RS SHIPPING BULLETIN

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REED SMITH

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1 ARBITRATION

1.1 THE FAILURE OF THE MAJORITY OF A TRIBUNAL TO SPECIFICALLY ADDRESS THE CONCERNS OF THE DISSENTING MEMBER WAS NOT A SERIOUS IRREGULARITY UNDER S.68 ARBITRATION ACT 1996

In *Ispat Industries Ltd v Western Bulk Pte Ltd* [2011] EWHC 93 (Comm), the Applicant Charterer applied to challenge an arbitration award made in favour of the Respondent Owners under s.68 Arbitration Act 1996 (the "Act"), and also appealed the award under s.69 of the Act.

The Applicant had chartered the Respondent's vessel. Shortly before the start of one trip, the Applicant cancelled the charterparty because the intended cargo was unavailable at the loadport due to political unrest. The Respondent accepted the Applicant's repudiatory breach and claimed damages for the hire it would have earned. The majority of the tribunal found in the Respondents' favour, while the dissenting arbitrator considered that the evidence of a witness called by the Respondent was unreliable.

On appeal, one of the Applicant's arguments was that there had been serious irregularities within s.68 of the Act, one of the reasons being that the tribunal had failed to address the dissenting arbitrator's concerns.

The court found that the majority's failure to address these concerns did not amount to an irregularity. The tribunal had a duty to decide the essential issue in the case, and it had done so. While the majority had not referred to the dissenting arbitrator's concerns regarding the witness evidence and had not explained why they found that evidence reliable, there had been no obligation on them to do so. Even if the failure had been an irregularity, it would not have been a serious one within the meaning of s.68(2) as there was no reason to suppose that the majority would have reached a different conclusion had they specifically addressed the dissenting arbitrator's concerns.

For further details on other issues considered by the Court in this case, see item 9.1, below.

2 CONTRACT

2.1 COURT OF APPEAL CONSIDERS WHETHER A PARTY'S INTENTION TO PERFORM IS RELEVANT TO THE ASSESSMENT OF LOSS

In *Acre 1127 Ltd (In Liquidation) v De Montfort Fine Art Ltd* [2011] EWCA Civ 87, the Court of Appeal considered a damages claim where the Claimant alleged that it had terminated a supply agreement as a result of the Defendant's repudiatory breach. The Defendant argued that by service of its counterclaim it had accepted the Claimant's repudiatory conduct in terminating the agreement.

In its judgment, the Court referred to authorities which state that a party in repudiatory breach has a defence to a claim brought against him in respect of that breach if he can prove that, at the time of the repudiation, the other party was already unable to perform the contract. This inability to perform must not, however, be attributable to the breach.

The same result should follow if it can be shown that the "innocent" party had no intention of performing the contract. In this case, the Defendant's unwillingness to perform pre-dated the Claimant's breach, and so was not a consequence of that breach. The Defendant took 18 months to accept the Claimant's breach, and in the intervening period the Defendant neither sought performance of the contract nor asserted an entitlement to damages.

The Court noted that proof of an intention not to perform a contract was tantamount to a finding that the party in question would not have performed. In such circumstances a party (such as the Defendant in this case) could not recover loss of profit based on such performance, as that performance would not have taken place.

2.2 COURT OF APPEAL FINDS THAT A CONTRACT WAS MADE WHEN A SIGNED QUOTATION WAS ACCEPTED, AND THAT THE PROVISION FOR A FURTHER FORMAL CONTRACT TO BE SIGNED DID NOT PREVENT THE CONCLUSION OF A CONTRACT AT THAT STAGE

In *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89, the Appellant appealed a decision that a contract for the storage of goods at the Respondent's facilities had been made in the course of email exchanges between the parties.

The Appellant had enquired about storage space at the Respondent's facilities, and there had been email exchanges between the parties about the availability and cost of storage. The Respondent sent a quotation by email to the Appellant, and attached its general storage conditions. The quotation provided for a formal contract to follow in due course. The Appellant faxed back a signed copy of the quotation, following which the Respondent sent a "contract confirmation" accepting the Appellant's offer to take up storage. In this communication the Respondent stated that a "full contract" would be sent to the Appellant to be signed and returned. This was sent, but was never returned to the Respondent.

When a dispute arose, the first instance judge found that a contract was made by the contract confirmation email. On its appeal, the Appellant submitted that the signed quotation was not an offer capable of acceptance as it stated that a formal contract would follow. Further, the Respondent's email could not amount to an acceptance as it provided for a full contract to be prepared and signed.

The Court of Appeal upheld the first instance decision. In doing so it stated that if the documents relied on as constituting a contract contemplated the execution of a further contract, it was a question of construction whether this further execution was (a) a condition of the bargain or (b) simply an expression of the desire of the parties as to the manner in which a transaction already agreed to would proceed. In this case, the only conditions to which the Respondent's quotation was expressed to be subject were certain and required no further discussion or negotiation. No conditions such as "subject to contract" were included. In the circumstances, the provision that a formal contract would follow did not indicate that the acceptance of the signed quotation was simply an agreement subject to contract.

The Court also held that the reference in the confirmation email to sending a full contract carried forward the provision in the quotation that a formal contract would follow. It corresponded with, rather than varied, the terms of the offer. The reference to the formal contract did not prevent the email from being an acceptance which immediately created a contract. The Court noted that the reference to a full contract had to be read in the context of the entire email, which strongly supported the conclusion of a contract at the time of the "contract confirmation" email.

3 COSTS

3.1 COURT OF APPEAL UPHOLDS A DECISION NOT TO MAKE AN ORDER AS TO COSTS DESPITE THE CLAIMANT'S FAILURE TO OBTAIN A JUDGMENT MORE ADVANTAGEOUS THAN THE DEFENDANT'S PART 36 OFFER

At first instance in *Walsh v Singh* [2011] EWCA Civ 80, the judge exercised his discretion under CPR 36.14(4) in holding that even though the Claimant had failed to obtain a judgment more advantageous than the Defendant's Part 36 offer, it would be unjust to order the Claimant to pay costs and interest from the date of that offer. The basis for this decision was the Defendant's conduct of the trial. It was also held that, as a Part 36 offer had been made, the Court should not order the Defendant to pay any part of the Claimant's costs.

The Defendant's subsequent appeal was dismissed. In doing so, the Court noted that a trial judge has a wide discretion and this should not be interfered with simply because a higher court would have made a different order. It may at times be appropriate for the court to show its disapproval of a party's contact by disallowing costs, although any disallowance must be proportionate to the conduct in question. Here, there was no basis on which the Court could interfere with the trial judge's findings. The only issue was whether the disallowance was proportionate, and this was something that the trial judge was in a much better position to evaluate.

This case is one of the first times that the Court of Appeal has considered the exercise of the court's discretion under CPR 36.14(4).

4 EU

4.1 BIMCO ISSUES SPECIAL CIRCULAR ON EU ADVANCE CARGO DECLARATION CLAUSES

BIMCO has issued a special circular containing further information on the EU Advance Cargo Declaration Clauses, which were initially published in November 2010. The purpose of the clauses is to address the EU rules on advance cargo declaration, which came into force on 1 January 2011.

The Circular contains guidance about the EU rules, as well as explanatory notes on the Clauses. The Circular, together with the clauses for time and voyage charters, can be downloaded from the BIMCO website.

5 INSURANCE

5.1 THE INABILITY OF A CARGO TO WITHSTAND THE ORDINARY PERILS OF THE SEA DOES NOT AUTOMATICALLY AMOUNT TO "INHERENT VICE" UNDER SECTION 55(2)(C) MARINE INSURANCE ACT 1906

In *Syarikat Takaful Malaysia Berhad v Global Process Systems Inc & Anr* [2011] UKSC 5 the Claimant insured claimed against the Defendant insurer in relation to damage sustained by an oil rig during transportation from the USA to Malaysia. The oil rig was insured under a policy of cargo insurance which incorporated the Institute Cargo Clauses (A) of 1 January 1982, and contained a provision which mirrored s.55(2)(c) Marine Insurance Act 1906 (the "Act") in excluding "loss, damage or expense caused by inherent vice or nature of the subject matter insured.

The rig was carried on a barge with its three legs elevated in the air. During the voyage, all of the legs broke off and fell into the sea. This damage was caused by metal fatigue resulting from the motion of the sea, and the impact of a "leg breaking wave" which caused the first leg to break off. Following this, the stresses on the remaining legs increased until they too broke off. It was common ground between the parties that the weather experienced was within the range that could reasonably have been expected. Further, both parties were aware from the outset that the legs were at risk of fatigue cracks during the voyage.

The Claimant submitted that the sole proximate cause of the loss was a fortuitous external accident which fell within the concept of "all risks of loss or damage". The relevant fortuity was the stress put on the rig by the nature of the waves encountered on the voyage. The Defendant argued that there was nothing that could be described as a fortuitous accident or casualty, as the triggering of the rig's unfitness for the insured voyage by foreseeably bad weather, which gave rise to loss or damage, occurred in the ordinary course of the voyage.

The Court noted that, under s.55(1) of the Act, whether a loss was covered under a marine insurance policy depended on its proximate cause. In this case, the Court applied commonsense principles and found that the cause was neither inherent vice nor the ordinary action of the wind and waves, but an external fortuitous accident or casualty of the seas, as argued by the Claimant. The Defendant was therefore liable under the insurance policy.

5.2 COMMERCIAL COURT CONSIDERS A SHIPOWNER'S ENTITLEMENT TO RECOVER UNDER WAR RISKS INSURANCE FOLLOWING THE ARREST OF A VESSEL

In *Melinda Holdings SA v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2011] EWHC 181 (Comm), the Court considered whether the Claimant was entitled to recover under a war risks policy for a constructive total loss of the vessel, or whether the Defendant was entitled to rely on the exclusions in the policy or alternatively on the alleged breach of one of the policy terms.

The policy in question excluded losses arising out of ordinary judicial process, action taken for the purpose of enforcing or securing payment of a claim, or any financial cause of any nature. It

also contained a suing and labouring clause which stated that it was the duty of Owners and their agents to take reasonable steps to avert or minimise a loss, any claim could be rejected.

The vessel was arrested by the Egyptian authorities in respect of unpaid court dues imposed on unsuccessful defendants in previous proceedings, who were the owners of a vessel which had been involve din a pollution incident. There was no connection between the owners of that vessel (the defendants in the previous proceedings) and the Claimant. The Claimant had challenged the arrest, but those proceedings were dismissed and two years later the vessel remained in the custody of the Egyptian authorities. While the Defendant accepted that the vessel was a constructive total loss, it denied liability based on the policy provisions set out above.

The Court held that the Claimant was entitled to recover under the policy. There was no connection between the Claimant and the owners of the vessel to which the court dues related, and in upholding the arrest of the Claimant's vessel the Egyptian court had not acted as an independent judicial body. The situation amounted to extortion from an owner who had nothing to do with the original claim, and as such the process was neither ordinary nor judicial, as required by the exclusion clause in the insurance policy. Further, as there was no bona fide claim involved, the matter could not be classed as "action taken for the purpose of enforcing or securing payment of a claim". The exclusion covering "any financial cause of any nature" also did not apply, as that term had to be construed in context and also had to affect the vessel itself.

The Court also held that there had been no breach of the suing and labouring clause, as the Claimant's Egyptian lawyers had acted competently and with appropriate diligence.

As such, the Defendant had failed to establish that the loss fell within any exclusion clause in the policy, or that there had been a breach of the suing and labouring clause, and the Claimant was entitled to recover for a constructive total loss.

6 JURISDICTION

6.1 HIGH COURT GRANTS AN INJUNCTION RESTRAINING A PARTY FROM PURSUING FOREIGN ARBITRATION PROCEEDINGS WHERE THE COURT HAD PREVIOUSLY HELD THAT NO ARBITRATION AGREEMENT EXISTED BETWEEN THE PARTIES

In *Claxton Engineering Services Limited v TXM Olaj-Es Gazkutato KTF* [2011] EWHC 345 (Comm), the Applicant applied for an injunction restraining the Respondent from pursuing an arbitration which it had commenced in Hungary in reliance on an alleged arbitration agreement between the parties. The Applicant's case was that the arbitration proceedings had been brought in breach of an English exclusive jurisdiction clause, and despite the fact that the English court had already determined that there was no arbitration agreement. In granting the injunction, the Court considered issues of jurisdiction and discretion.

As regards jurisdiction, the Respondent had argued that following the ECJ's decision in *West Tankers Inc v Allianz SpA* [2009] 1 AC 1138, the English Court had no jurisdiction to injunct arbitral proceedings taking place in an EU Member State. The Court held that this was a misinterpretation of the *West Tankers* decision, which applies to court proceedings and not to arbitration proceedings. As such, the Court was satisfied that it had jurisdiction to grant an injunction, which derived from s.37 Supreme Courts Act 1981.

On the issue of discretion, the judge noted that while the granting of an anti-suit injunction is a matter of continuing debate and controversy, the English courts do have jurisdiction to grant such injunctions. This must be done with caution, however, particularly in relation to arbitrations outside the jurisdiction, as such matters are generally best left to the relevant supervisory courts, i.e. the courts of the country of the seat of arbitration.

An injunction of the type requested can only be granted in exceptional circumstances, and it will usually be necessary to established that the Applicant's legal or equitable rights are infringed or threatened by the continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable. In the present case, the Applicant was able to establish a breach of its legal rights as the English court had already held that the contract was subject to an English exclusive jurisdiction clause, and the arbitration proceedings commenced by the Respondent were a clear breach of that contractual agreement. Further, as the English court had already held that there was no arbitration agreement, the Applicant was able to establish that it would be vexatious and oppressive to allow the arbitration to continue.

The Court was therefore satisfied that sufficiently exceptional circumstances existed to justify the grant of an injunction. Alternatively, if the circumstances could not be characterised as exceptional, the judge stated that a broader approach should be taken where the English court has already held that the claim is subject to an English jurisdiction clause and/or that there is no arbitration agreement.

6.2 HIGH COURT GRANTS SUMMARY JUDGMENT WHERE ENFORCEMENT OF THAT JUDGMENT WOULD BE ILLEGAL IN A FOREIGN JURISDICTION

In *AES-3C Maritza East 1 E00D v Credit Agricole Corporate and Investment Bank* [2011] EWHC 123 (TCC), the Claimant applied for summary judgment in relation to an on-demand bond provided by the Defendant.

The French courts had made various orders which prevented the Defendant from making payments under the bond, which fact was accepted by the Court. The Court noted that these orders were the equivalent of an interim injunction issued by the courts which had jurisdiction over the Defendant, i.e. those of France

It is established law that the English courts will not enforce the performance of a contract governed by English law where that contract requires a party to perform actions which would be illegal under the law of the country of performance. However, there is a distinction between (a) a judgment which determines a party's contractual obligations and (b) the enforcement of any obligation to make payment under that judgment. In this case, under the contract between the parties the Defendant was obliged to make payment to the Claimant, and the English court was entitled to issue a judgment to that effect. The orders of the French court would however prevent the Defendant from complying with its obligations under the judgment and the English court would not require the Defendant to comply with these obligations while they remained illegal in France.

The Court therefore granted summary judgment to the Claimant, but ordered that the judgment was not to be enforced while the Defendant was prevented from complying with it due to the orders of the French court.

The judge noted that the expectation would be that the French court would proceed to discharge the orders, as summary judgment had been issued by the court which had jurisdiction to determine liability under the bond. This, however, was a matter for the French court.

6.3 HIGH COURT HOLDS THAT A DISPUTE SHOULD BE ARBITRATED IN LONDON NOTWITHSTANDING THE RECOGNITION IN ENGLAND OF THE SWISS BANKRUPTCY OF ONE OF THE PARTIES

In *Cosco Bulk Carrier Co Ltd v (1) Armada Shipping SA (2) STX Pan Ocean Co Ltd* [2011] EWHC 216 (Ch), the Court considered various cross applications arising out of a recognition order by which the Swiss bankruptcy of Armada Shipping SA ("Armada") was recognised in England. At the time the bankruptcy order was made, Cosco Bulk Carrier Co Ltd ("Cosco") had chartered a vessel to Armada, who had in turn chartered it to STX Pan Ocean Co Ltd ("STX"). Both charterparties provided for English law and London arbitration.

Cosco exercised its owner's lien over sub-freights and sub-hire when Armada defaulted on hire payments, and a dispute subsequently arose between Cosco and Armada relating to entitlement

to sub-hire due from STX. Both Cosco and STX commenced arbitration proceedings in London. One of the issues that the court was required to decide in this case was whether the dispute with Armada should be resolved by London arbitration (as Cosco argued), or whether it should be resolved in Switzerland (as Armada argued), where the Swiss courts had bankruptcy jurisdiction in relation to Armada.

The Court held that the dispute should be dealt with in London arbitration. The majority of the issues were of English law, in particular English shipping law, in relation to which London arbitrators of the type required by the relevant arbitration clauses were experienced and well qualified. Further, there was "an air of unreality" to the idea that it would be fair, just or convenient to ask a Swiss bankruptcy court to adjudicate a dispute almost entirely governed by English law, and which was already the subject of two pending arbitrations before experienced tribunals pursuant to the contracts out of which the dispute arose. The Swiss court's relevant experience would be limited to Swiss insolvency law (of which none of the parties could identify a specific issue which needed to be decided) and it would have to rely on expert evidence as to English law.

The judge also stated that he was in general satisfied that proceeding in arbitration would properly protect the interests of Armada, its creditors and all other interested persons.

7 PRACTICE AND PROCEDURE

7.1 COURT OF APPEAL SETS ASIDE ORDERS EXTENDING THE TIME FOR SERVICE OF THE CLAIM FORM UNTIL AFTER THE EXPIRY OF THE LIMITATION PERIOD

In *Bayat Telephone Systems International Inc and others v Lord Michael Cecil and others* [2011] EWCA Civ 135, the Court of Appeal allowed an appeal and set aside orders which extended the time for service of a claim form until after the expiry of the limitation period.

The claim form had been issued by the Respondents in May 2008, and in September 2008 they were granted a 6 month extension of time for service. In March 2009, an extension of a further month was granted. One of the Respondents' main reasons for obtaining the extensions was their lack of funding. The judge at first instance held that funding was required for a claim to be viable, and that while this did not justify a prolonged extension, a short extension was justified.

The Court of Appeal disagreed, stating that funding was not required for the claim to be viable. The Respondent had the means to commence litigation, but they did not want to expose themselves to lengthy proceedings without being insulated against the incidence of costs. This did not justify the deliberate decision to delay service of a claim form, thereby necessitating an extension of time. The Court went onto say that limitation defences are "blind to the resources of the claimant": if a claimant is unable or unwilling to bring proceedings within the relevant limitation period, even if due to a lack of resources, the claim becomes statute-barred.

The Court also considered the "balance of hardship", and stated that while the first instance judge had considered the Respondent's loss of their claim, he had not considered the Appellant's loss of their limitation defence. The key question to ask is whether, if an extension is granted, a defendant will or may be deprived of a limitation defence. While it is relevant that the effect of a refusal to grant an extension will deprive a claimant of what may be a good claim, the stronger the claim, the more important is the defendant's limitation defence. This defence should not be circumvented by an extension of time for service of a claim form except in exceptional circumstances.

8 SALE OF GOODS

8.1 COMMERCIAL COURT FINDS THAT A TRADER WAS ENTITLED TO INTERVENE IN A SALE OF GOODS CONTRACT AS AN UNDISCLOSED PRINCIPAL

In *Novasen SA v Alimenta AS* [2011] EWHC 49 (Comm) the Applicant, a trader in vegetable oils, appealed against a decision that the Respondent was the undisclosed principal of another trader (the "Third Party") with whom the Applicant had contracted.

A sale was set up whereby the Third Party would purchase product from the Applicant and sell it on. The Third Party contacted the Respondent, who was willing to take the product on the condition that its identity was not disclosed. The Third Party drew up two contracts (both on FOSFA 201 terms), one in which the Applicant was the seller and the Third Party the buyer, and the other in which the Applicant was the seller, the Respondent was the buyer and the Third Party was the "agent acting for buyer's account". The latter contract was sent by the Third Party to the Respondent but not to the Applicant.

When the goods were not shipped, the Respondent commenced arbitration against both the Applicant and the Third Party, its case being that the Third Party acted as its buying agent. The Applicant was not aware of the contract with the Respondent until disclosure took place in the arbitration proceedings. The tribunal found that the Respondent had shown that it was the undisclosed principal of the third party and therefore a party to the contract. Further, the Applicant had been unable to prove that it would not have contracted with the Respondent as a principal. As a result, the tribunal made an award to the effect that the Respondent was a party to the contract. The Applicant appealed to the High Court.

In dismissing the appeal, the Court held that the Respondent had established the existence of an agreement with the Third Party to act as its undisclosed agent, which made commercial sense. The contract with the Respondent also referred to the Third Party as being the buyer's agent. While an undisclosed principal cannot create the relationship of agency by ratification, the Third Party's authority to enter into the contract with the Applicant did not arise only as a result of ratification. Intervention by the Respondent as undisclosed principal was not incompatible with the terms negotiated between the Applicant and the Third Party. The Applicant had not decided that it would refuse to contract with the Respondent, and no such decision had been communicated to either of the other two parties. The transaction was an ordinary commercial contract, and it could be assumed that the Applicant was willing to treat as a party to this contract anyone on whose behalf the Third Party might have authorised to contract.

There was an agreement to arbitrate between the Applicant and the Respondent, and there was also an agreement between the Respondent and the Third Party that the latter would act as the Respondent's undisclosed agent in a contract with the Applicant. This was not an arrangement to which the Applicant could object, subject to questions of authority and intervention. The Respondent's rights in respect of the contract, including the arbitration agreement, would be unquestioned but for the issues of ratification and intervention, and there was an arbitration agreement between the Respondent and the Applicant by which a tribunal was to resolve these issues. This would be the case whether or not there was a binding contract, in accordance with the principle of severability set down in s.7 Arbitration Act 1996.

9 SHIPPING

9.1 HIGH COURT CONSIDERS AN ARBITRATION APPEAL DEALING WITH ISSUES OF DAMAGES AND SECURITY ARISING OUT THE UNAVAILABILITY OF CARGO DUE TO POLITICAL UNREST AT THE LOADPORT

In *Ispat Industries Ltd v Western Bulk Pte Ltd (The "Sabrina 1")* [2011] EWHC 93 (Comm), the High Court considered an appeal by Charterers against an arbitration award in Owners' favour.

Owners had chartered a vessel to Charterers pursuant to the terms of a fixture recap stated to be on the terms of the "last performed CP based on Owners BTB with logical amendments and main terms as fixed", for one time charter trip "from Vizag to Mumbai lawfully trading between safe port(s)". The last performed charter had been on the NYPE form for a time charter trip. Charterers subsequently informed Owners that there would be no cargo available at the loadport (Vizag) due to terrorist activity. Charterers proceeded to cancel the charter. Owners accepted this cancellation as a repudiatory breach, and claimed damages being the hire which would have been earned on the time charter trip. Owners twice attached funds in relation to their claim, with both attachments being released on Charterers' application. Charterers counterclaimed for the attached sums.

The majority of the tribunal found in Owners' favour, stating that the charterparty was a time charter and even though the intended cargo was not available because of "enemy activity" which fell within clause 16 of the NYPE form, Charterers were obliged to find an alternative cargo. In any event, cargo became available around 12 days after Charterers had first informed Owners that it would not be available. Charterers' counterclaim was dismissed on the grounds that Rule B attachments did not constitute a breach of the arbitration clause incorporated into the fixture note. Charterers appealed to the High Court.

The Court considered certain questions of law. The first related to whether the tribunal was correct to find that the fixture was a time charter. Charterers argued that it was not, as the parties had contracted with a specific trip and cargo in mind. The Court disagreed and held that it was a time charter. References to a specific voyage and cargo simply identified Charterers' intentions at the time of the recap. As the charter was a time charter, it was not appropriate to regard the giving of employment directions pursuant to NYPE clause 8 as the making of an irrevocable election. The Court also noted that the delay in waiting for the disruption at the loadport to end was not a frustrating delay.

The second question of law related to the arbitrators' findings that the Rule B attachments did not constitute a breach of the London arbitration clause. The Court agreed with the arbitrators' findings: ancillary applications for security were not a breach of an arbitration clause so long as there was no attempt to have the merits of the dispute heard other than by the agreed arbitral tribunal. While Owners' might have acted unreasonably, as a matter of New York law, in obtaining the second attachment, there was no evidence that they were seeking to have the claim decided anywhere other than in London arbitration.

The final question considered related to remoteness of damages. The Court noted that the general test of remoteness is whether a loss was a "not unlikely" result of the breach. In this case,

Owners claimed damages measured by the hire that would have been paid for the expected minimum duration of the time charter trip. There was no basis on which it could be said that such measure of damages was contrary to market understanding or expectations.

Charterers appeal was dismissed.

9.2 A PARTY IS FOUND NOT TO BE IN BREACH OF CONTRACT WHEN OVERHAULING A VESSEL'S ENGINES IN ACCORDANCE WITH COMMON INDUSTRY PRACTICE RATHER THAN IN ACCORDANCE WITH THE MANUFACTURER'S SERVICE MANUAL

In *Wightlink Ltd v Mitchell Diesel Ltd (t/a Mitchell Power Systems)* [2011] EWHC 241 (Comm), the Claimant ferry operator claimed that damage to the engines of two of its vessels was caused by the Defendant's breach of contract when overhauling the engines.

After the engines had been overhauled by the Defendant, one engine on each vessel failed. All of the engines were sent to the manufacturer for repair and assessment, who reported that, among other things, the internal diameter of the piston pin bushes on the connecting rods in the engines was undersized. The Claimant argued that the Defendant's failure to ensure that the clearance between the piston pins and the piston pin bushes met the requirements of the manufacturer's service manual had caused the engine failures. The Defendant argued that it had machined the bushes with smaller clearances in accordance with both common industry practice and its own standard practice. The smaller clearances, it argued, neither could have nor did cause the engine failures.

In dismissing the claim, the Court held that the terms of the manufacturer's manual had not been incorporated into the overhaul contracts, and further there was no contractual requirement for the manual to be strictly complied with. The Defendant did, however, owe duties to exercise reasonable care and skill and it did have to have regard to the manual's provisions as this was the only obvious and relevant reference document for the overhaul of the engines.

The Claimant had failed to show that the smaller clearances had caused the engine damage. They did not cause the engines to fail, although the precise reason for the failures had not been established.

Finally, the Court held that the Defendant was justified in machining the bushes to smaller clearances, and that this was in accordance with accepted engineering principles and practices. While the Defendant should not have departed from the provisions of the manufacturer's manual without good reason, there were sufficiently good reasons in this case. The Defendant had not breached its duty to act with reasonable care and skill, or indeed any other duty owed to the Claimant.

9.3 HIGH COURT ALLOWS THE VEIL OF INCORPORATION TO BE PIERCED WHERE CHARTERPARTIES HAD BEEN ENTERED INTO AS PART OF A SCHEME TO DIVERT CORPORATE OPPORTUNITIES

In *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm), the Respondent "one ship" companies had brought proceedings against the Applicant beneficial owners of certain companies (the "Corporate Defendants"). This particular hearing was of the Applicant's application to set aside service of the claim form on the grounds that the English court lacked jurisdiction.

The Respondents were all under the ultimate beneficial ownership of the Latvian Shipping Company ("LSC"), and had obtained judgment against the Corporate Defendants on the basis that the latter had been used to dishonestly siphon off profits from LSC's chartering business. It was argued that senior officers of LSC, including the Applicant, were the beneficial owners of the Corporate Defendants who had been interposed between the Respondents and commercial charterers. As a result, the Corporate Defendants had benefited from chartering vessels to end users at substantially higher rates than in the head charters from the Respondents. In the current proceedings, the Respondents sought to "pierce the corporate veil" and to hold the Applicant jointly and severally liable with each of the Corporate Defendants in respect of the Applicant's alleged losses arising out of the scheme. The Respondents relied on the English jurisdiction clauses in the charterparties to which the Corporate Defendants and (on the Respondents' case, by virtue of piercing the veil) the Applicant were parties.

The Court held that there was a good arguable case that the veil of incorporation should be pierced in order to permit the Respondents to try to enforce the charterparties against the Applicant as a party to them. On the facts, the Corporate Defendants had no independent or non-fraudulent existence, and indeed had been set up for the purpose of the alleged fraud. The Court noted that if there were a number of wrongdoers in control of the companies, with a common purpose, then the veil of incorporation could be lifted as against one or all of them.

The Court also stated that the Respondents, in their claim to pierce the corporate veil, were not required to show at the outset that the claim was necessary. As regards jurisdiction, the Court held that there did not have to be a separate consideration of whether the jurisdiction clauses were entered into by the Applicant as an alter ego of the Corporate Defendants.

The application was refused.

9.4 HIGH COURT CONSIDERS THE CORRECT INTERPRETATION OF A 30 DAY TIME LIMIT FOR COMMENCING ARBITRATION IN A SHIPBUILDING CONTRACT

In *(1) Nanjing Tianshun Shipbuilding Co Ltd (2) Jiansu Skyrun International Group Co Ltd v Orchard Tankers Pte Ltd* [2011] EWHC 164 (Comm), the Applicant seller challenged the jurisdiction of a tribunal.

The Applicant had entered into a shipbuilding contract with the Respondent buyer, in respect of which a refund guarantee was issued by a Chinese bank. After paying the first four instalments, the Respondent gave notice that it was exercising its right to terminate/cancel the contract due to delay in delivery. Article X of the contract gave the Applicant the right to dispute cancellation by instituting arbitration proceedings in accordance with Article XIII, provided that such proceedings were instituted within 30 days of the cancellation. The Applicant disputed the cancellation, but failed to institute proceedings within the prescribed time frame. The Respondent argued that the claim was time barred as a result, to which the Applicant replied that failure to institute arbitration proceedings within the 30 days did not bar the right to dispute the cancellation, it simply barred a party from obtaining a remedy by way of an arbitration award.

The Court refused the application, holding that entitlement to a refund could only be deferred if arbitration in accordance with Article XIII was commenced within 30 days, and that that arbitration was the only forum in which the seller could dispute the buyer's cancellation. This was confirmed by the terms of the refund guarantee, which gave the bank the right to withhold payment until an award had been made under Article XIII. The Applicant accepted that recovery of all instalments under the guarantee would discharge both parties' obligations. It would, therefore, be odd if despite that, the buyer's liabilities were retained.

There was no commercial purpose in granting the Applicant an option to either institute arbitration within 30 days, or alternatively to commence litigation proceedings after 30 days. This period was not simply a window after which the bank could not resist a refund of the instalments, leaving the sellers free to commence proceedings challenging their own obligation to refund. Such an idea was inconsistent with the premise that the bank's liability under the guarantee only arose when the instalments had become repayable and the builder had failed to repay. The absence of words expressly barring rights of suit was not determinative.

Finally, the Court noted that Article X of the contract did not contain a right to arbitrate separate to that in Article XIII. Both Article X and the guarantee referred back to arbitration under Article XIII, and the Applicant's claim arose in relation to the construction of the vessel within this article.

9.5 HIGH COURT CONSIDERS THE MEANING OF THE PHRASE "WITHIN 12 MONTHS OF FINAL DISCHARGE OR TERMINATION OF THIS CHARTERPARTY" IN A MODIFIED CENTROCON ARBITRATION CLAUSE

In *X v Y* [2011] EWHC 152 (Comm), the Appellant Charterer appealed the decision of an arbitrator that the Respondent Owner's claim for demurrage was not time barred.

The parties entered into a charterparty containing a modified Centrocon arbitration clause, which provided that a claim would be time barred unless an arbitrator was appointed "within 12 months of final discharge or termination of this charterparty". The charterparty was a consecutive voyage charter for three voyages, and the Respondent claimed demurrage in respect of the first voyage. The Appellant argued that the phrase "final discharge" meant discharge in respect of each individual voyage, and that because the Respondent commenced arbitration more than 12

months after final discharge on the first voyage, its claim was time barred. The Respondent argued that arbitration was commenced in time because it had been done within 12 months of the termination of the charterparty, i.e. of the last date for payment of the balance of freight in respect of the last voyage.

The arbitrator agreed with the Appellant's construction of "final discharge". However, he also found that "termination" meant termination of the charterparty at the end of the third voyage, and as such the Respondent's claim was not time barred. The Appellant appealed this decision.

The High Court dismissed the appeal. The words "final discharge" in a consecutive voyage charter are generally accepted as meaning the discharge of the cargo on the voyage in respect of which the claim was made. Such an interpretation should not be disturbed by the addition of extra or alternative words. As regards "termination", this was the date when the last of the primary obligations under the charterparty was due to be performed, rather than when it was actually performed. As such, the Respondent's interpretation was preferred.

As regards the time in which notice of arbitration had to be given, there were two starting points: either final discharge, or termination of the charterparty. The claim was in time if it complied with either of these deadlines. The key question was when the notice of arbitration had to be given, not when the cause of action arose. On such an interpretation, it was necessary to read the words "whichever is the later" into the clause. As a result, the Respondent's notice of arbitration was given within 12 months of termination of the charterparty, and so was not time barred.

RS SHIPPING BULLETIN

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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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