Shipping E-Brief

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SHIPPING E-BRIEF
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The London Commercial Court rules that vessel chartered on NYPE terms remains on hire whilst detained by pirates

COSCO Bulk Carrier Co. Ltd v Team-Up Owning Co. Ltd [2010] EWHC 1340 (Comm) (*The Saldanha*)

In an important ruling for the maritime industry, Mr Justice Gross of the London Commercial Court has upheld the unanimous decision of an eminent arbitration tribunal that a vessel chartered on the NYPE 46 form which was seized by pirates remained on hire whilst under the control of the pirates.

In an Award on Preliminary Issues dated 8 September 2009, the tribunal had held unanimously that the vessel remained on hire during the period of detention and until it reached an equidistant position with the location at which it was seized. The arbitrators considered *inter alia* the extent and scope of the off-hire clause in the charter party and concluded that seizure of the vessel by pirates was not a peril covered by the wording of that particular clause.

The charterers appealed this part of the tribunal's decision. Mr Justice Gross has now upheld the arbitrators' position and dismissed the appeal. The charterers have been refused leave to appeal to the Court of Appeal.

The successful owners were represented by Ince & Co.

Factual and contractual background

The MV *Saldanha* was seized by Somali pirates on 22 February 2009 whilst sailing in a laden condition through the International Recommended Transit Corridor in the Gulf of Aden. The vessel was taken by the pirates to Eyl where it was detained by the pirates until 25 April. The vessel reached an equidistant position with the location at which it was seized on 2 May.

The charter was on the NYPE form and included the familiar off-hire Clause 15 in the following terms :

"That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost…" (underlining added to identify the words relied on by the charterers)

The words *"default and/or"* and *"including strike of Officers and/or crew or deficiency of"* were amendments to the standard wording.

The Charterparty terms also included a "bespoke" clause 40 dealing with seizure, arrest, requisition and detention of the vessel, as well as a put-back clause and the CONWARTIME 2004 clause.

The issues

It was common ground that the charterers were required to pay hire for the use of the ship unless they could bring themselves within the ambit of the off-hire exceptions. If unable to do so, the risk of delay was to be borne by the charterers. The charterers sought to argue that the vessel was off-hire on several grounds. These are dealt with individually below.

Average accident

The charterers argued that detention by pirates amounts to *"detention by average accidents to ship or cargo"*. They submitted that the capture of the vessel, albeit planned in advance and a deliberate act on the part of the pirates, was a fortuity so far as the crew and the vessel were concerned. Mr Justice Gross disagreed and endorsed the tribunal's findings, namely that heavily armed pirates attacking and seizing a vessel was not an accident, let alone an 'average accident' to the ship; and that an 'average accident' to ship necessarily means an accident that causes damage to the ship, as stated by Kerr J (as he then was) in *The Mareva* A.S. [1977] 1 Lloyd's Rep 368. As the tribunal had put it:

"Accident requires lack of intent by all protagonists. An obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim."

Furthermore, whilst the wording 'average accident' points towards an insurance context, the judge stated it does not follow that 'average' in this context is simply to be equated with a peril ordinarily covered by marine insurance, such as the risk of piracy.

Default and or deficiency of men

The charterers argued that the phrase *"default and/or deficiency of men"* encompasses errors, alternatively negligent errors, by the master and crew. They sought to argue that the ship's officers and crew had failed to take adequate anti-piracy precautions before and during the attack, that those alleged failures were a significant cause of the vessel being seized, and that such alleged failures fell within the scope of the 'default of men' exception.

The owners vehemently dispute that there were any such failings as alleged and should it prove necessary in due course, the tribunal will be asked to consider the facts and circumstances of the seizure and make a finding in this regard. Nonetheless, solely to allow for the determination of the preliminary issues, the tribunal proceeded on the assumption that the alleged failure on the part of the officers and crew was a significant cause of the vessel's seizure and detention.

Both the arbitration tribunal and the judge rejected the charterers' argument that 'default of men' in clause 15 includes any failure by the Master and crew to perform their duties or any breach by them of their duties. Whilst it was accepted that the natural meaning of 'default of men' was capable of including a negligent or inadvertent performance of duties by the Master or crew, both the arbitrators and the judge decided that a narrower construction should be applied to the wording. In particular, the words *"default and/or"* and *"including strike of Officers and/or crew or deficiency of"* were added to the standard wording of the off-hire clause to meet a particular mischief, namely the refusal of officers and crew to perform duties, whether or not amounting to a full-scale strike.

Mr Justice Gross also observed that accepting the charterers' construction would result in a startling alteration to the bargain typically struck in time charterparties as to the risk of delay because it would follow that on almost every occasion when the Master or crew negligently or inadvertently failed to perform their duties causing a loss of time, a vessel would be off-hire under the 'default of men' wording. It was noted that such an argument had never been advanced in any previous cases.

Any other cause

The charterers argued that seizure by pirates falls within the sweep-up provision *"any other cause"*. The charterers based this argument on several alternatives, all of which were rejected by the judge. *Inter alia*, the judge labelled as *"unreal"* the charterers' submissions that the crew's failure to carry out their duties under duress of pirates was equivalent to a refusal to perform those duties. With regard to average accident, he dismissed the contention that a fortuitous occurrence normally covered by marine insurance which happens not to have caused damage would fall within *"the spirit"* of clause 15 and be caught by the catch-all wording. In addition, the judge dismissed the suggestion that there was only a *"fine distinction"* between the narrower and wider constructions of 'default of men', still less a distinction that would bring the charterers within the sweep-up wording.

Finally, the judge observed that it was telling that bespoke clause 40 dealing with the risk of seizure, arrest, requisition and detention did not extend to cover seizure by pirates.

Comment

Mr Justice Gross confirmed that, in his view, seizure by pirates is a "classic example" of a totally extraneous cause that falls outside of the scope of the standard NYPE off-hire clause. However, had the wording of clause 15 been qualified with the addition of "whatsoever" after the words "any other cause", it is conceivable that the decision might have gone the other way. Parties contracting on the basis of NYPE time charter wordings should therefore consider closely the wording of their off-hire clause to achieve the desired allocation of risk.

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Demurrage claim time-barred where full and correct documentation not submitted

AET Inc Ltd v Arcadia Petroleum Ltd (Eagle Valencia) [2010] EWCA Civ 713

This was an appeal by charterers against a first instance decision of Mr Justice Walker in the Commercial Court in 2009, which was covered in some detail in our January 2010 e-Brief. The appeal was allowed and the appeal judges have held *inter alia* that the original NOR tendered by owners was invalid. Whilst this finding depended on the interpretation of the specific charterparty clauses in the present case, a point of more general application arises as a result of the appeal decision. This is that, in the event that there is any doubt as to the validity of an original NOR tendered by owners and a demurrage claim is subsequently submitted, the demurrage claim and accompanying documents should also include at the very least any subsequent NORs tendered without prejudice to the validity of the original NOR. Otherwise, owners may find their demurrage claim time-barred.

Facts and first instance decision

The *Eagle Valencia* was chartered on a Shellvoy 5 Form as amended, with Shell Additional Clauses (SAC).

Clause 13 of the charterparty provided, *inter alia*, that time at each loading/discharge port was to start to run six hours after the vessel was in all respects ready to load or discharge and written notice had been tendered, or when the vessel was securely moored at the specified loading or discharging berth, whichever first occurred. Further, if the vessel did not immediately proceed to such berth, time was to commence six hours after (i) the vessel was lying in the area where she was ordered to wait or, in the absence of such a specific order in the usual waiting area; and (ii) written NOR has been tendered; and (iii) the specified berth was accessible.

Clause 22 of SAC provided *inter alia* that if owners failed to obtain free pratique and/or customs clearance either within the six hours after NOR was originally tendered or when time would otherwise normally commence under the charterparty, then the original NOR would not be valid (SAC 22.1). The clause further stated (at 22.5) that *"the presentation of the notice of readiness and the commencement of laytime shall not be invalid where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths"*.

The charterparty also contained a demurrage time bar provision which provided for a demurrage claim to be presented within 60 days after completion of discharge and full and correct documentation to be presented within 90 days, failing which the demurrage claim would be extinguished.

In this case, free pratique was granted more than six hours after the original NOR was tendered and whilst the vessel was still at anchorage (i.e. free pratique was not granted when the vessel berthed). The Master did, however, subsequently send two emails repeating the original NOR on the day that free pratique was granted.

Owners' primary claim for demurrage was calculated on the basis that the original NOR was valid. Charterers argued that that NOR was invalid because *"free pratique was not obtained within 6 hours per c/p clause 22"*. At first instance, Mr Justice Walker upheld owners' claim for demurrage on the basis that clause 22.5 meant that the original NOR was not invalid if free pratique had been granted before the vessel berthed. Charterers appealed.

Court of Appeal decision

(i) Validity of original NOR

The Court of Appeal disagreed with Mr Justice Walker and allowed the appeal. Lord Justice Longmore gave the leading judgment. He considered that the scheme of SAC 22 in relation to free pratique was intended to implement different arrangements to the position under clause 13 of the charterparty, as otherwise there would be no point in having a special additional clause at all. The judge's view was that if the NOR was valid under SAC 22.5 if free pratique was given at any time before berthing, it is difficult to see how clause 13 had been altered.

Lord Justice Longmore found that SAC 22 means that clause 13 will govern if free pratique is granted within six hours of the tender of NOR, but if it is not then, in accordance with clause 22.1, the original NOR is not valid. That regime does not, however, prevent a fresh NOR from being tendered once free pratique has been granted after the six hour limit from the original NOR. Time would then run from six hours after that fresh NOR was tendered. The judge considered this to be an eminently workable scheme and, although not so favourable to owners as clause 13 alone, nonetheless allows them to start the laytime clock six hours after free pratique is granted and the fresh NOR is tendered (which is admittedly somewhat later than envisaged by clause 13 alone). He considered that the only situation where owners would be heavily disadvantaged by this interpretation would be if free pratique was only granted when the vessel berthed. However, in that scenario SAC 22.5 would come into play and allow the original NOR to be valid unless the delay in obtaining free pratique was in some way attributable to the fault of the owners.

The Court of Appeal therefore found that in this case, since free pratique was granted more than six hours after the original NOR and was not granted at berth, the original NOR was rendered invalid under SAC 22.1.

(ii) Validity of subsequent emails as NORs

Owners' alternative case was that the subsequent e-mails sent by the Master constituted valid NORs and that in the event the original NOR was invalid, laytime began to run six hours after these emails were sent (by which point free pratique had been granted). At first instance, the judge did not have to determine this issue as he had upheld the validity of the original NOR. On appeal, the Court of Appeal stated that there is no legal requirement for an NOR to be in a prescribed form and the only additional requirement mentioned in 13(1)(a) of Shellvoy Part 2 was that the notice be in writing. They held that the contents of the first email, stating that the vessel was in all respects ready to load a parcel of crude oil, constituted a valid NOR.

(iii) Time bar relating to alternative demurrage claim

Mr Justice Longomore then considered whether owners' alternative claim for demurrage based on this subsequent NOR was time-barred, as alleged by charterers. At first instance, Mr Justice Walker had suggested that it would be. Owners argued that the demurrage time bar provision was not intended to extinguish an alternative lesser but correct claim and, to the extent that the documentation submitted by owners in accordance with their claim under the first NOR (which the Court had found to be invalid) was incorrect, only a small amendment of the claim was required.

The Court of Appeal found that the substance of owners' claim was presented in time in as much as it was clear that owners were claiming a particular number of days and hours spent at the port when no berth had been accessible. However, Mr Justice Longmore added that an essential document in support of every demurrage claim is the NOR and the only NOR submitted by owners in support of their demurrage claim was the original, contractually invalid NOR. He therefore held that the alternative claim could not be said to be fully and correctly documented. The judge stressed that this was not necessarily to say that alternative laytime statements and invoices would always have to be submitted to avoid an alternative claim being time-barred, but merely that the documents submitted pursuant to a claim for demurrage must include a valid NOR. The Court of Appeal therefore concluded that owners' alternative claim for demurrage was extinguished pursuant to the demurrage time-bar provision in the charterparty.

Comment

1. It is noteworthy that the Court decided that an NOR did not need to be in a particular form; an e-mail from the ship saying that the vessel has arrived and is in all respects ready to load/discharge the cargo is sufficient (see also Cooke on Voyage Charters, Third Edition at paragraph 15.22 and following).

2. The outcome in respect of the alternative demurrage claim might, at first blush, seem somewhat unfair (as owners submitted) given that charterers had not taken the point that the original NOR was invalid until after time for submitting the claim documentation had expired. Nonetheless, Lord Justice Longmore said that this consideration was not conclusive. In his opinion, in similar circumstances to the present case, *"it is not unreasonable to expect an Owner claiming demurrage to include alternative notices of readiness when he submits a claim, on the basis that they may be legally relevant"*.

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Hague-Visby Rules: New Zealand Supreme Court rules that default or neglect in management of a ship does not have to be "bona fide"

Tasman Orient Line CV v New Zealand China Clays Ltd and others (Tasman Pioneer) [2010] 1 Lloyd's Law Reports Plus 41

In the February 2008 and May 2009 editions of Shipping E-Brief, we reported the controversial decision of the New Zealand High Court and Court of Appeal in *The Tasman Pioneer*. The decision concerned the Hague-Visby Rules exemption at Article IV.2(a) of "neglect or default of the master in the navigation of the ship" (the 'negligent navigation defence'). At first instance, the High Court held that the carrier could not rely on this exemption where the relevant actions of the master were not made "bona fide" (in good faith) to preserve the safety of the ship, her crew and the cargo, but were instead motivated out of a desire to avoid personal responsibility for an error. The carrier's appeal was dismissed by a majority of 2:1 in the Court of Appeal, which agreed with the court below that the master's "outrageous" and "selfish" behaviour was not conduct "in the navigation or in the management of the ship".

New Zealand's Supreme Court has now allowed the carrier's appeal, reversing the judgment of the Court of First Instance and the Court of Appeal.

Facts

The laden *Tasman Pioneer* was bound for Busan in Korea. The intended route was to proceed west along Japan's Pacific coast and then through the Japan Inland Sea before crossing the Korean Strait. During the voyage, the master realised the vessel was behind schedule and so, in order to make up some time (about 30 minutes), the master chose to take a short-cut through the narrow passage between Biro Shima and Kashiwa Shima.

After making the course alteration the vessel lost all radar images. When the radar was re-established, Biro Shima was shown just 800 yards off the vessel's port side and, despite trying to change course, the vessel struck bottom breaching her cargo and ballast tanks. The master did not alert the Japanese Coastguard or the ship managers for several hours after the incident. Instead, the master steamed for a further 22 nautical miles at full speed, away from the incident, into near gale force winds and high swells, before anchoring in a sheltered bay. He then notified the ship's managers that the vessel had hit an unidentified floating object. The master also instructed the crew to mislead investigators about the true location and cause of the incident and falsified the ship's charts.

Decision of the Supreme Court

Unlike the Court of Appeal, the Supreme Court focused on the scheme of the Hague-Visby Rules. The court noted that the Rules provide for a division of responsibility where the carrier was responsible for loss or damage to cargo caused by matters within their direct control (termed "commercial fault"), such as the seaworthiness and ship manning, but not responsible for loss or damage due to other causes, including the acts or omissions of the master and crew during the voyage (termed "nautical fault"). The Supreme Court observed that this scheme "promotes certainty and provides a clear basis on which the parties can make their insurance arrangements and their insurers can set premiums."

It was common ground between the parties that the exceptions from liability contained in the Hague-Visby Rules did not cover barratry (damage caused to the ship by the master or crew with intent). However, the cargo interests contended they would also not cover "acts of gross negligence". The Supreme Court determined that the definition of 'barratry' for the purposes of the Rules should be taken from the section of the Rules dealing with when limitation of liability would not be available: i.e. where "the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result" (Article IV.5).

The Supreme Court found that there was no support in previous legal authorities for implying a requirement into the negligent navigation defence that the conduct of the master or crew must be in "good faith". The court also rejected the argument that the negligent navigation defence did not protect the carrier when the Rules were read "purposively". The ordinary meaning of the words used in Article IV.2(a) sufficiently gave effect to the purpose of the Rules: to make the carrier responsible only for loss or damage caused by matters within their direct control. The court concluded: "However culpable the conduct, and whether or not it is intentional, the owner or charterer is not, subject only to barratry, deprived of the benefit of the exemption conferred by the paragraph."

In conclusion, while the conduct of the master was "reprehensible", the Supreme Court concluded that they were acts taken in the navigation or management of the ship and so, unless the cargo interests could establish barratry, covered by the negligent navigation defence.

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The Socol 3 – NYPE charter incorporates the Hague-Visby Rules – liability for loss of deck cargo due to vessel being unstable

Onego Shipping & Chartering BV v JSC Arcadia Shipping (M/V Socol 3) [2010] EWHC 777 (Comm)

The *Socol 3* was fixed for a trip time charter from Finland to Egypt on an amended NYPE 1993 form with a clause paramount incorporating the Hague Visby Rules. She loaded packs of timber on deck but, shortly after leaving the load port, some of these were washed overboard in bad weather and she was forced to seek shelter at a port of refuge in Sweden. Disputes arose under the charter. The Court held that the Hague-Visby Rules did not apply to the carriage of the deck cargo uner the charter because the bills of lading were marked carried on deck. However, as one of the causes of the loss was instability, and as this was uniquely within owners' knowledge, owners were liable for the loss. Owners were not protected by the indemnity clause in the charter relating to deck carriage, because this did not protect against their own negligence.

Background facts and the Tribunal's decision

The cause of the deck cargo loss, according to the London tribunal, was: (i) inadequate stowage (e.g. timber packs were loaded too high and there were void spaces); (ii) container lashing equipment, rather than conventional turnbuckle lashings, were used; (iii) these were not tightened shortly after the voyage commenced by the crew; (iv) instability - the vessel should not have loaded a fourth tier and the stability of the ship was uniquely within the chief officer's knowledge.

Standard clause 8 (a) said *"…. the Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging and tallying, at their risk and expense, under the supervision of the Master."* As instability was a cause of the casualty and, as this was uniquely within the Master's knowledge, the owners were liable for the loss of cargo. However, notwithstanding their negligence, they were protected by standard clause 13 (b) of the charter which provides an exclusion clause and indemnity in respect of deck cargo. The Tribunal also dismissed the charterers' argument that the Hague Visby Rules applied to a deck cargo when incorporated into a charter. *"The rules expressly do apply to deck cargo, so do we simply ignore them?...We concluded that we did."* Charterers appealed on two points of law.

Were the Hague-Visby Rules applicable to the deck cargo?

The charter contained a clause paramount. Charterers wanted the Hague-Visby Rules ("the Rules") to apply to the deck cargo so as to allow them to argue that Art III, rule 8 (that's the one that says *"Any clause relieving the carrier from liability…shall be null and void.."*) made clause 13 (b) void. It would also allow them to argue that owners, in addition to being in breach of clause 8, were in breach of their seaworthiness obligations at the commencement of the voyage.

Readers will recall that Article 1 (b) of the Rules says *"'Contract of carriage' applies only to contracts of carriage covered by a bill of lading...in so far as such document relates to the carriage of goods by sea….."*. Article 1 (c) says *"'Goods' includes good, wares…….except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."* This is the "on-deck statement". Article II says *"…under every contract of carriage of goods by sea the carrier, in relation to the loading, handling…..and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."*

Charterers said that the 'contract of carriage' in 1 (c) meant the charter. The charter allowed the charterers to load on deck, but it did not have an

on-deck statement, so the exclusion of deck cargo did not apply. Furthermore, owners would often want to rely on the Rules. They could do this because Article II confers rights and responsibilities in respect of 'contracts of carriage of goods by sea" and 'contracts of carriage' was defined in 1 (b). It is because one reads the references to contracts of carriage as being a reference to the charterparty that the Rules apply at all. Just as the 'contract of carriage' in art II is the charter and not the bills, so too the contract of carriage in 1 (c) is also the charter and not the bills.

Mr Justice Hamblen disagreed. He accepted that in order to make sense of the Rules when incorporated into a charter *"it will generally be necessary to read 'bill of lading' or 'contract of carriage' as referring to the governing charterparty. However, there is no principle or rule that this must always be so. Verbal manipulation is a process which should be carried out intelligently rather than mechanically and only in so far as it is necessary to avoid insensible results…….In my judgment whether 'contract of carriage' in the Rules refers to the bill(s) of lading or the charterparty depends on the context in which it is being used. Unlike in relation to the opening paragraph of art II, there is no necessary reason for construing 'contract of carriage' in art I (c) as referring to the charterparty as opposed to the bill of lading. Indeed it is a provision which can only sensibly apply to the bill of lading since it is only the bill of lading which is ever likely to contain an on deck statement."*

The Judge made a number of further points to support this reasoning. Firstly, a time charter would often be entered into before the charterers knew if any deck cargo would be carried. *"The practical effect of the Charterers' construction would therefore be that the carriage of deck cargo under the NYPE charterparty will almost invariably be subject to the Hague/Hague Visby Rules and to render the art I (c) liberty to contract out of the Rules illusory."* Secondly, the Judge thought it made good sense for the liability for deck cargo to be the same under the charter as under the bills and in support of this he quoted a passage from *The Fjord Wind* judgment which referred expressly to the argument he himself had been making in that case as counsel. Thirdly, he noted that to hold otherwise would allow charterers to argue that Article III, rule 8 would make the exclusion clause for deck cargo void. Fourthly, he pointed out that time charterers would generally have control of the terms of the bills.

On the basis that it was implicit from the Tribunal's award that the bills of lading were stamped "carried on deck", the Rules did not apply to the charter so far as deck cargo was concerned.

The Judge then went on to consider clause 8 of the charter and confirmed the Tribunal's application of the principles in *Court Line*. This meant that even though the Rules were not applicable to the deck cargo, the owners were still liable, unless they were protected by standard clause 13 (b).

Does the deck cargo exclusion clause protect an owner from his crew's negligence?

Clause 13 (b) states: *"In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded."*

To determine whether this covers negligence, the Court applied the well-established three stage approach set out in *Canada Steamship* [1952] AC 192 at 208. This is as follows:

"(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter the "proferens") from the consequence of the negligence of his own servants, effect must be given.

(2) If there is not express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If doubt arises at this point it must be resolved against the proferens.…

(3) If the words used are wide enough for the above purposes, the court must then consider 'whether the head of damage may be based on some ground other than that of negligence'…..The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification…..the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are wide enough to cover negligence on the part of his servants."

Clause 13 (b) did not expressly refer to negligence or the vessel's unseaworthiness being exempted. Although the words used were wide enough to cover negligence, it would be realistic for owners to be liable without negligence or breach of the seaworthiness obligation and be indemnified for this. For example, in extreme weather a well stowed deck cargo might shift and, without fault on the part of the owners, result in general average expenses being incurred. This meant the clause, contrary to the Tribunal's decision, did not protect owners for loss caused by their own negligence and/or breach of the obligation of seaworthiness.

Comment

This case is an interesting one on many fronts. We all know that in shipping we often have to look to the terms of a charter in order to understand what the terms of a bill of lading are. But the idea that this also works the other way round is unfamiliar. As regards the exclusion clause for deck cargo, the case is a good reminder that if you want to exclude liability for negligence then the only safe way is to refer to negligence expressly.

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The Vine - Commercial Court construes laytime provisions of charterparty and rules on governing law and jurisdiction of related guarantee

Emeraldian Limited Partnership v Wellmix Shipping Ltd and another (The Vine) [2010] EWHC 1411 (Comm)

In this case, the Commercial Court was asked to construe the laytime provisions of a voyage charterparty and consider how the laytime exceptions applied to a situation where the intended berth had been unavailable for a lengthy period and was within the control of a wholly-owned subsidiary of the charterers. As the laytime provisions had been taken from the terms of the sale and purchase contract of the iron ore cargo in question, some interesting issues arose as to how those provisions should be interpreted in the context of the charterers' other obligations under the charterparty, primarily the safe berth warranty.

The charterparty

The charterparty in this case was evidenced by a fixture recap providing for a voyage from *"1 or 2 safe berths, 1 safe port Itagui, Brazil, always afloat"* to China with a cargo of 120,000 mt of iron ore. Itagui is also known as the port of Sepetiba. The fixture recap stated *inter alia* that *"SCALE terms"* were to be part of the charterparty. Those terms were appended to the fixture recap and were taken from a long term contract for the sale and purchase of iron ore between Guangzhou Iron & Steel Corporation Ltd ("Guangzhou") and Vale SA, the major Brazilian iron ore exporter.

Clause 4.1 of the SCALE terms dealt with Notice of Readiness and, so far as relevant, provided as follows:

"Notice of Readiness (NOR) may be tendered after arrival of the vessel at Loading Port, at any time, ……provided that the vessel is ……cleared by the Port Authorities……. "

Clause 5 of the SCALE terms dealt with laytime. Clause 5.10 provided *inter alia* as follows:

"5.10 Time lost as a result of all or any of the causes hereunder shall not be computed as laytime, unless vessel is already on demurrage:

(iv) Accident at the mines, railway or ports;…….

(viii) Partial or Total interruptions on railways or port;……

(ix) Any cause of whatsoever kind or nature, beyond the control of Seller, preventing cargo preparation, loading or berthing of the vessel."

The fixture recap also provided that *"otherwise C/P to be based on Vine/PML c/p dtd 21 June 2007."*

Background facts

The charterers nominated a berth at Sepetiba port which was leased to and operated by CPBS, a company owned by Vale SA. The vessel arrived in the port on 8 January 2008 but did not berth until 15 February 2008 due to the fact that repairs were being conducted to the berth. Those repairs had been necessitated by damage to two out of three berthing dolphins arising out of two earlier incidents. The issue arose as to (i) when notice of readiness had been validly given, (ii) whether the delay in berthing counted as laytime and (iii) if the delay did count as laytime, whether the cause of that delay was a breach by the charterers of their obligation to nominate a safe berth.

Commercial Court decision

Commencement of laytime

Notice of readiness was tendered at 0038 on 8 January 2008. The port authorities granted clearance on 1020 on 12 January 2008. The charterers argued that laytime only commenced when port authority clearance was granted, pursuant to clause 4.1 of the SCALE terms. The owners countered that CPBS had authority to waive the requirement for port authority clearance and that they had done so. On the evidence, Mr Justice Teare found that the requirement for port clearance to be given before notice of readiness was accepted had been waived by CPBS. Therefore, he concluded that laytime commenced at 0038 on 8 January 2008.

Whether delay in berthing counted as laytime

The judge considered the relevant laytime exceptions in clause 5 of the SCALE terms in turn. Principally, he found as follows:

"Partial or total interruption on railway or port": The judge commented that the phrase "partial interruption on port" was unusual but said it was common ground that the phrase partial interruption "on port" meant partial interruption "of the business of the port". A port was made up of several berths. Where all business in the port was stopped, there was "total interruption" of the business of the port. Where business at a particular berth within the port was stopped, there was a "partial interruption" of the business of the port.

The judge disagreed with the owners' submission that the interruption of the business of the port had to be fortuitous. He was not persuaded by the owners' argument that the ordinary meaning of "interruption" should be restricted to interruptions which were not planned in advance by the port. The judge concluded therefore that the charterers had brought themselves within the "partial interruption" exception to laytime under clause 5.10(viii).

"Beyond the control of the seller": the owners sought to argue that the "partial or total interruption on port" discussed above had to be beyond the control of the seller, submitting that those words should be extended beyond clause 5.10 (ix) to the other laytime exceptions specified in that clause. The owners also argued that when considering whether a cause was beyond the control of the seller, it was appropriate to consider whether it was beyond the control of CPBS.

The judge agreed that, having regard to the fact that CPBS was wholly-owned by Vale SA and on reviewing the SCALE terms (which referred, *inter alia*, to *"Seller's loading facilities"* and *"its pier at the Port of Itaguai"*), that it could not have been intended that the seller could say that the berth was not "its berth". However, he stated that clause 5.10 should be given its ordinary meaning and that in the absence of words manifesting the parties' intention to extend the phrase *"beyond the control of Seller"* in sub-clause (ix) to the other sub-clauses, particularly where some of those exceptions were unlikely to have any connection with the sellers (e.g. war, bad weather), there was no reason to do so.

Consequently, although he concluded that the time lost was not beyond the control of the seller because there was no evidence that CPBS could not have repaired the berth as far back as 2007 if they had wished to do so, this did not impact on his finding that the delay in berthing the vessel was caused by a partial interruption to the port.

Breach of the safe berth warranty

The owners submitted that although time might have been lost by an event covered by one of the laytime exceptions in the charterparty, the charterers would nonetheless be liable for time lost if that time was lost by reason of the berth being unsafe in breach of the charterers' safe berth warranty. They further argued that any damages for delay arising out of such breach should be calculated at the demurrage rate, which was the agreed rate of damages for delay. The judge agreed and added that the fact that there may have been no breach of the obligation to load within the laydays did not prevent the owners from claiming the agreed rate of damages for delay caused by breach of the safe berth obligation.

Following detailed review of expert evidence, the judge concluded that the CPBS berth was unsafe and consequently that the owners were entitled to claim damages at the agreed demurrage rate.

Claim on the guarantee

Another aspect of the dispute related to the validity and enforceability of the guarantee given by the Chinese buyers of the iron ore, Guangzhou, to guarantee the charterers' obligations under the charterparty. In summary:

(1) Mr Justice Teare drew an adverse inference from Guangzhou's failure to provide full disclosure and consequently dismissed the argument that the employee who had issued the guarantee had no actual authority to do so;

(2) although the guarantee contained no law and jurisdiction clause, the judge held that the reasonable and objective inference to be drawn from the circumstances of the case was that the parties had impliedly chosen English law as the applicable law of the guarantee, alternatively that the guarantee was most closely connected to England. Particular reliance

was placed on the fact that Guangzhou had agreed to guarantee the performance of charterparty obligations governed by English law and subject to English jurisdiction;

(3) the judge stated that it would not be contrary to English public policy to enforce the guarantee notwithstanding that it had been issued in breach of Chinese local law *inter alia* because Chinese law did not make a guarantee issued in breach of foreign exchange regulations invalid or unenforceable.

Comment

It is noteworthy that whilst the charterers were successful in bringing the delay in berthing at Sepetiba port within one of the laytime exceptions specified in the charterparty, damages were nonetheless awarded against them for the sum claimed by the owners in demurrage (less charterers' despatch claim) on the grounds that that delay in berthing was caused by the unsafety of the berth.

As regards the law and jurisdiction governing the guarantee, Mr Justice Teare took a robust view with regard to the Chinese guarantor company's attempts to avoid liability under the guarantee. This is not the first time that a Chinese company has sought to argue in legal proceedings that the employee signing the guarantee did not have the requisite authority. It is therefore recommended that any beneficiary of such a guarantee should ensure that the guarantor company's authorised legal representative signs the guarantee or that such a guarantee is signed by a properly authorised employee whose authority is confirmed in writing.

Finally, in order to avoid a potential dispute as to the governing law and jurisdiction of a guarantee, it is recommended that the guarantee expressly contain a law and jurisdiction clause which mirrors the governing law and jurisdiction of the claim in respect of which the guarantee is given.

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Deck carriage: the Court of Appeal revisits the obligations of a seller under a CIP contract and of a freight forwarder in respect of arranging carriage and insurance

Geofizika DD v MMB International Ltd (The Green Island) [2010] EWCA Civ 459

We first reported on the judgment of Judge Mackie QC in favour of the buyer in this matter in our Shipping E-Brief of October 2009. The "*unusual combination*" of facts with which this case concerns itself have since been revisited by the Court of Appeal, with the result that the initial decision has been reversed.

The facts

In October 2006, Geofizika DD ("Geofizika") agreed to buy from the defendant, MMB International Limited ("MMB"), three Land Rover ambulances for delivery to Libya under a "CIP Tripoli" contract subject to Incoterms 2000. MMB was obliged to contract for the carriage of the goods *"on usual terms"* and *"in a customary manner"* and to "*obtain…cargo insurance...such that the buyer…shall be entitled to claim directly from the insurer"*, with such insurance to be *"in accordance with minimum cover of the Institute Cargo Clauses"*. MMB agreed with freight forwarder Greenshields Cowie & Co. Ltd ("GSC") that GSC would arrange both shipment and insurance. GSC in turn contracted with Brointermed Lines Ltd ("Brointermed"), a carrier it had not used before.

On 14 November, Brointermed sent GSC a booking confirmation stating *"ALL VEHICLES WILL BE SHIPPED WITH 'ON DECK OPTION' this will be remarked on your original bills of lading…"* The vehicles were shipped on 29 November. On 4 December, GSC received the original bills of lading which were not claused. These included, at clause 7(2) of Brointermed's standard terms, a liberty clause allowing Brointermed to carry the cargo on deck or under deck without notice. GSC arranged insurance cover on the terms of the

Institute Cargo Clauses (A) together with an additional term that the cargo was *"Warranted shipped under deck"*. The vehicles were stored on deck during the voyage and two were washed overboard in the Bay of Biscay.

Insurers declined Geofizika's claim for the insured value of the two ambulances (£57,890) on the grounds of breach of warranty. Geofizika claimed against the carrier under the bills of lading in Libya, ultimately settling for £50,000. Geofizika subsequently commenced proceedings against MMB, who joined GSC. Damages were awarded to Geofizika at first instance comprising the insured value of the vehicles, the cost of freight and insurance for replacements, the hire of substitutes and legal costs. With credit for the sum recovered from the carriers, this came to £37,000. Both MMB and GSC successfully sought leave to appeal.

The Court of Appeal's findings

Did MMB fail to procure a compliant contract of carriage?

The Court of First Instance had held that the contract of carriage formed was one that permitted carriage of the goods on deck, as the booking confirmation was insufficiently clear to constitute a prior antecedent agreement preventing the carrier from exercising its liberty under clause 7(2), and the contract was therefore non-compliant as it did not reflect the parties' agreement that goods be shipped under deck. The Court of Appeal disagreed. Although the booking confirmation was *"inartistically worded"*, it held that anyone in the industry familiar with longstanding practice would realise that its effect was that if the cargo was to be carried on deck, then the face of the bill of lading would have to be claused. The liberty, granted under clause 7(2), to ship on deck without notice had been circumscribed. A compliant contract of carriage had therefore been formed under which the ambulances should not have been shipped on deck, as per the wishes of the parties.

Did MMB fail to procure a contract of insurance?

The Court of Appeal agreed with the decision of the Court of First Instance that the warranty of under deck shipment should never have been given as the warranty had already been broken, and as a result there was never any valid insurance in place under which Geofizika could claim. However, it disagreed that the insurance was defective because it did not match the contract of carriage, as discussed further below.

MMB's claim against GSC

The Court of Appeal agreed that GSC had been negligent in giving the warranty of under-deck carriage. Although a freight forwarder is not *"in any way responsible"* for the supervision of a carrier's performance of a contract, the consequences of a breach of warranty are so severe that a warranty should not be given without due care being taken to check that the facts being warranted are, in fact, true.

Nevertheless, the Court of Appeal held that Geofizika was unable to recover its losses. Neither MMB's breach (in failing to obtain insurance) nor GSC's negligence (in giving the warranty) had caused Geofizika's loss. Under the express terms of the contract of sale, Geofizika was only entitled to *"minimum cover"*, being Institute Cargo Clauses (C), and these do not cover loss caused by being washed overboard by perils of the sea. Even if MMB had complied with its obligations to obtain insurance in accordance with the contract of sale, the loss would therefore still not have been covered. At first instance, the Court had evaded this outcome by finding that there is an implied obligation to obtain insurance that matches the contract of carriage actually being performed, i.e. MMB had been obliged to obtain insurance which would cover the carriage of cargo on deck. The Court of Appeal said that the Court had approached this from the wrong direction and that the correct position is that a seller's obligations in relation to insurance are dictated first and foremost by the express provisions of the contract, in this case Incoterms 2000, and no implied obligation can override these express terms. The trial judge had been wrong to accept Geofizika's witness evidence that MMB had agreed to provide cover beyond the minimum, since the witness had not been cross-examined on this issue.

Comment

The Court of Appeal reached its decision *"with some regret"* and described it as *"odd"* that GSC should be able to escape the consequences of its negligence. Therein, of course, lies a rather obvious (although not to the parties at the time) lesson: parties to a contract of carriage should take care to ensure that the documents that make up that contract reflect what has been agreed, taking into account *"first impression, common sense, business efficacy and trade practice"*. The Court expressed its surprise that acute and affluent men of business could be so *"careless with language"*, and frustration that failure to exercise such care had resulted in costs *"wholly disproportionate"* to the amount at issue. This is a timely reminder that contractual documents should be checked thoroughly, and discrepancies and ambiguities resolved. It is also a warning that warranties should be approached with caution, especially where it is, in fact, a third party, to whom a seller has contracted its obligations, who is giving the warranty.

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Switching bills - the rights of the original consignee

A.P. Moller - Maersk A/S (trading as "Maersk Line") v Sonaec Villas Cen Sad Fadoul [2010] EWHC 355

It is clear that owners will be taking considerable risks where new bills of lading are issued without surrender of the original set. This recent decision of the High Court, one of very few English authorities on the practice of switching bills, illustrates the difficulties that can arise even where the original bills are surrendered prior to issue of a second set and the importance of ensuring that the shipper is clearly identified in the bill.

The First Bill

Yekalon Industry Inc sold a consignment of tiles to Sonaec Villas in Benin. The goods were booked and shipped on Maersk's liner service through local agents, High Goal Logistics GD Limited. A bill of lading was issued on 17 January 2008 (the "First Bill") naming Sonaec as consignee and the shippers as B&D Co Ltd P/C ("par compte de") Vernal Investment ("Vernal") and Yekalon. Vernal was a subsidiary of Sonaec. The port of discharge was Benin.

The Chinese proceedings

Shortly after the First Bill was issued, a dispute arose in China as to who was its lawful holder. Yekalon who had not been paid by Sonaec asked High Goal for the bill, but High Goal refused on the basis that they had received instructions from B&D. Yekalon then applied to the Guangzhou Maritime Court for delivery of the original First Bill and a declaration that Yekalon was entitled to possession of it, which declaration was granted.

The Second and Third Bill

Yekalon surrendered the original bills to Maersk and requested a new bill (the "Second Bill") be issued to the order of Yekalon. Yekalon then found a new buyer and also surrendered the Second Bill for a further replacement bill of lading, with Hondujres SA now named as consignee and with delivery in Honduras.

The Benin proceedings

On 27 February, Sonaec commenced proceedings in Benin, claiming the goods were sold on an FOB basis; property had passed on loading; they were the owners of the cargo and entitled to delivery of the same. Maersk disputed the Benin court's jurisdiction, the First Bill being subject to an exclusive English law and jurisdiction clause and asserted that any rights which Sonaec may have had under the First Bill had been brought to an end when the First Bill was cancelled by the rightful shipper and replaced. Despite these submissions, the Benin Court made an interim ruling requiring Maersk to ship the cargo to Sonaec in Cotonou and imposing a daily fine on Maersk of US$4,800.

The English proceedings

Maersk then sought a declaration from the High Court of Justice in London that:

1) all disputes arising under the First Bill were to be determined by the English High Court of Justice in London (to the exclusion of the jurisdiction of the courts of any other country) in accordance with the exclusive law and jurisdiction clause in that Bill; and

2) Sonaec had no title to sue under the First Bill.

Sonaec were not represented at the hearing in the High Court.

Jurisdiction

The exclusive jurisdiction clause would be binding on Sonaec only if Sonaec was a party to the contract contained in or evidenced by the First Bill. This depended on whether Sonaec was a party to whom rights would pass under the Carriage of Goods by Sea Act 1992 ("COGSA 1992") and, if so, whether upon surrender of the First Bill Sonaec continued to be bound by the exclusive jurisdiction clause.

The First Bill was not "to order", but identified Sonaec as a named consignee. It did not therefore fall within the definition of a bill of lading for the purpose of COGSA 1992, as being a document that was capable of transfer by indorsement or delivery. However, it did fall within the definition of a seaway bill for the purpose of COGSA 1992, being a receipt for the goods, containing or evidencing a contract for the carriage of goods by sea and identifying the person to whom delivery of the goods was to be made.

Under Section 2.(1)(b) of COGSA 1992, the person to whom delivery of goods to which a seaway bill relates is to have *"transferred to and vested in [it] all rights of suit under the contract of carriage as if [it] had been a party to that contract"*. Consequently, at some stage Sonaec was a party to the First Bill, including the law and jurisdiction clause.

Effect of surrender of the First Bill on the Exclusive Jurisdiction Agreement

Maersk were also seeking a declaration that any rights of suit that Sonaec may have had under the First Bill had ceased to exist upon surrender of that Bill. It was therefore necessary for the Court to determine whether Sonaec and Maersk continued to be bound by the jurisdiction clause following surrender of the First Bill. On this issue, the Judge noted that it is well established that arbitration agreements are ancillary to and will survive termination of the main contract. Although no authority had been cited to him on this issue, he held that similar principles applied to an exclusive jurisdiction clause. Consequently, even if Sonaec had ceased to have rights under the First Bill upon its surrender, the law and jurisdiction clause survived and any claim under the First Bill must be brought in England.

Did surrender of the First Bill bring to an end Sonaec's rights under that Bill?

The transfer of rights under COGSA 1992, whether under a bill of lading or a seawaybill, is expressly stated to be *"without prejudice to any rights which derive from a person's having been an original party to the contract contained in or evidenced by, a seaway bill"* (section 2(5)). Consequently, a shipper who is and remains party to the contract of carriage does not lose his right *vis-à-vis* the carrier to divert the goods, as he may wish to do if he is not paid for them. Maersk argued that if a shipper can re-direct the goods, by changing the terms, the shipper must also be entitled to agree with the owners to terminate the contract and substitute a new contract of carriage contained in a new bill of lading, with a new consignee. The Judge agreed, holding there was no reason that the shipper could not agree with the carrier to replace the original bill of lading with another one.

However, Maersk faced a further difficulty insofar as it was not clear that it was Yekalon that was the original shipper and, therefore, the party entitled to re-direct re-delivery. The shipper had been described on the First Bill as "B&D Co Ltd [pour compte de] Vernal & Yekalon". As Vernal was an associate company of Sonaec, Vernal and Yekalon were parties with potentially antithical interests and it was not clear whether B&D were purporting to act as agent for both and, if so, in what respect.

There was conflicting evidence in the Chinese and Benin proceedings as to the precise sequence of events leading to the shipment of cargo and the issue of the bill of lading. Rather than reach a conclusion on this evidence, the Judge determined the matter on the basis that the Chinese Court had ordered delivery of the First Bill to Yekalon on the footing that Yekalon was the shipper and entitled to the First Bill. In these circumstances, the Judge held that Yekalon became the party entitled to the rights of the shipper under the First Bill and that Yekalon was, therefore, the party entitled to re-direct delivery or cancel the First Bill. Consequently, Maersk was entitled to a declaration that any rights of Sonaec under the First Bill were brought to an end prior to 18 February 2008.

Comment

The decision of the High Court will provide some reassurance to owners regarding the rights of a consignee under English law where an original bill of lading or seaway bill has been switched. However, the facts highlight the risk of proceedings being brought by the consignee under the original bill in another jurisdiction, in which an English judgment may ultimately be of limited use to the owners defending such a claim.

Finally, the case is a useful reminder of the difficulties that can arise and additional costs that may result, here both in proceedings in China and in England, where the description of the shipper is not sufficiently clear to enable that party to be identified with certainty. In this case, the Judge accepted the Chinese Court's ruling that Yekalon was the shipper under the First Bill. However, it is not apparent from the judgment that Sonaec were party to those Chinese proceedings and, had they been represented and put forward evidence in the London High Court proceedings, it is possible that a different conclusion may have been reached.

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Bunkers – who pays when the charterer doesn't?

Angara Maritime Ltd v Oceanconnect UK Ltd & another (The Fesco Angara) [2010] EWHC 619 (QB)

This case concerns a familiar situation in time charters. A bunker supplier provides bunkers to a time charterer, who has the job of ordering bunkers under the time charter. The time charterer does not pay. The bunker supplier looks to the shipowner to pay. The supplier relies on his retention of title clause, saying that the bunkers belong to him until he gets paid. In this situation, the shipowner is often left holding the baby - especially if the charterer disappears or goes bankrupt.

However, this is not always the case, as the *Fesco Angara* shows.

Facts

The *Fesco Angara* was time chartered to Britannia Bulkers. As time charterers, Britannia supplied the vessel with bunkers. They entered into a contract of sale with bunker suppliers, Oceanconnect. The sale contract contained a retention of title clause saying that the suppliers would retain ownership until they got paid.

Britannia did not pay for the bunkers, so they did not become the owners of the bunkers. They then ran into serious financial difficulties and eventually went into liquidation. They made early redelivery of several vessels - including *FA*. The charter required the shipowners to take over and pay Britannia for the quantity of bunkers remaining on board.

The shipowners refused to pay. Both parties made claims and the issues went to Judge Mackie in the High Court. The bunker suppliers argued that owners were liable to pay for the value of the bunkers because the vessel had consumed them during the time charter and also because after the charter was terminated, they assumed ownership when the charterers redelivered the vessel.

Mercantile Court decision

The shipowners won. The Court held that they had acquired ownership of the bunkers despite the retention of title clause. The judge decided that they took delivery of the bunkers in good faith and without notice of the charterers' non-payment. So, in accordance with section 25 (1) of the Sale of Goods Act 1979, they effectively became the owners of the bunkers.

This case is important, but it was decided on its facts. First, the judge accepted on oral evidence that the owners really knew nothing about the terms of the bunker supply contract and of the charterers' non-payment. (Section 25 is very wide here - good faith without any notice of lien or anything else). Second, there was an agreed redelivery under the charter rather than a termination by the owners. The judge decided that this was the necessary "delivery" of the bunkers under S25 (1). The Act says that delivery means voluntary transfer of possession. He relied on the charterers' voluntary act of offering the vessel for early redelivery and the owners accepting it with them taking over the bunkers. If the charter had been terminated by owners for non-payment of hire, then the transfer would not have been voluntary within the meaning of section 25(1) (see *The Saetta* (1993) 2 LLR 268).

Comment

The case is a warning to bunker suppliers. Drafting tighter clauses in the supply contract may not get round it. It may be possible for the bunker suppliers to include terms in their contracts requiring charterers to account for the proceeds of sale, but how effective this will be will heavily depend on how tight the wording is and if the buyers agree to it .

From a shipowner's viewpoint, the case is not a blueprint. The facts may be different in the next case - in terms of their knowledge of the bunker contract terms or the circumstances of the redelivery. A simple termination of a charter by the owners for charterers' breach and automatic transfer of ownership in the bunkers to them under the charter provisions may not block a claim by the supplier.

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"Buyer's supplies" under shipbuilding contract: express provision required in bareboat charter

BW Gas AS v JAS Shipping Ltd [2010] EWCA Civ 68

Background facts

This litigation arose out of a chain of contracts relating to a new LPG carrier built in Japan. The builder entered into the shipbuilding contract with the buyer, who in turn bareboat chartered the vessel to the head charterer. The head-charterer (disponent owner) entered into a bareboat sub-charter with the claimant sub-charterer. Ince & Co acted on behalf of the sub-charterer in the court proceedings.

The sub-charterer's claim against the disponent owner under the bareboat charter was for a failure to deliver the vessel to them with the "buyer's supplies" installed in the vessel. Those items were listed in the building contract's specifications and included both general, arguably non-essential items (or "optional extras", as the first instance judge referred to them), as well as items required by the classification society and international conventions, including SOLAS.

The two bareboat charters were in the Barecon 2001 form and were essentially on back-to-back terms. They provided *inter alia* for the vessel to be constructed in accordance with the building contract and its specifications as annexed to the charters. However, no specific mention was made of buyer's supplies in the charters. Rather, the charters provided that, subject to the vessel being constructed in accordance with the building contract and specifications and upon acceptance of the vessel for delivery, the charterers were to have no further claim up the contractual chain.

The vessel was simultaneously delivered under the building contract and the two charters. The sub-charterer subsequently alleged that it had accepted delivery of the vessel on a "without prejudice" basis and claimed over US$600,000 from the disponent owner to make good the vessel's deficiencies arising out of the failure to provide the vessel with buyer's supplies. It argued that, in the context of the charterparty, the expression "to be constructed in accordance with the charterparty and the specifications" must be taken as meaning that the vessel would be delivered into the charter complete with the buyer's supplies. In the alternative, it was also argued that it was an implied term of the sub-charter that: (i) the disponent owner would supply the vessel with such items as would in the ordinary course be supplied by an owner to a charterer under a bareboat charter of a newbuild LPG carrier; or (ii) insofar as the shipbuilding contract identified buyer's supply items of a generic description, the disponent owner was bound to supply such items as were necessary and / or standard for such a vessel and / or as would in the ordinary course be supplied by an owner to a charterer under a bareboat charter of a newbuild LPG carrier.

The disponent owner's defence was essentially that it was under no obligation under the shipbuilding contract to supply such items and could not therefore be in breach of contract under the sub-charter. Rather, it argued, such items were for the ultimate operator of the vessel to choose and supply.

The relevant issues were dealt with by direction of the court (despite the sub-charterer's resistance) at first instance as preliminary issues. Mr Justice Burton in the Commercial Court held that there was no breach of the sub-charter terms which required the vessel to be constructed in accordance with the building contract and its specifications. He disagreed that any terms such as suggested by the sub-charterer should be implied into the sub-charter, saying that such terms were uncertain in their nature and "simply would not work". However, the judge did make a concession in respect of the items claimed which were required by convention or class rules or regulations governing the equipment of the vessel. He held that the sub-charterer could recover the costs of making good the non-supply of those items.

The sub-charterer appealed and the disponent owner cross-appealed regarding the excepted items for which the judge found the sub-charterer could recover.

Court of Appeal decision

Lord Justice Rix gave the leading decision and emphasised that the point at issue appeared to be entirely novel, yet had been treated as a preliminary

issue without the benefit of expert or other evidence. He regretted the "absence of context", including the absence of evidence as to why the specification covered certain items but not others, what was standard or normal on a newbuild LPG carrier in the way of supplies and spare parts, why some items had been claimed for and not others and so on.

However, notwithstanding his reservations as to these "somewhat artificial circumstances", Lord Justice Rix held that nothing in the provisions of the sub-charter expressly required the disponent owner to provide the items listed as "buyer's supplies" in the shipbuilding contract. The building contract specifically provided that if the buyer did not supply the items in question to the builder, there was no need for the vessel to contain them on delivery. Rather, the builder was entitled to proceed with construction of the vessel without installation of the buyer's supplies and the buyer had to accept and take delivery of the vessel so constructed. The judge concluded that a vessel constructed and delivered without the items in question which the buyer had failed to supply was a vessel constructed and delivered in accordance with the building contract and its specifications. If that was so under the building contract, then Lord Justice Rix saw no reason why it should not be so for the purposes of the bareboat charters.

The judge added that the charters emphasised throughout that delivery of the vessel under the building contract and the charters respectively was the same delivery (insofar as the condition of the vessel was concerned). Therefore, in his opinion, each charterer was limited to remedies under the building contract against the builder for anything that had gone wrong in the building of the vessel as required by the building contract and its specifications, and the charters left no room for any claim *under the charters* (judge's emphasis) against the chartering owners in respect of the condition of the vessel as built and delivered. He could not, therefore, see how, if there was no claim under the building contract against the builder, there could nevertheless be a claim under either of the charters against the chartering owners in respect of a complaint that the vessel as constructed and delivered had not been constructed in accordance with the building contract or its specifications.

The judge also found that the language used in the shipbuilding contract in respect of the buyer's supplies (the "shall" language or equivalent) was "the language of choice, not of obligation" and that consequently, the parties had contracted that to the extent that the buyer wanted such items installed, it had to arrange to supply them at its cost. He agreed with Mr Justice Burton that the "absence of obligation" in this regard was supported by the difficulty of finding an implied term which would identify the items in question. Whilst a court would strive to make sense of a provision in a subsisting contract if it were necessary to make the contract work, this was not necessary in the present case, particularly where the court had no means of knowing whether it was possible sensibly to speak of the normal or standard equipment reasonably to be expected to be installed on a newbuild LPG carrier.

Therefore, the judge dismissed the sub-charterer's appeal. Furthermore, he allowed the disponent owner's cross-appeal. In his view, the cost of those items in respect of which the first instance judge had made an exception would have fallen on the buyer rather than the builder in any event had they been supplied. Additionally, the hull specification expressly provided that the builder would equip and supply the vessel with anything not mentioned in the specifications but required by the rules and regulations of the vessel's classification society and various international conventions and codes, *with the exception of the buyer's supply articles* (our emphasis). That provision seemed to the judge to be ultimately definitive of this question.

Comment

The sub-charterer will not be appealing and the Court of Appeal's decision therefore stands. The decision is of considerable significance to both litigators and transactional lawyers who may be involved in negotiating or advising on a bareboat charter. Where delivery is to take place directly from the shipyard, it is essential that any issues concerning buyer's supplies are directly and expressly addressed in the terms of the bareboat charter.

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Piracy – recent developments

With the monsoons now established in the Indian Ocean the number of attacks there have fallen away, allowing the industry to take stock. Around twenty vessels remain in captivity off Somalia and some four hundred and fifty crew are being held hostage. There have been over a dozen attacks in June in the Red Sea and it is perhaps unsurprising that, at the time of writing, news arrives that they have finally hijacked a vessel (the *Motivator*) north of the Bab El Mandeb straits. The EUNAVFOR commander has recently estimated a threefold increase in the number of pirates since 2008 and yet, even though the Navy claims to have intercepted some fifty nine pirate groups at sea, the cycle of attacks remains at levels similar to last year. The EU mandate has been extended until December 2012 in an increased area to take into account the distances at which the pirates are operating with a Dutch submarine joining the force.

Whilst the emphasis of this article is on Somalia, there has been a marked increase in the number of attacks off Nigeria and, in recent days, there was an example of an attack along Somali lines with crew members being taken from the ship and held hostage. They were released within a matter of few days with no clues as to whether a ransom was paid, but these are worrying signs that the Somali model is being exported to other high risk areas.

Mavi Marmara – was it piracy ?

In the aftermath of the Israeli boarding of the *Mavi Marmara*, several commentators suggested that this too was an act of piracy. It is worth reminding readers of the definition of piracy. Under Article 101 of the UNCLOS piracy is defined as an illegal act on the high seas against another ship, but it is made clear that it must be committed for "private ends", which excludes therefore acts sanctioned by a state.

Israel also relied on the little known San Remo Manual on International Law applicable to Armed Conflict at Sea to justify the action taken. This is not a treaty or formal Convention but what is best described as a summary of international maritime law in the context of a war between two states. It was put together by lawyers and Human Rights experts. Blockades are referred to and are a recognised naval strategic concept, used for example by the UK in their exclusion zone around the Falklands in 1982and more recently in the Balkans conflict. There have been recent calls for a blockade of the pirate havens along the coast of Somalia preventing the skiffs from leaving the shore. If legitimate, the issue then is whether a State has a right to board a vessel seeking to break the blockade. The lawful right to board is more widespread than may be realised (for example under fishery, drugs and terrorism Treaties) but is usually done with implied or express consent of the flag state which, in this case, was the Comoros Islands and not Turkey as widely reported.

Putting aside the politics, the intervention by Israel also highlighted the problems of the concept of self defence and the complexity of the issues involved which were brought into stark focus with the deaths of nine passengers. The Israeli troops who fast-roped onto the deck of the vessel found themselves in a situation where they believed lethal force was required to defend themselves. The issue of the legitimate use of lethal force in the context of self defence and protection of property is one that is debated across the maritime security sector by those involved in protecting vessels in transit through high risk such as the waters off Somalia. Whilst the level of publicity and accountability was higher than anything that may happen in the Indian Ocean, this incident illustrates the very real difficulties that could arise if armed men are seen to overstep the mark in the way they deal with pirates…. or fishermen mistaken for pirates.

Citadels

To the successful recapture of the *Taipan* can now be added the story of the *Moscow University*, which was hijacked and then freed within hours after the crew retreated to a well-secured area in the engine room. There is still some confusion as to the use of citadels and the difference between them and a safe muster point, although this may have been dissipated by the new edition of Best Management Practice Guidelines 3. A safe muster point is described as "*a short term safe haven*" to which all crew not required on the bridge to deal with an attack can retreat at the time of a hijacking. This is different to a citadel which is defined as a:

"..... pre-planned area purpose built into a ship where, in the event of imminent boarding by pirates, all crew will seek protection. A citadel is designed and constructed to resist a determined pirate trying to gain entry."

The important difference being that the citadel is a place for all crew which can be used with an expectation that it may be occupied for a number of hours whilst a hijacking is ongoing. Critical to whether a military intervention could happen will be the crew's ability to communicate with any would be rescuers and of course survive and resist entry by the pirates. Use of a citadel remains a risky strategy and one which needs to be well thought out and understood prior to transit.

Jurisdiction and legal issues

There have been more encouraging signs that countries other than Kenya (who now has its own dedicated "piracy court" funded by the UN) will pursue and prosecute pirates. The US are prosecuting two pirates who attacked a US warship. Their defence team is relying on an 1820 case, where it was said that piracy was defined as the boarding or capture of a ship, which was not the case here. One would hope that defence would fail. In Holland, five pirates were sentenced to five years in prison which, compared to life in Haradheere, may not be so much of a hardship. Indeed, one has claimed political asylum, which is what the politicians feared may happen. Given that some of their colleagues have been sentenced to death in Yemen, they may understand the benefits of being caught by an EU ship where they are enveloped in the full panoply of the Human Rights legislation. The Seychelles, Tanzania and Mauritius are all being given funds to finance prosecutions of pirates.

In London, the legal developments are on the civil side with issues relating to piracy being brought to arbitration. This e-brief contains a detailed report on the *Saldanha* and the High Court's decision that a vessel chartered on an NYPE form with an un-amended clause 15 remains on hire. In making that decision, the Court agreed with the underlying decision of the Tribunal. It was perhaps sensible that an appeal was heard by the High Court so as to give the commercial world some certainty in this area, but the charterers have now been refused leave to take the off hire point further. Other issues where charterers may yet seek the guidance of a tribunal include: what constitutes *"reasonable measures"* in the BIMCO Piracy Clause and whether the Best Management Practice guidelines or a similar standard of conduct is somehow incorporated into a charter party through ISPS, particularly in respect of flag states which have signed up to the New York Declaration.

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Enforcement of Arbitration Awards in the UAE

Arbitration in Dubai has grown considerably in recent times and is a process increasingly used by businesses in Dubai to resolve their disputes. Despite this growth in arbitration, however, the enforcement of arbitration awards in the UAE has a troubled history, primarily due to unclear domestic arbitration law. The UAE reached perhaps its lowest point in this respect in 2004, when the UAE Court annulled a domestic arbitration award on the ground that some of the witnesses in the arbitration had not been sworn in the manner required by UAE law for Court hearings.

Recently, steps have been taken to reform the process of the enforcement of arbitration awards in the UAE. In 2006, the UAE ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") and a new UAE federal arbitration law is currently being drafted. It is hoped the latter will replace and modernise some of the existing provisions in the domestic arbitration law.

The UAE does not currently have an arbitration law based on the UNCITRAL model law. Domestic arbitration law in the UAE is based upon only 25 or so Articles in UAE Federal Law No. 11 of 1992 ("UAE Civil Procedure Code"), including 10 Articles dealing with execution of foreign awards (in comparison, the UK Arbitration Act 1996 has over 100 sections and several schedules). Not all of these provisions are fully consistent with established international practices and the UAE's obligations under the New York Convention. Furthermore, the relevant decree implementing the New York Convention in the UAE did not expressly displace the enforcement provisions in the Civil Procedure Code. Therefore, parties seeking to enforce an award – whether under the New York Convention or otherwise – must satisfy the relevant requirements of the UAE

Civil Procedure Code. In summary, these state that a party seeking to enforce an arbitration award must show that:

- the courts of the UAE did not have jurisdiction in the dispute that gave rise to the award;
- the award was issued by an arbitrator or tribunal which was competent to hear the dispute in the country in which the award was made;
- the parties were duly summoned and represented in the arbitral proceedings;
- the award is final in accordance with the laws of country in which the award was passed;
- the award does not conflict with or contradict any judgment or order previously made by the UAE court; and
- the award is not contrary to public policy in the UAE.

In practice, this means that the process of enforcing awards can often be lengthy and unpredictable. It is not uncommon for the UAE courts to require that the foreign award satisfies the rules and procedures of the UAE and may refuse to enforce if there is a violation of local laws. One potential difficulty arises in convincing the UAE Court that it did not have jurisdiction to hear the dispute in the first place (irrespective of the arbitration agreement between the parties). The UAE Court typically has a fairly broad jurisdiction over disputes including, for example, claims connected to monies or assets within the UAE and claims arising out of contracts executed or to be performed in the UAE, as well as claims over foreigners resident in the UAE. As a result, it has proven difficult to convince the UAE Court that it did not have jurisdiction.

All of this creates uncertainty in relation to how the UAE Court will deal with enforcement applications and can mean that what should have been a relatively short-form execution procedure under the New York Convention may turn into a much longer process more analogous with a full-blown court case. These complications can defeat the very purpose of arbitration as a faster and more efficient dispute resolution process.

Another recent development in the UAE has been the establishment of the LCIA-Dubai International Financial Centre (DIFC) Arbitration Centre, together with the release of the DIFC Law No. 1 of 2008 ("DIFC Arbitral Law") which came into force on 01 September 2008 and is based on the UNCITRAL Model Arbitration Law. The DIFC is a financial free zone which is exempted from UAE federal commercial and civil laws. It is not at all, as some commentators portray, the beginning and end of Dubai jurisdiction. Nevertheless, the recently established arbitration centre brings together LCIA's expertise in administering arbitrations and provides Dubai with a well-known arbitral institution and a modern arbitration law. Any award issued by the DIFC is a New York Convention Award.

Article 42 of the DIFC Arbitral Law provides for recognition and enforcement of arbitral awards and Article 44 sets out limited grounds on which recognition or enforcement of an award can be refused by the DIFC Court, including where:

- either party was under some incapacity or that the arbitration agreement was invalid;
- the party against whom the award is being invoked was unable to present its case;
- the arbitrator exceeded its jurisdiction;
- the composition of the tribunal or the arbitral proceedings was not in accordance with the agreement of the parties;
- composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the law of the State or jurisdiction where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a Court of the State or jurisdiction in which the award was made.

The DIFC Arbitral Law is certainly a helpful step forward. However, it only applies within the DIFC and does not affect the existing arbitral provisions set out in the UAE Civil Procedure Code. Reform of UAE Federal arbitration laws is much needed and it is hoped that any new federal arbitration law that is introduced in the UAE will take heed of the more modern provisions of the DIFC Arbitral Law and, crucially, will facilitate the proper operation of the New York Convention.

Conclusion

Although the UAE, and especially the Emirates of Dubai and Abu Dhabi, have clearly invested in, and profiled, the development of arbitration as a dispute resolution process, a revised UAE federal arbitration law is much needed. Indeed, a new arbitration law is key to the advancement of arbitration in the UAE. Particularly in the context of the enforcement of foreign arbitration awards, it is to be hoped that any

new law will eradicate the current inconsistencies between the provisions of the UAE Civil Procedure Code and the UAE's obligations under the New York Convention.

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Hold cleaning under time charters – recent London arbitration award

When a time-chartered vessel's holds fail their inspection at an intended loadport and need further cleaning, a question arises as to who is liable for the shore cleaning time and costs – owners or charterers? The answer will depend on the applicable charterparty terms. This issue was recently considered in London Arbitration 7/10, where the arbitrators held that the owners had complied with their hold cleaning obligations under the charterparty in question.

Background facts

The vessel was chartered on the NYPE form for 110/170 days. She was delivered to the charterers DLOSP (dropping last outward sea pilot) at Haldia, India – just after discharging her last (coal) cargo under her previous charter. She then sailed in ballast to Bangshapan, Thailand to load her first cargo (steel) under the charter. Her holds were cleaned by the crew during the ballast voyage. The cleaning included scraping and sweeping. On arrival at the loadport, the on-hire surveyor found the holds to be in a sound condition, but noted dark staining on the bulkheads and sides. The staining was from the pre-charter coal cargo.

The vessel then sailed to discharge in the U.S. (Long Beach, California and Kalama, Washington). During the voyage, she was fixed to load grain at Vancouver, Washington after Kalama. At Kalama, the NCB (National Cargo Bureau) surveyor inspected the holds and required the removal of the staining. The charterers expressed their concern that, in view of this, the holds would fail their Vancouver inspection. The Master advised that the holds were being cleaned further with chemicals to remove the staining, and that they would be clean and ready for loading as soon as discharge was completed (which, in the event, happened two days later).

The vessel arrived at Vancouver seven hours after completion of discharge at Kalama. The USDA (U.S. Department of Agriculture) and NCB inspectors rejected her holds – apparently due to the staining. This led to five days of further cleaning by the crew and a shore team before the holds were passed at a re-inspection.

The charterers claimed for the delay, the bunkers consumed during it and the shore team expense.

The relevant charterparty clauses were (among others):

- Lines 21-22. *"Vessel to be at the disposal of the Charterers on dropping last outward sea pilot Haldia … Vessel **on her delivery** to be ready to receive cargo with clean-swept holds..."*.

- Clause 54. *"Vessel's holds condition **on arrival at first loading port** to be fresh water washed down, clean dry, free from loose rust flakes/scales and residues of previous cargo and in every way ready and suitable to load Charterers' intended cargo to the satisfaction of the independent surveyor. If vessel is rejected by the independent surveyor at load port, vessel to be off-hire until ready to pass inspection..."*.

- Clause 124. *"All **intermediate hold cleaning** to be in Charterers' time, risk and expense, and vessel to remain always on hire, however crew to perform such cleaning with the same care as if they were acting on behalf of the Owners..."*.

The problem had arisen because the vessel had to load grain at the second loadport, and the standard of cleanliness for that was higher than the standard for loading steel at the first loadport (which the vessel had satisfied).

Tribunal's decision

The tribunal rejected the charterers' claim. It held that:

1. True, on delivery the vessel's holds were not *"ready to receive cargo with clean-swept holds"* as required by lines 21-22. The vessel was delivered DLOSP Haldia, just after discharging the previous charter's coal cargo. It was impossible for the crew to clean the holds adequately between completion of discharge of the coal and delivery under the charterparty.

2. The charterparty catered for this situation in clause 54. Clause 54 prevailed over lines 21-22. It was specific about how clean the holds had to be, and when: on arrival at the first loadport, the holds had to be sufficiently clean to load the intended cargo (steel). The crew were therefore given the chance to clean the holds properly; not before delivery, but during the ballast voyage to the first loadport – *after* delivery.

3. Clause 124 reinforced that. It was clear about what owners' obligations were at the second and subsequent loadports. As long as the crew cleaned the holds properly (*"with the same care as if they were acting on behalf of the Owners"*) during the ballast voyages to those loadports, owners were not liable if the holds were rejected. This was consistent with the decision in *The Bunga Saga Lima* [2005] 2 Lloyd's Rep. 1, which had concerned a charterparty hold cleaning clause which was materially similar to Clause 124.

4. Therefore, the owners had complied with their charterparty obligations. They were not liable for the vessel's arrival at the second loadport in a non-grain clean condition.

Analysis

The decision shows a continuing commercial approach by London arbitration tribunals.

It seems the result might have been different if (1) lines 21-22 had required the holds to be 'grain clean' on delivery (i.e. more clean on delivery than at the first loadport); and (2) there had been enough time for the crew to make the holds grain clean before delivery. In such a case, charterers might have had stronger grounds for saying that the rejection at the second loadport was caused by the vessel's uncleanliness on delivery, and that Clause 124 was irrelevant in such circumstances.

Clearly, owners cannot ignore the hold cleanliness requirements on delivery, assuming that a clause such as Clause 54 will allow them to rectify the situation before arrival at the first loadport. This was an exceptional case, where the cleanliness requirement on delivery had been impossible to meet.

If the crew are expected to, and can, clean the holds as required before delivery, they must do so. Owners will be in breach if they do not. If the crew have not cleaned the holds as required on delivery, but the holds are nevertheless passed at the first loadport because the intended cargo requires a lower degree of cleanliness than on delivery, there is no issue – charterers have suffered no loss. If the holds fail their survey at the second or a subsequent loadport, where a higher degree of cleanliness is required, and charterers can show that this was the result of the uncleanliness on delivery, there is a potential issue. Clause 124 may be insufficient to protect owners in such circumstances.

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Reporting to Oil Majors after a casualty

Arguably, at its simplest, risk management operates at two levels. First, it is about minimising or eliminating the likelihood of an unplanned expense by reducing the chance of a "wrong" occurring. Secondly, it is about being prepared to mitigate the effect of the "wrong", should it occur, to prevent an initial loss from becoming a larger one.

From the litigation risk management perspective, one of the simplest risks to manage (and yet one that is often left unaddressed) is the creation of post-incident documents that address causation. In the context of English law, a litigant must provide an opponent with relevant documents, whether or not they adversely

affect his own case or support another party's (tests of relevance, reasonableness and proportionality apply to this requirement and documents which attract privilege are protected).

The obligation to disclose is continuous. As a consequence, any document created after an incident, but prior to conclusion of proceedings, may have to be provided to an opponent. The risk presented here is that individuals in an owner's or manager's office, physically remote from the claims handling or insurance function, may be creating documents after an incident, not only unaware of how the documents' content may impact on proceedings, but also unaware that opponents may have a right to view such documents. From a risk management perspective, this absence of control over individuals who have no knowledge of the threat presented by their actions is the worst of all worlds.

Following a casualty, Oil Majors (even those not currently chartering the vessel) will often request the tanker owner/operator to provide a report detailing what went wrong, why it went wrong and what the company is doing to prevent recurrence. A failure to produce such a report may result in the chartering approval for the subject vessel being withdrawn, or approval for all vessels under the same management being withdrawn.

In reporting, there can be a pressure to demonstrate to the Oil Major that positive steps have been taken to prevent recurrence of the incident. Consequently, those drafting the reports frequently overplay the root cause deficiency to lend legitimacy to their proposed solution.

Clearly then, from a managerial and commercial perspective, the report must be produced. Yet it is likely that there will be an obligation to provide a copy to, say, cargo claimants. How then can risk management techniques be applied in such a situation?

The first step is identifying and understanding that the risk exists. It is not difficult to understand how an over enthusiastic analysis of the root cause could be prejudicial in the hands of an opponent.

It may be that a simple change in wording is sufficient to protect owners' interests. Each case will, of course, turn on its own facts. To a superintendent writing to an Oil Major following a ship board accident, the words negligent and incompetent may be interchangeable. Yet in the presentational context of a carriage of goods by sea dispute, the difference between the two words could have a major impact on the advancement of a case by an opponent.

Accordingly, it is essential that those responsible for the claims handling function liaise closely with those responsible for producing post incident documentation, such as Oil Major reports. With respect to managing the risk presented by the content of these reports, it is vital to work closely with the P and I Club and legal representatives, so that an informed decision as to how best to proceed can be made.

Risk management is, in part, about understanding what can go wrong and preparing for eventualities. With respect to reporting to Oil Majors, it is about identifying those with the functional responsibility for producing the reports. Once identified it is important to ensure that those individuals work with the claims handling team, so that the report produced treads the fine balance between managerial and commercial requirements and minimising the litigation risk.

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Business & Finance

Taxation – Non-Domiciles

Following implementation of the legislation introduced by the previous UK Government, which imposed a new charge for UK resident but not domiciled individuals wishing to continue to be taxed on the remittance basis, there has been much concentration on the effect of the new legislation and on completion of the first tax returns under the new regime including paying the £30,000 "fee" and considering the need to make rebasing elections in relation to Trust property, where appropriate.

Consequently, it may not have been at the forefront of the minds of individuals concerned to consider their potential liability to inheritance tax ("IHT"). This has not changed as a result of the legislation introduced by the previous Administration, nor, thus far, by the new Coalition Government.

It may, therefore, be opportune for individuals likely to be affected, to consider their inheritance tax position in relation to their UK and worldwide assets if they have any connection with the UK.

Inheritance tax is chargeable at a flat rate of 40% on the UK sited assets of any individual, notwithstanding the location of death or the residence/other status of the individual. This is subject to the nil rate band exemption (currently £325,000 and frozen until 5th April 2015) and to a spouse exemption but not necessarily an unlimited exemption.

The unlimited spouse exemption applies only if (i) both spouses are domiciled in the UK or (ii) both spouses are non UK domiciled or (iii) the deceased spouse is non UK domiciled and the survivor is UK domiciled.

In other words, the total spouse exemption is not available if the deceased spouse is domiciled in the UK but the surviving spouse is not. In that case, the exemption from IHT for assets passing to a spouse is reduced to £55,000. That means there will be a considerable inheritance tax burden for any Estate passing from a UK domiciled spouse to a non UK domiciled spouse which has a value in excess of £380,000.

It is also important to remember that a person who is a non UK domiciliary is treated for inheritance tax purposes, as "deemed domiciled" if he or she has been resident in the UK for 17 out of the 20 years preceding his or her death. This is crucial as the worldwide assets of a person who is either domiciled or "deemed domiciled" in the UK will be subject to inheritance tax. Full details of their worldwide assets will be disclosable in the returns filed with HMRC and tax payable on the total value of the whole Estate (less the exemption(s) referred to above and any others which may be applicable).

It is only those who are not domiciled or not deemed domiciled in the UK who pay inheritance tax only on those assets which are situated here.

Although there have been no specific changes announced in the Emergency Budget for IHT or the basis of taxation of UK resident non-domiciled taxpayers, it should be noted that those who are claiming the remittance basis and who have chosen to pay the £30,000 charge will, with effect from 22 June 2010, pay Capital Gains Tax at 28% on their UK source gains and remitted non UK gains and will not be eligible to claim the 18% rate which remains for some UK domiciled individuals. It is also worth noting that the surcharge Capital Gains Tax rate where gains are distributed from a non UK resident Trust to UK resident Beneficiaries will remain at a maximum of 28.8% for basic rate tax payers and will rise to a maximum of 44.8% for higher rate tax payers.

The new Coalition Government has reaffirmed its commitment, as set out in the Coalition Agreement, to review the taxation of non-UK domiciliaries and further details are awaited.

We will be monitoring the situation carefully and further developments will be reported in future publications; nevertheless, if you have concerns about your UK tax status please contact Albert Levy or Deborah Collett.

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Ince & Co advises United Arab Chemical Carriers on $280 million credit facility agreement

In London, international law firm Ince & Co advised United Arab Chemical Carriers (UACC) on a $280 million credit facility agreement with a consortium of eight international banks.

The mandated lead arrangers of the facility agreement are Citi, Nordea, Deutsche Bank, ITF Suisse, NIBC and Fortis Nederland. Societe Generale and Natixis are participants. The bookrunners of the facility are Citi, Nordea, and Deutsche Bank. Citi also acts as the Facility Agent and the Coordinating bank.

UACC, based in Dubai, is a product/chemical tanker owner. The loan, together with existing credit facilities, will provide finance towards UACC's current fleet and new building program including an order of ten 45,000-dwt tankers currently under construction with SLS Shipbuilding in South Korea.

Commenting on the transaction, Mr. Ketil Ostern, SVP Finance: "The new facility is based on traditional ship finance principles and will enable UACC to move into the next phase of its development plan."

Ince & Co partner David Baker said: "We were delighted to advise UACC on all aspects of this transaction. It is a credit to UACC that they have been able to attract a first class syndicate of banks notwithstanding the continuing difficult economic conditions. There are very few new syndicated transactions taking place in the Middle East right now. This finance will greatly aid UACC in their expansion strategy."

Ince & Co's team was led by partner David Baker. He was assisted by senior associates Jeff Morgan and Stuart Plotnek.

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Employment Update

Equality Act 2010 - implementation date

The Equality Act 2010 is intended to update, simplify and strengthen the previous legislation and to deliver a clear and accessible framework of discrimination law which protects individuals from unfair treatment.

Having received Royal Assent on 8 April 2010, the majority of the Act was due to come into force in October 2010. However, following the recent change of government, there has been some doubt as to whether the proposed implementation date will be effective.

The latest guidance from the Government Equalities Office's website states:

"The provisions in the Equality Act will come into force at different times to allow time for the people and organisations affected by the new laws to prepare for them. The Government is currently considering how the different provisions will be commenced so that the Act is implemented in an effective and proportionate way. In the meantime, the Government Equalities Office continues to work on the basis of the previously announced timetable, which envisaged commencement of the Act's core provisions in October 2010."

For now, therefore, employers should work on the basis that the Act will still come into force in October and ensure that they are familiar with their obligations under the Act and, if necessary, prepare new workplace policies setting out their anti-discrimination policies.

Immigration Update – limits on non-EU migrants

On 28 June 2010, the Home Secretary announced the introduction of a temporary annual limit on non-EU migration into the UK. This is in advance of the permanent annual limit which is to be introduced from April 2011.

The temporary limit is to come into effect in mid-July 2010 and run until April 2011. The number able to obtain permission to work in the UK as a tier 2 skilled worker will be cut to 24,100 for the period July 2010 to April 2011, and the number able to obtain permission to work in the UK as a tier 1 highly skilled worker will be cut to approximately 19,000 for the same period. This is a reduction of 5% on last year's figures in both categories. The points required for a successful tier 1 application will also be raised from the current level of 95 points to 100 points.

However, crucially for many international businesses, any tier 2 skilled workers who are coming to the UK under the intra-company transfer category (i.e. essentially as transferees from overseas offices of the same company) are to be exempted from the initial temporary cap.

Nationality-based pay discrimination against seafarers

Under existing law, ship owners are allowed to pay seafarers who don't live in the UK less than their colleagues who are UK residents. A recent report by the Department for Transport (Review of Stakeholder Evidence on Differential Pay in the Shipping Industry) has recommended outlawing this practice of nationality-based pay differentials for seafarers. This is likely to shape the Department's plans on regulations to be made under the Equality Act 2010. Responding to the report, the TUC has called on ministers to act now to end pay rates of less than £2 an hour within the UK shipping industry.

Compensation for breach of terms of Employment Contract

Edwards v Chesterfield Royal Hospital NHS Trust

Employment Tribunals can award compensation for unfair dismissal of £65,300, which in the case of higher paid employees often falls far short of their actual lost earnings. However, where there is a contractual disciplinary procedure, higher earners may be able to get round this limit by bringing a claim in the courts for wrongful dismissal for breach of the contractual disciplinary procedure. Previously, in such cases, the courts have limited the amount of damages to the employee's contractual notice period and the salary they would have earned while the employer was following the contractual disciplinary procedure. However, this recent Court of Appeal decision has opened the door to claims for much higher levels of damages.

In this case, a consultant surgeon was dismissed for gross professional and personal misconduct in circumstances where his employers failed to follow a contractually binding disciplinary procedure. He argued that had his employers followed the contractual disciplinary procedure he would not have been dismissed. He therefore claimed for the entire earnings lost since dismissal. The Court of Appeal held that the level of damages for breach of contract should reflect the chance that if proper procedures had been followed, the disciplinary proceedings would have been decided in favour of the employee and he would have kept his job. The employee may therefore be able to recover a substantial sum by way of compensation.

This case illustrates the need to follow closely the terms of the applicable disciplinary procedure before dismissing employees. It is advisable that all employers, particularly those employing high-earners, ensure that they have clear disciplinary practices and that these are adhered to fully when considering the dismissal of an employee.

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