noted that where there is a general discretion to order security for costs, it is unlikely to be appropriate to order security where a claimant is suing on a judgment obtained in a country, such as the US, which has a generally similar process for the enforcement of judgments as the UK.

### ❖ Court of Appeal considers which party is in fact the "winning" party for the purposes of costs

***Medway Primary Care Trust and another v Marcus* [2011] EWCA Civ 750**

This case involved a medical negligence claim, with the Claimant being awarded £2,000 damages where his claim had initially been valued at £525,000.

The Defendants were ordered to pay the Claimant 50% of his costs of the entire action, and appealed against this decision. They argued that the costs decision was unjust and wrong, and that they should have recovered all or a significant proportion of their costs as, for practical purposes, the claim had failed. The Claimant submitted that he could not have obtained any damages at all without going to court, and that the Defendants were trying to achieve a more favourable result than they would have achieved if they had made a settlement offer.

The Defendants' appeal was allowed. The relatively small amount of damages recovered by the Claimant did not constitute vindication for him. The issue of causation had in fact been decided against the Claimant, and that issue had been the crux of the action. The majority of the costs were incurred in advancing and defending that issue. The Defendants were, therefore, the successful parties, and the starting point should be a costs order in their favour.

From that starting point, there should be a reduction to take into account the fact that the Claimant did succeed to a very small extent. There should not be a reduction because there was no Part 36 offer made, but it was relevant that the Defendants could have written a Calderbank letter offering £3,000 plus proportionate costs. Ultimately, however, the real claim failed: no sensible party would have issued the proceedings which were issued to recover only £2,000.

The Court ordered that the Defendants should recover 75% of their costs.

- **In certain situations the costs consequences of a settlement offer may continue, even if that offer is withdrawn**

***Owners and/or Bareboat Charterers of SAMCO EUROPE v Owners of MSC PRESTIGE* [2011] EWHC 1656 (Admlty)**

The Claimant's and Defendant's vessels were involved in a collision. The Claimant made an offer to settle liability 60:40 in its favour, which offer was described as being made "in accordance with CPR Part 61.4(10)-(12) and/or Part 36". Around 17 months later, and 2 months before trial, the Claimant withdrew the offer and instead offered to settle liability two-thirds / one-third in its favour. At trial, liability was apportioned 60:40 in favour of the Claimant.

In relation to costs, the Claimant argued that there should be cross-liabilities for those costs incurred before the offer was made in the same proportion as liability, but that the Defendant should pay the Claimant's costs from 21 days after the original offer was made and should not recover any of its own costs after that date. The Defendant argued that there should be cross-liabilities for all costs in the same proportions as liability in the action, because the original offer had been withdrawn.

In reaching its decision, the Court noted that there is a line of authority which indicates that where an offer which should have been accepted had been withdrawn, it would not be unjust to award the offeror all of its costs. This is because if the offer had been accepted, then no further costs would have been incurred thereafter. The mere fact that an offer has been withdrawn does not necessarily deprive the offer of effect on the question of costs. Where a defendant fails to accept an offer which it should have accepted, it should appreciate the costs risk and take protective steps by making a realistic Part 36 offer. However, the withdrawal of an offer might have an effect on the appropriate costs order. The key question is: what caused the costs to be incurred after the expiry of the 21 day period?

In this case, the Claimant's offer should have been accepted within the 21 day period after it was made. Had it been accepted, no further costs would have been incurred. The fact that it was withdrawn 2 months before trial did not make it unjust to order that the Claimant should receive all of its costs from 21 days after the offer was made. The Court ordered that the Defendant should pay 60% of the Claimant's costs before that date, and the Claimant should pay 40% of the Defendant's costs.

- **Court of Appeal considers various issues relating to when the Part 36 costs consequences should apply**

***Howell and others v Lees-Millais and others* [2011] EWCA Civ 786**

The Appellant had been unsuccessful in its claims against the Respondents, and following disposal of those claims a costs hearing had been listed. Prior to that hearing, the Appellant sent letters containing what they described as Part 36 offers to two of the Respondents. A proportion or fixed sum was offered in respect of those Respondents' costs, and the offers were stated to be open for 21 days. No offer was made to the third Respondent, and the other two rejected the offers made.

Almost a year later, the Appellant indicated that it was willing to offer a sum in respect of the third Respondent's costs if the other two would now accept the offers previously made. All three Respondents accepted this proposal, but the costs hearing still went ahead. The Appellant argued that it was entitled to its costs from the expiry of the original 21 day period referred to until the time when the offers were accepted.

At first instance, the judge declined to make the order for costs requested by the Appellant and held that the earlier offers were not Part 36 offers. They had been expressed in terms which implied that they would be withdrawn after 21 days, which was inconsistent with Part 36. The issues for the Court of Appeal to consider where (a) whether the earlier offers were Part 36 offers, (b) if so whether the offer which was later accepted was better or worse than the original offers, and (c) if the later offer was not the same or worse, how the court should exercise its discretion in respect of costs.

The appeal was dismissed. The Court of Appeal found that the earlier offers were not Part 36 offers, as they explicitly excluded the offerees from recovering all of their costs, and gave them the option of recovering only a proportion or a fixed sum. However those offers should, if possible, be treated as Part 36 offers. This was supported by the fact that all parties treated the offers as having been made under Part 36, and had explicitly stated that the offers were in force well after the expiry of the 21 day period. In such circumstances an offer, expressed to be a Part 36 offer and which largely complies with Part 36, should be given substantially the same effect as a Part 36 offer.

The later offer was different from the earlier ones, as it included an additional provision, namely the offer of a sum in respect of the third Respondent's costs. That rendered the later offer more attractive to all of the Respondents. As the later offer was better that the earlier ones, the allocation of liability for costs for the period between expiry of the 21 days and acceptance was a matter for the judge's discretion. Taking in to account all of the circumstances, the judge ordered that each party should bear its own costs from the expiry of the 21 day period.

❖ **Court of Appeal allows an application for security for costs on the basis that a party had taken steps in relation to his assets which would make it difficult to enforce a costs order against him**

***Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC and others*** **[2011] EWCA Civ 761**

The Applicant bank had applied for security for costs under CPR 25.15(1) in respect of an appeal lodged by the Respondent. In particular, the Applicant relied on CPR 25.13(2)(g) asserting that the Respondent had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

The Respondent alleged that he had no assets of any significant value, and yet was able to fund high living and legal expenses. He stated that these were funded by loans from family, affiliated companies and third parties.

The Court of Appeal granted the application for security. In doing so it said that where a party states that it is devoid of assets and yet is able to fund litigation on the basis of loans, it was incumbent on that party to provide details of the nature and terms of those loans, and to provide details of the efforts he has made to obtain further funds from the same sources. Where no such details are given, it will often be appropriate for the court to infer that that party had undisclosed assets. The failure to disclose those assets can lead to a further inference that they had been put out of reach of creditors.

On the basis of the evidence in this case, it was appropriate for an order for security for costs to be made. There was an overwhelming inference that the Respondent had available to him assets which he had dealt within in a way that would make it difficult for the Applicant to locate them for the purpose of enforcing a costs order.

**INSURANCE**

## ❖ Court of Appeal considers the issue of fair presentation of risk to an insurer

***Garnat Trading & Shipping (Singapore) Pte Ltd & Anr v Baominh Insurance Corporation* [2011] EWHC Civ 773**

The Appellant insurer insured a floating dock owned by the Respondent. The dock was to be towed on a voyage from Vladivostock to Vung Tau in Vietnam, for which a specific towage plan was devised. Towage was only permitted in conditions up to sea force 5, with a maximum wave height of 3.5m.

The dock was lost during the voyage and the Respondent claimed on the insurance. The Appellant rejected the claim, on the grounds of non-disclosure of the permissible towage conditions, and breach of the warranty of seaworthiness. At first instance, the judge held that the towage conditions had been disclosed to the Appellant, and that the dock had been seaworthy at the commencement of the voyage.

On the facts, the Court of Appeal found that there had been a fair presentation of the risk to the Appellant insurer, and as such the Appellant bore the risk of the dock meeting conditions with a sea force greater than 5 and wave heights greater than 3.5m.

The adventure insured was one where it was contemplated by the parties that there would be a maximum wave height of 3.5m. As a result, the dock had to be fit in all respects to encounter the ordinary perils of the sea for that adventure, rather than some other voyage.

The appeal was dismissed.

## ❖ Court considers the meaning of the notation "(100%)" in a "sum insured" clause

***Gard Marine v (1) Lloyd Tunnicliffe (on his behalf and on behalf of all other members of Lloyd's Syndicate 780 for the 2005 year) (2) Glacier Reinsurance AG (3) Agnew Higgins Pickering & Co Ltd* [2011] EWHC 1658 (Comm)**

The Claimant had participated in the insurance of an oil and exploration company (the "Company"), which insurance covered all risks of physical loss or damage to offshore or onshore property and business interruption. The Claimant reinsured part of the insurance with the Defendant. The "sum insured" clause in the reinsurance policy provided *"to pay up to Original Package Policy limits/amounts/sums insured excess of USD250million (100%) any one occurrence of losses to the original placement"*.

When the Company claimed on the insurance, the Claimant paid its proportion and then claimed on the reinsurance. It calculated its claim on the basis that the $250m excess point referred to 100% values of the property and other subject matter comprising the Company's claim. As the Company had less than a 100% interest, the excess point had to be scaled down to reflect that lower interest. That, the Claimant argued, was the effect of the "(100%)" notation in the sum insured clause. Scaling down the deductible increased the amount due from the Defendant.

The Court held that the question of construction should be approached on the assumption that the parties intended to use words which had a special meaning within a particular trade. The express terms of the contract would prevail if they were inconsistent with any such meaning. However in this case, the evidence pointed to the fact that the notation "(100%)" in regard to an excess or limit had a recognised and established meaning on the market writing direct insurance of offshore energy risks and facultative reinsurance. It meant that the limit or excess had to be scaled to reflect the assured's interest in the relevant assets.

The Claimant's interpretation of the reinsurance policy was correct: the excess point in the sum insured clause was based on the total insured value of the original lost asset, and not on the Company's interest in that original lost asset. In other words, the excess point scaled for interest.

## JURISDICTION

### ❖ Commercial Court considers competing jurisdiction and arbitration clauses

***PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and another* [2011] EWHC 1842 (Comm)**

The application before the Court in this case arose in the context of disputes concerning two related agreements dealing with the operation of a coal mine in Indonesia. One was an operating agreement which provided for disputes to be referred first to expert determination, then to arbitration in Singapore. The other was a cash distribution agreement which contained a clause referring disputes to the non-exclusive jurisdiction of the English courts.

Disputes arose under the operating agreement, and were referred to arbitration in Singapore. The Claimant also commenced proceedings in the Commercial Court seeking to enforce the terms of the cash distribution agreement. The Defendant argued that the issue of whether the Claimant was entitled to enforce this agreement depended on whether it was entitled to receive payment under the operating agreement. That issue, in turn, was one which had to be arbitrated in Singapore. As such, the Defendant submitted that the court should stay the proceedings before it under s.9 Arbitration Act 1996.

The judge considered that the key issue was the construction of the dispute resolution provisions in the two contracts. In order to consider this, the court had to identify the contract under with which the claims were most closely connected. In the present case this was the cash distribution agreement, which was governed by English law. That there was some degree of overlap with the other contract was not sufficient justification for imposing a mandatory stay.

Where the court is required to consider competing dispute resolution clauses, it will first identify the contract with which the claim is most closely connected. In the context of arbitration this means that, even thought the wording of an arbitration clause may seem broad enough to cover a particular claim, the court will refuse a stay of proceedings where that claim is more closely connected with a different contract.

## LEGISLATION

### ❖ Wreck Removal Convention Act 2011 receives Royal Assent

The Wreck Removal Convention Act 2011 received Royal Assent on 12 July 2011. The Act implements the Nairobi International Convention on the Removal of Wrecks 2007.

The Act amends the Merchant Shipping Act 1995 by inserting sections 255A-U. These deal in particular with the reporting, locating and marking of wrecks, the removal of wrecks by the registered owner, the imposition of conditions on removal and removal in default, liability for costs and insurance.

The full text of the Act is available online.

**SHIPPING**

- **Commercial Court holds that only Forward Freight Agreements with time still to run as at automatic early termination are to be taken in to account in calculation of the payment due upon early termination**

***Pioneer Freight Futures Co Ltd (In Liquidation) v Cosco Bulk Carrier Co Ltd* [2011] EWHC 1692 (Comm)**

The Claimant and Defendant had entered in to 11 forward freight agreements (the "FFAs"). The Claimant was the seller under 7 of the agreements, and the buyer under the other 4 agreements. All 11 of the agreements were on the standard 2007 terms of the Forward Freight Agreement Brokers Association, which incorporated the 1992 ISDA Master Agreement. Section 2 of the Master Agreement provided that the parties' payment obligations were subject to the condition precedent that no event of default, with respect to the other party, had occurred and was continuing.

The Claimant went in to liquidation, which brought about automatic termination under the Master Agreement. The dispute between the parties concerned whether the "wash out" calculations which the Claimant undertook under the Master Agreement should include the 8 FFAs whose last contract month had come to an end before the Claimant went in to liquidation. The Claimant argued that the fact that the contract months of some of the FFAs had come to an end did not mean that those agreements were not still "outstanding" transactions or transactions "in effect" for the purposes of the ISDA Master Agreement. As such, the Claimant submitted, they should be taken in to account.

The Court found in favour of the Defendant, holding that none of the 8 FFAs whose last contract month had come to an end before the Claimant went in to liquidation should be taken in to account in calculating the payment due on early termination under s.6 of the Master Agreement. Where a particular transaction had terminated at the end of its natural term, any contingent obligation which might have revived, if the condition precedent in s.2 had been fulfilled before the transaction terminated, did not survive the termination of the transaction at the end of its natural term. On that analysis, none of the transactions which terminated at the end of their natural term was a "terminated transaction" within the meaning of the Master Agreement. The definition of "terminated transaction" in the Master Agreement encompassed only transactions "in effect" at the time of early termination.

In addition, none of the transactions which had come to an end could be described as "outstanding", as that word assumed that some obligation remained to be performed in the future. If the relevant agreement came to an end through natural expiry, it could not be said that there was an "outstanding transaction" relating to that agreement within the meaning of s.6 of the Master Agreement.

As to the four FFAs where the s.2 condition precedent had not been fulfilled before the last contract month passed, it could not be said that the relevant transactions were "incomplete or unperformed" when the Claimant became insolvent. Neither party had any obligation to do anything in the future under those concluded transactions. Similarly, in relation to the four FFAs where the Defendant was the seller and the Claimant had failed to pay the settlement sums due, while it could be said that there was an accrued debt outstanding when the agreements came to an end which remained outstanding when the Claimant became insolvent, it would be incorrect to describe those as "outstanding transactions".

- **Court of Appeal considers the situation where a guarantor under shipbuilding contracts is liable to refund advance payments made by the buyers, where those contracts have been terminated according to their terms**

***Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* [2011] EWCA Civ 827**

The Respondent buyers had entered in to three shipbuilding contracts (the "Contracts") with a Korean shipyard (the "Yard"), and had made advance payments of the purchase price of the vessels. The Appellant insurance company had guaranteed the return of those payments in the event that the Contracts were terminated prematurely. The guarantees incorporated the ICC's Uniform Rules for Demand Guarantees.

The Yard subsequently merged with another company, which transferred the shipbuilding business to a new company (the "Company"). The Yard had been dissolved, and under Korean law its rights and obligations under the Contracts had been transferred to the Company.

The Respondent served notice of default under and terminated the Contracts, and demanded repayment from the Company. When this was not received, the Respondent demanded repayment from the Appellant under the guarantees. The Appellant submitted that on the true construction of the guarantees, it had only guaranteed the Yard's obligation to make repayment, and not anyone else's. As such, once the Yard's obligation disappeared, the guarantees no longer had any application. Further, the Appellant argued that once the builder of the vessels was the Company rather than the Yard, no demand in conformity with the Contracts could be made (as was required by the guarantees).

The Court found in favour of the Respondent. In the circumstances, the guarantees were to be operated against documents without regard to the underlying contract. The Respondent was entitled to repayment, and in the absence of repayment by either the Yard or the Company, that repayment had to be made by the Appellant. The guarantees operated on the basis that no refund had occurred, not on the basis that the Yard had failed to make repayments when required.

It was also held that the Respondent was able to make a demand in conformity with both the Contracts and the guarantees. Under the guarantees, the buyer's demand was payable on receipt of its signed statement certifying that its demand was made in conformity with the contract, and that the Yard had failed to make the refund. The Respondent's statement did exactly that. It was not relevant whether or not there was a true liability to refund under the contracts, nor whether the Yard had in fact failed to make the refund.

Taking into account the nature of the particular guarantees in issue, where payment was to be made against documents (in this case, signed certificates), questions of whether the debtor was liable under the underlying contracts were irrelevant. In cases such as this if the documents were in order, then the guarantor had to pay.

❖ **High Court considers the method for determination of damages for breach of charterparty, in the situation where there was no available market at the time of the breach**

***Glory Wealth Shipping Pte Ltd v Korea Line Corporation*** **[2011] EWHC 1819 (Comm)**

The parties had entered in to a time charter, on an amended NYPE form, for a minimum of 36 months to a maximum of 38 months. Five months after commencement of the charterparty, Charterers purported to make early redelivery of the vessel. Owners accepted that redelivery as a repudiatory breach entitling them to terminate the charterparty.

When the dispute was referred to arbitration, Charterers accepted that their termination of the charterparty was wrongful. The only issue between the parties was, therefore, the determination of damages. At the time when Charterers redelivered the vessel there was no available market, and Owners had continued on a spot fixing basis for the next 7-8 months until the market revived.

The judge referred the matter back to the arbitrators for calculation of Owners' actual loss. He held that, in the absence of an available market at the time of Charterers' breach, damages should be determined based on Owners' actual loss, rather than applying actual losses until an available market came in to existence.

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.

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