ReedSmith

SHIPPING GROUP MONTHLY BULLETIN

JULY 2011

BIMCO

❖ BIMCO publishes Wreckhire2010

BIMCO has published Wreckhire 2010, the latest edition of the BIMCO/ISU daily hire wreck removal and marine services agreement, which was first adopted in 2010.

Wreckhire 2010 contains some new provisions, which have been agreed in order to encourage a swift conclusion of operations and a quicker resolution of on-site disputes. These include:

- a bonus incentive scheme, designed for operations over an extended period, whereby contractors will be paid an agreed bonus if the task is completed within a specified period;

- a provision which places a time cap on completion of the salvage operation, for operations over an extended period of time, after which the daily rate of hire will be reduced; and

- an expert evaluation process designed to expedite disputes over the application of standby rates.

The latest edition of Wreckhire has been published on BIMCO Idea. Sample copies and explanatory notes are available to download from the BIMCO website.

CIVIL PROCEDURE

❖ **High Court grants relief from sanctions where the deadline for service of a witness statement was a bank holiday, and the statement was served late**

***Chiu v Waitrose Ltd and another* [2011] EWHC 1356**

The Claimants brought a claim for damages, alleging that their property had been flooded due to construction works being carried out by the Defendant. The Defendant in turn brought claims against the contractor who had been carrying out these works.

When witness statements were not exchanged by the agreed date, a consent order was agreed that unless the contractor exchanged statements within 14 days, its defence and Part 20 claim would be struck. The last day for compliance with this order was a bank holiday. The next working day after the bank holiday, the contractor's solicitors served the statements, stating that the deadline ran to that day because of the bank holiday.

The other two parties considered that the contractor had not complied with the unless order, and sought judgment against it. The contractor applied for relief under CPR 3.9.

The relief sought was granted, but the judge made the point that where a consent order has been agreed, relief will only be granted in a limited number of cases. In this particular case, there had been mistakes by all parties when agreeing the order. For example, the order did not specify a particular date for exchange, and when the parties realised that the date for exchange was a bank holiday they did not discuss how service would be effected on that day.

In addition, the contractor's application for relief was made promptly, and there had been no deliberate intention on its part not to comply with the order. A good reason had been given for non-compliance, the contractor had generally complied with other orders, and the trial date could still be met if relief were granted.

This case highlights the fact that time limits should always be considered carefully, and dealt with in such a way as to ensure that there is no ambiguity in exactly when a particular time limit expires. Where a time limit has been agreed, the court will only grant relief from sanctions for non-compliance in limited circumstances.

CONTRACT

- **Commercial Court holds that a right of first refusal constitutes a right to receive a contractual offer on terms which the party who has granted that right is prepared to accept**

***Astrazeneca UK Ltd v Albemerle International Corp* [2011] EWHC 1574 (Comm)**

The Claimant was an English company which manufactured ingredients for anaesthetic from product supplied by the Defendant, an American company. The supply agreement included a provision that, should the Claimant decide to cease using this particular product and purchase a different one, the Defendant would have the "first opportunity and right of first refusal" to supply this other product to the Claimant "under mutually acceptable terms and conditions".

The Claimant decided to purchase the alternative product direct, and entered into an agreement with another supplier. The Defendant terminated the supply agreement on the grounds that the Claimant had breached the clause cited above. The Claimant denied this, and claimed against the Defendant for failure to deliver product under the supply agreement prior to termination.

The court found in favour of the Defendant, holding that it had been entitled to terminate the agreement. A right of first refusal confers a right to obtain the subject matter of the right (e.g. a business opportunity to enter a contract). Further, it confers a right to be given an opportunity to match any third party offer and, if the offer is successfully matched, to be offered the business to which the offer related. A right of first refusal is a right to receive a contractual offer on terms which the party who granted the right is prepared to accept. This is the case even if the detailed terms of any contract may require further negotiation, and may not ultimately result in a contract at all.

The grantor of the right of first refusal is obliged to act in good faith and to provide the grantee with full disclosure of the terms of any third party offer which it considers accepting.

The sensible construction of the clause in question was that the Claimant's obligation to provide the Defendant with details of the third party's offer, and with an opportunity to match it, arose at the point when the Claimant seriously considered accepting the third party's offer. It was too late at the point when the Claimant was about to enter into the contract with the third party. The Claimant had decided to accept the third party's offer without giving the Defendant details of that offer, or allowing it an opportunity to match it, and so was in breach of the supply agreement.

Further, the Claimant's obligations with regard to the right of first refusal were not contingent on the Defendant's obligations under the supply agreement to deliver the product.

❖ **High Court holds that a party's duty to use "all reasonable endeavours" is not limited by that party's commercial interests**

***Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529**

The contract between the Claimant (a low cost airline) and Defendant (owners of an airport) was drafted in broad, although not uncertain, terms and required both parties to "use their best endeavours" to promote the Claimant's business. The contract also required the Defendant to "use all reasonable endeavours" to provide a suitable low-cost base for that business. The parties agreed that, in this case, "best endeavours" and "all reasonable endeavours" had identical meanings.

For the first four years of the contract, the airport ran at a loss, and the Defendants allowed the Claimant's planes to arrive and depart outside of the airport's published opening hours. In an attempt to improve profitability, the Defendant subsequently refused to accept arrivals or departures outside those hours, giving the Claimant one week to change its schedules. The Claimant sued for breach of contract, and the Defendant argued that its duties to use its best or all reasonable endeavours did not require it to act against its own commercial interests.

The Court found that the Defendant's sudden and unilateral decision not to honour the Claimant's flights unless certain conditions were met was a serious breach of contract. The Defendant's argument that its actions were justified in order to protect its commercial interests was rejected. The parties could not have intended that the Defendant should be able to pick and choose what to do in light of what suited it or its shareholders financially. It was improbable that the parties would have agreed on the use of an expression which meant that one of them could limit or abandon performance once it became commercially unprofitable or undesirable.

On the facts of this case, it was found to be relevant that the Defendant's duties to use its best or all reasonable endeavours related to matters within its own control. A distinction was drawn between cases such as this, and other "all reasonable endeavours" cases where a party was not required to pay an extortionate price towards achieving a result outside its control. The Court also noted that the meaning of the expression is a matter of contract interpretation, not of extrapolation from other cases.

INTERNATIONAL TRADE

❖ **Court rules on a trade supplier's entitlement to sums claimed from an insurance company under three credit supplier guarantees**

***Crown Aluminium Ltd v Northern and Western Insurance Co Ltd* [2011] EWHC 1352 (TCC)**

The Claimant, a supplier of building products, obtained credit insurance against its trade debts as a matter of policy. The Second Defendant, a broker specialising in providing financial risk products, offered the First Defendant insurer the business of guaranteeing one of the Claimant's overseas customers (the "Customer"). The First Defendant subsequently issued a guarantee to the Claimant in respect of credit provided to the Customer.

When some of the Claimant's invoices to the Customer were not paid, the Claimant gave notice of its intention to claim under the guarantee. The Second Defendant told the Claimant that it only needed to send to the First Defendant copies of the guarantee and the invoices. In the meantime, the First Defendant signed two further guarantees, and the Claimant made calls under both of them. Neither was paid. The Claimant issued a claim against the First Defendant, who neither acknowledged service nor filed a defence and was debarred from defending the claim. The Claimant chose to continue the claim, rather than enter judgment in default, in order to obtain judgment on the merits.

The Claimant argued that, whilst the calls had not complied with the original terms of the guarantees, these terms had been varied since the Second Defendant had acted as the First Defendant's agent when instructing the Claimant as to the form and content of the notices required by the guarantees. As a result, it argued, its claim was valid. Alternatively, the Claimant argued that the Second Defendant had owed it a duty of care when giving advice in relation to the calls and, should the variation of the terms not be effective, then the Second Defendant had been negligent.

The Second Defendant denied that it had acted as the First Defendant's agent and submitted that the calls, as made, complied with the original terms of the guarantees and so the Claimant had a good claim against the First Defendant. The Second Defendant also argued that because judgment in default could have been enforced against the First Defendant, the Claimant could have made a full recovery. In any event, therefore, the Second Defendant could not have caused any the Claimant any loss.

The Court allowed the claim against the First Defendant, and dismissed that against the Second Defendant. It found that the only obligation relating to payment under the guarantees was that the Customer had to make payments of the sums stated in the Claimant's invoices, up to the amount and by the date stated in the guarantee. The Second Defendant's advice to the Claimant about the documents it needed to send to the First Defendant was, therefore, correct. The calls satisfied the requirements in the guarantees, and were valid. The Claimant was therefore entitled to judgment against the First Defendant for the full sum, and the claim against the Second Defendant failed.

The judge also stated that even if the Second Defendant had been negligent, the Claimant would have been able to recover in full from the First Defendant by entering default

judgment prior to trial. Any negligent advice given by the Second Defendant would thereby have ceased to be an effective cause of the Claimant's loss.

JURISDICTION

❖ **Court of Appeal considers the issue of which court is first seised under the Brussels Regulation, when a first action which is not related to a second action for the purposes of the Regulation is amended so as to become related**

***FKI Engineering Ltd v Stribog Ltd* [2011] EWCA Civ 622**

The Respondent had owned a German company (the "Company"), which had sold its assets to the Appellant. The Company became insolvenct, leaving the Respondent as its principal creditor. The Respondent alleged that the Appellant had stripped the Company of its assets, and took an assignment from the Company's administrator of all claims by the Company against the Appellant.

The Appellant brought proceedings in Germany for a declaration of non-liability to the Appellant. Any potential purchase price claims under the contract by which the Company's assets were sold were expressly excluded from the German proceedings. The Respondent , as assignees of the Company, commenced proceedings in England seeking the unpaid purchase price under the contract. The Appellant then added an allegation to the German proceedings stating that the assignment to the Respondent of all the Company's claims was invalid.

The Appellant applied to stay the English proceedings on the grounds that they were related to the German proceedings and, under the Brussels Regulation, the German court was first seised. The Respondent argued that the proceedings had only become related when the Appellant amended the German proceedings, and that this had taken place after the English proceedings had been commenced. The court at first instance found in favour of the Respondent, stating that where a first action, which was not related to the second action when the latter was commenced, was subsequently amended, then the court of the second action was the court first seised for the purposes of article 28 of the Brussels Regulation.

The Court of Appeal disagreed, and allowed the appeal. In his judgment, Mummery LJ identified five steps which the court must consider in an application for a stay under article 28:

1. Which national court is seised of the particular action (as opposed to a particular issue in an action)? In this case, the German court was seised of the German action and the English court was seised of the English action.

2. On what date was the court of each Member State seised of the action instituted in them?

3. The 'competitive' step, i.e. which court was seised first? The German court was seised of the German action four months before the English court was seised of the English action. In terms of chronology, therefore, the German court was first seised.

4. The 'comparative' step: the English court, as the court not first seised, must compare the proceedings to see if they are related. If they are not, the question of a stay does not arise as there is no risk of irreconcilable judgments. In this case, the actions were related at the time when the English court had to decide this issue. There was, therefore, a risk of irreconcilable judgments and so a discretion arose to stay the English action.

5. Should the discretion to order a stay be exercised? In this case, it was found that the first instance judge should have stayed the German action until the German courts had found whether the assignment was valid or void.

LEGAL PROFESSION

❖ **Court finds that a conditional fee agreement is unenforceable where its effect has not been properly explained**

***Langsam v Beachcroft LLP* [2011] EWHC 1451 (Ch)**

In this case, the Claimant brought a claim for damages for professional negligence against his former solicitors. The Defendant solicitors counterclaimed for their fees. The Defendant had acted for the Claimant under a conditional fee agreement which capped the amount of the Defendant's basic charges. This agreement was replaced by a second agreement, which did not contain a cap.

Both the claim and counterclaim were dismissed. As regards the counterclaim, the court held that the Claimant had been entitled to an explanation of the changes that the second agreement introduced. The fact that there were no longer any caps on the Defendant's fees, a potentially material change, was not explained, either orally or in writing. This failure to explain the effect of the agreement in a material respect meant that it was unenforceable pursuant to section 58(3)(c) of the Courts and Legal Services Act 1990 (the "Act").

The Defendant also argued that, despite any unenforceability of the second agreement, it was entitled to recover its legal fees on the grounds of election, estoppel or quantum meruit. The court rejected all of these, holding as follows:

1. A person will not be regarded as having elected to accept an agreement until he has been able to ascertain his rights under it, and is aware of their nature and extent. The Claimant had not had such an opportunity, and so had not elected to accept the second agreement.

2. The Defendant argued that as the Claimant did not challenge certain costs figures put forward during negotiations, he was estopped from denying the Defendant's entitlement to recover its costs. In order for estoppel to arise, it is necessary to show reliance and detriment. The court found that the Defendant had not relied, to its detriment, on any failure on the Claimant's part to challenge the costs figures. There were therefore no grounds for saying that it would be inequitable for the Claimant to object in the current proceedings.

3. The Defendant argued that it was entitled to a quantum meruit, and that it was unconscionable for the Claimant to keep monies that were to cover the Defendant's costs. The court noted that the quantum meruit claim was for payment for services provided under a CFA which was unenforceable due to non-compliance with statutory requirements. The statute in question was intended to protect the public at the expense of solicitors, and to allow a solicitor to recover payment for services on the basis of a quantum meruit claim in circumstances such as these would undermine the operation of section 58 of the Act.

PARIS MOU

❖ Committee approves 2010 inspection results and adopts new performance lists

The Paris MoU Committee has approved the 2010 inspection results, and has adopted new performance lists for flag states and recognized organisations, which take effect from 1 July 2011.

The list, called the "Black, Grey and White List", presents the full spectrum of flags, from quality flags to those with poor performance which are considered high or very high risk. It is based on the total number of inspections and detentions over a 3-year rolling period, for flags with at least 30 inspections in that period.

A total of 84 flags are listed: 18 on the "Black List", 24 on the "Grey List", and 42 on the "White List".

Further information is available on the Paris MoU website.

PRIVILEGE

- **Court of Appeal holds that privilege in advice received at a meeting with legal advisers has been waived when a witness statement refers to the nature of that advice**

***D (a child)* [2011] EWCA Civ 684**

These were child care proceedings, but they highlight some key points about the waiver of legal advice privilege.

One of the parties had served a witness statement which included details of advice received during meetings with her lawyers. The witness statement clearly demonstrated that her position had changed from that adopted in an earlier statement. At first instance, it was held that by including details of the advice, any privilege in that advice had been waived. The witness was ordered to give further disclosure of both the advice and the circumstances in which the later witness statement was drafted.

The Court of Appeal upheld this decision. While a mere statement that a witness is acting on legal advice is unlikely to waive privilege, in this instance the nature of the advice had been revealed. The undesirability of breaching confidentiality between a client and legal advisers was outweighed by the unfairness to the other party in the proceedings, if he were unable to cross-examine the witness on the evidence given.

The judgment advises lawyers to be aware that advice given may have changed a client's position. The client should be protected from revealing that advice in evidence, whether written or oral.

SALE OF GOODS

❖ **European Court of Justice considers the meaning of "place of delivery" in the context of founding jurisdiction under the Brussels Regulation.**

***Electrosteel Europe SA v Edil Centro SpA* Case C-87/10**

Buyers (a French company) had entered into a contract with Sellers (an Italian company) for delivery of goods, to take place "ex works" the Sellers' factory in Italy, for delivery to the Buyers' premises in France.

The Sellers commenced litigation under the contract in Italy, and the Buyers disputed the Italian court's jurisdiction. They argued that they were entitled to be sued in their country of domicile. The Sellers argued that, under article 5(1)(b) of the Brussels Regulation, jurisdiction was in the place of performance under the sale contract. This, they argued, was their business premises in Italy, in accordance with Incoterm EXW which applied to the contract. The Italian court referred the issue to the ECJ.

The ECJ held that article 5(1)(b) must be interpreted as meaning that, in the case of distance selling, the place where the goods were or should have been delivered must be determined on the basis of the specific provisions of the relevant contract. To verify whether the place of delivery is determined 'under the contract', the national court seised must take into account all relevant terms and clauses of that contract which are capable of clearly identifying that place. This includes terms and clauses generally recognised and applied in international trade or commerce, such as Incoterms.

If it is not possible to determine the place of delivery on that basis, without referring to the law applicable to the contract, then the place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained actual power over those goods.

SHIPPING

❖ **Commercial Court rules on the validity of a notice of readinesss tendered when the berth was both occupied and unreachable due to tidal conditions**

Suek AG v Glencore International AG (The "Hang Ta") **[2011] EWHC 1361 (Comm)**

The Claimant Seller entered into a contract of sale with the Defendant Buyer on a CIF basis. Clause 7.13 of the contract provided that if the nominated berth was occupied on arrival, the vessel could tender notice of readiness at the usual waiting place, whether in berth or not.

When the vessel arrived at the discharge port, the nominated berth was occupied by another vessel. Further, the weather conditions were such that the vessel would not have been able to reach the berth in any event. The Master gave notice of readiness in accordance with clause 7.13, and the Claimant subsequently brought a claim to determine the construction of that clause in relation to laytime and demurrage. The issue for the court to consider was whether the clause should be interpreted as leaving the responsibility for delay with the Buyer, who did not have the berth available, or with the Seller, whose vessel could not access the berth.

The Defendant submitted that clause 7.13 only operated if the only cause of the delay was the unavailability of the berth. If there was a weather problem, then the vessel would have to wait until the conditions cleared, and only if the berth was unavailable at that point could the Master give notice of readiness.

The Court found in favour of the Claimant. There was no implicit assumption in the clause that the Seller would bear the heavier responsibility for ensuring the vessel's arrival at the berth. Further, it was incorrect to interpret the clause as interfering with an overriding or otherwise primary obligation of the Seller.

It was true that there might be some inconvenience to the Buyer if notice of readiness was given at a time when both causes were operational at the time of the vessel's arrival, and the berth became available before the weather conditions lifted. However, it was for the Buyer to provide a berth and if one was available when the vessel arrived at the port then, irrespective of the weather or tidal conditions, the Buyer would be protected and service of notice of readiness would be prevented.

In this case, the Buyer's argument would require a rewriting of clause 7.13 so that the exception should only apply if the unavailability of a berth were the only reason why the vessel could not access it. There was no need for such rewriting. Notwithstanding the presence of tidal conditions which also prevented access to the berth, the unavailability of the berth entitled the Master to tender notice of readiness. As such, the notice of readiness had been validly tendered.

❖ **Tribunal considers whether Charterers were in anticipatory breach of a charterparty by redelivering the vessel early, and if so whether Owners accepted that breach as terminating the charterparty**

London Arbitration 2/11

Owners timechartered a vessel to Charterers for a period of 24 months +/- 30 days in Charterers' option. 40 days after delivery of the vessel, Charterers asked Owners to reduce the hire rate, arguing that it was too high given the state of the market. Owners declined to do this. Two days later, Charterers sent a message to Owners saying that if they were not willing to renegotiate the charterparty, then that message should be taken as 7 days' notice of redelivery. Owners responded, saying that they had to take the vessel to minimise their losses, and to start looking for alternative employment, but that they considered Charterers in breach of the charterparty as a result of the early redelivery. The vessel was eventually redelivered only 47 days after delivery, 653 days early.

Owners claimed damages for repudiatory breach and for the balance of hire due. They submitted that by giving notice of redelivery before the contractual term of the charterparty had expired, Charterers were in anticipatory breach. Further, Owners had accepted this breach by way of their response to Charterers' 7 days' redelivery notice. Charterers denied that they were in repudiatory breach, and even if they were Owners had not accepted their notice of redelivery as a wrongful repudiation. Rather, Owners had accepted that the charterparty should remain in force, and that hire remained due, until the vessel completed its present voyage.

The Tribunal held that Charterers' message had given unequivocal notice of their intention to redeliver, which amounted to an anticipatory repudiatory breach, and that Owners had accepted that breach by accepting the early redelivery of the vessel. They either accepted the breach as terminating the charterparty at that point, or alternatively by taking the vessel back on redelivery. That conclusion was not affected by the fact that the vessel continued on charter until completion of discharge and redelivery.

The Tribunal also considered the quantum of Owners' damages. In relation to damages for loss of earnings, they were entitled to damages from the date of actual redelivery to the earliest contractual redelivery date (653 days) at the difference between the charterparty rate and the market rate. Owners were also entitled to damages for the balance of hire owed.

❖ **Commercial Court considers the meaning of a provision in a contract for sale of a yacht that the vessel is to be of a particular Class**

***Riva Bella SA v Tamsen Yachts GmbH* [2011] EWHC 1434 (Comm)**

The Claimant buyer was a company set up specifically for the purposes of yacht purchase and charter, and the Defendant seller was a German company which had commissioned construction of a yacht from a Turkish shipyard. At the date of the sale contract, the yacht was in the course of construction.

The Defendant intended the yacht to be classed by RINA, and it was to be flagged in the Isle of Man. The sale contract stated that the vessel was to be "RINA Charter Class (MCA)", and included a document stating that the vessel's top speed at light displacement would be 30 knots plus or minus 10%.

The Isle of Man Registry carried out pre-registration surveys of the vessel, and produced a report and list of deficiencies, but despite this the vessel was delivered and both parties signed a protocol of delivery and acceptance ("PDA"). The vessel was then surveyed by RINA and again by the Registry. The Claimant subsequently decided that the yacht would be flagged in Luxembourg, and it was surveyed again by RINA.

The Claimant claimed damages for breach of the sale contract on the basis that various deficiencies existed at the date of delivery. The Claimant also alleged that the vessel did not comply with the speed warranty in the contract. The Defendant argued that the Claimant had accepted the yacht by signing the PDA, and so was not entitled to bring the claim. In any event, there were no deficiencies at the date of delivery which constituted a breach of contract or, if there were, they had been rectified.

The Court upheld some of the Claimant's damages claims but not others, and also upheld the Defendant's counterclaim in respect of crew costs and other costs and expenses. The Court held that the Claimant's acceptance of the vessel, and signing of the PDA, did not preclude a claim for damages. The agreement by the Claimant to take delivery even through the vessel was not fully classed and certain works remained outstanding did amount to a contractual variation. However, the agreement was simply a temporary convenience and did not relieve the Defendant of its obligation to complete the necessary work to the contractual standard in due course.

Further, the Court held that while the contract provided that class was to be RINA Charter Class (MCA), that did not mean that on delivery the yacht would comply objectively with the LY2 code of technical standards produced by the MCA and applicable to large commercial yachts. What mattered was whether the yacht complied with LY2 as applied by RINA, or possibly the Isle of Man Registry.

The Court also found that, after delivery, the deficiencies identified by the surveys had been rectified, and at that stage the vessel met the physical requirements of RINA Charter Class MCA. The only reason she was not classed as such was because the Claimant decided to register her in Luxembourg rather than the Isle of Man.

❖ Admiralty Court rules on the apportionment of responsibility for a collision

Owners and/or Bareboat Charterers and/or Sub Bareboat Charterers of the Samco Europe v Owners of the MSC Prestige **[2011] EWHC 1580 (Admlty)**

The Claimants' oil tanker and the Defendants' container ship collided in the Gulf of Aden. About 27 minutes before the collision, the radar echo of a vessel which proved to be the Defendants was observed by the Claimants about 1 point on the port bow at about 16-17 miles. She appeared to be south-east bound, steering a course of about 101 degrees and

making around 24 knots. The Claimants were on a north-west course of about 300 degrees, making around 16.5 knots.

By about 8 minutes before the collision, the radar data indicated that the Defendants had altered course by about 6 degrees to starboard. The data continued to show that the Defendants were shaping to cross ahead of the Claimants. At 7.5 minutes before the collision, with the data indicating that the Defendants would pass the Claimants on the starboard side at a distance of two cables, the Claimants decided to alter course to port. They continue to do so until the collision.

The Claimants argued that the Defendants had failed to keep a good radar and visual lookout, and that as the give-way vessel they had failed to take early and substantial action. As a result, it had created the situation of danger. The Defendants submitted that the Claimants should have maintained their course and speed, rather than alter course at 7.5 minutes before the collision.

The court found that the Defendants were 60% responsible for the collision, and the Claimants 40% responsible. The dangerous close-quarters situation was brought about by the faults of both vessels, however, the causative effect of the Defendants' initial fault was greater, as it resulted in her appearing on the Claimants' radar to be shaping across ahead of the Claimants, and so led to the latter's alteration to port.

In principle it was correct to consider which vessel had created the situation of danger to assist in determining the relative causative potency of each vessel's fault, although this is not the only factor to take into account. The Defendants' greater culpability in the early stages was reduced, although not eliminated by, the Claimants' greater culpability in the latter stages.

- **Commercial Court finds that an owner is entitled to enforce a letter of indemnity given to the voyage charterer by the receiver of the cargo, in a situation where the cargo had been delivered to the receiver on the charterer's instructions in the absence of presentation of original bills of lading**

Great Eastern Shipping Co Ltd v Far East Chartering Ltd

Indonesian shippers agreed to supply shipments of coal FOB to a Swiss company (the "Company"), who sold on one of those shipments to the Second Defendant Receivers on CIF terms. The First Defendant, the Company's chartering arm, chartered the Claimant Owners' vessel to carry this shipment to India. The Owners issued bills of lading, but disputes arose between the shippers and the Company, and the Company refused to pay to take up the bills of lading. Neither the Owners nor the Receivers knew of the dispute at the time.

When the vessel arrived in India, the Owners issued a delivery order to the port authority in favour of the Receivers and the cargo was discharged. The Receivers rejected the cargo on grounds that it was below specification. The shipper gave notice of a claim for damages against the Owners for delivering to the Receivers without presentation of the bills of lading. The Owners then tried to revoke the delivery order.

The Receivers eventually agreed with the Company to take the cargo at a reduced price. The Owners had, meanwhile, obtained an injunction preventing removal of the cargo from the port. The shippers had brought proceedings against the Owners in Singapore and obtained judgment on liability.

The on-sale contract and voyage charter provided for the cargo to be discharged against a LOI if the bills of lading were not available, and the Receivers had given such a LOI to the First Defendant which extended to the latter's servants and agents. The Owners argued that it was able to enforce the LOI under the Contracts (Rights of Third Parties) Act 1999 (the "Act"), as the First Defendant had instructed it to deliver the cargo to the Receivers. As a result, the Owners argued, it was acting as the First Defendant's agent. The Receivers argued that, as a matter of public policy, the Claimant could not rely on the LOI as it could not be indemnified against its own wrongdoing, i.e. deliberate misdelivery of the cargo by either it or the First Defendant.

The Court found in favour of the Claimant Owners. It was clear that the LOI had been issued to the First Defendant, and as a matter of interpretation of the LOI, the issue of the delivery order and the discharge of the cargo was sufficient to amount to delivery.

The Court held that there were no issues of public policy in this case. The Company believed that nothing further was due to the shippers, and the Receivers had failed to establish that the Company's position was not genuinely held and that there was no bona fide commercial dispute. There were no relevant acts which could be said to be manifestly unlawful, or known to be unlawful by the parties. The goods had been delivered, and so the Owners were entitled to enforce the LOI.

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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