ReedSmith

SHIPPING GROUP MONTHLY BULLETIN

MAY 2011

ARBITRATION

❖ **Commercial Court confirms that the court's power under s.66 Arbitration Act 1996 to enforce an arbitration award extends to declaratory awards**

***West Tankers Inc v (1) Allianz SpA (2) Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm)**

The Claimant Owners' vessel had collided with a pier while on charter, with the Defendant being the charterers' subrogated insurers. An arbitration tribunal issued a declaratory award stating that the Claimant was under no liability to the Defendant in respect of the collision. After the commencement of the arbitration, the Defendant brought proceedings against the Claimant in Italy in respect of the same incident. The Claimant feared that if the Defendant obtained a favourable Italian judgment, it would seek to have it recognised and enforced in England. The Defendant might then seek to enforce a Club LOU, which was subject to English law and which had been made applicable to the Claimant's liabilities to the Defendant (if any) by way of a side letter.

The Claimant therefore applied to have the tribunal's declaratory award enforced as a judgment, so that any subsequent Italian judgment could not be recognised in England. The Defendant argued that leave could only be given under s.66 Arbitration Act 1996 if a judgment in terms of the award would be capable of being enforced by an available means of execution. A declaratory judgment, it said, could not be so enforced, as it was simply a declaration of the parties' rights. Simon J granted the Claimant leave to enforce the declaratory award, and the Defendant applied to have this order set aside on the grounds that the judge did not have jurisdiction under s.66 of the Act to grant leave.

The Court held that Simon J did have such jurisdiction. The purpose of ss.66(1) and (2) is to provide a means by which a successful party in an arbitration can obtain the material benefit of an award other than by suing on it. Where that party's objective in obtaining an order under s.66 is to establish the primacy of a declaratory award over an inconsistent judgment, such an order would make a positive contribution to that party securing the material benefit of the award.

As regards the burden of proof, it was enough for the party seeking to enforce the award to show that he had a real prospect of establishing the primacy of the award over an inconsistent judgment.

❖ **Court of Appeal considers whether monies paid into court by a Claimant in support of a freezing injunction should be paid out to the Claimant or Defendant on discontinuance of that injunction**

***CMA-CGM Marseille v Petro Broker International* [2011] EWCA Civ 461**

In this case, the Appellant had obtained two arbitration awards against the Respondent, one for the principal sum and the other for contractual interest on a claim relating to non-payment for bunker fuel. The Respondent had also brought a counterclaim for damages for the supply of off-specification bunkers, and was concerned that the Appellant would be unable to pay any award made on this counterclaim. The Respondent had argued before the Tribunal that it would be wrong to make an award on the Appellant's claim without regard to the prospect that the Respondent might be unable to enforce any award on its counterclaim. The Tribunal rejected this submission.

The Appellant brought enforcement proceedings, and in response to these the Respondent provided guarantees as security for the arbitration awards. While the Respondent unsuccessfully challenged the first award, it was able to obtain a without notice freezing injunction preventing the Appellant from enforcing the awards against the guarantees. The injunction was granted on the basis that there was a risk of dissipation of the Appellant's assets, and was not to come into force until the Respondent paid the amounts due under the awards into court. The Respondent duly did so, but on the return date it requested the return of these monies rather than the continuation of the injunction. At first instance, the judge ordered the monies to be returned to the Respondent. They had been paid into court as a "quid pro quo" for preventing the Appellant from drawing down on the guarantees. Now that this impediment no longer existed, it was appropriate to take the parties back to square one and return the money to the Respondent.

The Court of Appeal found in favour of the Appellant. The payment into court had meant that the Appellant was fully secured, even though it could not enforce against the guarantees. As such, payment in had been a condition of the granting of the order.

The fact that the reason for requiring the payment in no longer applied did not, in itself, provide a conclusive answer to the question of whether the monies should be returned to the Respondent. Under CPR 3.1(6A) the court will take the view that monies paid in should be available as a secured fund against which one party to litigation may enforce against the other payment of such sums as might become due in that litigation. The Respondent had paid into court the amounts due pursuant to the arbitration awards, and these could no longer be challenged. There was, therefore, no reason why the Appellant should not be allowed to enforce against these sums. There was no longer a risk of dissipation, and the Respondent had no further arguments to make in resisting enforcement.

The order for payment out to the Respondent was set aside, and was replaced by an order for payment out to the Appellant.

- **Commercial Court considers the effect of the late payment of outstanding fees owed to an arbitration appeal board following notification of a final interim award.**

Nikola Rotenberg v Sucafina SA **[2011] EWHC 901 (Comm)**

The Applicant and Respondent had contracted for the supply of coffee, by way of a contract which provided for arbitration to be dealt with by the Coffee Trade Federation. It also provided a right of appeal to an appeal board. When a dispute between the parties was referred to arbitration, a deposit was paid to the Federation in consideration of its costs. The Respondent was initially successful, but on appeal the board found in the Applicant's favour by way of two interim awards. Its final interim award, concerning costs, was not made final and binding as neither party paid outstanding fees owed to the Federation within the required time limit.

On application to the Court, the Applicant argued that in the event of the board's final award not being taken up, the first two awards remained final and binding. In addition, the Applicant argued that the Court had jurisdiction under s.79 Arbitration Act 1996 to extend the time limit so as to enable payment of the outstanding fees.

The Court held that the board's first two awards were final and binding, regardless of anything that happened subsequently. They were published in such terms, and contained nothing to suggest that their validity or finality was in any way subject to or conditional on the future payment of the Federation's fees, costs or expenses.

However, the Court also held that the deadline for payment of fees was stated in clear terms, and the Applicant was not able to satisfy the strict "substantial injustice" test set down in s.79. The Applicant had been represented by solicitors and counsel throughout, and its explanations for its failure to pay were unpersuasive. As such, the case was not one where the Court should exercise its discretion to grant an extension.

BIMCO

❖ BIMCO launches radiation clause for time charterparties

BIMCO has launched a "Radioactivity Risk Clause" for time charterparties, in response to the recent events in Japan and the various "home-made" clauses which had begun to circulate.

BIMCO's intention with this clause is to achieve a balanced contractual solution that addresses the potential risk of exposure to high levels of radioactivity based on thresholds established by competent authorities. The objective of the clause is to provide a measured response to the situation and to clarify where the parties to a time charter stand contractually in respect of trading to areas which may potentially place the vessel, crew and cargo at risk of exposure to high levels of radiation.

The clause is available on BIMCO's website, together which a Special Circular which sets out various FAQs in relation to the clause.

COMPANY LAW

❖ Supreme Court considers the meaning of "subsidiary" where a contract incorporates the definition in the Companies Act 1985

***Enviroco Ltd v Farstad Supply A/S (The "Far Service")* [2011] UKSC 16**

The Defendant Owner chartered the "FAR SERVICE" to Asco UK Ltd as Charterer. During the course of the charterparty, the Claimant contractor was instructed to clean the vessel's oil tanks. While the tanks were being cleaned, a fire broke out which caused substantial damage to the vessel. The Defendant brought proceedings for damages against the Claimant in Scotland.

The charterparty provided that both the Owner and Charterer would indemnify and hold each other harmless in respect of any loss or damage. In the case of the Charterer, this extended to its "Affiliates". The term "Affiliate" was defined as essentially being either (a) a subsidiary of the Charterer, (b) a company of which the Charterer was a subsidiary, or (c) "a company which is another subsidiary of a company of which the Charterer is a subsidiary". "Subsidiary", in turn, was defined as having the meaning given to that term in s.736 Companies Act 1985.

The Claimant argued that it was an affiliate of the Charterer, and so was entitled to rely on the indemnity. The Claimant commenced proceedings in England (as the charterparty contained an exclusive English jurisdiction clause) for a declaration that both it and the Charterer were subsidiaries of a third company (the "Parent Company").

It was agreed that, but for one point, the Claimant and Charterer would have been affiliates. The issue was that the Parent Company, registered in Scotland, had executed a Scottish law deed of pledge in favour of the Bank of Scotland in respect of the Parent Company's shares in the Claimant. The pledge required the Bank to become the registered holder of these shares, although it was made clear that this was for the purposes of security only. The Defendant argued that, as the Parent Company's registration of its membership of the Claimant had been transferred to the bank, the Parent Company was no longer a "member" of the Claimant within the meaning of s.736.

At first instance, the judge held that a company remained a holding company of a subsidiary within the meaning of s.736 even after it had given all its shares as security and the lender had been registered as the holder of those shares. As such, the Claimant was a subsidiary and therefore an "affiliate".

The Court of Appeal allowed the Defendant's appeal, stating that s.736 required a holding company to be registered as a member of the subsidiary. The commercial context of this case did not allow a different interpretation of s.736.

The Supreme Court dismissed the Claimant's appeal. Historically, the "member" of a company is the person on the register, and there was no basis in this case for construing s.736 any differently. The fact that the definition was incorporated into a contract made no difference to its interpretation. As such, the Claimant was not an "affiliate" of the Charterer within the terms of the charterparty.

COSTS

❖ Court makes wasted costs and non-party costs orders against a solicitor

Media CAT Ltd v Malcolm Adam and others **[2011] EWPCC 10**

The claimant, represented by a law firm acting by its principal, had sought to serve notices of discontinuance in relation to copyright proceedings. These notices were struck out as an abuse of process on the grounds that the intention behind them was to avoid judicial scrutiny of the underlying claims. The actions themselves were later struck out, and the Claimant ordered to pay the Defendants' costs on the indemnity basis. Some of the Defendants then applied for wasted costs and non party costs orders against the law firm.

The orders were applied for on the basis that two revenue-sharing agreements entered into between the Claimant and the law firm were champertous. The agreements provided for a contingency fee to be paid to the law firm of 65% of net revenues from litigating copyright issues.

As regards wasted costs, the court must consider both a merits test (is there evidence before it which is likely to lead to an order being made?) and a proportionality test (are the wasted costs proceedings justified?). In this case, the revenue sharing agreements were at the heart of the case. All of the Defendants' costs of the proceedings had been caused by those agreements and were therefore wasted. As such, both the merits and proportionality tests were satisfied. The judge noted that while it was not necessary to find that the law firm had knowingly assisted in the notices of discontinuance (which were found to be an abuse of process), it had nevertheless "lent its assistance" to proceedings which were a breach of process, and had "used litigious procedures for purposes for which they were not intended".

As regards non-party costs, the court has full discretion to determine by whom and to what extent costs are to be paid, and as such can order a non-party to pay costs where appropriate. For a non-party costs order to be made, the non-party must be added as a party to the proceedings for the purposes of costs only. In this case, the judge held that there was a good arguable case to do this, and to make the requested order. The law firm had not acted under a conventional collective conditional fee agreement, and the legal services provided were for the law firm's own benefit at least as much as that of the Claimant. It was not necessary for the law firm to be the sole beneficiary of the proceedings, and the law firm's allegation that no profit had been made from the revenue sharing agreements was irrelevant. The important point was that it was entitled to 65% of any damages.

The judge found in favour of the Defendants, and made both the orders requested, holding that the revenue sharing agreements were in breach of Rule 2.04 of the Solicitors' Code of Conduct 2007, which deals with contingency fees. In particular, it states that a solicitor must not enter into a contingency fee arrangement for work done in relation to contentious proceedings except as permitted by statute or common law.

❖ Court of Appeal sets down guidance on costs following discontinuance by a Claimant

***Brookes v HSBC Bank plc; Jemitus v Bank of Scotland plc* [2011] EWCA Civ 354**

In these related claims, the Court of Appeal considered whether a claimant should be liable for the defendant's costs when discontinuing a claim. The Court concluded that a claimant should be so liable, unless it can provide "cogent reasons" for departing from this default position.

The starting point in relation to discontinuance is CPR 38.6(1), which states that unless the court orders otherwise, "a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant". There is, therefore, a presumption that the defendant should recover his costs, and the claimant must show good reason for departing from that position.

In order to displace the presumption, the claimant will need to show a change of circumstances to which he has not contributed. The fact that the decision to discontinue may have been motivated by practical, pragmatic or financial reasons (as opposed to lack of confidence in the merits) will generally not be sufficient. A change of circumstances is only likely to suffice if it was brought about by some form of unreasonable conduct by the defendant which, in all the circumstances, provides a good reason for departing from the rule.

EVIDENCE

- **Court of Appeal considers the admissibility of evidence where a party has failed to take the correct procedural steps to admit that evidence**

***(1) James Lavelle (a child) (2) Megan Lavella (a child) (by their mother and litigation friend Michelle Lavelle) v (1) Ceri Noble (2) Philip Lawless (3) Leslie Gibbs (4) Dennis McCarthy (5) Jean McCarthy* [2011] EWCA Civ 441**

This case arose out of the fatal injury of the Appellants' father, and the matter had also been dealt with in related criminal proceedings. On the first day of the civil trial the Appellants applied, without notice, to rely on a schedule of DNA results which had come into existence for the criminal proceedings. The schedule did not state who had prepared it, and it did not meet the requirements of CPR 35. The Appellants submitted that because it was not known who had prepared the schedule, it was documentary hearsay rather than expert evidence and so was admissible under s.1 Civil Evidence Act 1995. The application was refused.

Two of the Respondents declined to give evidence. Towards the end of the trial, the Appellants applied for permission to rely on a transcript of the evidence which these two Respondents had given at the inquest, or alternatively for an order that they be required to give oral evidence. This application was also refused.

The Court of Appeal disagreed with the Appellants' interpretation of CPR 35, as set out above. If it were correct, then an expert's report prepared for one set of proceedings would be free of the constraints in CPR 35 in any other sets of proceedings. The Appellants' legal team had committed a serious error in not taking the procedural steps necessary to enable them to rely on the DNA evidence, and the judge at first instance had been entitled to refuse the application.

As regards the application relating to the Respondents' evidence, the judge was bound to refuse this given the late stage in the proceedings at which the application was made.

This case exemplifies the importance of both being aware at an early stage of all evidence that is intended to be relied on, and of ensuring that the correct procedures are followed in order that this evidence may be admitted.

INSOLVENCY

- **Court of Appeal finds that a clause providing that an indemnity will cease on a company's insolvency is invalid**

***Folgate London Market Ltd v Chaucer Insurance plc* [2011] EWCA Civ 328**

Personal injury proceedings had been brought against a company which was insured by the Respondent, however the Respondent refused to pay out on the basis of an exception in the insurance policy. The insured company claimed against the Appellant broker for negligence in arranging the policy. These two parties entered into a settlement agreement, under which the Appellant agreed to indemnify the insured for sums payable in respect of the personal injury claim. The agreement provided that the insured's right to an indemnity would cease if it went into administration, which it subsequently did.

The Respondent was joined as a defendant to the personal injury proceedings. The insured's interest under the settlement agreement was assigned to the Respondent, who sought to enforce the agreement, arguing that the provision cited above infringed the anti-deprivation principle. The Appellant argued that the provision in question simply put a time limit on the indemnity. It also argued that under the terms of the agreement, it was entitled to take over the defence of the personal injury claim, and there was a commercial link between the insured's obligation under the agreement to provide assistance to the Appellant in defending the claim and the release of the Appellant's payment obligations. In those circumstances, the Appellant argued, the termination of the payment obligation did not infringe the anti-deprivation principle.

The judge at first instance found that the provision in question did infringe the anti-deprivation principle, and as such was invalid. The Court of Appeal agreed. The insured's inability to continue to assist the Appellant in defending the claim did not release the Appellant from its payment obligations. If such had been the intention of the agreement, then it could have been expressly provided for. The clause appeared to be an attempt to provide that the insured's right to payment and the Appellant's obligation to pay would be extinguished if payment was in fact to be to the insured's creditors. This was in effect a device to avoid the consequences of the insolvency legislation.

The clause did infringe the anti-deprivation principle. The condition which led to the non-availability of an asset to the insured's creditors was the insolvency itself. The effect of the clause was to remove an asset from the debtor's creditors, which amounted to an infringement.

Parties cannot attempt to "contract out" of the insolvency legislation, as this is contrary to public policy. This should be borne in mind when drafting both transactional and settlement documentation.

PRACTICE AND PROCEDURE

❖ Commercial Court considers whether it is appropriate to grant a default judgment where decisions are pending on related issues

***Football Dataco Ltd and others v Smoot Enterprises Ltd and another* [2011] EWHC 973 (Ch)**

In this case, the Court considered whether it was appropriate to grant a default judgment where the Claimant's substantive claims turned on a point of EU law which had been appealed to the Court of Appeal, and on which a reference to the ECJ was pending. The claim concerned breaches of copyright and database rights. In similar proceedings, brought by the same Claimant against a different Defendant, questions about the interpretation of EU law relating to the protection of databases had been referred to the ECJ. A Court of Appeal decision was awaited pending the ECJ's determination.

The Court concluded that the ECJ reference (which went to the subsistence, in law, of part of the Claimant's claim) did not prevent it from granting a default judgment. The judge gave the following main reasons for his decision:

1. A default judgment is not a judgment on the merits, and as such the judge is not required to form a view on the merits (either in fact or law).

2. Where a Claimant applies for default judgment, any judgment given shall be such as it appears the Claimant is entitled to on his claim. The court can tailor the relief so that it is appropriate to the cause of action in question. Default judgment can often be obtained through a purely 'administrative' route, which does not allow any judicial analysis of the underlying claim.

3. The existence of an adjourned appeal (pending the ECJ's determination) on a point which went to the Claimant's cause of action did not mean that the Claimant would not be entitled to default judgment on the particular point applied for. In other cases, the Claimant had established their claim and neither the ECJ nor the Court of Appeal had yet expressed any view on the merits.

4. Pending appeals do not deprive litigants of the benefit of a judgment already obtained. The first instance judge's decision still has persuasive effect, for the time being at least.

5. Where judgment is imminent in a pending appeal on a similar point, it may be appropriate to delay giving judgment, or to adjourn or stay the proceedings. However, this is not always the case and there is no reason to do so where a defendant has failed to acknowledge service or serve a defence.

6. An appeal is likely to be substantially delayed where a reference is made to the ECJ. Such a reference also suggests uncertainty in the meaning or effect of the underlying EU law. These factors might justify refusing, for example, summary judgment. However, when default judgment is applied for and the cause of action relied on is not obviously bad, the court gives judgment because the defendant has failed to take the basic steps to challenge it rather than because the court needs to resolve any underlying factual or legal uncertainty.

PRIVILEGE

- **Supreme Court grants leave to appeal decision that legal professional privilege does not apply to any professional other than a qualified lawyer**

Court of Appeal decision: *R (Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] EWCA Civ 1094

In this case, the Court of Appeal found that common law legal professional privilege does not apply to any professionals other than qualified lawyers. In reaching this decision, the Court of Appeal emphasised that the application of legal professional privilege must be clear and certain. Extending it to other professions would raise serious issues about its scope. Ultimately, the Court held that it was for Parliament to extend its scope through primary legislation.

The Law Society has stated that it intends to make a formal application to intervene in the proceedings, should the appeal proceed. In the Law Society Gazette, it stated that such an intervention would be "to ensure that the scope of LPP remains clear and certain, so that it remains an important safeguard for clients who seek and obtain legal advice."

It is currently unknown whether Prudential has decided to launch an appeal.

SANCTIONS

❖ Iran (Asset-Freezing) Regulations 2011 (SI 2011/1129)

These Regulations came into force on 15 April 2011. They put in place criminal penalties for the breach of EU financial sanctions in relation to Iran. The relevant financial sanctions are contained in Regulation 359/2011.

❖ Libya (Restrictive Measures) (Overseas Territories) Order 2011 (SI 2011/1080)

This Order came into force on 9 April 2011. It gives effect in overseas territories to restrictive measures imposed by UN Security Council Resolutions 1970 (2011) and 1973 (2011).

It also gives effect to EU autonomous measures imposed in the EU by Decisions 2011/137, 2011/156, 2011/176 and 2011/178.

❖ Ivory Coast (Asset-Freezing) Regulations 2011 (SI 2011/1086)

These Regulations came into force on 7 April 2011, and put in place criminal penalties for breach of EU financial restrictions contained in Regulation 560/2005.

SERVICE OUT OF THE JURISDICTION

❖ Commercial Court sets aside an order for service out of the jurisdiction where the original pleadings disclosed no reasonable prospect of success, and where amendments made after service put the case on a new legal basis

***Al-Sadi v Al-Sadi* [2011] EWHC 976 (Comm)**

This case concerned a long-running family dispute. An agreement had been entered into to vary the distribution of a deceased family member's estate, and a dispute arose as to how certain assets were properly to be characterised within the meaning of that agreement. The Claimants obtained permission to serve proceedings on the Fourth Defendants out of the jurisdiction. The Fourth Defendant applied to have the order for service set aside.

The Claimants' case, as originally pleaded, turned on the construction of the agreement and an argument that the Fourth Defendant held the assets on trust. Shortly before the hearing of the application to set aside, the Claimants amended their pleadings. In doing so, they formulated their case against the Fourth Defendant in several different ways which had not been pleaded originally. In deciding whether the order for service out had been properly made, the Court had to decide whether it should consider only the claims relied on at the time of the Claimants' application for service out, or whether the subsequent amendments could be taken into account.

The Fourth Defendant's application to set aside was granted. If a claimant wishes to serve out of the jurisdiction, he must show (a) that he has a reasonable prospect of success and (b) that England is the most convenient place for the claim to be brought (CPR PD 6B 3.1). The order granting permission to be served out could not be justified by reference to the original pleadings, as they did not disclose a claim with a reasonable prospect of success.

It is well established that a claimant who has been given permission to serve out of the jurisdiction cannot resist an application to set aside by pleading a new cause of action (initially set down in *Parker v Schuller* (1901) 17 TLR 299). In the current case, the amendments put the Claimants' case on three completely new legal bases, which in turn led to new facts being pleaded. The entire focus of the case had shifted. As such, it was correct to rely on the principle set down in *Parker v Schuller* and set aside the order for service out.

❖ Commercial Court sets out the test to be applied when considering the jurisdictional gateways for service of proceedings concerning contractual claims out of the jurisdiction

***Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm)**

The Respondent had sold an aircraft to the company of which the Applicant was managing director, and the sale agreement provided for disputes to be settled by arbitration in England, governed by English law. The Respondent alleged that the company had failed to pay sums due, and so terminated the agreement and commenced arbitration proceedings.

It also commenced proceedings against the Applicant, on the basis that he had entered into a collateral contract guaranteeing that he would either ensure that the company complied with its contractual obligations or, if it failed to do so, that he would perform them himself. These proceedings were served on the Applicant out of the jurisdiction in India, and the Applicant applied to set aside service.

The Respondent argued that its claim under the contract of guarantee was "in respect of" the sale and purchase agreement, which was governed by English law, and so satisfied the jurisdictional gateway under CPR PD 6B 3.1(6)(c). It further argued that England was the appropriate forum for resolution of the dispute. The Applicant argued that the Respondent had to satisfy the court that it had a "good arguable case" that the contract of guarantee existed, and that it was not able to do this.

On granting the application to set aside service, the Court stated that three questions arose in relation to the jurisdictional gateways in cases concerning contractual claims. Each of these had to be answered by reference to the "good arguable case" test. The questions are:

1. Does the contract on which the claim is brought actually exist? This question must be approached on the basis that every case turns on its individual facts. In this case, for example, there was no presumption that assurances given by a company director were given in his capacity as a director rather than personally.

2. If so, does a claim under the contract satisfy one of the jurisdictional gateways?

3. If not, is the claim one "in respect of" a contract falling within a jurisdictional gateway?

As regards the merits test, where one of the aspects of a cause of action is also part of what must be established to satisfy the jurisdictional gateways, the "reasonable prospect of success" standard is subsumed by the higher requirement of a "good arguable case".

On the facts of this case, the Court found that the contract of guarantee did not exist. However, had it existed, England would have been the appropriate forum to resolve any disputes. The sale and purchase agreement was governed by English law, and the fact that the guarantee was related to it was a strong indication that it was also so governed. Further, liability under the guarantee would partly depend on the construction of the sale and purchase agreement, and those questions would have to be determined under English law.

SHIPPING

❖ Commercial Court considers which party should bear the burden of proof under the Hague Rules in establishing the cause of cargo damage

***Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm)**

The Appellant cargo owners had brought a claim in arbitration against the Respondent vessel owners for short delivery, caking and wetting of a cargo of rice. The relevant bills of lading were subject to the Hague Rules. The Appellant's short delivery claim was rejected by the tribunal and the damage claim was upheld only in part. The basis for the latter finding was that the Appellant had not discharged the burden of proving that all of the damage suffered to the cargo was a result of the Respondent's breaches of the contract of carriage.

The Respondent had argued that the Appellant had no title to sue, as it was not an original party to the bills of lading and had not asserted any rights under COGSA 1992 until after the tribunal had ordered that no new issues, arguments or evidence would be allowed.

The appeal concerned the issue of which party bore the burden of proof of establishing the cause of damage. The Appellant submitted that, in imposing the burden on it, the tribunal had erred. That error, the Appellant argued, had coloured the Tribunal's approach to the allocation to the Appellant of responsibility for the majority of the damage. The Respondent argued that the tribunal had not acted fairly when determining that the Appellant had established its title to sue.

The Court held that the tribunal had been incorrect in imposing the burden of proof on the Appellant, and this error had affected its conclusions on the amount of compensation that the Appellant should receive. The burden of proof under Article IV r.2(m) of the Hague Rules (which provides that owners are not liable where the cause of loss is 'inherent defect, quality or vice') is on Owners.

The Court found that the tribunal had, in fact, acted fairly in relation to the title to sue issue. The Respondent's point about the lateness of the Appellant's reliance on COGSA 1992 was a technical pleading point only. The Appellant was clearly presenting a case based on this Act, and the tribunal had correctly concluded that it was sufficient that the Appellant was endorsee of the bills of lading. The Appellant did not have to explicitly state its reliance on the Act: it is the court's or tribunal's duty to know the law, and the Respondent's argument essentially asked both to feign unawareness of COGSA 1992. Such an argument had to be rejected.

❖ Commercial Court considers delays under a shipbuilding contract, and whether as a result of such delays the buyer was entitled to rescind the contract and recover instalments paid

***Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm)**

The Defendant had engaged the Claimant shipyard to build a number of ships. The contracts required the vessels to satisfy the requirements of both the UK Maritime Coastguard Agency

("MCA") and the relevant safety code for special purchase ships. Also included in the contracts was a right for the Defendant to rescind if two of the vessels were not ready for sea trials by dates specified in the contracts. The vessels were not ready in time, and the Defendant purported to exercise its right of rescission.

The contracts also provided that unless the Claimant commenced proceedings, it was required to refund to the Defendant all instalments previously paid. The Claimant did commence proceedings, and the court had to decide whether the Defendant had been entitled to rescind the contracts. The Claimant argued that the imposition of new design items (either by MCA safety requirements or by the Defendant) had prevented it from completing the vessels in time for sea trials, and as such it was entitled to an extension of time. The Defendant argued that these design items did not amount to variations of the contracts, and stated that there had never been any change in approach to the MCA's safety requirements. Even if they had amounted to variations, they had not been the cause of the delay. The Claimant was already behind in constructing the vessels, and had failed to comply with notice requirements for seeking extensions of time under the contracts.

The Court found in favour of the Defendant. As regards the MCA requirements, these had not changed: they had always been that the special purpose ship safety code should be complied with. Further the "prevention principle" (i.e. that a buyer could not insist on performance of an obligation which he had prevented from being performed) did not apply if the contract provided for an extension of time in respect of the events in question.

In any event, the Claimant had failed to show that the Defendant's conduct had rendered it impossible or impracticable for the Claimant to have carried out the work within the required time. The design items had not caused any actual delay, as the project was already irretrievably delayed well before this point. The Defendant was entitled to rescind the contract, as the Claimant's failure to complete the vessels by the date specified for sea trials was caused neither by permissible delay nor by buyer's default.

As a result, the Defendant's counterclaim for the refund of the instalments paid, plus interest, was successful.

- **Commercial Court considers which sums a party must take into account when calculating its loss on the early termination of forward freight agreements**

***Pioneer Freight Futures Co Ltd (In Liquidation) v TMT Asia Ltd* [2011] EWHC 778 (Comm)**

The Claimant in this matter had entered into a number of forward freight agreements ("FFAs") with the Defendant. The earlier agreements incorporated the standard 2005 terms of the Forward Freight Agreement Brokers Association ("FFABA"), while the later four agreements referred to the 2007 terms. All of the agreements incorporated the ISDA 1992 Master Agreement (Multicurrency-Cross Border). Under this Agreement, it was a condition precedent to a payment obligation that the other party was not subject to an event of default. These events were defined so as to include failure to pay outstanding sums and bankruptcy events. The 2005 FFABA terms did not incorporate the ISDA provisions for automatic early termination on the occurrence of an event of default, while the 2007 terms applied automatic early termination to both parties.

Sums became due under the FFAs which the Claimant was unable to pay. Such failure was an event of default, but was not a bankruptcy event giving rise to automatic early termination. Although the market subsequently turned in the Claimant's favour, the Defendant was not obliged to make any payments as the Claimant was subject to a subsisting event of default and so could not satisfy the ISDA condition precedent to payment.

Provisional liquidators were then appointed over the Claimant, and so a relevant bankruptcy event of default occurred. The Claimant argued that this event triggered automatic early termination in relation to all of the FFAs. The issues for the court to decide were whether the earlier agreements became subject to the 2007 terms and so to automatic early termination, whether the later agreements were subject to automatic early termination and how the Defendant's loss on such termination should be calculated.

The Court determined these issues in favour of the Claimant. The 2005 and 2007 FFABA terms provided for one applicable ISDA Master Agreement with uniform elections. As such, the earlier agreements were treated as confirmations under an ISDA Master Agreement with the modifications and elections set out in the 2007 terms. It therefore followed that automatic early termination applied to all of the agreements.

In calculating its loss, the Defendant was required to take into account the payments which it would have been required to make to the Claimant before the termination, when the Claimant was unable to satisfy the ISDA condition precedent to payment. The Court noted that when a party's prospective 'loss' was calculated, it was to be assumed that the parties would continue to fulfil the conditions precedent to payment after the automatic early termination date. The Defendant was, therefore, obliged to calculate its loss by reference to sums which would have become due to the Claimant had the Claimant not remained subject to an event of default after the automatic early termination.

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.

Reed Smith LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2RS
Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City / DX18 London
www.reedsmith.com

Email: sunderhill@reedsmith.com
aeallan@reedsmith.com

Reed Smith LLP is a limited liability partnership registered in England and Wales with registered number OC303620 and its registered office at The Broadgate Tower, 20 Primrose Street, London EC2A 2RS. Reed Smith LLP is regulated by the Solicitors Regulation Authority. Any reference to the term 'partner' in connection to Reed Smith LLP is a reference to a member of it or an employee of equivalent status.

This Bulletin was compiled up to and including April 2011.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Richards Butler in association with Reed Smith LLP of Delaware, USA. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website www.reedsmith.com.