ReedSmith

SHIPPING GROUP MONTHLY BULLETIN

JUNE 2011

ARBITRATION

❖ A party cannot challenge the jurisdiction of a tribunal where its arbitration claim has already been dismissed by the court

P Kruecken GmbH & Co KG v Agrital Import Export SRL **[Unreported]**

The Applicant had brought an arbitration claim, under s.67 Arbitration Act 1996, relating to the jurisdiction of a German tribunal. The Tribunal had ruled on jurisdiction and made an award. The English court had supervisory jurisdiction over the matter.

The Applicant subsequently applied to discontinue its claim under CPR 38.2. Such discontinuance would only be effective with the court's permission, as one of the parties had given an undertaking which had the effect of qualifying CPR 38.2(2)(a)(ii). It was, therefore, common ground that the notice of discontinuance was invalid. The Applicant did not directly seek to make a subsequent challenge to the tribunal's jurisdiction, but it tried to preserve the opportunity to do so.

It was submitted by the Applicant that once the claim was dismissed, the court had nothing more to do. The Respondent argued that the court had jurisdiction under s.67(3)(a) to confirm the tribunal's award, and that the consequence of dismissing the claim was to declare the contrary.

The application was granted, and the claim was dismissed as it was not being pursued. As a consequence of this dismissal by the supervisory court, no subsequent challenge could be made to the jurisdiction of the tribunal. The only available option was to confirm the tribunal's award, as no evidence had been put forward to suggest that this should not be done. Dismissal of the claim was in effect a declaration that the Respondent was not liable, however it was not necessary to make an actual declaration to that effect. This had been made clear (a) by virtue of the dismissal of the claim, (b) by noting that the notice of discontinuance was invalid, and (c) by confirming the award.

If a challenge was issued in the German courts, then that was a matter for them. There was no need to return to the English courts.

❖ France revises Arbitration Law

A new arbitration law was adopted in France by Decree No. 2011-48 of 13 January 2011, which came into force on 1 May 2011. The aim of the new law is to enhance efficiency in both the arbitral process and the enforcement of arbitral awards, to clarify French arbitration law and to make it more accessible to practitioners worldwide.

For further information on this new law, including a summary of the major innovations and an outline of various practical steps to consider, please see the **Reed Smith Client Alert** dated 25 May 2011.

COMPANY LAW

❖ Court of Appeal rules on the requirements for the proper execution of sale and purchase documentation by companies

Redcard Ltd v Williams **[2011] EWCA Civ 466**

The Appellants had purported to purchase the freehold interest in some residential property from the First Respondent, and the leasehold interest from leaseholders who were directors and shareholders of the First Respondent.

The parties entered into a contract and supplementary agreement which both defined the First Respondent as the "seller" and the Appellants as the "purchasers". The agreement bore various signatures under the section designated "signed … seller", including those of two of the First Respondent's authorised signatories. These two signatories were also, in their own right, defined as sellers of their leasehold interest in part of the property.

The Appellants subsequently refused to complete the purchase, arguing that the agreement was invalid. This argument was based on the fact that the agreement did not expressly state that the signatures of the authorised signatories were made "by or on behalf of" the First Respondent, as required by s.44(4) Companies Act 2006. It could not be said that the agreement had been executed by the First Respondent within the meaning of s.44(4), as there was no precise expression stating that the First Respondent itself was executing the agreement.

At first instance, it was held that a reasonable reader of the agreement would have understood that the signatures were added to the agreement both on the individuals' and the First Respondents' account. The Appellants appealed.

In dismissing the appeal, the Court of Appeal held that s.44(4) did not require the words "by or on behalf of" to be including in the agreement in addition to the signatures of authorised signatories. In this particular case, it was sufficient that the First Respondent was described as a "seller" and that the signatures in question appeared in the section designated "signed … seller". In such circumstances, it would be "absurd" to say that the contract for the sale of the freehold interest by the First Respondent was not expressed to be executed by that party.

COSTS

❖ **Court of Appeal considers whether a party's application for security for the costs of an appeal, and the imposition of a condition on that appeal, constituted an abuse of process**

***Mahan Air and another v Blue Sky One Ltd and others* [2011] EWCA Civ 544**

The Respondents had applied for security for costs of appeals made by the Appellant and its parent company. They also applied for conditions to be imposed on the appeals pursuant to CPR 52.9(1). Costs orders were made against the Appellant, who appealed that decision.

The Appellant argued that it lacked the means to comply with any substantial condition imposed under CPR 52.9(1), and that it was only able to provide "limited" sums as security for costs. These arguments were rejected. The Court of Appeal also rejected the Appellant's assertions that the imposition of any substantial financial conditions would stifle its appeals, constitute an abuse of process and infringe their right to a fair trial.

This case exemplifies the approach that the court is likely to take where a party is seeking to avoid both providing security and having conditions imposed on an appeal. The court will review the conduct of the matter as a whole, including compliance with interim orders. In this case, on a review of all of the circumstances, the Court came to the conclusion that the Appellants had had access to funds when they needed them, and that they had been able to pay the sums necessary to keep their own claims alive.

❖ **A pre-action Part 36 offer must specifically refer to pre-action costs if liability for these costs is to be determined under Part 36**

***Udogaranya v Nwagw* [2010] EWHC 90816 (Costs)**

The Defendant had made a pre-action Part 36 offer, which was accepted by the Claimant. This offer made no express reference to pre-action costs. As a result of the Claimant's acceptance, no proceedings were commenced.

The effects and costs consequences of the acceptance of a Part 36 offer are set out in CPR 36.10 and 36.11. These are based on the assumption that proceedings had already been commenced when the offer was made. In the past, therefore, it has been uncertain whether the costs consequences of accepting a Part 36 offer will follow where a pre-action offer is accepted.

In this case it was held that if, following the acceptance of a Part 36 offer, liability for pre-action costs are to be determined under Part 36, then the offer must specifically refer to liability for these costs.

EVIDENCE

- **In considering whether to grant permission to rely on additional witness evidence during the course of a trial, the lateness of the application is only one factor to take into account and should not be given elevated status**

***Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties* [2011] EWHC 1918 (Ch)**

The First and Second Applicants had sought specific performance of sale agreements entered into with the Respondent. The Respondent denied that it was liable to complete the agreements, and sought to rescind on the grounds of fraudulent misrepresentation on the part of the Applicants. The burden of proving this was on the Respondent.

During the trial, agents of the Applicants were cross-examined on what had occurred during various meetings. One of these agents was not originally included as one of the Applicants' witnesses, and permission was sought to adduce evidence from him 10 days into the trial. The Applicants accepted that this was late, but argued that if this witness' statement was not allowed in, the Applicants might suffer a serious injustice. This was particularly important, they argued, where they faced allegations of fraud.

The Applicants also argued that a judge's power under CPR 1.1 and 1.4, to ensure that a trial was disposed of fairly, extended to allowing witness statements in however late they were. Further, the judge's case management powers under CPR 3.1 should be exercised to further the overriding objective and permit the evidence to be received.

The Respondent argued that the application was too late, and that it was prejudiced by that lateness, as all cross-examinations had been completed. Allowing the evidence would place a further burden on the Respondent, and cause an adjournment of the trial.

In granting the application, the Court noted that a trial judge must ensure that a trial proceeds, as far as possible, efficiently and fairly. No sufficient reason had been given for this person not being a witness. Indeed, there was no way the Applicants could run their case without calling him. Given the allegations of fraud, the Applicants should be given the fullest opportunity to present their case, and a trial without this evidence would be proceeding on a false basis.

The judge noted that there is no requirement for an applicant to justify an application more strongly when it is made late. To impose such a requirement would place an "unjustified gloss" on the application of the CPR. While lateness was a factor to take into account, it should not be given elevated status above any other factor in ensuring that justice is done between the parties.

INSURANCE

❖ **Court of Appeal considers the validity of an insurer's notice of cancellation under the Iran Sanctions Clause in a policy of marine insurance**

Arash Shipping Enterprises Co Ltd v Groupama Transport & Sveriges Angfartygs Assurans Forening **[2011] EWCA Civ 620**

The Appellant was the representative of co-assureds under a composite policy of marine insurance issued by the Respondent, the assets insured by which comprised an Iranian fleet of oil tankers. The policy was for 12 months, with an agreed extension for a further 12 month period at the anniversary date. The policy contained an Iran Sanctions clause, which allowed the insurer to cancel "where the Assured has exposed or may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to any sanction".

The Respondent gave notice to cancel the policy, relying on Article 26(4) of EU Regulation 961/2010 which banned the extension or renewal of insurance with Iranian entities. The Appellant challenged the Respondent's right to serve this notice, and sued the Respondent both on its own behalf an as representative of other underwriters subscribing to the policy. The Appellant argued that the obligation to extend the period of insurance for a further 12 months on the same terms was an automatic renewal which would not infringe the Regulation. The Respondent asserted that it was not properly joined as a representative defendant, and that the case in question was not an appropriate one for representative proceedings.

The Court held, firstly, that the Respondent should not have been made a representative party. Its cancellation had been expressly served on its own behalf only. Further, the underwriters were incorporated and carried on business in different jurisdictions, and not all of them were EU Member States, so the Iran sanctions legislation applicable to the various underwriters was not identical.

The Court also held that the Respondent had been entitled to serve its notice of cancellation, and that the notice was effective. The Respondent's conclusion that an extension of the period of insurance would expose it to the relevant risk was not arrived at in bad faith, nor was it unreasonable or premature. The Regulation does not provide for a derogation for automatic renewal.

As regards the validity of the notice, the time to test this is when it is tendered, and underwriters are not obliged to exercise their discretion as to when the notices take effect. Further, it was neither reasonable nor necessary to imply a term requiring the underwriters to re-exercise their discretion before the notice took effect if there was a material change of circumstances.

Finally, the Court found that it was not necessary to decide whether the extension of the period of the policy was prohibited by the Regulation.

For further information on this case, please see the **Reed Smith Client Alert** dated 13 May 2011.

JURISDICTION

❖ **Commercial Court rules on the position where the English court has made an order in relation to a foreign company, and the court in the jurisdiction of incorporation has made a contradictory order**

Masri v Consolidated Contractors International Co SAL **[2011] EWHC 1024 (Comm)**

The First and Second Respondents were Lebanese companies. The First Respondent had assigned an interest in a Yemeni oil field to the Second Respondent. The Applicant obtained a judgment against both Respondents on the grounds that he had been granted a share in their interest in the field, which the Respondents refused to pay. The Respondents' owners also made it clear that they would not pay the judgment sum.

The English Court appointed receivers of the Respondents in order to enforce the judgments, and made freezing orders and various orders requiring them to provide certain information about their assets. In the meantime, the directors of the Respondents resigned and judicial administrators were appointed by the Lebanese Court.

The Applicant applied for a declaration that the Respondents were in contempt of court by reason of breaches of the English court orders. It argued that the Respondents had pursued an "anti-enforcement strategy" in order to prevent enforcement of the judgment, and that that strategy had included acts which amounted to contempt of court. The Respondents submitted that they had a reasonable excuse for their actions, because of the constraints imposed on them by the orders of the Lebanese Court.

The Court found the Respondents in contempt for breaches of some of the orders, but in relation to certain others the Applicant failed in its application. In reaching its decision, the Court noted that it was not appropriate for it to determine whether or not to exercise its contempt jurisdiction by reference to the court to which the potential contemnors owed their primary allegiance. The correct approach was a flexible one which took into account all of the circumstances, including the nature of the orders made by both the English and foreign courts, the circumstances in which these orders were obtained, and the consequences of breach of the foreign orders.

❖ **Admiralty Court finds that it has jurisdiction to determine a personal injury claim brought by an Indian employee for injuries sustained whilst working on board a vessel flagged in the Marshal Islands**

Saldanha v Fulton Navigation Inc **[2011] EWHC 1118 (Admlty)**

The Respondent, an Indian national, was injured whilst working on board the Applicant Owner's vessel, which was registered in the Marshall Islands. The injury was sustained while the vessel was at anchor off the coast of Wales: the vessel had begun to drag its anchor, and the Respondent was injured whilst trying to resolve the problem. He was hospitalised in England before undergoing further medical treatment in India.

The Respondent commenced proceedings against the Applicant for negligence, and obtained permission to serve the claim form out of the jurisdiction. No acknowledgment of serve challenging the jurisdiction was filed, and default judgment was obtained.

The Applicant subsequently applied for declarations that the English court did not have jurisdiction to decide the claim, and that the default judgment should be set aside.

The application was refused. The Court found that s.11 of the Private International Law (Miscellaneous Provisions) Act 1995 applied, and as a result CPR PD 6B para 3.1(9) required a consideration of the physical location of the vessel when the act which gave rise to the damage in question took place. The context did not require the law of the jurisdiction of the flag state to be applied, indeed the circumstances supported the opposite conclusion. This provision of the CPR also allowed for consideration of the place where the damage was suffered. A large proportion of the pain and suffering on the Respondent's part occurred when he was in hospital in England, and that was sufficient to found jurisdiction.

To the extent that Indian law might be relevant to the claim, this could be proved by expert evidence. Apart from the Master, who was Indian, it was unlikely that any further witnesses would be required. The incident occurred in bad weather conditions off the Welsh coast, and the steps which the Applicant should have taken to avoid the incident needed to be considered against that background. Further, the necessary medical evidence was largely available in England. All of these factors pointed to England being the proper forum for the dispute.

As regards setting aside the default judgment, the Court held that the Applicant had failed to show that it had a real prospect of successfully defending the claim. It had also failed to address the issue of whether its servants were causally negligent in allowing the situation to develop. The fact that the vessel dragged its anchor placed the burden of explaining how that came about without negligence on the Applicant, who had failed to satisfy this burden.

- **Court of Appeal finds that it has jurisdiction to rule on the validity of an arbitration agreement, and to grant an anti-suit injunction preventing a party from bringing proceedings in breach of that agreement, where there is no arbitration in being and none realistically in prospect**

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC **[2011] EWCA Civ 647**

The Appellant and Respondent were both Kazakhstan companies. They had entered into a concession agreement which was governed by Kazakhstan law, but which contained an arbitration agreement governed by English law and providing for arbitration in London.

When the Appellant brought a claim against the Respondent in the Kazakhstan courts, the Respondent applied to have the claim dismissed on the basis that disputes had to be arbitrated in London. This application was rejected. The Kazakhstan court relied on a previous decision of the Kazakhstan supreme court, in proceedings between the parties' predecessors, that the arbitration clause in question was void.

The Respondent then obtained a declaration from the English court that the Appellant was required to submit disputes, including those relating to the effectiveness of the arbitration clause, to arbitration in London. It also obtained an anti-suit injunction preventing the Appellant from litigating disputes which fell within the arbitration clause in Kazakhstan.

The Appellant appealed this decision, arguing that the English court had no power to intervene in the absence of existing or prospective arbitration proceedings in England. It also submitted that the Respondent lacked a proper jurisdictional gateway for service of its proceedings out of the jurisdiction, and that because the Respondent had submitted to the jurisdiction of the Kazakhstan court, that court's decision should be enforced and/or recognised by the English court.

The appeal was dismissed. The Court held that, where a party asks the court to protect its interest in a right to have its disputes settled in accordance with an arbitration agreement (even where no arbitration has been commenced and none is intended), the court may consider whether, and how best, to protect such a right to arbitration. While the court must be careful not to usurp any arbitral process, it has the jurisdiction to consider such issues.

The Court also held that it was not bound by the Kazakhstan court's construction of the English law arbitration agreement (which, in any event, had been misconstrued), subject to any question of submission. It was also not bound by the Kazakhstan court's view that the agreement was contrary to Kazakhstan public policy. In the circumstances, there was no reason why the Kazakhstan judgment should be recognised or enforced.

Finally, the Court held that the Respondent had not submitted to the jurisdiction of the Kazakhstan court. While it had unsuccessfully challenged the jurisdiction and then argued the merits while maintaining its objection to jurisdiction, it had not gone on to defend the merits after failing on jurisdiction. Even if that was wrong, the Kazakhstan judgment did not have to be and should not be recognised or enforced.

LEGAL PROFESSION

- **A solicitors' firm has been found able to assert a common law retaining lien over monies held in client account in order to satisfy that client's debt to the firm for outstanding fees**

***Withers LLP v Rybak* [2011] EWHC 1151 (Ch)**

The Respondents were clients of the Applicant solicitors' firm. Following settlement of litigation with a third party, a court order was made that money from a property sale by the Respondents should be paid into the Applicant's client account. Such payment was to be made on terms that the money could only be withdrawn by order of the court to discharge the Respondents' debt to the third party, or for living or legal expenses. The monies were paid into the client account, and subsequently became the subject of a worldwide freezing order over the Respondents' assets.

An order was subsequently made permitting the Respondents to direct payments to be made from the client account to satisfy all legal expenses incurred by the Respondents, with permission to apply for an order permitting additional payments.

Judgment was given in favour of the third party on its counterclaim against the Respondents, and the court ordered that the Applicant's fees plus interest be retained in the client account. A month later, the Respondents assigned to the third party all of its interest in the relevant monies in the client account.

The Applicant applied to vary the court's order on the basis that it was entitled to assert a solicitor's common law retaining lien over the monies in its client account. It submitted that the previous court orders did not create any interest in the monies by way of a security for the benefit of the third party, in respect of monies claimed by it against the Respondents.

The application was granted. The Court held that the freezing order had not created a charge over the frozen assets in favour of the third party, as it did not impose an obligation on the Respondents to pay any monies to the third party out of the sums to be paid into the client account.

Further, the Court held that the Applicant clearly held the monies in its client account in its professional capacity as the Respondents' solicitors. The monies were held on trust for the client, but the client was subject to restraints imposed by the court orders. It was not right, in relation to monies in the client account, to replace the ordinary solicitor-client relationship with an implied contractual relationship involving the Applicant, Respondents and the third party. The court orders did not produce the result that the Applicant held the monies for a particular purpose that was incompatible with the Applicant having a retaining lien for their fees over those monies.

PART 36

- **Court of Appeal finds that while CPR Part 36 does not permit settlement offers to be time-limited, where such an offer otherwise complies with the requirements of Part 36 the courts should not readily interpret it in a way which would prevent it from being a Part 36 offer**

***C v D* [2011] EWCA Civ 646**

The Respondent had made the Appellant an offer, specified to be an "offer to settle under CPR Part 36". The offer was stated to be open for 21 days from the date of the letter, which set out the costs effects of failure to accept the offer within the relevant period. The Appellant purported to accept the offer nearly a year later, only three weeks before trial.

At first instance, the judge found that Part 36 did not allow for time-limited offers, as a Part 36 offer can only lapse when a written notice of withdrawal is served. He also found that the phrase "open for 21 days" meant that the offer lapsed without express withdrawal, and so was time-limited.

On appeal, the court was required to determine firstly whether a Part 36 offer could be made in terms which limited the acceptance of the offer to a stipulated period, and secondly the true construction of the offer being "open for 21 days" in the context of what was intended to be a Part 36 offer. Thirdly, the court had to decide whether the Respondent's offer was withdrawn either by the time-limited terms of the offer or by subsequent emails.

The Court found that Part 36 does not expressly exclude time-limited offers. However, in order for a Part 36 offer to have effect in terms of costs consequences after trial, it must have remained on the table rather than being withdrawn. There was no room within Part 36 for an offer which was neither withdrawn before or after the expiry of the relevant period, but which lapsed as a matter of its own terms. Further, a time limit is not part of the subject matter of an offer over which an offeror within Part 36 has autonomy. As such, the Part 36 regime cannot accommodate a time-limited offer.

The Court went on to find that while a time-limited offer is inconsistent with Part 36, the letter in this case could be reasonably construed in a manner which avoided it being construed as a time-limited offer. The words "open for 21 days" could be read to mean that the offer would not be withdrawn within those 21 days, but that after those 21 days withdrawal was a possibility. Such a construction would save the offer as a Part 36 offer and would also provide clarity and certainty. Accordingly, on an objective interpretation, the offer was not time-limited, but was an offer which complied with Part 36. The Court also noted that the express time limit was not the equivalent of a Part 36 withdrawal.

It was noted that in order for the Part 36 regime to remain secure, parties must understand that if a claimant wishes to make a time-limited offer, in that the offer will lapse of its own accord at the end of the stipulated period, then such an offer cannot be made under Part 36. However an offer presented as a Part 36 offer, and otherwise complying with that Part, will not be readily interpreted in a way which will prevent it from being a Part 36 offer.

PRIVILEGE

❖ **Where a party has deliberately waived legal professional privilege in relation to certain material, he can be required to give specific disclosure of that material**

***Berezovsky v Abramovich* [2011] EWHC 1143 (Comm)**

The Respondent had commenced proceedings against the Applicant. It was alleged that the Applicant had intimidated the Respondent into disposing of, at an undervalue, interests in an oil and gas company, of which the Applicant was the legal shareholder.

The evidence of a former business associate of the Respondent, now deceased, was crucial to the allegations raised. In defending a summary judgment application, the Respondent relied heavily on parts of interviews which this associate had given with the Respondent's former solicitors. The Applicant sought disclosure of all documents recording or reflecting the content of these interviews, and any conversations between the associate and the Respondent's former solicitors in relation to the subject matter of the action.

In granting the application, the judge held that the principle of collateral waiver had been engaged in relation to the documents sought. The Respondent had deliberately chosen, in the context of the summary judgment application, to waive legal professional privilege as regards the content of the interviews by referring extensively to them. In such circumstances it would not be just or fair to permit him, simply because he said he had not decided whether or not to refer to such evidence at trial, to withhold disclosure of the underlying privileged materials relating to the interviews.

Allowing the Respondent to withhold disclosure would give him an unfair advantage. He would have been able to deploy privileged and possible selective materials in order to surmount the summary judgment hurdle, but would then not be required to give full disclosure of the underlying materials for the purposes of the trial. This would be the case in circumstances where there was no dispute that, if the evidence was deployed at trial, the disclosure would have to be made.

❖ **Law Society granted leave to intervene in appeal to the Supreme Court regarding whether legal professional privilege should be extended to professionals other than qualified lawyers**

In *R (Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] EWCA Civ 1094, the Court of Appeal found that common law legal professional privilege ("LPP") did not apply to any professionals other than qualified lawyers. Leave was given to appeal this decision.

The Law Society has now been granted leave to intervene in the appeal to the Supreme Court, and has stated as follows:

"LPP is closely tied to the administration of justice. The first duty of a solicitor … is to the Court and the second is to the client. In this respect lawyers are unique among the professions. If LLP is opened up to any professional person who asserts that they give advice

on the law, such as tax advice, they can then seek to withhold vital information from bodies such as HMRC. Extending LPP in such a way risks creating uncertainty over what can and cannot fall under LPP. The boundaries of LLP must remain clear."

It is the Law Society's view that if the application of LLP is to be extended beyond the legal profession then this must be done by statute rather than by a decision of the court.

SANCTIONS

❖ European Union and United States impose sanctions in relation to Syria

Both the EU and the US have imposed various sanctions in relation to Syria.

Council Regulation (EU) No. 442/2011 came into force on 10 May 2011. This provides that all funds and economic resources belonging to, owned, held or controlled by the persons listed in Annex II to the Regulation shall be frozen. The Regulation further provides that no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the persons listed in Annex II.

Council Regulation (EU) No. 504/2011 came into force on 24 May 2011, and added further individuals to the list of designated persons.

US Executive Order 13572 was issued on 29 April 2011. The Order blocks the property of certain listed persons who are involved with human rights abuses in Syria.

For further information on the Syrian sanctions, please see the **Reed Smith Client Alert** dated 13 May 2011.

❖ European Union and United States update Iran sanctions

Council Regulation (EU) No. 503/2011 came into force on 24 May 2011, and added over 100 entities and individuals to the list of designated persons and entities already in existence. Many have been added due to their links with the Islamic Republic of Iran Shipping Lines.

Also on 24 May, the US administration began naming companies that will be subject to the sanctions set down in the Comprehensive Iran Sanctions, Accountability, and Divestment Act 2010 ("CISADA"). These companies include PCCI, Royal Oyster Group, Speedy Ship, Tanker Pacific, Ofer Brothers Group, Associated Shipbroking and Petroleos de Venezuela.

For further information on the recent updates to the Iran sanctions, please see the **Reed Smith Client Alert** dated 24 May 2011.

SERVICE OUT OF THE JURISDICTION

❖ **High Court upholds service out of the jurisdiction without permission under CPR 6.33(2), despite the Claimants filing a defective form N510**

***DSG International Sourcing Ltd v Universal Media Corporation (Slovakia) SRO* [2011] EWHC 1116 (Comm)**

The Respondent had brought a claim against the Applicant Slovakian company for damages for breach of a supply contract between the parties. The claim was served on the Applicant out of the jurisdiction under CPR 6.33(2), and the Applicant subsequently challenged the jurisdiction of the English court.

The Respondent argued that certain of the goods were supplied under an umbrella agreement which contained an exclusive English jurisdiction clause, and that the other goods were supplied under a second umbrella agreement containing a non-exclusive jurisdiction clause. The Applicant denied the existence of the umbrella agreements, and asserted that the supplies were made under various purchase orders which referred to different standard terms. The Applicant also argued that the Respondent had failed to identify the correct ground of jurisdiction in the form N510 which it filed. Form N510 must be filed when a claimant intends to serve a claim form out of the jurisdiction without permission.

In refusing the application, the Court held that despite the defective form N510, the Respondent could rely on the provisions of Regulation 44/2001. The CPR does not require the basis for invoking jurisdiction to be set out in the claim form or the particulars of claim, and failure to do so is not a procedural mistake. The court has a discretion under CPR 6.34(2)(b) to permit service of the claim form in the absence of form N510, and the Applicant had sustained no prejudice as a result of the defective form.

❖ **The Court has power to order service by email on US companies where a *Norwich Pharmacal* order is sought against those companies**

***Bacon v Automattic Inc* [2011] EWHC 1072 (QB)**

In this case, the Applicant applied for permission to serve claim forms out of the jurisdiction on the Respondent US companies, and also for an order for service to be by email.

The Applicant argued that various defamatory articles and comments had been posted on the Respondent's websites, and so sought a *Norwich Pharmacal* order requiring the Respondent to disclose information that would assist the Applicant in identifying the person or persons responsible. The Applicant asserted that the court had power, under CPR 6.40(3), to authorise service by an alternative method under CPR 6.15(1) and 6.37(5)(b)(i).

In granting the application, the Court held that the power to authorise service by an alternative method should be exercised under CPR 6.15 rather than CPR 6.37.

CPR 6.15 requires the court's order to specify certain matters, which are set out in CPR 6.15(4). There must be a good reason, within the meaning of CPR 6.15(1), for service by an

alternative method. In this case, the Respondents agreed to service of the order by email, and it could therefore be inferred that they would probably have agreed to service of the claim form in the same way. For one of the Respondents, its website invited service by email.

The court therefore had the power to order service on the Respondents in the US by email at the addresses which had been notified to the Applicant either by correspondence or through the Respondents' website.

SHIPPING

- **Commercial Court considers a Disponent Owner's challenge of the striking out of its demurrage claim on the grounds that there was no contract between it and the Voyage Charterer, and as such no arbitration agreement between them**

***TTMI Sarl v Statoil ASA* [2011] EWHC 1150 (Comm)**

The Claimant Disponent Owner, who had time chartered the vessel in question, instructed shipbrokers to sub-charter the vessel to the Defendant. In the fixture recap, the shipbrokers mistakenly named the Claimant's parent company, rather than the Claimant itself, as disponent owner of the vessel.

The voyage under the charter between the two parties was fully performed. The notices of readiness, all of which were correctly tendered and accepted, referred to the terms and conditions of the charterparty and identified the Claimant as disponent owner. The freight invoice stated that an amount was due to the Claimant, and specified the Claimant's bank account details for payment.

The Claimant brought a demurrage claim in arbitration, but the arbitrator held that he had no jurisdiction and struck out the claim on the grounds that there was no contract between the parties, and thus no arbitration agreement.

The Claimant appealed, and argued that the Defendant had contracted with the Claimant and/or its parent company which had instructed the shipbrokers to negotiate the sub-charter, and the shipbroker's mistake in recording the disponent owner's name in the fixture recap did not mean that there was no contract. The Claimant also submitted that in any event a contract had come into existence by conduct: the voyage had been performed by, and the freight paid to, the Claimant, and not the entity named in the fixture recap. Finally, the Claimant submitted that it was entitled to sue as an undisclosed principal.

The Court noted that it is common for charterparties to be concluded by an exchange of communication, with the terms being set out again in a fixture recap. Charterparties could also be concluded orally and recapitulated in this way. In this case, however, there was no evidence of an oral contract coming into existence prior to the recap. Indeed, the charterparty had not been agreed, either fully or substantially, before the issue of the name of the disponent owner arose.

Even if a written fixture recap was preceded by an oral agreement, the terms of the fixture recap itself were still very important. In this case, the fixture recap was the main, indeed possibly the only, expression of the agreement between the parties. It could, therefore, for all material purposes be regarded as the charterparty. The identity of the vessel's owner was specifically set out in that document, and the Claimant's argument was at odds with and undermined by the express terms of the fixture recap.

As regards the Claimant's 'undisclosed principal' argument, the Court held that it was the position of the party named in the contract which determined whether or not a person who claimed to be an undisclosed principal could take the benefit of the contract. Here, there was no evidence that the parent company was authorised to act as the Claimant's agent.

Finally, the Court held that a contract had been formed by the parties' conduct. This contract was formed when the freight was paid, although other possible points of formation included when the first NOR identifying the Claimant as disponent owner was accepted, or when the cargo was loaded. The contract so created was on the terms set out in the correspondence, and the arbitration agreement was insufficiently evidenced in writing for the Arbitration Act 1996 to apply.

The arbitrator's award was set aside, and the matter remitted to the arbitrator.

❖ **Commercial Court finds that a Charterer can rely on an exclusion in a berth charter where a vessel's unloading was delayed by congestion after a strike**

***Carboex SA v Louis Dreyfus Commodities Suisse SA* [2011] EWHC 1165 (Comm)**

The Appellant Charterer had entered into a berth charter with the Respondent Owner on an amended AmWelsh voyage charterparty form. The charterparty provided for the transport of coal by four vessels from Indonesia to Spain.

Under clause 40 of the charterparty, time was to run from 12 hours after the vessel's arrival at berth once notice of readiness had been tendered. If a berth was not available at that time, provided that this was not due to any fault on the Charterer's part, laytime commenced 12 hours after the first permissible tide, whether the vessel was in berth or not. Clause 9 of the charterparty provided that time would not count where strikes, or any other causes beyond the Charterer's control, delayed or prevented discharge, unless the vessel was already on demurrage.

After the vessels arrived at the discharge port and tendered notices of readiness, discharge was delayed by around two weeks due to port congestion. This congestion was caused by a nationwide Spanish haulage strike. The strike ended before each of the vessels berthed, and did not cause any interruption in the actual discharge process.

The Owner brought a claim in arbitration for demurrage, submitting that the effect of the "whether in berth or not" provision in clause 40 was that the Charterer bore the risk of delay due to congestion. The Charterer argued that this provision had no effect on the construction of the exceptions in clause 9.

The tribunal found that the Charterer could not rely on the exception in clause 9, as the strike had ended by the time the vessels berthed. The Charterer appealed.

In allowing the appeal, the Court found that the "whether in berth or not" provision did no more than start the laytime clock ticking. The exceptions clause was to be construed as a free-standing provision. Further, the ordinary meaning of the words in clause 9 covered delay in discharging caused by congestion due to the after-effects of a strike that had ended. They also covered delay in discharging caused by congestion due to a strike where the vessel arrived after the strike had ended. As a result, the tribunal had been wrong to conclude that the Charterer did not have the protection of the exceptions in clause 9 of the charterparty.

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 May 2011.