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1 ARBITRATION

1.1 COURT OF APPEAL ALLOWS SERVICE OF AN ARBITRATION CLAIM FORM ON THIRD PARTIES OUT OF THE JURISDICTION

In *Tedcom Finance Ltd v Vetabet Holdings Ltd and others* [2011] EWCA Civ 191, the Court of Appeal heard an urgent appeal from the High Court's refusal to allow an arbitration claim form to be issued and served out of the jurisdiction. The Claimant sought injunctive relief under s.44 Arbitration Act 1996 (the "Act") for the preservation of assets which were the subject matter of arbitration proceedings between it and the First Defendant. However, the claim form named five Defendants in all.

CPR 62.5.1(b) allows the court to grant permission to serve an arbitration claim form out of the jurisdiction if the claim is for an order under s.44 of the Act. The judge at first instance took the view that this permission applied only to the parties to the relevant arbitration, i.e. the Claimant and the First Defendant. He did not think that there was a sufficiently arguable case that the court had jurisdiction to consider the claims against the other defendants.

The Court of Appeal disagreed, stating that it is arguable that CPR 62.5(c) allows service out. It is also arguable that permission to serve out of the jurisdiction on a third party could be granted under Practice Direction 6B, and further that CPR 62.5 may not be an exclusive remedy regarding the service of proceedings out of the jurisdiction.

This decision has not disposed of the jurisdictional issue in the case. If the Second to Fifth Defendants challenge the jurisdiction of the English court, then that issue will be heard in full. However, it is clear that the Court of Appeal believes the issues of service on third parties and whether permission to serve out can be granted under Practice Direction 6B to be in need of reconsideration.

2 CONTRACT

2.1 ADMIRALTY COURT RULES ON THE INCORPORATION OF A BIMCO ARBITRATION CLAUSE IN A CONTRACT FOR SALVAGE SERVICES

In *Tryggingarfelagio Foroyar P/F v CPR Empresas Maritimas SA (The "Athena")* [2011] EWHC 589 (Admlty) the Defendant applied for an anti-suit injunction restraining the Claimant from pursuing proceedings in Chile on the grounds that the contract between the parties incorporated an English arbitration clause.

The Claimant insurer had insured a trawler which caught fire off the coast of Chile. The Defendant, a towage and salvage company, made an offer to the trawler's owner to provide salvage services. They failed to bring the fire under control and were replaced by another salvage company. The Claimant settled the trawler owner's claim for repair costs and commenced proceedings in Chile against the Defendant, stating that the Defendant's negligence resulted in damage to the vessel in causing the fire to re-ignite and spread. The Defendant argued that its services had been provided on the BIMCO Wreckhire terms, which contained an English law and arbitration clause, and as such it was entitled to an injunction restraining the Claimant from continuing the proceedings in Chile.

The anti-suit injunction was granted. A completed contract had been entered into when the owner accepted the Defendant's offer, which contained all of the essential terms. While the parties did expect the agreement to be put into writing and to be supplemented by further detailed provisions, the absence of such terms did not render the agreement unworkable or uncertain. Such a conclusion was reinforced by the fact that the Defendant started work immediately.

When the Defendant was engaged, the parties expected that although the agreement was not subject to contract, it would be reduced to writing and that written agreement would be on standard terms. A BIMCO form was the only option available, the relevant form being Wreckhire, and the Defendant had made it plan that the 'finalised' version would be a BIMCO contract. The owner did not protest about this, and as such its assent to BIMCO terms could be inferred. The Defendant was therefore able to establish that the agreement incorporated the BIMCO Wreckhire arbitration clause and so it was entitled to an anti-suit injunction.

3 EVIDENCE

3.1 REPORTS PRODUCED WHEN THERE IS A REASONABLE PROSPECT OF LITIGATION, BUT WHICH ARE NOT PRODUCED FOR THE PREDOMINANT PURPOSE OF LITIGATION, ARE NOT SUBJECT TO LITIGATION PRIVILEGE

In *Axa Seguros SA de CV v (1) Allianz Insurance Plc (2) Swiss Re Europe SA (3) Muchener Ruckversicherungsgesellschaft AG (4) Assicurazioni General SpA (5) QBE Insurance (Europe) Ltd* [2011] EWHC 268 (Comm), the Applicant insurer applied for the inspection of reports produced by civil engineers engaged by the Respondent. The original insured, a Bank, had claimed against the Applicant and obtained an arbitration award. The Applicant paid the award, and claimed on reinsurance provided by the Respondent.

The claim related to damage to a Mexican highway following a hurricane, which damage the Respondent argued had been caused by a failure to maintain and/or that the roads had not been constructed and/or brought up to internationally acceptable standards. The civil engineers had inspected the highway and prepared three reports for the Respondent. The Applicant wished to see these documents, but the Respondent claimed litigation privilege, arguing that they had been prepared and obtained for the dominant purpose of obtaining legal advice in connection with litigation reasonably in prospect.

The Court held that there had been a reasonable expectation of litigation between the Applicant and the Respondent when the civil engineers were appointed. There was a reasonable expectation, when they were appointed, that the engineers' reports would reveal why the Applicant had not fulfilled its obligations to provide surveys of the roads, as a result of which the Respondent would commence litigation. On the facts, the prospect of litigation was beyond the "merely possible" when the engineers were appointed.

However, the Respondent had to establish that the reports were produced for the predominant purpose of anticipated litigation between themselves and the Applicant, and they had failed to do this. The material had in fact been produced (a) to assess whether the highway had been constructed to internationally acceptable standards and (b) to determine to what extent any damage had been caused by the hurricane and to determine the quantum figures for repair works. In so far as the engineers were instructed in relation to the quantum of the Bank's claim, the interests of the Applicant and Respondent were common rather than adverse, however neither of those purposes was predominant. The Respondent had also not been able to establish that the material produced by the engineers could be separated into distinct parts, each either wholly or predominantly attributable to a separate purpose.

The Respondent was, therefore, not entitled to claim litigation privilege for the reports produced by the civil engineers and related documents.

4 EXPERTS

4.1 SUPREME COURT ABOLISHES EXPERT WITNESSES' IMMUNITY FROM SUIT FOR BREACH OF DUTY

In *Jones v Kaney* [2011] UKSC 13, the Appellant challenged the rule that an expert witness is immune from any form of civil action arising from evidence he/she gives in the course of legal proceedings.

The underlying action was a claim by the Appellant, who was injured in a car crash, for damages for personal injury. As part of these proceedings, two experts had signed a joint statement as to their findings of the psychiatric effects of the accident on the Appellant. The Appellant argued that its expert, the Respondent, had acted negligently in signing this statement, as it wrongly recorded that she agreed with her opposing expert that the Appellant had not suffered post traumatic stress disorder and that she had found the Appellant to be deceitful in reporting his symptoms. As a result of this statement, the Appellant argued, it had been forced to settle the damages claim for a significantly lower sum than might otherwise have been the case.

The Appellant brought negligence proceedings against the Respondent, who applied to have those proceedings struck out. The judges in the lower courts allowed the application, as they were bound by previous Court of Appeal authority stating that expert witnesses are entitled to immunity from such claims in respect of the preparation of joint statements for trial. The case came before the Supreme Court on the grounds of it being a point of general public importance.

The Supreme Court allowed the appeal, holding that the immunity from suit previously enjoyed by expert witnesses should be abolished.

The main rationale for keeping the immunity in place was a concern that an expert might be reluctant to give evidence contrary to his client's interest if there was a risk that his client might sue him. Not giving such evidence would be a breach of the expert's duty to the court. However, there is no conflict between the expert's duty to provide services to his client with reasonable care and skill, and his duty to the court. There is nothing to suggest that immunity is necessary to secure an adequate supply of expert witnesses. The majority of the court therefore concluded that there was no justification for continuing to hold expert witnesses immune from suit for breach of duty in relation to evidence given in court, or views expressed in anticipation of court proceedings.

Two judges dissented, voicing their concern that removal of the immunity would lead disappointed litigants to commence pointless but time-consuming claims against their experts. There was no secure, principled basis for removing the immunity, nor was there a clear dividing line between what was to be affected by the removal and what was not. The wiser course, they suggested, was to leave any reform to Parliament.

4.2 THAT PRIVILEGED INFORMATION HAS BEEN GIVEN TO AN EXPERT BY ONE PARTY TO LITIGATION IS NOT, IN ITSELF, A SUFFICIENT BAR TO THAT EXPERT BEING CALLED AS A WITNESS BY THE OTHER PARTY

In *Meat Corp of Namibia Ltd v Dawn Meats (UK) Ltd* [2011] EWHC 474 (Ch), the Applicant applied for an order that the Respondent be refused permission to call a particular industry expert as a witness. The Applicant had initially wanted to instruct this expert, and had provided her with privileged and confidential information relating to the Applicant and its business. The expert agreed to act for the Applicant in principle, however she later changed her mind, and was subsequently instructed by the Respondent in the same proceedings. She also worked for the Respondent as a consultant. The Respondent and the expert agreed that any information that the expert had received from the Applicant would remain privileged and confidential.

The Applicant submitted that the information it had provided to the expert meant that she was prevented from acting for the Respondent. Further, the Applicant argued, the expert lacked independence due to her consultancy work for the Respondent.

The application was refused. As regards whether the expert was prevented from acting, the Court held that she was not. The expert had not been engaged to do anything, rather she had received the information simply in the course of enquiries as to whether she would act as an expert. There was therefore no similarity, as the Applicant had argued, between her relationship with the Applicant and the solicitor/client relationship. Further, the expert had undertaken not to use the privileged material, and in any event this material was largely irrelevant to the functions which the expert was required to perform.

As regards the second issue, the Court held that whether an expert is disqualified from acting by reason of a connection with one of the parties will depend on the facts of each individual case. It is not enough to rely on a single consideration, such as whether the expert is already in a contractual relationship with the party seeking to call him/her as an expert. A consultant provides limited functions for a limited time, and so holding this position does not automatically disqualify an expert from acting. In this case, considering the facts and the role performed by the expert in question, there was nothing which would put her independence at risk.

The Court did note that it was open to the Applicant to challenge the degree of the expert's independence at trial, during cross-examination.

5 INSURANCE

5.1 THAT A MARINE INSURANCE POLICY IS GOVERNED BY ENGLISH LAW DOES NOT AUTOMATICALLY MAKE ENGLAND THE APPROPRIATE FORUM FOR THE RESOLUTION OF DISPUTES UNDER THE POLICY

In *(1) Mujur Bakat SDN BHD (2) SMS Ship Management Services SDN BHD v Uni Asia General Insurance Berhad & others* [2011] EWHC 643 (Comm), the Applicant Malaysian marine underwriters applied to set aside an order granting permission to serve a claim form on them out of the jurisdiction.

The Respondent (also a Malaysian company) owned and managed a vessel which was damaged on a voyage to Indonesia, and subsequently grounded. The vessel was insured by the Applicant under a policy which was placed by Malaysian brokers and which was stated to be subject to English law. The Respondent claimed the full insured value of the vessel on the basis that it was a constructive total loss. Permission was granted by the English court, on a without notice basis, for the Respondent to serve the claim form out of the jurisdiction on the ground that the policy was governed by English law.

The Applicant applied to set aside the order, arguing that the Malaysian courts were a far more appropriate forum as Malaysia was the location of the parties, the evidence, the key witnesses and was close to where the events occurred. Further, the Malaysian courts would apply English law to marine insurance matters, so the Respondent would suffer no juridical disadvantage.

The Court held that, as regards the location of both the parties and the evidence, England was not the most appropriate forum for the action. The importance of the fact that English law was the proper law of the contract would depend on the context of the whole case. A further important factor was whether the foreign forum would apply its own law, notwithstanding the parties' choice of English law. Here, however, there was no evidence that the Malaysian court would not apply English law. The case did not involve any novel, complex or previously undecided issues. Taking into account all the circumstances, the fact that English law was the governing law of the policy was of relatively little significance, and the choice of English law did not make England the most appropriate forum. The order for service out of the jurisdiction was set aside.

6 INTEREST

6.1 COMMERCIAL COURT RULES ON THE APPROPRIATE INTEREST AWARD FOR A SHIPPING COMPANY'S US DOLLAR DAMAGES CLAIM

In a 2010 case, *Fiona Trust & Holding Corporation and others v Privalov and others* [2010] EWHC 3199 (Comm), the Claimant ship-owning and operating companies were successful in their claims for damages, which are to be awarded in US dollars. The Court has now delivered a judgment setting down the rate of interest and the rest periods to be used in the calculation of interest on those damages.

The Claimants argued that interest should be awarded at either US Prime Rate, or US dollar three-month LIBOR with an uplift of 2.5%, with quarterly rests in either case. The Defendant argued that the rate should be US dollar three-month LIBOR with an uplift of 0.85% and annual rests. This, the Defendant said, was to reflect the fact that the Claimants could have borrowed at a relatively low rate, as they were state-owned Russian companies.

The judge stated that the Commercial Court's usual practice is for interest on US dollar sums to be paid at US Prime Rate. However, the general practice of the shipping industry was to adopt the US dollar three-month LIBOR when setting interest on loans to shipping companies. LIBOR is also usually adopted as the benchmark for awards of interest in LMAA arbitrations. As such, that was a more appropriate rate to apply in this case. Interest was awarded at the rate of US dollar three-month LIBOR with an uplift of 2.5% and quarterly rests.

The judgment contains a useful analysis of the relevant authorities and of the current practice of the Commercial Court and London maritime arbitration as regards the awarding of interest. This case is also a reminder that only the general characteristics of a party may be relevant to the court's decision whether or not to depart from the usual interest rates: the court will rarely enquire into the particular characteristics of a party.

7 PRACTICE AND PROCEDURE

7.1 THE COURT HAS NO POWER TO REVOKE FINAL ORDERS MADE BY WAY OF JUDGMENT ON ADMISSION

In *Kojima v HSBC Bank Plc* [2011] EWHC 611 (Ch), the Respondent bank had issued proceedings to recover monies from the Appellant, who initially acted as a litigant in person. The Appellant had admitted part of the debt, and the Respondent had applied for judgment for that amount. The district judge granted an unless order to the Respondent, which stated that unless the Appellant executed a charge over his flat for the admitted amount, the Respondent could enter judgment. The Appellant executed the charge, but was subsequently informed by solicitors that he had a defence to the Respondent's claim. As a result, he applied under CPR 3.1(7) to have the unless order revoked in order that he could seek permission to withdraw his admission. The application was refused, and the Appellant appealed.

The Appellant argued that the court should be able to revoke a final order in order to correct the injustice which would occur where a litigant had admitted a claim and submitted to final judgment on it, only to discover upon subsequent legal advice that he had an arguable defence of which he had previously been unaware. The Respondent submitted that previous authorities imposed a jurisdictional ban on the application of CPR 3.1(7) to final orders.

The appeal was dismissed. While there is no complete jurisdictional ban on the application of CPR 3.1(7) to final orders, the court's jurisdiction to review a final order cannot be exercised on the grounds that there has been a material change of circumstances, or that the judge has been misled on the facts. Once a court has finally determined a matter, such considerations are usually displaced by the greater (and indeed overriding) public interest in finality, subject to a party's right of appeal.

The judge stated that a judgment on admission is a final judgment on the merits for such purposes, and so finality must apply. A final order remains final, unless there are grounds for appeal. In this case, the public interest consideration alone was sufficient reason for the dismissal of the Appellant's application to revoke the unless order.

7.2 COMMERCIAL COURT CONSIDERS THE AMBIT OF A POST-JUDGMENT FREEZING ORDER AND WHEN A CLAIMANT MUST GIVE A CROSS-UNDERTAKING IN DAMAGES

In *Nomibold Securities Inc v Mobile Telesystems Finance SA* [2011] EWHC 337 (Comm), the Court considered various applications concerning a worldwide freezing order obtained by the Claimant against the Defendant. The Claimant had obtained judgment against the Defendant, and subsequently obtained the freezing order to prevent dissipation of the Defendant's assets.

The Defendant had submitted that the freezing order should not have been made without the Claimant giving a cross-undertaking in damages. The Court agreed, stating that it was always appropriate to give a cross-undertaking in damages, as there could be circumstances where the effects of a freezing order could be overly damaging and prejudicial to the Defendant. However,

it would be very unusual to have to fortify that undertaking where the Claimant was owed a substantial amount of money under a judgment.

The Court also considered the ambit of post-judgment freezing orders, stating that such orders did not legitimise interference in ordinary commercial transactions simply because a judgment debtor was not paying the sums owed by him quickly enough. There must be some element of impropriety.

7.3 COURT OF APPEAL CONSIDERS THE RELATIONSHIP BETWEEN AN APPLICATION TO SET ASIDE AN ORDER AND A PARTY'S RIGHT OF APPEAL

In *Bank of Scotland v Pereira and others* [2011] EWCA Civ 241, the Court of Appeal considered the Appellant's appeal against a refusal to set aside an order, together with its application for permission to appeal that order. In giving its judgment, the Court considered the relationship between an application to set aside an order under CPR 39.3 (which deals with a party's failure to attend trial, and ensures that both claimant and defendant have had an opportunity to present their case to a judge) and a party's right of appeal under CPR 52.

Six guidelines were set out in the Court's judgment, which will apply to the majority of cases:

- (1) Where a party seeks a new trial on the ground that he did not attend the original trial, he should normally proceed under CPR 39.3 (even though he may have other possible grounds of appeal), provided he can satisfy the requirements of CPR 39.3(5).
- (2) If that party cannot establish a good reason for not attending the trial and/or if it cannot meet the requirements of CPR 39.3(5), it may still seek to appeal the court's decision under CPR 52. The rights of appeal of an unsuccessful party should, in principle, be the same whether they attended the trial or not.
- (3) Where a CPR 39.3 application has failed, the right to appeal a trial judge's order should, in principle, be the same as if the application had not been made. An appeal court will, however, take a lot of persuasion to depart from the decision of the judge who heard the application.
- (4) A party will not normally be able to raise the same arguments on appeal as it made in a CPR 39.3 application, where that application failed because it was found that there would be no reasonable prospect of success at trial. While there might be exceptional cases, the proper course would be to challenge the refusal of the CPR 39.3 application.
- (5) Where a party's CPR 39.3 application has failed, that party will normally face severe difficulties in contending on appeal that he should be allowed to rely on evidence which was not before the trial judge.
- (6) If a party does not make a CPR 39.3 application but does appeal and seeks to put in new evidence or requests an order for a retrial, that party will face difficulties. However, it will

be for the appeal court to decide whether the requirements of CPR 39.3(5) could have been satisfied, and it may remit the issue to the court below as a CPR 39.3 application.

In this particular case, the judge at first instance had been entitled to conclude that the Applicant had been aware of both the hearing and the order made there. The CPR 39.3 application, made two years after this order, had not been made promptly. The application for permission to appeal was also rejected, as the only grounds with any prospect of success arose directly and solely from the fact that the Applicant had not attended the trial, and the CPR 39.3 application had already been rejected.

7.4 HIGH COURT CONSIDERS VARIOUS ISSUES RELATING TO THE VALIDITY OF PART 36 OFFERS

In *AB v CD and others* [2011] EWHC 602 (Ch), the Court considered various novel issues relating to Part 36 in the context of a split trial.

This was a trademark infringement case. The Defendant put in a Part 36 offer, the terms of which included various undertakings relating to infringement of the relevant trademarks, payment of a specified sum in settlement of the Claimant's claim and payment of the Claimant's costs. The Claimant responded with a further Part 36 offer, which required the Defendant to give certain undertakings, pay damages to the Claimant to be assessed if not agreed, and to pay the Claimant's costs. The Claimant also requested further information from the Defendant, which it said it needed in order to be able to evaluate the Defendant's offer. The Defendant declined to provide this information, and neither party accepted the other's offer.

At trial, each party argued that it was entitled to the favourable costs consequences under Part 36 because it had beaten, or was likely to beat, its own offer. Each also argued that the other's offer was not a valid Part 36 offer.

The judge held that the Claimant's offer was not valid. It was not valid in relation to the quantum stage of the proceedings because it did not state a specific sum which the Claimant would be prepared to accept in satisfaction of its claim. As regards the liability stage of the proceedings, the judge stated that a request that the Defendant submit to judgment for the entirety of the relief sought by the Claimant did not amount to an offer to settle within the meaning of Part 36. Such an offer must contain some element of concession on the part of the offeror, to which significant value could be attached.

The Defendant's offer, on the other hand, was held to be valid, despite the fact that the Defendant had not provided the information requested by the Claimant. There is nothing in Part 36 to suggest that a failure to comply with such a request will invalidate an offer. If the Claimant required further information, it could have applied for an order under CPR 36.8, but it did not do so.

The judge also commented on CPR 31.13(2), which provides that the fact that a Part 36 offer has been made must not be communicated to a trial judge. There is no longer any exception to this for a split trial. It was confirmed that a literal reading of this provision suggests that even the

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existence, let alone the terms, of a Part 36 offer generally must not be communicated to the trial judge until the conclusion of the quantum trial. In a split trial the court will, therefore, have to deal with the costs of the liability hearing in ignorance of the fact that a Part 36 offer has been made, unless all relevant parties agree that the offer can be disclosed.

8 SALE OF GOODS

8.1 COMMERCIAL COURT FINDS THAT THE FOSFA SCOTT V AVERY CLAUSE EXCLUDES THE RIGHT TO APPLY FOR A FREEZING INJUNCTION

In *B v S* [2011] EWHC 691 (Comm), disputes arose between parties to a sale contract on the FOSFA 54 form. The Buyer commenced arbitration proceedings, and then applied to the court for a worldwide freezing injunction over the Seller's assets, pursuant to s.44 Arbitration Act 1996 (the "Act").

When this was granted, the Seller applied to have it set aside on the grounds that the court's power under s.44 was excluded by clause 29 of FOSFA 54. The latter incorporated a *Scott v Avery* clause, which provided that no legal proceedings could be brought unless an arbitration award had already been obtained. The Buyer argued that this clause, and the similar GAFTA clause, did not preclude the court from considering ancillary proceedings such as those under s.44 of the Act.

The Court found in favour of the Seller and set aside the freezing injunction, holding that clause 29 of FOSFA 54 amounted to an agreement between the parties to exclude the court's powers under s.44 of the Act. The judge held that, as a matter of construction, the wording of the clause was wide enough to exclude applications for freezing injunctions. Further, on a detailed analysis of the authorities (the majority of which in any event pre-dated the Act), the English court had not reached a settled decision on either the meaning or construction of *Scott v Avery* clauses in relation to ancillary proceedings.

This is the first time that the exclusion of the court's jurisdiction under s.44 by a *Scott v Avery* clause has been directly considered. The court's decision puts paid to the commonly held view that such clauses only prevented the commencement of substantive proceedings.

9 SHIPPING

9.1 HIGH COURT RULES ON THE CERTIFICATES TO BE SUPPLIED WITH A VESSEL SOLD ON THE NORWEGIAN SALEFORM 1993

In *Polestar Maritime Ltd v YHM Shipping Co Ltd & Anr* [March 2011, unreported], the Appellant seller appealed against an arbitration award which stated that the Respondent buyer was entitled to cancel a contract for the sale of a ship.

The parties had agreed the sale and purchase of a bulk carrier under a memorandum of agreement on the Norwegian Saleform 1993 (the “MOA”). Under its terms, the Respondent was entitled to cancel if the vessel was not delivered within the dates specified in the MOA. Following execution, an addendum was agreed detailing the documents which the Appellant was to provide. The parties also agreed the terms of a bill of sale. The vessel was detained in Hong Kong on the basis that it did not have an ISPP certificate (which had not been required at the date of the MOA). The Buyer purported to cancel the MOA. The issues in dispute between the parties related to:

- (a) whether lines 220-4 (clause 11) of the Norwegian Saleform 1993 required the Respondent to deliver the vessel with all certificates required by law at the date of delivery;
- (b) if so, whether that obligation was overridden by an addendum which stated that “copies of all trading/class national and international certificates have already been passed to [the buyer], originals of which will be delivered to [the buyer] on board the vessel on the date of closing/delivery”;
- (c) whether under lines 242-5 of the Norwegian Saleform 1993 the provision that the Seller should have “three banking days ... to make arrangements for the documentation held out in [the MOA] clause 8” allowed the Seller three days in which to procure that it was ready and able to delivery the bill of sale.

In finding that the Buyer was wrong to rescind the MOA, the Court held as follows on these three points:

- (a) Lines 220-4 require a seller to deliver a vessel with all the certificates that it had when it was inspected. These lines should not be extended to include new certificates to also be supplied, as this would introduce uncertainty as to exactly what certificates would be required. This problem could not be solved by limiting the certificates to those that the parties knew would be required at a date after the sale was agreed, as compliance with clause 11 was a condition precedent to entering into a sale agreement, and required certainty between the parties.
- (b) The addendum merely recorded that the Seller had provided those documents which were required by the MOA as at the date of the addendum, and did not modify clause 11.
- (c) This was answered in the affirmative. The Seller’s securing the vessel’s release from detention did amount to “making an arrangement for documentation”.

9.2 TRIBUNAL CONSIDERS CHARTERERS' OPTION TO ADD OFF-HIRE DAYS TO THE BASIC CHARTER PERIOD UNDER AN AMENDED NYPE FORM

In London Arbitration 1/11 [(2011) 817 LMLN 2], Disponent Owners chartered the vessel in question on an amended NYPE form for a period of 13-15 months. Line 17 of the charter provided for "Charterers' option to add any off-hire period" and clause 58 stated that "Charterers have the option to add any off-hire period to the charter period". During the period of the charter, the vessel was off-hire for around 159 days as a result of repairs undertaken by the registered owners. The issue for the tribunal to consider was whether Charterers were entitled to add the 159 off-hire days to the charter period.

Owners submitted that Charterers had to expressly exercise this option. As they had not, Charterers' continued use of the vessel after the redelivery date amounted to a breach of the charter. Owners argued that the option was a "contract option" as opposed to a "performance option", in that there had to be some express or implied provision for its exercise within a reasonable time and that the election had to be communicated to the other party. This was necessitated by the fact that a time charter had to have a final terminal date.

Charterers argued that the parties could have provided for the extension provisions to have the status of a "contract option", but they had specifically chosen not to do so. They pointed out that clause 13 of the NYPE form had been deleted, and pointed to several other provisions which referred to what were specifically described as "options", the exercise of which did not have to be declared. As regards Owners' argument about the charter needing a final terminal date, Charterers said that the requirement to give 20/15/10/7/5/3/2/1 day notices of intended redelivery gave precisely the required level of certainty.

The tribunal held that, where the parties had agreed options relating to the duration of the charter (which were clearly performance options), had they viewed the off-hire 'bolt-on' provision as a contract option they would have provided a mechanism for its exercise. There were also authorities which made it clear that not every time charter has to have a final terminal date ascertainable at the time the contract is made. In the tribunal's opinion, the redelivery notice provisions gave Owners as much notice as they could reasonably expect. As such, the option relating to adding off-hire to the charter period was a performance and not a contract option and it was therefore unnecessary for Charterers to give notice of their intention to add on any or all of the off-hire days.

The tribunal also considered what the position would have been had they found that the option was a contract option, and looked at how Charterers had exercised that option. They stated that, on an analysis of the facts, Charterers had given constructive notice to Owners of their exercise of the option.

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

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

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