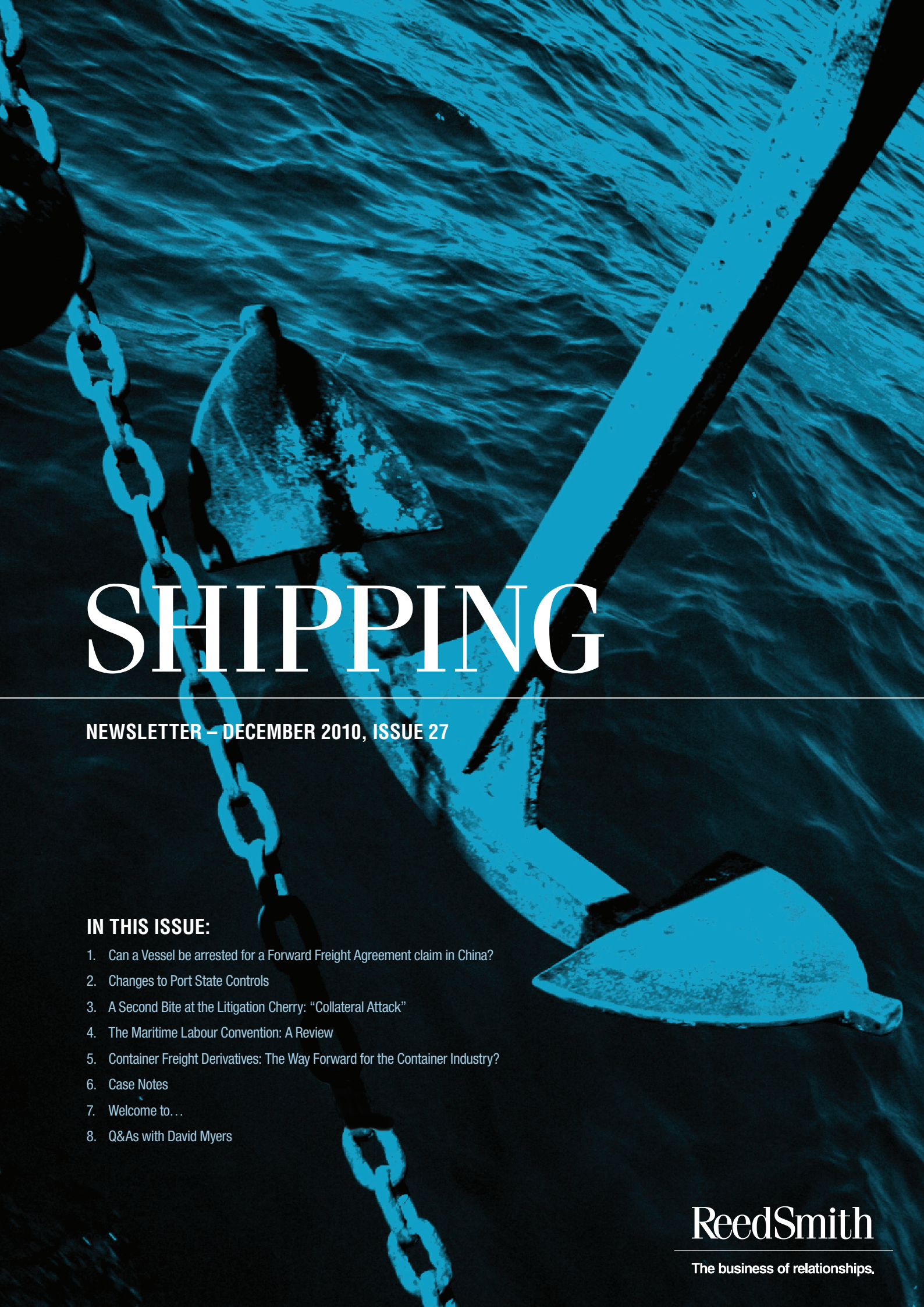

SHIPPING

NEWSLETTER – DECEMBER 2010, ISSUE 27

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ReedSmith

The business of relationships.

CAN A VESSEL BE ARRESTED FOR A FORWARD FREIGHT AGREEMENT CLAIM IN CHINA?

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Nick Shaw, a Partner in the London Dry Shipping Group, and Sarah Choudhry, an Associate in the London Dry Shipping Group, consider and comment on a recent decision of the People's Republic of China Shanghai Maritime Court.

In July this year the People's Republic of China Shanghai Maritime Court considered whether a claim arising under a forward freight agreement ("FFA") is a maritime claim for the purposes of the Maritime Procedure Law of the People's Republic of China ("PRC").

The Court considered the position following the arrest of a vessel to secure claims that had arisen under several FFAs. Under Article 22 of the Maritime Procedure Law of the PRC, an application for arrest can only be made for maritime claims listed in Article 21 of that law. In support of the arrest it was submitted that a FFA claim fell within the following Articles:

(i) Article 21(6) - Agreement in respect of the employment or chartering of a ship;

(ii) Article 21(12) - The providing of supplies or rendering of service in respect of a ship's operation, management, maintenance and repair; and

(iii) Article 21(18) - Commission, brokerage or agency fees relating to ships payable by or paid for a ship owner or bareboat charterer.

The arrest was challenged on the basis that a FFA claim does not fall within any of the defined categories of maritime claims. FFAs are financial derivatives that allow parties to hedge against the volatility of freight rates. They give the contract buyer the right to buy and sell the price of freight for future dates.

It was argued that the purpose of restricting definitions was to ensure certainty and predictability of the claims that may result in a ship arrest and avoid any possible confusion. Further, it was argued that a FFA claim does not relate to a specific ship and so it was not one that entitled ship arrest.

The FFA contract as a whole was considered and whether it could fall within the Articles relied upon. As a financial derivative, it was argued that a FFA had no direct links to a physical ship or actual transportation. Indeed, a FFA did not relate to the employment or chartering of a specific ship. It could not be considered as a claim under Article 21(12) because a FFA did not relate to a specific service performed in respect of a particular vessel.

COURT DECISION

After reviewing the submissions of both parties, the Court held that a dispute under a FFA contract does not fall within the maritime claims defined by the Maritime Procedural Law of the PRC, without giving reasons for its decision.

COMMENT

The Maritime Procedure Law of the PRC is similar to the International Convention on Arrest of Ships. It is therefore not surprising that the PRC Court decided that a FFA claim does not fall within the PRC Maritime code. Indeed, the fact that an arrest for this type of claim is a novel point would suggest that there is a general acceptance by lawyers in multiple jurisdictions that FFA claims are not maritime claims as they do not relate to an identifiable ship (England). Further, in Australia, the courts have held that the test for a maritime claim is that there must be a reasonably direct connection between the agreement and the carriage of goods by a ship or its use/hire and that relationship must not be tenuous or remote. This position is also supported in South Africa. The exception to this is in New York where FFAs are presently considered a maritime contract.

CHANGES TO PORT STATE CONTROLS

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Alexandra Allan, an Associate in the London Dry Shipping Group, reviews recent and upcoming changes to Port State Controls which demonstrate a lack of tolerance for vessels which do not meet the required standards.

Imminent changes to the Paris Memorandum of Understanding on Port State Control (the "Paris MoU") and the changes made in September 2010 to US Coast Guard policy to ban repeat offenders reflect both a tightening up of Port State Controls and a growing lack of tolerance for substandard vessels.

THE PARIS MOU

The New Inspection Regime ("NIR") comes into force on 1 January 2011. The NIR is a risk based targeting mechanism that, according to Paris MoU, aims to "reward quality shipping with a smaller inspection burden and concentrate on high-risk ships, which will be subject to more in-depth and more frequent inspections". To achieve this, ships visiting ports and anchorages of Paris MoU members will, in principle, be inspected in at least one state annually. Currently, Paris MoU members aim to inspect just

25% of ships calling at their national ports and anchorages. Below are set out the amendments being made to the existing Paris MoU, the net result of which will be the tightening of Port State Controls.

CLASSIFICATION OF RISK CATEGORY

Under the NIR the Target Factor, a grading regime scoring ships according to certain generic (flag, type, class, age) and historical factors, is replaced by the Ship Risk Profile. Ships will now be classed as low, standard or high risk. Assessing risk will be by reference to a more detailed set of generic and historic factors. However, under the NIR, not only will the Ship Risk Profile be taken into account when considering a vessel for inspection, but so too will the performance of the company responsible for the ISM. Feasibly, even new vessels may find themselves categorised as high risk and detained or possibly banned from port if they are managed by companies with a poor reputation and track record.

INSPECTION

The NIR documents the right of members to inspect foreign flagged ships in their ports at any time. The inspection regime consists of two categories: periodic (to be determined by the time window) and additional (to be triggered by overriding or unexpected factors). The time window for inspections is set according to a ship's risk profile. For example, for a high risk ship the window is 5-6 months after the last inspection in the Paris MoU region, and for a low risk ship it is 24-36 months after the last inspection. Whatever the level of risk, there is a time limit within which that vessel will need to be inspected under the Paris MOU.

The NIR sets out a selection scheme for inspections when ships must, or may, be selected for inspection. This will depend on whether the relevant time window referred to above is open or has passed, and also whether any overriding or unexpected factors have been logged in relation to the ship.

The current inspection types (initial, more detailed and expanded) will not change. On a periodic inspection, each ship with a high risk profile and all bulk carriers, chemical tankers, gas carriers, oil tankers or passenger ships older than 12 years must undergo an expanded inspection. All standard and low risk ships which are not one of the above types will undergo an initial inspection or a more detailed one if clear grounds are established.

BANNING

The detention regime remains largely unchanged. Banning for multiple detentions, however, will be widened to cover all ship types. The criteria for first and second bans have been amended:

- if the ship's flag is black-listed, it will be banned after more than two detentions in the last 36 months;
- if the flag is grey-listed, the ship will be banned after more than two detentions in the last 24 months.

Time periods are also introduced after which a ban can be lifted, ranging from three months after the first ban to 24 months after the third. A fourth ban is a permanent ban.

REPORTING OBLIGATIONS

Finally, the provisions on arrival notifications will be widened. In particular the 72 hour pre-arrival message is widened to all high risk ships and to all bulk carriers, chemical tankers, gas carriers, oil tankers and passenger ships older than 12 years which are eligible for expanded inspection. All ships must still provide a pre-arrival notification 24 hours in advance.

US COAST GUARD POLICY LETTER : BANNING OF FOREIGN SHIPS

The US Coast Guard has released the text of Policy Letter 10-03 (the "Policy Letter"), entitled "Banning of Foreign Ships", the contents of which became effective on 1 September 2010. The purpose of the Policy Letter is to ensure that all ships operating in US waters are doing so "in compliance with US regulations, international conventions and other required standards". It outlines Coast Guard procedures for denying foreign flagged commercial ships entry into US territorial waters and any port or place subject to US jurisdiction when that ship has been detained three times within the previous twelve months.

The Policy Letter states that the cornerstone for ensuring that a ship is compliant with all required standards is "a well written and properly implemented" Safety Management System ("SMS"). The importance of this comes into play when considering the reasons for a ship's detention. The Coast Guard must follow the procedures set out in the Policy Letter if the ship has been detained by the Coast Guard three times in the last twelve months, and it is determined that failure to effectively implement the ship's SMS may be a contributing factor for the substandard condition(s) that led to the detentions.

If, following the necessary inspections, it is determined that adequate measures have not been taken to prevent future non-compliance with the relevant standards, a Letter of Denial will be issued to the ship's owner. This Letter will inform the owner that the ship will be denied entry into any US port or place unless specific actions are completed. The Letter of Denial and all its requirements will be associated with the ship's IMO number, and will remain in effect whether the ship is sold, placed under new management, renamed or re-flagged. If the requisite steps are taken, a Letter of Acceptance will be issued, although a further Port State Control examination must be conducted before the ship can proceed as scheduled.

The Policy Letter is similar in its purpose to the amendments to the Paris MoU, however an important distinction is the ISM Code expanded examination which must be undergone to determine whether implementation of the ship's SMS was a factor in the detention.

A SECOND BITE AT THE LITIGATION CHERRY: "COLLATERAL ATTACK"

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Halani Lloyd, an Associate in the London Dry Shipping Group, reports on a recent case in which the Hong Kong High Court considered a strike out application brought on the basis that the proceedings were a collateral attack on the findings of a London Arbitration Tribunal.

A party cannot seek to re-litigate something which has already been decided. This is the doctrine of *res judicata* – if a cause of action or issue has been decided as between two parties, neither they nor their privies can raise the same issue or cause of action again, without something more (e.g. fraud).

But what if, in a second Court action raising very similar issues to a previous action, the parties are different (and not privies) to the parties to the first action? Or if the causes of action are expressed slightly differently in the second action? *Res judicata* might then not strictly apply. Nevertheless, a second bite at the (litigation) cherry could still be impermissible, this time on the broader basis that it would be an abuse of the Court's process. The Court's power in this respect derives from its inherent power to regulate its own procedure, as well as from public policy. As with *res judicata*, there is public interest in a party not being twice vexed for the same reason and in the finality of litigation. There is also public interest in preventing the administration of justice from coming into disrepute. These are of course imprecise notions, but the Courts have said that the approach to be adopted in determining whether a second action is an abuse of process is to be broad-brush, merits-based and dependent on the facts of each case. If a party, having lost in one proceeding, were permitted to set up exactly the same case in other proceedings though in a different form, the Courts have said that this would be a "scandal" upon which it should act.

These issues recently arose in a case in which the firm was involved, litigated first in London arbitration and subsequently before the Hong Kong High Court. Details of the London arbitration have been made public as a result of the litigation. In the arbitration, Galsworthy, a member of the Goldbeam/Jinhui ("Goldbeam") group, claimed damages from Parakou Shipping Pte Limited ("Parakou") for repudiation of a 5 year charterparty. Parakou denied that a charter had been agreed and, amongst other things, raised the argument that even if there was a charter, they had been entitled to rescind it because of misrepresentations made to them by the sole broker involved in the chartering negotiations. Subsequently in Hong Kong (though before the London arbitration was determined), Parakou commenced proceedings against four other companies within the Goldbeam group, seeking an indemnity against any liability they might be found to have in the London arbitration, on the grounds that such liability would have been caused by misrepresentations made by the broker on behalf of one of the four Goldbeam companies. The misrepresentations pleaded were the same as those pleaded in the London arbitration.

Parakou applied successfully to expedite the Hong Kong hearing, but fortunately, the London arbitration award was published one month prior to commencement of the Hong Kong hearing. The arbitrators found in favour of Galsworthy, against Parakou. In doing so, they dealt with many of the factual issues raised by Parakou in both the London arbitration and the Hong Kong proceedings.

Accordingly, the Goldbeam defendants applied to strike out the Hong Kong proceedings, on the basis that the Hong Kong action was a "collateral attack" on the findings of the arbitrators. Galsworthy's strike out application succeeded. Although *res judicata* did not strictly apply, the Court (per Mr Justice Reyes) found that the four Goldbeam companies were privies of Galsworthy and that there was substantial overlap (indeed near identicality) between the fundamental issues in the Hong Kong action and the London arbitration. His Honour noted that allowing Parakou to proceed with the Hong Kong action would effectively allow it to attempt to obtain a different outcome to that reached by the London arbitrators, in circumstances where the Hong Kong action was premised upon Galsworthy succeeding in the London arbitration. On the basis principally of English authorities, the Hong Kong Court considered Parakou's action to be an abuse of process.

The final point of interest, and which proved to be the central issue in the strike out application, was whether it made any difference that the first action was an arbitration rather than Court proceedings. Arbitration is private and consensual, Parakou argued, and bound only the parties to the arbitration agreement: in this case, Galsworthy and Parakou. Thus, for example, Parakou could not have joined the four other Goldbeam companies to the first action. Parakou argued that it was wrong in these circumstances to enable strangers (ie. the other Goldbeam companies) to strike out a collateral attack against the arbitration award. There was no manifest unfairness in allowing the Hong Kong action to proceed.

The Court did not accept these arguments. There was no authority before the Court in support of Parakou's contention that the "abuse of process jurisdiction" necessarily excluded cases involving arbitration. On the contrary, English authorities emphasised that there should be no hard and fast rule to exercise jurisdiction to strike out a claim in these circumstances; rather, a case by case process was to be adopted. The Court considered it to be its duty, to prevent manifest unfairness to the Goldbeam companies and to prevent the administration of justice being brought into disrepute, to refuse to allow Parakou's claim to proceed.

THE MARITIME LABOUR CONVENTION: A REVIEW

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Ruth Bonino, an Associate in the London Employment Group, and Laurence Rees, a Partner in the London Employment Group consider the benefits conferred by the Maritime Labour Convention and whether it is in the UK's interests to ratify the Convention.

BACKGROUND

The Maritime Labour Convention ("MLC") was adopted by the International Labour Conference of the ILO in February 2006. The MLC consolidates, and updates where necessary, the current 68 maritime labour instruments, creating a comprehensive set of global standards which sets out seafarers' rights relating to working conditions and which aims to foster an atmosphere of fair competition amongst shipowners. The standards set down by the Convention include ones relating to conditions of employment, hours of work and rest, accommodation, health protection, medical care and general welfare. The MLC also regulates the services by which seafarers are recruited and placed with vessels.

WHO HAS JURISDICTION UNDER THE MLC?

The inherently international nature of the maritime industry has long caused problems with establishing jurisdiction and ensuring flag State responsibility. Often, the beneficial ownership of a ship is based in one State, the ship operates under the jurisdiction of another and the seafarers working onboard are of various different nationalities. The MLC aims to provide some consistency by establishing a system of compliance and enforcement based on the inspection and certification of labour and conditions for seafarers, such tasks to be carried out by the ship's flag State. This is to be complemented by an inspection carried out by the authorities in the ports visited by the ship, the aim of which is to ensure compliance with the requirements of the MLC. Such a system aims to eliminate substandard ships from the market by ensuring that port visits will be quicker and will run more smoothly if the vessel in question meets MLC standards.

RATIFICATION

The MLC will come into force 12 months after the date on which there have been registered ratifications by at least 30 ILO member states with a total share of 33% of the world's gross tonnage. The latter criterion has already been met, but so far only 11 member states have ratified the MLC since its adoption by the ILO in 2006. These are the Bahamas, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Liberia, Marshall Islands, Norway, Panama, Spain and St Vincent and the Grenadines.

Ratification will provide benefits to Governments and shipowners, as well as to the seafarers whose rights are catered for in the MLC. For Governments, reporting obligations will be simplified as they will be dealing with only one Convention rather than many. There is also a large degree of flexibility as to how the MLC is to be implemented at national level. For example, many of the prescriptive requirements in existing Conventions which have given rise to implementation problems in the past are set out in Part B of the MLC, the provisions of which are set out in the form of guidelines, and are not mandatory, and so are not subject to inspections by port authorities. Governments are simply required to give "due consideration" to these provisions when implementing their obligations. National authorities also have a certain amount of flexibility to exempt smaller ships from some aspects of the MLC (ships of 200 gross tonnage and below) which do not undertake international voyages.

For shipowners, the MLC will create a more equal operating environment by ensuring fair competition and significantly reducing the commercial opportunities for companies that trade using substandard ships, thereby protecting the ships flagged to the ratifying countries which meet the MLC requirements from unfair competition. Such ships will also benefit from a system of certification. This system will reduce or altogether avoid the likelihood of lengthy delays caused by inspections in foreign ports.

WHY DOES THE UK NEED TO RATIFY THE MLC?

The prevailing view within the UK shipping industry is that the UK is unlikely to ratify the Convention until 2011 at the earliest. There are fears that UK-flagged ships will be at a disadvantage if this ratification continues to be delayed and the UK is not a signatory by the time the Convention comes into force.

One of the main concerns focuses on a clause in the MLC which states that ships flagged in non-signatory states will not be treated more favourably than those flagged in signatory states. The idea behind this clause is that ships should not be placed at a disadvantage because their flag country has ratified the MLC. The practical consequence is that all ships, irrespective of whether their country has ratified the MLC or not, will be subject to inspection in any country that has ratified the MLC. Further, and crucially, a ship faces detention if it does not meet the MLC's minimum standards. Those ships flagged to a country which has ratified the MLC will be at an advantage as they will have an MLC certification which should give them a "fast pass" through port inspections. UK-flagged ships, on the other hand, would face rigorous port inspections in accordance with the standards laid down in the MLC, which may lead to the detention of ships if the results are unfavourable, without benefiting from any of the flexibilities or derogations

available to countries that have ratified the MLC.

Ratification of the MLC may boost the reputation of the UK shipping industry. It would signal to the rest of the world that the UK is a leading advocate of optimal working and living conditions for seafarers, and further will ensure that all ships calling in UK ports respect the standards laid down by the MLC. Three leading industry and union figures have stated in a letter to the Minister of Shipping, which sets out concerns at the UK's delay in ratifying the MLC, that ratification is "essential if the UK … is to be acknowledged as a guardian of quality shipping".

WHAT ARE THE KEY RIGHTS GIVEN TO SEAFARERS UNDER THE MLC?

- The seafarer must be provided with an employment agreement that sets out the terms and conditions of the seafarer's employment, which is signed by the seafarer and the employer (or the employer's representative).
- The employer is required to pay wages at least on a monthly basis, in accordance with the employment agreement and any relevant collective agreements.
- Working hours are limited to 14 hours within any 24 hours period, and 72 hours in any 7 day period.
- Rest hours are required to be at least 10 hours within any 24 hour period, and 77 hours in any 7 day period.
- The employer must pay for a seafarer's repatriation in the event of illness, injury, insolvency, sale of the ship or shipwreck.
- The Convention sets out specific requirements (depending on the size of the ship in question) for accommodation and recreational facilities on the ship, including minimum room sizes, satisfactory heating, ventilation, sanitary facilities, catering, lighting and hospital accommodation.
- The seafarer must be given access to prompt medical care when on board and in port.

DOES THE MLC GO FAR ENOUGH?

Some commentators have criticised the MLC for not going far enough to protect seafarers, and claim that its ratification will in fact be an impediment to further reform in this area. The MLC does not, for example, deal with the issues of visas for shore leave or protection of the right to strike. Due to the amount of time spent by the ILO in putting together the MLC (around five years), together with the amount of time between adoption by the ILO and its coming into force (four and a half years and counting), once it is fully ratified it is arguable that any further reforms might not be pursued for some time in any event.

Nevertheless, the MLC is a great step forward in both consolidating the rights of seafarers and harmonising inspection and compliance procedures to be followed by flag States and port authorities. It remains to be seen, however, how the Government will respond to the concerns raised by the leading industry and union figures in their letter, and whether these will affect the timing of the UK's ratification, or otherwise, of the MLC.

CONTAINER FREIGHT DERIVATIVES: THE WAY FORWARD FOR THE CONTAINER INDUSTRY?

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Samantha Roberts, a Partner in the London office, looks at the emerging container freight derivatives market and considers why, despite the potential advantages, carriers are reluctant to become involved.

The first meeting of the Container Freight Derivatives Association ("CFDA") was held in Shanghai on 14 September 2010. The CFDA is an independent organisation for participants in the container freight derivatives market which, in its own words, has among its aims to "promote the trading of container freight derivatives" and to "promote and develop the use of standard contracts [and] other 'over the counter' and exchange traded derivative products for container freight derivatives and related price risk management". Representatives of several of the major container ship lines attended the meeting, but at the moment they are cautious about becoming involved in a market which has been likened by the CEO of Maersk Line to a "casino".

In this article we have considered the key features of this new market and why carriers are so cautious about becoming involved.

Forward freight agreements ("FFAs") are commonplace and are routinely bought and sold by shippers and carriers on the Baltic Dry Index, their purpose being to hedge against the risk that a rise or fall in the spot rate might detrimentally affect the profit that parties expect to make from a voyage. It has been estimated that FFAs are currently worth approximately 40% of the physical market. Brokers have for some years been trying to create a similar hedging tool for the container shipping industry, but these efforts were hampered by an inability to decide on whether such a tool could or should be based on charter or freight rates.

Such efforts have eventually resulted in the Container Freight Swap Agreement ("CFSA") developed by Clarkson Securities, a cash settled swap product made on a principal to principal basis, the first trade on which took place in January 2010. For the first time this allowed parties in the container market to fix a specified freight rate (USD per TEU or FEU) for forward positions without assuming any underlying risk. Contracts will usually be based on the CFSA standard, incorporating any amendments agreed between the principals. The swap is settled against the Shanghai Containerised Freight Index ("SCFI"), recently created by the Shanghai

Shipping Exchange, by taking an average rate over a four-week period. The SCFI is based on freight data received from fifteen carriers and fifteen freight intermediaries, representatives of both having been chosen in order to create a neutral index, and covers fifteen routes in and out of Shanghai.

The market is still in its infancy, with volumes remaining small, although they have risen since the clearing houses, LCH.Clearnet of London and SGXAsiaClear of Singapore were authorised to clear trades. Clearing provides security to parties on both sides of a trade, as it ensures that they will be paid. The CEO of Clarkson Securities told the inaugural meeting of the CFDA that it is likely that the derivatives market will add up to 5% of the size of the physical market from Shanghai to Europe and North America by the end of 2011. This will not be achieved, however, without the liquidity provided by the participation of the major carriers, who are currently reluctant to buy into the market.

Derivatives in general received a bad press for their role in the recent global financial crisis, and this could only add to carriers' natural, and perhaps understandable, caution when it comes to embracing any major change to an industry in which they have invested billions of dollars.

One of the arguments in favour of container freight derivatives is that because the price is set by the market, they could allow carriers more time to concentrate on the relationships with their customers. Carriers do not, however, see this disconnection from the price as being an advantage. It is, they say, simply a step towards becoming a commodity and this is not a direction in which container shipping should be heading. It is a market which is seen by its members as far less suited to futures trading than bulk shipping, as container shipping requires the negotiation of long-term contracts which contain deal-specific provisions other than price and volume, for example free use of containers and inland delivery. Such contracts are viewed as the best way to provide stability and a solution to rate instability. In contrast, it is feared that a container freight derivatives market could create increased price volatility and in fact destabilise the liner market.

Brokers are keen to assuage carriers' fears, and have said that derivatives could in fact calm the wild price swings that have been seen in the last few years and which expose both carriers and their customers to unpredictable costs. Further, the long-term contracts favoured by the container industry and derivatives should not be seen as exclusive. An FIS broker has suggested that shippers and carriers could negotiate a contract and then peg rate changes to the SCFI, or alternatively protect themselves against price swings in the spot market by buying or selling futures contracts. The point has also been made that similar doubts were raised when dry bulk freight derivatives were introduced, and these are now fully accepted as an important market tool. They also proved their worth in 2008 when the physical dry bulk market collapsed. It is hoped that eventually carriers will come to see container freight derivatives as a tool enabling them to manage the risk of their business, something which is essential in a market where there is a constant risk of default.

While it is clear that carriers still have grave doubts about becoming involved in a container freight derivatives market, the presence of many of the major players at the meeting in Shanghai indicates a willingness to seriously consider a development which could fundamentally change the container industry. If carriers and brokers are able to work together, and if the latter are able to sufficiently address the former's concerns, it may well be that container freight derivatives will soon become as commonplace as their dry bulk counterparts.

CASE NOTES

OCEANBULK SHIPPING & TRADING SA V TMT ASIA LIMITED & ORS [2010] UKSC 44.

BE CAREFUL WHAT YOU SAY WHEN NEGOTIATING: THE SUPREME COURT AND THE WITHOUT PREJUDICE RULE.

THE DECISION

The Supreme Court's judgment in this case has added a new "interpretation exception" to the *without prejudice* rule.

The Court concluded that "evidence of what was said or written in the course of without prejudice negotiations should in principle be admissible, both when the court is considering a plea of rectification based on an alleged common understanding during the negotiations and when the court is considering a submission that the factual matrix relevant to the true construction of a settlement agreement includes evidence of an objective fact communicated in the course of such negotiations" (per Lord Clarke at para 45, p 1440A to B)

TMT and Oceanbulk had entered into a series of forward freight agreements (FFAs). In 2008, the market imploded. Losses under the FFAs soared. The parties agreed a settlement. One of its terms was that "[the parties] will co-operate to close out the balance of 50 per cent of the open FFAs for 2008 against the market on the best terms achievable by 15 August 2008". A dispute arose as to whether, on the proper construction of this term, the process was to involve only TMT and Oceanbulk, or to take into account the opposite market positions under FFAs entered into by Oceanbulk (i.e. that Oceanbulk's positions under their FFAs with TMT were 'sleeved').

TMT's case on the merits rested on two arguments. First, estoppel. Oceanbulk was estopped, they said, from denying the FFAs were sleeved, or estopped from denying in negotiating and entering into the settlement agreement, the parties were proceeding on the common assumption they were "sleeved transactions". Second, the settlement agreement was concluded in reliance upon representations the FFAs were sleeved. It was or should have been, they said, in the parties' reasonable contemplation that closing out the 2008 FFAs left the risk of the market rising or falling on TMT because Oceanbulk was protected by its opposite market positions.

To provide the factual underpinning for their arguments, TMT sought to rely upon four representations made, or allegedly made on Oceanbulk's behalf. Two of the representations were "open"; two were made *without prejudice*. The latter two concerned the Supreme Court. They comprised, first, an email sent *without prejudice* by an Oceanbulk representative. And, second, they said, the same representative had, at two *without prejudice* meetings asserted, or allowed the negotiations to proceed on the assumption the FFAs were sleeved. Should the two *without prejudice* representations be admitted into evidence?

The *without prejudice* rule is based on public policy and contract principles. First, the public policy of encouraging litigants to settle their differences rather than litigate them to the finish. And, second, the express or implied agreement of the parties that communications in the course of their negotiations should not be admissible in evidence if, despite their negotiations, a contested hearing follows.

It is accepted that the *without prejudice* rule will apply both to single written exchanges between the parties, e.g. emails, and also to the many comments which may be made during the course of lengthy settlement meetings which may go on for several days, as in, for example, a mediation. The parties need to be able to speak freely, and the *without prejudice* rule is therefore applied generously.

THE EFFECT AND SIGNIFICANCE OF THE DECISION

The *without prejudice* rule is not and has never been absolute. Resort may be had to without prejudice material for a variety of reasons where the justice of the case requires it. For example, in determining whether the *without prejudice* negotiations have resulted in a compromise agreement; or whether there has been a misrepresentation. The parties may also rely on statements made in *without prejudice* negotiations on which they have relied, i.e. by way of estoppel, even where no agreement is reached.

The effect of the judgment is that if facts are stated in the course of *without prejudice* negotiations which result in a settlement agreement being reached, evidence of what was said or written *without prejudice* may be admissible in construing the agreement reached. In adding the "interpretation exception" to the *without prejudice* rule, the Court in effect removed the distinction between contracts which are concluded after *without prejudice* negotiations and those which are not, insofar as any facts relied upon in reaching the agreement can be admissible when construing the agreement reached. However, the general rule remains that evidence of what was said or done in the course of negotiating an agreement for the purposes of determining what was agreed should be excluded. Evidence of the factual matrix is only admissible as an aid to interpretation when a dispute arises as to what the settlement agreement means. The Court was keen to emphasise that "nothing in this judgment is intended otherwise to encourage the admission of evidence of pre-contractual negotiations".

The judgment does not seek to change the situation in cases where the *without prejudice* negotiations do not result in any settlement. To that extent parties can continue to negotiate freely and without concern under the *without prejudice* banner. However, Lord Phillips' final comment that the principle that "evidence which is within the parties' common knowledge is admissible when construing a contract" applies both in the case of a contract that results from the *without prejudice* communications and "in the case of any other subsequent contract concluded between the same parties" may have wider implications. We are yet to see in what circumstances *without prejudice* communications which do not result in a contract can be referred to when interpreting a subsequent contract between the same parties.

REPUDIATORY BREACH OF CONTRACT : *EMINENCE PROPERTY DEVELOPMENTS LIMITED V KEVIN CHRISTOPHER HEANEY* [2010] EWCA CIV 1168

This recent decision of the Court of Appeal explores the implications of treating your contracting party as in breach of contract and whether, in doing so, you can yourself be in repudiatory breach of contract entitling the other party to terminate.

In *Eminence Property Developments Limited v Kevin Christopher Heaney*, the solicitors acting for Eminence served a ten-day notice to complete but calculated those ten days, mistakenly, as actual days rather than working days, meaning that the notice of rescission which they sent after the expiry of those ten days was premature. The other party, which by this time did not have sufficient funds to complete the contract, responded saying that "the act of rescinding contracts under cover of your letters of [xxxx] constitutes a repudiatory breach of contract. Our client accepts your clients' repudiatory breach of contract and elects to rescind the contracts and is discharged from them."

In deciding whether Eminence was in repudiatory breach of contract, the Court reviewed the key authorities, including *Woodar Investment Development Limited v Wimpey Construction UK Limited* [1980] 1 WLR 277 and *The Nanfri* [1979] AC 757. It is clear from such authorities that when considering whether conduct is repudiatory, it is necessary to assess the behaviour objectively: "The question is not what the owners wanted or wished in the recesses of their minds, but did they by their conduct evince an intention no longer to be bound by the contract or to perform it only in a way inconsistent with their obligations under the charter?"

The Court determined that the legal test is simply whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

It accepted that these cases are very difficult to determine, as they are all always highly fact sensitive, and comparisons with other cases are therefore of limited value.

Further, all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker. This means that motive may be relevant if it is something, or if it reflects something, of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way in which the act would have been viewed by a reasonable person.

It is clear, therefore, that although the test is simply stated, its application to the facts of a particular case may not always be easy to apply.

Consider the situation, therefore, where an anti-technicality notice is sent, and before its expiry, mistakenly or otherwise, Owners withdraw the vessel. Whether Owners themselves are in repudiatory breach will depend whether, on the facts, an intention can be shown by Owners to abandon and altogether to refuse to perform the contract.

IRAN SANCTIONS

The sanctions against Iran continue to be amended and updated, with the latest update being EU Council Regulation 961/2010. For further information and to be kept up to date with all of the latest developments in this area, please visit the Client Alerts section of our **website**.

WELCOME TO…

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Samantha is a Partner in the EME Corporate Group, London office. She joined Reed Smith in September 2010, having previously worked at Holman Fenwick Willan. Samantha specialises in corporate and commercial law, with a focus on the shipping and ports and terminals industries. She provides transactional advice to, amongst others, national and international shipping lines, harbour and coastal towage companies, transport and logistics companies and commodity trading houses. She also provides commercial advice on a wide range of shipping related contracts and agreements, including shipbuilding contracts, ship sale and purchase agreements and charterparties.

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Ben Williams qualified into the Reed Smith Shipping Group in September 2010 having trained with Reed Smith within the Shipping, Energy, Trade and Commodities (Trade Finance), Corporate and General Litigation departments. Prior to training, Ben studied Law at the University of Bristol. Ben has experience of a variety of dry shipping matters, including charterparty, bills of lading, ship management, off-hire and ship building disputes.

Angela Hampshire
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Angela Hampshire joined Reed Smith's Shipping Group in October 2010. She is currently working on a variety of collision, charterparty and ship management disputes. Angela was appointed as a solicitor and admitted as an Australian Legal Practitioner in 2007. She cross-qualified and was admitted as a solicitor in England and Wales in 2010. Previously, Angela worked at Holman Fenwick Willan on a number of large trials including the "MSC NAPOLI" and the "WESTERN NEPTUNE".

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Alexandra qualified in 2009, at Salans LLP, and joined Reed Smith's Shipping Group in September 2010. She has experience of a variety of dry shipping matters, including demurrage and off-hire claims, speed and performance disputes and cargo-related disputes. She also has experience of wider trade and commercial disputes. Alexandra also works as one of the Group's Professional Support Lawyers.

Michael Wood
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Michael joined Reed Smith's Shipping Litigation Group in November 2010, having previously qualified into Hill Dickinson's Shipping Team in 2008. He has significant experience in a wide range of charterparty disputes, collision, salvage, piracy, marine insurance, and general dispute resolution. Prior to training as a solicitor, Michael graduated from the University of Southampton with a Masters of Engineering degree in Naval Architecture and Marine Engineering. Michael has also recently been awarded a Masters of Maritime Law degree from the University of London.

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Q&As WITH **DAVID MYERS**

What is your full name?

Davd Addison Myers

Mother/Father's nationality?

Both citizens of Trinidad and Tobago although my father began life as a national of Jamaica and migrated to Trinidad and Tobago when quite young.

Where were you born?

Port of Spain, Trinidad and Tobago.

Any lawyers in family before?

Yes. My great grand Uncle Arnold Bates. I think he was called to the Bar in London around 1910. He was an infamous sort of fellow. He died at 92, at which stage, his "girlfriend" was about 40.

What jobs, other than the law, did you consider?

Journalism. Cricket commentary. I wanted to be E. W. Swanton. I still have his book "Sort of a Cricket Person". It was a very precious birthday present.

History Professor: I like teaching and I was very fond of History.

When I was very much younger, I attended a party at the RAF Club in Port of Spain where the guest of honour was a famous WWII pilot. Until I was about 11, I thought it would be a pretty decent thing to be a fighter pilot!

What other jobs did you do in your summer holidays etc?

During summers, I mostly worked in law firms as an outdoor clerk. So far as "etc" goes, I spent nearly a year at the UK P&I Club.

How does working at RS compare to them?

It is bordering on the impossible to compare. However, I have to say that at Reed Smith I have never served a Writ of Summons (they were called Writs of Summons when I used to serve them) on an irate Rastafarian in his garden while he was digging with a rather large cutlass. One does not normally dig with a cutlass. Fortunately, I was much slimmer and quicker then. I left before he realised precisely what I had done.

If you could go to one place in the world where would it be?

Australia. I keep trying to find the time to go there but entirely without success.

Why?

I want to see any Boxing Day Test Match at the MCG.

Last concert you went to?

Beyonce at the Queens Park Savannah, Port of Spain, Trinidad and Tobago earlier this year.

Last item of clothing you bought?

Three very ordinary but serviceable shirts from Marks & Spencer.

Favourite sport?

Cricket.

Do you play or just spectate?

I used to play but I am now too old and fat.

How do you relax?

Watching cricket and football. Arguing, also known as trying to solve the problems of the world, with my wife and older son.

We are meant to learn from our mistakes – what will you never forget?

Always ensure your box is correctly positioned when facing a fast bowler.

Reed Smith is a global relationship law firm with nearly 1,600 lawyers in 22 offices throughout the United States, Europe, Asia and the Middle East. Founded in 1877, the firm represents leading international businesses, from Fortune 100 corporations to mid-market and emerging enterprises. Its lawyers provide litigation services in multi-jurisdictional matters and other high-stakes disputes; deliver regulatory counsel; and execute the full range of strategic domestic and cross-border transactions. Reed Smith is a preeminent advisor to industries including financial services, life sciences, health care, advertising, technology, media, shipping, energy trade and commodities, real estate, manufacturing, and education.

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