RS SHIPPING BULLETIN

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REED SMITH

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1 ARBITRATION

1.1 HIGH COURT CONSIDERS THE STANDARD OF PROOF REQUIRED IN AN APPLICATION TO APPOINT AN ARBITRATOR UNDER SECTION 18 ARBITRATION ACT 1996

The High Court gave judgment in *Noble Denton Middle East and another v Noble Denton International Limited* [2010] EWHC 2574 (Comm) in May 2010, but the judgment text has only recently been made available.

The Defendants had applied to the court on the basis that there was no arbitration agreement between them and the Claimants. Further, they argued that as there were proceedings pending in the US relating to a claim by the Defendants and others against the Claimants, in respect of the same matters which the Claimants wished to have arbitrated, the English proceedings should be stayed. The issue between the Claimants and Defendants was the same both in London and the US: the Claimants argued that there was an arbitration agreement between the parties, and the Defendants argued that there was not. The Defendants accepted that there was a good arguable case that an agreement to arbitrate did exist, while the Claimants accepted that their case was only arguable.

The court had to decide two principal issues. The first was whether, in an application under s.18 Arbitration Act 1996 (the "Act"), it must be conclusively decided whether or not there was an arbitration agreement, or whether it is sufficient for there to be a good arguable case that such an agreement existed. Secondly, the court had to decide on the impact of the case going forward in the US and whether to stay the English proceedings on the basis of *lis alibi pendens* (i.e. that there was a dispute pending elsewhere).

The judge noted that a decision to arbitrate reflects the autonomy of the parties, and should only be overridden by the court in exceptional circumstances. Further, arbitrators are entitled to, and indeed must, decide the question of their own jurisdiction. The judge went onto refer to three "fall back statutory provisions" where the court may intervene (s.67, s.32 and s.72 of the Act), and stated that in the absence of these the party who denies the existence of an arbitration agreement still has the protection provided by the fact that an arbitrator can rule on his own jurisdiction. In these circumstances, it was held that for the purposes of s.18 it is sufficient for there to be a good arguable case that an arbitration agreement existed. In this particular situation, there was such a case and an order was therefore made for the appointment of a sole arbitrator.

As regards the stay, the crucial point was that the court was faced, sufficiently for that day's purposes, with an English arbitration clause. Such a clause is equivalent to an exclusive jurisdiction clause, if not more so. Referring to *Deutsche Bank AG v V Sebastian Holdings Inc* [2009] EWHC 3069 (Comm), the judge said that there need to be exceptional circumstances, or strong or very strong reasons, for an exclusive jurisdiction clause to be overridden and this is also the case, indeed "probably all the more so", where there is an arbitration clause. The judge did not think that such circumstances or reasons existed in this case, and so he refused the application for a stay.

1.2 BY ENDORSING A COA AS GUARANTOR, A PARTY AGREES TO THE ARBITRATION OF DISPUTES ARISING OUT OF THE GUARANTEE IN ACCORDANCE WITH THE ARBITRATION AGREEMENT IN THE COA.

In *Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985, the Applicant challenged an arbitration award under s.67 Arbitration Act 1996 on the grounds that because no arbitration agreement had been entered into between the parties, the tribunal lacked substantive jurisdiction.

The arbitration between the Applicant and Respondent was linked to another arbitration between the Respondent and a shipowning company which was a subsidiary of the Applicant (the "Subsidiary"). The Respondent claimed damages from the Subsidiary as charterer, alleging that the Subsidiary had agreed to enter into a contract of affreightment ("CoA") for four voyages, but had only completed the first voyage. The Respondent further alleged that the Applicant had guaranteed the Subsidiary's obligations under the CoA. The Subsidiary argued that as there was never a concluded contract, the tribunal lacked substantive jurisdiction. The tribunal in the arbitration between the Applicant and Respondent held that the arbitration agreement incorporated into the CoA encompassed the Applicant's obligation to guarantee the Subsidiary's performance.

In refusing the application, the court agreed with the tribunal that the Applicant had entered into a contract of guarantee. The parties had agreed that as and when the CoA was concluded, it would incorporate a term by which the Applicant would guarantee the Subsidiary's performance as charterer. This was despite the form of the contract of guarantee having changed: it was initially agreed that the Applicant would provide a separate guarantee letter, but it was later agreed that both the Applicant (as guarantor) and the Subsidiary would be parties to the CoA and would endorse the contract accordingly. The Applicant had (subject to any questions of authority) entered into a contract of guarantee with the Respondent which involved the former's endorsement of the terms of the CoA.

Further, by endorsing the CoA, the Applicant had endorsed and agreed to each of its terms. As regards the arbitration clause, the natural construction was that the Applicant's endorsement of it could only be meaningful if it involved the Applicant's agreement to arbitrate any dispute concerning its own obligations which may arise out of the guarantee. The parties had entered a tri-partite relationship evidenced by a single document, and it was reasonable to expect that they intended all disputes arising out of that document to be dealt with in the same way (following *Fiona Trust & Holding Corp v Privalov* (2007) UKHL 40).

1.3 SECTION 69 ARBITRATION ACT 1996 DOES NOT PERMIT THE COURT TO ENTERTAIN AN APPEAL ON A QUESTION OF FACT ON THE BASIS THAT THE PARTIES HAVE AGREED TO SUCH AN APPEAL

In *Guangzhou Dockyards Co Ltd (Formerly Guangzhou CSSC-Oceanline-GSW Marine Engineering Co Ltd) v ENE Aegiali I* [2010] EWHC 2826 (Comm), the Applicant shipowner applied to strike out part of an appeal by the Respondent dockyard on the basis that it was an appeal on questions of fact.

The parties had entered into a contract for the conversion of the Applicant's vessel at the Respondent's yard. The contract was governed by English law and provided for arbitration in London, and the parties further agreed that either party could appeal to the High Court on any issue arising out of any arbitration award. The agreed work on the vessel could not be carried out, and a dispute arose as to the reasons why. The dispute went to arbitration, where the Applicant was successful.

The Respondent appealed on points of law pursuant to s.69 Arbitration Act 1996 (the "Act"). It also challenged the award under s.68(2)(a) of the Act and purported to appeal on questions of fact. The Applicant submitted that the only appeal permitted under the Act was on a point of law, and the parties could not agree to confer jurisdiction where none existed. The appeal on the point of fact should therefore be struck out. The Applicant also submitted that even if the parties could agree to confer jurisdiction on the court to review questions of fact, the arbitration clause in the present case did not have that effect.

The court agreed with the Applicant that s.69 of the Act only provided for an appeal on a question of law. The words "unless otherwise agreed by the parties" could not be construed as expanding the jurisdiction of the court to include an appeal on a question of fact on the basis that the parties had agreed to such an appeal. The court further noted that an appeal to the court from an arbitration award was only concerned with the award, and not with the matters that initially gave rise to the dispute between the parties. The Respondent could only maintain its factual appeal if the court had an inherent jurisdiction to hear it, and under English law this was doubtful, even if the parties had agreed to it.

The court also found that the agreement that either party could appeal to the court "on any issue arising out of any award" did not extend to any issue of fact. It was of little significance that the words "of law" were not attached to the words "any issue". On a true construction of the clause, the intention of the parties was to dispense with the need to obtain permission for an appeal on a question of law pursuant to s.69, and there was nothing in the language used which warranted a wider construction.

1.4 SINGLE NOTICE OF ARBITRATION GIVEN UNDER TEN BILLS OF LADING HELD TO COMMENCE TEN SEPARATE ARBITRATIONS RATHER THAN A SINGLE CONSOLIDATED ARBITRATION

Easybiz Investments v Sinograin Chinatex [2010] EWHC 2656 related to arbitration proceedings commenced in relation to ten bills of lading. The Appellant Owners had entered into a voyage charterparty, under which the bills of lading were issued. The bills incorporated the terms of the charterparty, which contained a clause requiring arbitration in London under the terms of the Arbitration Act 1996 (the "Act").

When the vessel lost its rudder and had to be towed to Cape Town for repairs, Owners declared the voyage frustrated and required Cargo Owners to take delivery of the goods in Cape Town. A cargo recovery agent subsequently purported to commence arbitration against the Appellants under all ten bills of lading. The notice of arbitration identified the parties and the bills of lading,

and also provided that Cargo Owners had appointed an arbitrator "in respect of all disputes arising under the aforesaid bills of lading…".

The arbitrator ruled on his own jurisdiction, and the Appellant appealed against this ruling under s.67 of the Act. The Commercial Court dismissed the application, holding that the notice of arbitration was valid under s.14(4) as it did not seek to initiate a single consolidated arbitration of all the claims, rather the notice was to be construed broadly as validly initiating ten separate arbitrations.

1.5 SUPREME COURT REFUSES ENFORCEMENT OF ICC AWARD ON THE GROUNDS OF A PARTY NOT BEING BOUND BY THE ARBITRATION AGREEMENT, DESPITE THE TRIBUNAL'S PREVIOUS FINDINGS TO THE CONTRARY

In *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Pakistan* [2010] UKSC 46, the Supreme Court considered an appeal from a Court of Appeal decision refusing the Appellant leave to enforce an arbitration award made in its favour.

The Appellant had concluded a memorandum of understanding with the Respondent Government of Pakistan under which the Appellant was to construct a number of houses for pilgrims, and the Respondent was to take a 99-year lease of them. The Respondent established a trust as a vehicle for the project (the "Trust"), with which the Appellant eventually entered into an agreement. This agreement contained an arbitration clause providing for any disputes between the Appellant and the Trust to be dealt with by ICC Arbitration. Shortly after this agreement was made, the Trust ceased to exist as a legal entity.

Disputes arose, and the Appellant commenced arbitration proceedings against the Respondent. The tribunal found in favour of the Appellant, and also found that the Trust was the alter ego of the Respondent. As a result the latter was a true party to the agreement and was bound by it.

The Court had to consider whether the arbitration award was valid under French law (by virtue of s.103(2)(b) Arbitration Act 1996 (the "Act") and Article V(1)(a) of the New York Convention). This depended on whether the Respondent could prove that it was not a party to, and so was not bound by, the arbitration agreement. The Appellant submitted that the Respondent had at all times been an unnamed party to the agreement, as it had been the common intention of both parties that this should be the case.

The Court held as follows:

1. In order to determine whether the Respondent was bound by the arbitration agreement, all of the evidence had to be reviewed. The Court was not limited to reviewing the tribunal's ruling, and did not have to defer to the tribunal's views. Arbitration is consensual and a tribunal cannot, without specific authority, create or extend the authority conferred on it. A tribunal's decision on its own jurisdiction cannot bind a party which has not submitted the question of "arbitrability" to the tribunal in the first place. Under English law, a party who has not submitted to a tribunal's jurisdiction is entitled to make an application under s.67 of the Act

for a full determination on the issue of jurisdiction by the court, and this is also the case where the English court is asked to enforce a foreign award.

2. The tribunal's reasoning on the issue of whether the Respondent was bound by the arbitration agreement was neither conclusive nor persuasive. It was not clear that the tribunal had directed its mind to common intention, and the course of events did not justify a conclusion that it was the parties' common intention or belief that the Respondent was or should be a party to the agreement. The agreement was structured to be, and was agreed, between the Appellant and the Trust.

3. The phrase "recognition or enforcement of the award may be refused" in s.103(2) of the Act does not mean that a court can, in the absence of new circumstances such as another agreement or an estoppel, enforce or recognise an award which it found to have been made without jurisdiction.

2 CONTRACT

2.1 HIGH COURT CONSIDERS WHETHER A CONCLUDED SETTLEMENT AGREEMENT CAN BE RESCINDED FOR NON-DISCLOSURE, AND WHETHER IT SHOULD DECLINE TO ENFORCE A VALID AND BINDING SETTLEMENT DUE TO A FURTHER SUBSEQUENT SETTLEMENT BETWEEN THE PARTIES

A number of preliminary issues came before the High Court in *Silver Queen Maritime Limited v Persia Petroleum Services Plc* [2010] EWHC 2867 (QB), in which the Claimant claimed for monies due under a contract with the Defendant.

After the Claimant had issued proceedings, the parties negotiated a settlement deed in July 2009. The Defendant executed the deed and emailed it to the Claimant, but then purported to withdraw from the agreement on the basis that the Claimant had failed to disclose certain matters. The Claimant executed the deed, but a month later indicated that it would settle for a smaller sum provided that payment was made by a certain date. No such payment was made, and the Claimant brought proceedings to enforce the July 2009 settlement agreement. The issues for the court to consider were: (i) whether a concluded settlement had been reached in July 2009; (ii) if it had, whether it could be rescinded for non-disclosure; and (iii) whether there was a further settlement agreement between the parties in August 2009 such as to prevent the Claimant enforcing the July agreement.

The Court held:

(i) A settlement agreement was concluded between the parties in July 2009: it was an escrow, and took effect as a deed when the escrow conditions (i.e. that it be signed and returned) were fulfilled. The deed was irrevocable from the time of its delivery as an escrow and was clearly intended to be a deed binding on the Defendant. There was no express indication that the settlement deed was anything other than it purported to be, i.e. a document that had been executed and delivered as a deed and only needed to be signed and returned.

(ii) This concluded agreement could not be rescinded for non-disclosure. The negotiation of agreements to settle litigation does not give rise to a duty of disclosure. There had been no duty on the Claimant, prior to entering into the agreement, to make the disclosure that the Defendant alleged that it should have made. Even if a fiduciary relationship had existed between the parties, this would not have survived the issue of litigation proceedings.

(iii) There was no concluded settlement agreement in August 2009, and so the Claimant was not prevented from pursuing its claim under the July agreement.

2.2 THE PHRASE "TERMS AND CONDITIONS AVAILABLE UPON REQUEST" COULD INCORPORATE TERMS OF TRADING INTO A CONTRACT

The Court of Appeal considered the meaning and effect of the phrase "terms and conditions available on request" in *Rooney and another v CSE Bournemouth Ltd* [2010] EWCA Civ 1285.

The Claimants were the owners of an aircraft, which the Defendants operated pursuant to a management agreement between the parties. This agreement incorporated obligations relating to repair and maintenance. Before the Defendants began any work on the aircraft, they would produce a work order which was to be signed by either the Claimants or on their behalf. Most of these work orders included the words "terms and conditions available upon request", usually at the bottom of the page. When the Defendants carried out some work in an allegedly negligent manner, which resulted in damage to the aircraft, the Claimants commenced proceedings for damages.

The Defendants relied on a number of their standard terms, arguing that it was under these terms that the work had been carried out. The Claimants argued (a) that the work order was not a contractual document, and (b) that even if it was the words "terms and conditions available upon request" were insufficient to incorporate the Defendants' standard terms. The Claimants sought to have the aspect of the defence relating to reliance on the standard terms struck out.

At first instance, the Claimants were successful. The judge found that while the work order was a contractual document, the language used was not sufficient to incorporate the Defendants' standard terms. The Defendants appealed.

The Court of Appeal found in favour of the Defendants. The appeal was from a strike out order, and so the issue for the court to decide was whether the Defendants' construction of the words in question was reasonably arguable. Toulson LJ stated in his judgment that the work order was intended to be contractually binding, and that from a commercial point of view it would be strange to have a contract for the performance of services where one party devised detailed commercial terms, but only included them at the other party's request.

This case highlights the importance of clear drafting and of using unambiguous language when incorporating a party's terms of business into a contractual document.

3 COSTS

3.1 WHEN ASSESSING A SOLICITOR'S BILL OF COSTS ON THE APPLICATION OF A THIRD PARTY LIABLE FOR THOSE COSTS, THE COURT MUST ASSESS THE BILL AS IF THE CLIENT ITSELF HAD REQUIRED THE ASSESSMENT

In the underlying action to *Tim Martin Interiors Ltd v Akin Gump LLP* [2010] EWHC 2951 (Ch), the Respondent had borrowed money from a bank, which loan was secured by a mortgage and guaranteed by two directors of the Respondent. The Respondent defaulted on payment, and the bank instructed the Appellant solicitors' firm to enforce the mortgage and recover possession. A statement of the Respondent's indebtedness to the bank included over £100,000 in the way of legal fees payable to the Appellant. The bank transferred the mortgage to a director of the Respondent (also one of the guarantors) in consideration of a payment which covered the Respondent's indebtedness and which included the legal fees. The bank then paid the Appellant's fees in full.

The Respondent commenced proceedings against the Appellant for taxation of the latter's bill of costs under s.71 Solicitors Act 1974. At the assessment, the Master reduced the hourly rate which the Appellant had charged the bank, thereby reducing the overall bill, and ordered the Appellant to pay the balance to the Respondent.

On appeal, the court disagreed with the Master's approach. A solicitor charges fees to his client pursuant to a contract between them (the retainer), and the liability under that contract is that of the contracting party. The solicitor is not a party to any arrangement by which the client's liability is passed onto a third party, as it was in this case. His ability to recover his fees should therefore be unaffected by any such arrangement. In considering the effect of this external arrangement, the court was in fact considering which items in the bill of costs could be passed onto the third party, and not how much the client was liable to pay to his solicitor under the retainer. The third party was, therefore, only entitled to raise such objections as the client itself would be entitled to raise.

The court also found that the question of what was properly payable as between the Appellant and the bank was entirely separate from the question of what sums could be passed onto the Respondent. The court could not interfere with the Appellant's hourly rate, as this was not something that the bank could have done (it having already agreed that rate).

The Master had erred in his approach: he assessed the costs as between the bank and the Respondent, rather than as between the Appellant and the bank, which would have been the correct approach.

3.2 THERE IS NO PRESUMPTION THAT THE COSTS OF PRELIMINARY ISSUES WILL BE ASSESSED IMMEDIATELY FOLLOWING A HEARING OF THOSE ISSUES

In *Gb Gas Holdings Ltd v Accenture (UK) Ltd and others* [2010] EWHC 2928 (Comm), the High Court considered whether to order an immediate assessment of (a) the costs of preliminary issues following a hearing of those issues and (b) the costs of the Defendant's unsuccessful appeal from the preliminary issues hearing.

CPR 47.1 sets out the default costs position, i.e. that costs will generally be assessed once the proceedings have concluded. However, there may be cases where it is appropriate for a different order to be made, and the trial of a preliminary issue could be such a case particularly where discrete issues are dealt with. There is, however, no presumption to this effect.

In this case, the court held that an immediate assessment of the costs of the preliminary issue would waste both time and costs, and would disrupt preparations for the trial of the substantive action. Further, if the Claimant was ultimately successful at trial, the majority of the costs incurred in the assessment would be wasted. If there were a delay in payment of the costs of the preliminary issues, the Claimant could be compensated in costs at the end of the proceedings.

On the appeal costs, the court held that these were discrete and so an assessment would not be wasteful or disruptive. The Defendant submitted that the court had no jurisdiction to order an immediate assessment of these costs, as the original costs order was made by the Court of Appeal which did not order immediate assessment. The judge disagreed with this argument, saying that because the court had conduct of the proceedings generally, it was within his jurisdiction to order an immediate assessment of the appeal costs. He made such an order.

3.3 TRIBUNAL CONSIDERS APPROPRIATE COSTS ORDER WHERE BOTH CLAIMANT AND DEFENDANT HAVE SUCCEEDED ON DIFFERENT ISSUES

In a recent London arbitration (21/10, ref. 2010 LMLN 807), the Claimant Owners claimed the costs of an arbitration in which two separate claims had been dealt with. The Claimant submitted that it had made a substantial recovery and costs should follow the event. The Defendant Charterers contended that the two claims should be treated separately, that the vast majority of time and costs had been incurred in relation to one of the claims (which had failed), and that in any event they had been successful in a large proportion of interlocutory applications.

The Tribunal considered whether the two claims should be viewed as entirely separate or linked, and what proportion of the costs should be assigned to each. It also considered the various types of costs order that it had jurisdiction to make and which of them, if any, was applicable in this case. The Tribunal reached the conclusion that the two claims were broadly equivalent, and that each party was successful in one of the claims. The costs should therefore follow each of the two events, and should be regarded as having been expended equally between the two.

A full summary of this case is available on i-law.

4 INSURANCE

4.1 THE FINANCIAL RESTRICTIONS (IRAN) ORDER 2009 AND A LICENCE MADE UNDER IT DID NOT RENDER ILLEGAL THE PROVISION OF COVER BY A P&I CLUB TO AN IRANIAN SHIPOWNER, NOR HAD THE INSURANCE CONTRACT BEEN DISCHARGED BY REASON OF FRUSTRATION

In *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd & HM Treasury* [2010] EWHC 2661, the court determined whether the provision of insurance cover by the Defendant P&I Club to the Claimant Iranian shipowner had been rendered illegal, and further whether the contract of insurance had been discharged by frustration.

The Defendant had certified that a particular vessel belonging to the Claimant (the "Vessel") was entered for class 1 P&I insurance, which included cover against liability for pollution. The Defendant also issued a Blue Card to the Maritime and Coastguard Agency evidencing that the insurance in place in respect of the Vessel met the requirements of the International Convention on Civil Liability for Bunker Oil Pollution Damage (the "Convention"). The Agency then issued a certificate in respect of the Vessel in accordance with Article 7 of the Convention.

During the period of the insurance, the Financial Restrictions (Iran) Order 2009 came into force, which prohibited transactions and business relationships between certain persons and designated Iranian entities. The latter category included the Claimant. HM Treasury issued a licence permitting the Defendant to continue to provide insurance cover to the Claimant for a period of three months, however the Defendant elected to terminate the cover. It took the view that the terms of the licence issued by HM Treasury meant that it was no longer permitted to provide insurance cover to the Claimant. The Vessel subsequently suffered a casualty which rendered it a total constructive loss, and which also caused bunker oil pollution.

The Defendant submitted that:

1. under the terms of the licence it was not permitted to provide insurance cover or to indemnify the Defendant in respect of claims made by third parties against the Defendant for pollution damage, but was only permitted to make payments to third parties asserting a direct right of action against the Club under Article 7(1) of the Convention; and

2. in any event, the contract of insurance between the parties in respect of the Vessel had been discharged by frustration and/or supervening illegality when it became unlawful for the Defendant to insure the Claimant in respect of all other risks.

The Court held that:

1. The requirements of the Convention had to be considered, because there was a presumption that the licence would be consistent with the UK's international law obligations. While the protection of third parties was one of the most important purposes of the Convention, it was not the only one. Other purposes included the promotion of preventative measures and reinstatement. Both categories of costs fell within the compulsory insurance required by Article 7(1), but no distinction was made as to whether the costs of preventative measures

and reinstatement were initially borne by the shipowner or a third party. To distinguish between the positions of the insured shipowner and third parties did not reflect the language of the Convention. On its proper construction, the licence permitted the Defendant to continue to provide the Claimant with insurance cover in respect of the risks required to be insured by reason of the provisions of the Convention, and also to meet claims made in respect of those risks and not only claims made by third parties pursuant to Article 7(10).

2. The contract was not frustrated. The licence did not render the Defendant's obligations so radically different as to frustrate the contract: while the scope of the permitted cover was significantly narrower, its nature was not different. Part of the purpose of the contract, i.e. to provide indemnity insurance, remained lawful, and the performance by the Defendant of the part of the cover which remained lawful was not dependent on the other parts of the cover which were no longer lawful.

5 JURISDICTION

5.1 THE COMMERCIAL COURT CONSIDERS THE REQUIREMENTS FOR THE CONTINUATION OF AN ANTI-SUIT INJUNCTION

In *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) the Commercial Court considered an application by a shipowner to continue an anti-suit injunction.

The Applicant had time chartered three vessels to a nominee (the "Charterer") of the Respondent, and the latter had guaranteed the Charterer's performance. The charterparties incorporated clauses providing for English law and London arbitration. When the Charterer failed to pay hire, the Applicant commenced arbitration in London. The Respondent appointed an arbitrator, although it made the point that it was not a party to the charterparty and hence the arbitration clause.

The Respondent subsequently commenced proceedings in Russia, alleging that it was not obliged to act as guarantor of the Charterer. The reason given was that no reply had been received from the Applicant to the Respondent's letters expressing a willingness to act as guarantor. The Respondent further alleged that the Applicant had committed repudiatory breaches of the charterparties and that the Respondent had accepted these breaches, thereby terminating the charterparties. The Applicant challenged the Russian court's jurisdiction, and issued English proceedings claiming the sums due to it under the charterparties from the Respondent as guarantor. The Applicant obtained an anti-suit injunction in respect of the Russian proceedings.

In applying to continue the injunction, the Applicant argued that (1) the English court was the natural forum for the resolution of the dispute, as the guarantees were governed by English law, and (2) the Respondent's conduct in commencing the Russian proceedings had been "vexatious, oppressive and unconscionable".

In granting the application, the court noted as follows on the two strands of the Applicant's argument:

(1) In the circumstances, it was reasonably certain that the parties had chosen English law to govern the guarantees. The court referred to the facts that the Respondent and the Charterer were very closely connected, and that English law had been expressly chosen as applicable to the charterparties. The guarantee was mentioned in the charterparties, and so the parties must have contemplated that it too would be governed by English law. If English law applied to the guarantee, this strongly suggested that England was the natural forum for the resolution of the dispute. Further, while the English proceedings would determine all aspects of the dispute, the Russian proceedings were limited to the issue of whether or not there was a guarantee in the first place. The only two factors which suggested that Russia was the natural forum were that the Respondent was domiciled there, and that the guarantee appeared to have been signed there.

(2) It was more likely than not that the Respondent had commenced the proceedings in Russia in an attempt to frustrate the determination of the dispute in England. The Russian proceedings involved a point not taken before, and were commenced without any warning, which suggested that the Respondent wished to avoid the dispute being

determined in England. The point taken by the Respondent in Russia appeared to be a weak one, which pointed towards the proceedings being "vexatious and oppressive". There was clear evidence, as a matter of English law, that the Respondent had accepted the obligations of a guarantor and it would be surprising if the same was not found under Russian law.

5.2 A COURT IS NOT DEEMED TO BE SEISED OF PROCEEDINGS UNDER THE JUDGMENTS REGULATION IF THE COURT FEE HAS NOT BEEN PAID

The underlying matter in *SK Slavia Praha-Fotbal AS v Debt Collect London Ltd* [2010] EWCA Civ 1250 was a debt owed by the Appellant football club. The benefit of certain loan agreements had been assigned to the Respondent (a debt collection agency), which commenced proceedings claiming sums owed. Two months prior to this, the Appellant had lodged proceedings with a Czech court, however these proceedings could not be served because the necessary court fee had not been paid. The Appellant challenged the jurisdiction of the English court. At first instance the judge refused to stay the English proceedings, and the Appellant appealed.

The question for the Court of Appeal was: which court was first seised under section 9 and Article 30 of the Brussels I Regulation? The Court held that non-payment of a fee amounted to a failure to take a subsequent step required for effecting service. It followed that the proviso in Article 30.1 (that a court shall be deemed seised at the time when the document instituting the proceedings is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant) disapplied the general rule that a court was deemed to be seised of proceedings when those proceedings were lodged. The Czech court was therefore not seised of the proceedings before the English proceedings were issued and served. The English court was seised of the proceedings first, and the judge at first instance was therefore correct to dismiss the Appellant's application for a stay.

6 PRACTICE AND PROCEDURE

6.1 A SETTLEMENT OFFER EXPRESSED TO BE OPEN FOR ACCEPTANCE FOR A LIMITED PERIOD OF TIME IS NOT CAPABLE OF BEING A PART 36 OFFER

The High Court considered the issue of whether a settlement offer expressed to be open for acceptance for a limited period of time can be a Part 36 offer, and so attract the consequences of such offers, in *C v D and D2* [2010] EWHC 2940 (Ch).

In order for a settlement offer to attract the costs consequences set out in CPR Part 36, the offer must be made in accordance with CPR 36.2. As regards acceptance of a Part 36 offer, CPR 36.9(2) provides that such an offer "may be accepted at any time … unless the offeror serves notice of withdrawal on the offeree".

In this case, the Claimant had written to the Defendant making an offer to settle and the letter had included the phrase "the offer will be open for 21 days from the date of this letter". This period expired on 31 December 2009. The letter also stated that it was intended to have the consequences set out in Part 36. The Defendant accepted the offer on 5 November 2010, only a few weeks before the trial was due to start and almost a year after the offer was made. The Claimant applied for a declaration that the offer was no longer open for acceptance on 5 November 2010, and that the Defendant's purported acceptance was therefore not effective. The Defendant argued that the offer was still open for acceptance at this date because a notice of withdrawal had not been served. The offer had, the Defendant submitted, been validly accepted and there was no need for the matter to go to trial.

The court held that the letter was not a Part 36 offer, rather it was a valid time-limited offer which was not open for acceptance on 5 November 2010. Warren J noted that if the words used in an offer letter are not entirely consistent with Part 36 then that Part does not apply, regardless of the intention of the offeror. On the issue of whether a time-limited offer is capable of being a Part 36 offer, Warren J concluded that it is not. A Part 36 offer must be capable of acceptance unless and until it is amended or withdrawn.

This case highlights the need both to keep Part 36 offers under review, and to ensure that any settlement offer is very carefully drafted.

6.2 HIGH COURT CONSIDERS PROCEDURE FOR SERVICE OF A CLAIM FORM ON MEMBERS OF A PARTNERSHIP

In *Brooks v AH Brooks & Co (a firm)* [2010] EWHC 2720 (Ch), the High Court held that proceedings were deemed to have been served effectively on two former members of a partnership, despite a failure on the part of the Claimant to comply with the service provisions of CPR 6.9. An acknowledgment of service, served on behalf of the partnership, waived any defects.

The Claimant had attempted to serve the claim form on two former partners. Under CPR 6.9, an action against a partnership is essentially an action against the individual partners. A claimant

must therefore consider the position of each partner when determining the address/es for service. The court noted that when a claimant knows or has reason to believe that a person is no longer a partner, they are likely also to know or believe that the usual or last known place of business of the firm "is an address at which the defendant no longer … carries on business". In such a situation, a claimant should make enquiries as to an alternative address for service however the Claimant in this case failed to do so.

However, the fact that the acknowledgment of service was filed on behalf of the defendant firm corrected the defect caused by the Claimant's failure to make enquiries. The court held that the effect of Practice Direction 10.4.4(2) was to construe such an acknowledgment of service as being on behalf of all those who were partners at the date on which the cause of action accrued. Both the claim form and particulars of claim were therefore deemed served on the two former partners.

The case provides a useful review of the CPR provisions dealing with issuing and serving proceedings on a partnership, and the judgment sets out the various points that must be considered when serving and acknowledging such proceedings.

6.3 HIGH COURT CONSIDERS WHETHER AMENDMENTS CAN BE MADE TO A STATEMENT OF CASE AFTER THE RELEVANT LIMITATION PERIOD HAS EXPIRED

In *Fattal and others v Walbrook Trustees (Jersey) Ltd and others* [2010] EWHC 2767 (Ch), the Claimants had commenced the action in October 2006, and had served amended Particulars of Claim in February 2010. Draft re-amended Particulars were served in September 2010 which increased the length of the document by around 100 pages. The Defendants objected to many of the proposed amendments on the ground that they raised claims that were now statute-barred. In parallel with the Claimants' application to re-amend the Particulars of Claim, the Defendants applied for summary judgment.

The court dismissed the Claimants' application for permission to re-amend in relation to the vast majority of amendments. In doing so, the court noted that two questions arise when a limitation objection is raised in such an application: (1) whether the court has jurisdiction to permit the amendment, and (2) if it does, whether as a matter of discretion the court should permit the amendments to be made. The judge considered previous authorities on CPR 17.4. The first relevant test was that the introduction of a claim based on dishonesty (as had been introduced in this case), where none existed before, was a new claim where it did not arise out of the same facts as the previous claim or claims. The test under CPR 17.4(2) had later been expanded to include "the same facts already in issue". However, the rule was still restricted to cases where the factual issues under the old pleading were to be litigated between the parties.

Unless the amendment falls within the scope of CPR 17.4, the court has no power to permit it. However, even if an amendment does fall within CPR 17.4, the court still has a discretion whether or not to permit it. The discretion to allow an amendment after the limitation period has expired should not be lightly or routinely exercised, especially if the exercise of such discretion would deprive a defendant of a limitation defence.

The judge stated that in considering whether to permit an amendment, he also had to consider whether the amendment was supported by any evidence, and whether the claim had a real prospect of success. He noted that the later the amendment, the more evidence may be required to support it.

The judgment in this case contains a very useful review of the major cases in which the court has considered the question of amendments to a statement of case where a limitation objection has been raised. It also contains a list of the factors which influenced the court's discretion to refuse the vast majority of the amendments proposed.

6.4 COMMERCIAL COURT SUMMARISES KEY PRINCIPLES GOVERNING APPLICATIONS FOR SUMMARY JUDGMENT BASED ON DISPUTED ISSUES OF FACT

While no new law was established in *Credit Suisse International v Ramot Plana OOD* [2010] EWHC 2759 (Comm), the judgment provides a useful summary of the principles to be taken into account when summary judgment is sought on disputed issues of fact. The following key principles were identified:

1. The prospect of success must be more than fanciful or merely arguable (following *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472).

2. The hearing of an application for summary judgment should not be a "mini-trial". However, this does not mean that the defendant's evidence should be accepted without question. Disposing at an early stage of issues based on factual assertions which are clearly of no substance may save costs and avoid later delay.

3. The simpler the case, the easier it is likely to be for the court to find that it is without substance and so determine it on a summary basis (following *Three Rivers DC v Bank of England (No 3)* [2001] All ER 513).

4. The court should be wary of trying issues of fact on evidence where the facts appear to be credible, and are to be set against facts advanced by the other side. It is for the trial judge, rather than the judge on an interim application, to choose between such facts unless what it advanced is inherently improbable or contradicted by extraneous evidence.

5. The overriding objective should always be borne in mind when exercising the jurisdiction to grant summary judgment. Factors in favour of exercising this jurisdiction include saving costs, expediting proceedings and avoiding wasting the court's time and resources.

6.5 HIGH COURT CONSIDERS THE CIRCUMSTANCES IN WHICH IT CAN EXTEND TIME FOR PAYMENT BY A DEFENDANT WHERE IT HAS ADMITTED THE CLAIM

In *Gulf International Bank v Al Ittefaq Steel Products Co and others* [2010] EWHC 2601 (QB), the High Court set out the factors that must be taken into account by the court when exercising its discretion to extend time for payment of sums due following an admission.

In this case, the Defendants had admitted certain claims and applied for an extension of time in which to pay the sums owed. They were trying to restructure arrangements with their creditors, following previously failed attempts to reschedule the debt, and claimed that if the extension sought was granted then there was a real prospect that a rescheduling arrangement would be finalised.

The Defendants' application was made under CPR 14.9 and 14.10. Under the former provision a defendant who makes an admission may request time to pay, and the rule sets out the relevant procedure and consequences. The latter provision sets out the procedure to follow if the defendant's request is not accepted by the claimant. The court also has a power to postpone payment of sums in respect of which a creditor is entitled to judgment under CPR 40.11, and a power to give time to pay as part of the execution process by which judgments are enforced.

In his judgment, Field J stated that there were no cases dealing with how the discretion conferred on the court by CPR 14.10 is to be exercised. He therefore took into account decisions by the court dealing with applications under CPR 40.11. It was held that the court had to have regard to the interests of the relevant parties, and that liability to pay will not usually justify a pre-execution extension of time. An insolvent debtor (as the Defendant was in this case) must bear the usual consequences of its insolvency.

The judge noted that while the interests of other creditors will be relevant, these are matters for specialist insolvency proceedings and will therefore only rarely be a justification for an extension of time under CPR 14.10 or 40.11. Even then, an extension will usually only be granted for a relatively short period of time and only where the judgment debtor is solvent. Further, the court will give careful consideration to awarding interest to compensate the judgment creditor for having been temporarily deprived of its money.

In this instance, the Defendants' application was refused.

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7.1 COMMERCIAL COURT CONSIDERS WHETHER A DEMURRAGE CLAIM WAS BARRED BY THE SETTLEMENT OF A PREVIOUS CLAIM, AND FURTHER WHETHER THE SECOND CLAIM WAS IN ANY EVENT TIME BARRED

In *National Shipping Company of Saudi Arabia v BP Oil Supply Company* [2010] EWHC 3043 (Comm), the Claimant claimed demurrage under a voyage charterparty on an amended BPVOY4 form.

The Claimant had originally only claimed for demurrage in respect of the time spent by the vessel at the discharge port, which claim was settled by the Defendant. At the same time, the Claimant had claimed additional freight in respect of the period during which the vessel was at the load port, which claim was abandoned and replaced by the demurrage claim before the court in this case. This, however, was done after the expiration of the 90 day time bar provided for in the charterparty. The Claimant argued that it was entitled to summary judgment on this claim. The Defendant met this with its own claim for summary judgment, on the point that the claim was barred by the settlement of the discharge port demurrage claim. This settlement, the Defendant argued, had been in respect of any and all demurrage claims under the charterparty. The Defendant also argued that the claim was in any event time barred.

The first issue for the court to decide was whether the agreement reached between the parties settled just the discharge port demurrage claim, or any and all claims for demurrage. The background considered by the court included: the presentation by the Claimant of two separate claims, one for demurrage and one for additional freight, in respect of different periods under the charterparty; the fact that demurrage is a well known entitlement under voyage charters; and the fact that the relevant demurrage invoices included the words "combine all ports". The court held that the settlement incorporated all and any claims for demurrage. There was only one other period for which demurrage could potentially be claimed, and the Claimant had deliberately made a different claim for additional freight for this period.

Despite reaching this conclusion, the judge also dealt with the time bar issue in his judgment, as the point had been fully argued. He found that on the facts the original claim could not be regarded as substantially the same claim as the demurrage claim now advanced. Further, the Claimant did not comply with the requirement to present all supporting documentation substantiating each and every constituent part of the claim, and could not later rely on documents presented with an entirely separate claim. The court therefore found that even if the settlement had not incorporated any and all claims for demurrage, the Claimant's later claim would have been time barred.

The Court also dealt with issues of whether the Defendant was liable for (a) the cost of certain bunkers and (b) in damages for breach of an implied term that it would provide a cargo in sufficient time for it to be loaded within the laydays.

7.2 TRIBUNAL CONSIDERS ISSUES OF CAUSATION IN THE CONTEXT OF OWNERS' LIABILITY FOR DELAY ARISING OUT OF DAMAGE TO CARGO

In London Arbitration 22/10 ((2010) 809 LMLN 1), Charterers claimed against Owners for damages arising out of damage caused to the cargo by defects in the hatch covers allowing the cargo to be wetted by sea water. As a result of this damage, the cargo was not passed by the authorities at the discharge port and the vessel was delayed in berthing and discharging for around 23 days. While Owners did not dispute that they were in breach of the charterparty by reason of the vessel's unseaworthiness (in allowing seawater to cause damage to the cargo), they argued that their breach did not cause the delay. Rather, the delay was caused by the unreasonable actions of the authorities at the discharge port which broke the chain of causation between Owners' breach and the damage caused.

In its decision, the tribunal noted that the starting point for causation was as stated in *Chitty on Contracts*, 30th ed., Vol 1, para 26-032. There must be a causal connection between the breach of contract and the loss, and a claimant may only recover damages where the breach was the "effective" or "dominant" cause of that loss. There are no formal tests for causation, and the answer in each case must depend on "the court's common sense in interpreting the facts". The question to ask was: is there the necessary causal connection between breach and loss in the sense of the breach being "still … in effective operation at the time of the casualty", i.e. the "dominant cause" in "the whole complex of circumstances" (per Lord Wright in *Monarch Steamship Co Ltd v Karlshamns Oljefabroker (A/B)* [1949] AC 196).

In this case, events had taken an unexpected turn once the first sampling of the cargo was taken at the discharge port. On the facts, Owners' breach was not an effective cause of Charterers' loss, and the latter could not prove the necessary causal connection between the two. Owners' breach was not the "effective or dominant or equal cause" of the loss, which the tribunal considered to be the correct test on the authorities. The chain of causation was broken by the events which followed the vessel's arrival at the discharge port.

The tribunal also considered that the loss claimed by Charterers was too remote. The purpose of the charterparty had been to load, transport and discharge the cargo. It could not have been within the contemplation of the reasonable businessman that damage to a very small proportion of the cargo by a small amount of sea water could have resulted in the authorities' extreme reaction and an order prohibiting the discharge of the entire cargo. The delay which occurred could not have been within Charterers' contemplation as "arising in the usual course of things".

It should be noted that the tribunal's decision was based heavily on the specific facts of the case. A detailed case report can be found on i-law.

7.3 BIMCO LAUNCHES NEW STANDARD CLAUSES ADDRESSING THE IMPENDING EU RULES ON ADVANCE CARGO DECLARATION

BIMCO has introduced two new standard clauses, one for voyage charters and one for time charters, addressing the EU Rules on advance cargo declaration which are due to come into force on 1 January 2011. Under the voyage charter clause, it is the shipowner who assumes the role of ship operator and is therefore responsible for compliance with the Rules. Under the time charter clause, this responsibility rests with the charterer.

The clauses were published at the end of November, together with guidance by the European Community Shipowners' Association, and are available to download for free from the BIMCO website.

7.4 DOES SECTION 2(4) COGSA 1992 CREATE A SEPARATE CAUSE OF ACTION FOR PERSONS WITH AN INTEREST IN THE GOODS WHO ARE NOT HOLDERS OF THE BILL OF LADING?

The Respondent in *Pace Shipping Co Ltd of Malta v Churchgate Nigeria Ltd of Nigeria* [2010] EWHC 2828 (Comm) had brought a cargo claim in arbitration against the Appellant under s.2(1) Carriage of Goods by Sea Act 1992 ("CoGSA"). The Appellant had requested a declaration of non-liability from the tribunal, on the basis that the Respondent had no title to sue, as it had no title to the cargo.

After a lengthy arbitration history (summarised in the judgment of Burton J, available on LexisNexis), the case came before the High Court by way of an appeal under s.69 Arbitration Act 1996. The central dispute before the court was whether CoGSA gives rise to different causes of action according to whether or not the holder of the bill of lading has suffered loss, and whether in this case it was necessary for the Respondent to plead a separate cause of action in relation to s.2(4) CoGSA (i.e. one which arises specifically for parties with an interest in the goods who were not holders of the bill of lading).

The fundamental question for the court to consider was whether s.2(4) creates a separate cause of action "in the sense that the claimant, under the bill of lading, who has suffered no loss in the circumstances when s.2(4) is triggered because of not having been, or no longer being, the owner of the goods, is entitled, pursuant to s.2(4), to exercise those rights [being the rights under s.2(1)] for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised".

Burton J dismissed the appeal, holding that on a proper construction of s.2(4), the Defendant was pursuing its own cause of action. In the event that it lost on the issue of original ownership of the goods (which it did in this case), it was entitled, albeit having suffered no loss, to recover, pursuant to its own cause of action, the loss suffered by the owner of the cargo and, in due course, to account for it. The judge also noted that a case brought under s.2(4) of CoGSA had to be properly particularised in order for the opposing party to be able to raise the relevant defences.

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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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