

# International Trade and Commodities Legal Update

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## Introduction

We are delighted to introduce the first edition of our relaunched *International Trade and Commodities Legal Update*. In selecting which 2009 cases to report on, we have focussed on those decisions that give a flavour of the kind of issues which arise on a regular basis in international trade disputes.

In trade finance, disputes regarding discrepant documents under letters of credit are common. In *Fortis Bank and Stemcor v Indian Overseas Bank*, the court reaffirmed the traditional doctrine of strict compliance with the documentary requirements of a letter of credit. The decision is also significant in that it is one of the first cases to consider the terms of UCP 600 which came into effect on 1 July 2007 and it appears to be the first case to decide that incorporating the words “may add” into a letter of credit amounted to authority from an issuing bank to a confirming bank to confirm a credit under the UCP 600.

In *Vitol S.A. v Conoil Plc*, an Ince & Co case handled by partner Ian Cranston and solicitor Jamila Khan, the court confirmed that where a sale contract provided for a letter of credit to be issued, failure to issue the letter of credit did not mean that the contract did not come into effect. Consequently, the sellers were successful against the buyers in their claim for repudiatory breach of the sale contracts in question. The decision was also noteworthy in stating that a contractual term titled “Delay Penalty Clause” was not a penalty but rather a genuine pre-estimate of the sellers’ financing losses and accordingly enforceable. English courts are reluctant to uphold penalty clauses which are considered to be oppressive and *in terrorem* of (a deterrent to) the offending party. However, labelling a provision as a “penalty” is not determinative of its status.

In *The Ninae*, the court enforced the wording of the payment provision to the letter. In that case, the sale contract provided *inter alia* for payment to be made “without deduction, offset or counterclaim”. Consequently, the sellers were entitled to the full amount without deduction in respect of the buyers’ counterclaim and the buyers had to pursue their claim for damages against the sellers in separate proceedings. Parties entering into international sale of goods contracts should be alert to the implications and consequences of such provisions.

The decision in *Choil Trading v Addax Energy* serves as a useful reminder to commercial parties entering into international contracts to provide expressly for the jurisdiction where they wish any disputes arising out of their agreements to be determined. Often, parties

fail to turn their minds to such issues in negotiations, concentrating instead on the commercial aspects of their transaction. We recommend that those entering into international trade agreements consider incorporating into their contracts a comprehensive dispute resolution clause that takes into account both governing law and applicable jurisdiction.

*The Mercini Lady* relates to the implication of terms as to quality and fitness for purpose into an FOB contract for the sale of gasoil. It also deals with the interpretation of the exclusion clause in the contract (under English law, such clauses are interpreted strictly against the party relying on them). That decision is being appealed. The *Soufflet Negoce v Bunge S.A.* case, a dispute relating to an FOB shipment under GAFTA contract form no. 49, is also apparently being appealed. We will report further on both appeals, once their outcome is known.

In the “shipping” section, *The Eagle Valencia* deals with the validity of a Notice of Readiness and the interpretation of the relevant charter party provisions. In that case, the judge took a commercial view and applied a commonsensical interpretation to what he considered to be a badly drafted contractual provision. *The Pace* highlights the common practice of cargo being discharged pursuant to a letter of indemnity and without production of bills of lading. This practice often leads to disputes regarding title to sue on the part of the ultimate cargo receiver, because by the time the receiver gets the bills, they have been “exhausted”. Our summary explains how the Carriage of Goods by Sea Act 1924 deals with this situation by expressly allowing rights to be transferred even after the goods have been discharged.

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If you have any queries arising out of the content of this Update, or any other matters you wish to discuss with us, please feel free to contact anyone listed on the back page of this update or refer to your usual Ince & Co contact.

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## Trade Finance

### Letters of credit and documentary discrepancies: applying the doctrine of strict compliance

*Fortis Bank S.A. N/V and Stemcor UK Ltd v Indian Overseas Bank* [2009] EWHC 2303 (Comm)

#### Background to dispute

The dispute arose out of five Letters of Credit ("LCs") issued pursuant to sale contracts for containerised scrap CFR CY Haldia (or Haldia/Kolkata in sellers' option) between S as seller and an Indian buyer, the contracts having been arranged by a third party, MSTC.

MSTC applied to the defendant bank, IOB, to issue the credits, all of which were subject to UCP 600. F was nominated as advising bank. An advising bank advises the beneficiary of the letter of credit when the credit has been issued by the issuing bank. MSTC was named as the applicant and S as beneficiary in each letter of credit.

S made a number of drawings under the credits, which were negotiated and honoured by F. IOB subsequently purported to reject some of the documents presented to it as discrepant on the grounds that they did not conform to the documentary requirements of the LCs.

#### Decision

Mr Justice Hamblen in the Commercial Court rejected all but one of the alleged documentary discrepancies. He stated that IOB were not entitled to reject documents on the basis that they had not been prepared in the name of the buyer, because the LCs did not stipulate the name of the person to whom the documents should be addressed. What mattered were not the "true commercial facts" but the documentary requirements of the credit. Furthermore, with regard to bills of lading that were made out in the name of MSTC rather than the buyer, the judge was not convinced that this was a documentary discrepancy under the relevant LC. However, he said that even if on their true construction the instructions given did require the buyer's name to be on the bills, such instructions were ambiguous. In those circumstances, and in line with clause 2 of the International Standard Banking Practice for the Examination of Documents and the decision in *Credit Agricole Indosuez v Muslim Commercial Bank Ltd* [2000] 1 LLR 275, F was entitled to act on a reasonable construction of those instructions and to be subsequently reimbursed.

The judge also rejected IOB's contention that one of the commercial invoices was discrepant because it did not mention both Kolkata as well as Haldia as ports of shipment. Haldia and Kolkata were referred to in the price terms as alternatives, therefore a reference to Haldia alone sufficed in circumstances where the goods were shipped under Haldia bills of lading. Alternatively, the instructions were ambiguous and F was entitled to act on a reasonable construction of those instructions and to be reimbursed.

By contrast, in relation to the beneficiary's consolidated certificate, the judge found there **was** a documentary discrepancy because it certified that IOB rather than the beneficiary, S, would bear the costs of despatching the documents by courier to IOB. He held that there was no ambiguity in the documentary requirement that the certificate should specify that the documents be despatched at the beneficiary's cost and rejected the claimants' contention that the discrepancy was legally trivial. It was not for the document checker (IOB) to investigate the facts rather than merely examine the documents. There will, however, be a further hearing in due course on whether, as the claimants argued, IOB should be precluded from relying on the discrepancy in the consolidated certificate because, pursuant to Article 16 (c) of UCP 600, they were under an obligation to return documents promptly following a decision to reject those documents for non-compliance with the credit and had allegedly failed to do so.

IOB had also sought to argue that F was not a confirming bank. Therefore, they were not entitled to reimbursement under UCP 600 because the confirmations of the credits were not authorised by IOB, were therefore silent, outside the UCP and not, in law, confirmations at all. Article 2 of UCP600 defines a confirming bank as "*the bank that adds its confirmation to a credit upon the issuing bank's authorisation or request.*" The court held that the fact that the confirmation instructions in the letters of credit stated that F "may add" its confirmation meant that IOB as the issuing bank had authorised such confirmations by F. Furthermore, the additional words "the L/C may be confirmed at the request and cost of the beneficiary" in the credits provided further evidence that IOB authorised F to add its confirmation to the credits at S's request. Had F not been a confirming bank, the court said it would have been a nominated bank and therefore still entitled to reimbursement under Article 7 (c) of UCP 600.

It would appear this is the first authority on this point: UCP 500 did not recognise the negotiation of credits by a confirming or nominated bank, whereas Article 7 (c) of UCP 600 requires an

issuing bank to reimburse a confirming or nominated bank that has honoured or negotiated a complying presentation and duly forwarded the documents to the issuing bank. In this case, F had done so and was entitled to be reimbursed by IOB.

## Trading

### Implied terms in sale of goods contracts

***KG Bominflot Bunkergesellschaft für Mineralöle mbh & Co KG v Petroplus Marketing AG (The Mercini Lady)* [2009] EWHC 1088 (Comm)**

#### Background facts

The dispute arose out of a contract for the sale of a consignment of EU gasoil to be shipped on board the *Mercini Lady* or substitute FOB Antwerp. The contract included *inter alia* a provision setting out various specifications that the gasoil had to meet at the time of shipment, including as to total sediment (clause 4) and a provision providing for quality and quantity to be basis shore tank and to be determined by a mutually agreed independent inspector at the loading installation, in the manner customary at such installation, with such determination to be final and binding on both parties except in case of fraud or manifest error (clause 12). Clause 18 provided that *“there are no guarantees, warranties or representations, express or implied, or (sic) merchantability, fitness or suitability of the oil for any particular purpose or otherwise which extend beyond the description of the oil set forth in this agreement”*.

An analysis performed pre-loading found that the product met the stipulated specifications, including the sediment specification. However, the buyers, B, alleged that when the gasoil arrived at the destination port after a four day voyage, it did not conform to contractual specifications, including as to sediment and that the receivers had rejected it. B claimed that the sellers, P, were in breach of an implied term that

the goods would be of satisfactory quality following a normal voyage, pursuant to section 14 (2) of the Sale of Goods Act 1979 and / or an implied term that the goods would be reasonably fit for their purpose following a normal voyage pursuant to section 14(3) of the Sale of Goods Act 1979.<sup>1</sup> Further or alternatively, B argued that P were in breach of a term to be implied at common law that the gasoil would be of satisfactory quality and/or in accordance with the contractual specification following a normal voyage and for a reasonable time thereafter.

P countered that clause 18 of the sale contract precluded any such implied terms as alleged by B. Clause 18, according to P, was plainly directed at excluding the whole range of contractual promises including anything to be implied by statute or at common law dealing with merchantability, fitness for purpose or suitability. The quality of the goods was governed exclusively by clause 4. There was nothing unfair about that and it rendered the sellers' obligations certain. The parties' intention that quality at load port was to be determinative was clear, said P, from clause 12.

The court was asked to decide these questions as preliminary issues.

#### Commercial Court decision

Mr. Justice Field held that in the absence of an inconsistent contractual term, there was to be implied into an FOB contract under s14(2) a term that the goods would be of satisfactory quality not only when the cargo was delivered onto the vessel but also for a reasonable time thereafter. Such a term should also be implied at common law, with the additional factor that the goods should not only be of satisfactory quality for a reasonable time but should also remain in accordance with the contractual specification (if any) for such a period.

What was a reasonable time would depend on the circumstances of the individual contract in question,

<sup>1</sup> The relevant provisions of the Sale of Goods Act 1979 (as amended).

-s14(2): where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

-s14(2A): goods are of satisfactory quality for the purposes of the Act where they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances.

-s14(2B): the quality of the goods includes their state and condition, fitness for all the purposes for which goods of their kind are commonly supplied, freedom from minor defects, appearance and finish, safety and durability.

-s14(3): where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known – (a) to the seller or, (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker, any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which those goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

-s14(6): the terms implied by subsections (2) and (3) are conditions.

including the fact that there was to be delivery on board a vessel which rendered it likely the goods would be carried by sea before being used or sold on. Other relevant factors would be the nature of the goods and whether the seller knew the buyer was a merchant dealing with the type of goods sold or buying them for his own use.

However, the judge added that it did not follow that the goods had to be reasonably fit for the purpose of remaining within the specifications set out in the contract of sale whether for the time they were on the vessel or thereafter. Even if there were a purpose for which the goods had to be reasonably fit, P did not know the destination of the goods so would not have been obliged to provide goods fit for this purpose for the length of the voyage actually undertaken, but only for what in all the circumstances was a reasonable time.

Mr. Justice Field added that the requirement in clause 4 of the sale contract that the goods answer a detailed specification was not inconsistent with an obligation that the goods be of satisfactory quality both at the point of delivery and for a reasonable time thereafter. Nor was the contractual specification inconsistent with an obligation that the goods remain on spec post delivery for a reasonable time. Clause 12 of the contract was not inconsistent with the proposed implied terms because the specification did not require the gasoil to be otherwise than on spec at the point of delivery and the load port certificate would only be and was only ever intended to be final as to the matters referred to under clause 4.

Finally, turning to clause 18 of the sale contract, the judge emphasised the distinction under English law between conditions and warranties, a distinction which the parties “should be taken to know”. That clause did not contain the word “condition” and the obligations implied pursuant to section 14 of the Sale of Goods Act 1979 were conditions as per s14(6). Clause 18 was therefore ineffective in the present case. That said, it would appear that if the word “condition” had indeed been included in Clause 18, then the sellers’ arguments would have prevailed.

This decision is being appealed. We shall report on the outcome of the appeal once that is known.

## Whether failure to open suitable letter of credit meant no contract came into existence

***Vitol S.A. v Conoil Plc* [2009] EWHC 1144 (Comm)**

### Background to dispute

V entered into four sale contracts with C for the sale and purchase of gasoil. V was to effect delivery to C on DES terms off Cotonou in Benin via ship to ship transfer.

Payment was to be made by letter of credit. Clause 10 of the contracts provided *inter alia* as follows:

*“Payment to be secured by a fully operative and workable irrevocable documentary letter of credit...”*

*Without prejudice to time being of the essence and seller’s other rights generally, seller shall not be required to discharge the mother vessel prior to receipt of such letter of credit...”*

*In case the letter of credit is not made operational to sellers satisfaction on or before ... at seller’s option seller has the right to (1) terminate the contract and claim damages...”*

Although C part-performed under the first contract, it failed to open the letter of credit in respect of the balance of the oil to be bought under that contract. C also failed to lift any of the cargo agreed to be bought under the three further contracts. V treated C’s conduct as a repudiatory breach of the contracts, accepted that breach and thereby brought the contracts to an end.

When V sought damages in the Commercial Court in respect of C’s failure to perform its obligations under the sale contracts, C failed to take part in the proceedings. Instead, and in breach of an exclusive jurisdiction clause in the contracts, C commenced proceedings in Nigeria. In those Nigerian proceedings, C argued that the letter of credit was the “final binding document” between the parties and that until a confirmed irrevocable letter of credit had been issued, no contract came into existence between them and V.

### Decision

Mr. Justice Teare considered the wording of the sale contracts in general and clause 10 in particular. He stated that there was nothing in those contracts to suggest that issuing a letter of credit was a condition precedent to the contract

becoming enforceable. Whilst V was not obliged to discharge until the letter of credit was issued and could terminate the contract if the credit was not operational by a specific date, this did not mean that there was no binding contract until a letter of credit was issued. Therefore, by failing to lift the balance of the cargo under the first contract and any of the cargo under the remaining three contracts, C were in repudiatory breach of those contracts and V was entitled to damages.

In addition to claiming and recovering damages for its loss of bargain, V also sought to recover damages under a contractual term headed "Delay Penalty Clause" which was intended to be V's pre-estimate of its financing losses caused by delay in taking up the cargo. The judge held that although this clause was described as a "penalty", there was no reason not to regard it as other than a genuine pre-estimate of V's financing costs and accordingly enforceable.

## Payment first clause means what it says

### *Petroplus Marketing AG v Shell Trading International Ltd (The Ninae)* [2009] EWHC 1024 (Comm)

#### Background facts

The sellers P contracted with the buyers S to sell FOB Coryton high sulphur fuel oil ("HSFO") and light cycle oil ("LCO"). The sale was made through brokers who discussed the terms of the contract orally on 10 June 2008. E-mails in identical terms were sent out on 11 June 2008 by each broker to the other confirming the terms of the oral agreement. These e-mail exchanges stated *inter alia* that payment was "to be effected in full without deduction, offset or counterclaim .....latest five working days after bill of lading date ...." They also incorporated a formula for determining the price of the oil. The oil was to be lifted in one load at Coryton between 21 to 25 June 2008, with S to declare a three day loading range by close of business on 16 June 2008.

A subsequent written contract confirmation on 12 June 2008 from P to S included a preamble which stated that the contract confirmation cancelled and superseded any previous written or oral communications. The confirmation also set out a different price determination formula which did not reflect what had been orally agreed (apparently due to employee error at P) and reflected in the brokers' e-mails. S responded by confirming agreement, subject to some amendments they made to P's contract confirmation, including deletion of the preamble.

Further exchanges took place between P and S dealing with proposed amendments to the terms,

including the price determination formula. P pointed out that their contract confirmation of 12 June had contained an incorrect price determination formula and maintained the correct formula was that agreed orally on 10 June and confirmed in the subsequent identical e-mails exchanged between the brokers on 11 June.

In the meantime, on 24 June, the buyers nominated *The Ninae* and gave loading instructions. By then it was apparent that there would be a delay in delivery of the HSFO. The vessel started loading on 3 July.

Subsequently, P sought payment for the cargo based on the price formula in the 11 June communications. S contended they were only liable for the price of the HSFO calculated on the basis of the 12 June price formula. The dispute reflected an increase in the market price between 25 June and the time the cargo was delivered and the bill of lading issued. The difference in price was just over US\$2 million. P sought summary judgment against S and S counterclaimed for damages for late delivery and demurrage.

#### Commercial Court decision

S argued that there had been a variation of the price determination formula. Their counsel cited *Pagnan SpA v Feed Products Ltd* [1987] 2 LLR 601 and *The Harriette N* [2008] 2 LLR 685 to support the proposition that, once there is a concluded contract on the essential terms, then further terms may be agreed individually and the strict requirements of positive offer and positive acceptance are not necessarily appropriate.

The Court held that it was indeed possible for the parties to have varied their agreement about the HSFO pricing without resolving other outstanding matters. In the present case, however, based on the exchanges between the parties, he did not believe the parties would have intended to conclude a contract in such a piecemeal manner. He therefore rejected the argument that the parties had varied the 10 June agreement in relation to the price determination formula.

S had another argument based on the fact that P were allegedly in breach of contract for failing to deliver the oil when the contract specified. In those circumstances, S argued that it was an implied term of the contract that P were not entitled to claim a price calculated by reference to the bill of lading date because they would be taking advantage of their own wrong, namely claiming a higher price because of the late shipment.

Again, the judge found against S. He said that in this case, the pricing provision had established a machinery for P to be paid the invoiced amount ("*in*

full without deduction, offset or counterclaim .....latest five working days after bill of lading date") notwithstanding any alleged breach of contract. That machinery would be ineffective and the contractual intention frustrated if S could withhold payment by challenging the calculation of the price by reference to the bill of lading date on the grounds that it resulted from P's breach of contract. P were therefore granted summary judgment and S were left to pursue their counterclaim in subsequent proceedings.

## GAFTA Form no. 49 - FOB contract and readiness of vessel to load

*Soufflet Negoce v Bunge S.A.* [2009] EWHC 2454 (Comm)

### Background facts

The sale contract related to an FOB shipment with delivery stated to be "*between 9 - 22 October 2006 at buyers' call both dates included. (No extension).*"

The contract incorporated GAFTA form no. 49 (save where in conflict). Clause 6 related to the period of delivery and provided *inter alia* that the buyers should serve notice of the name and probable readiness date of the vessel and the sellers should have the goods ready to be delivered to the buyers at any time within the contract period of delivery. The clause further stated that provided the vessel was presented at the load port "in readiness to load" within the delivery period, the sellers should if necessary complete loading after the delivery period.

The vessel gave notice of readiness to load on the last day of the delivery period. The sellers contended that the vessel's holds were unclean and so not presented "in readiness to load" during the delivery period. The buyers disagreed and called on the sellers to load after 22 October. The sellers refused. Buyers treated this as a repudiatory breach of the sale contract and claimed damages for failure to load the cargo.

### The issue

The GAFTA Board of Appeal considered whether the sellers were under an obligation to complete loading after the prescribed delivery period. This was dependent on (i) the vessel being presented at the load port "in readiness to load" within the delivery period and (ii) loading having been commenced during the delivery period.

The Board held that the buyers, having bought on FOB terms, had a responsibility to provide a vessel

within the delivery period which was physically and legally possible to load. This the buyers had done and in the event, the sellers were obliged to load, whatever concern they might have about the cleanliness of the vessel. If the vessel's holds were not fit to receive the cargo such that they might be discharged clean, then that was buyers' decision and their risk.

The sellers appealed.

### Appeal decision

The judge's starting point was that under an FOB contract, the obligation to deliver arose on buyers' call and such a call was valid and effective if it was possible and lawful for the sellers to comply with it. Risk passed to the buyers on delivery and thereafter, the sellers had no further interest in the cargo.

In this case, the sale contract contemplated that the buyers could call for the cargo at any time during the delivery period and sellers had to obey that call if it was practical to do so. The sellers could not otherwise refuse to obey the call on the grounds, for example, that the vessel was not thought to be in a fit condition to receive the cargo.

Mr Justice David Steel added that there was nothing in this sale contract expressly requiring the buyers to give notice of readiness to load to the sellers in like terms to any such requirement on the part of shipowners to serve any such notice on the buyers (who were also the charterers of the vessel). "Readiness" in clause 6 was not to be read as equivalent to "NOR".

The sellers' appeal was therefore dismissed. We understand the sellers have obtained permission to appeal to the Court of Appeal. We shall report on the outcome of that appeal once it is known.

## Arbitration

### No exclusion of right to appeal arbitration award under s69 Arbitration Act 1996

*Shell Egypt West Manzala GmbH and another v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corporation)* [2009] EWHC 2097 (Comm)

#### Background to dispute

The dispute arose in connection with a Farm-In and LNG Co-operation Agreement between the parties relating to concessions for crude oil and gas exploration. The Agreement provided for disputes to be settled by arbitration in London under the UNCITRAL Arbitration Rules. The arbitration provision stated *inter alia* that the arbitrators' award "shall be final, conclusive and binding on the parties".

When disputes arose between the parties in relation to alleged breaches of certain provisions in the Agreement, S commenced arbitration against C. The arbitrators rejected all of S's claims against C in the arbitration. S sought permission to appeal on points of law arising out of the arbitration award, pursuant to section 69 of the Arbitration Act 1996. Section 69 of the 1996 Act provides that "unless otherwise agreed by the parties, a party to arbitral proceedings may ... appeal to the court on a question of law arising out of an award made in the proceedings".

It was not in dispute that section 69 allows the parties to an arbitration agreement to exclude any right of appeal to the court where the wording used is sufficiently clear to achieve this purpose. The issue was whether in fact the arbitration provision in this Agreement did exclude such a right of appeal.

#### Commercial Court Decision

It was argued on behalf of C that the words "final, conclusive and binding" excluded any rights of appeal that might otherwise arise under section 69 because those words stated in unequivocal terms that there should be no ability to appeal against the arbitration award and that any award should conclude all matters in issue between the parties without further argument or recourse.

Mrs Justice Gloster disagreed. She stated that, in the context of the parties' arbitration agreement, the words "final, conclusive and binding" were not to be construed as an agreement excluding the parties'

statutory right of appeal. Whilst no express reference to section 69 was required, sufficiently clear wording was necessary in order to amount to an agreement to exclude the right of appeal under section 69.

Whilst, at first sight, the words "final, conclusive and binding" appeared to be quite wide in scope, the expression "final and binding" simply meant that an arbitration award was final and binding in the traditional sense of creating a "res judicata" between the parties such that the award could only be challenged on appeal. Adding the word "conclusive" simply reflected the fact that an award prevented the parties from reopening issues of law or fact which were decided by the award but did not have the effect of excluding rights of appeal.

Accordingly, S were granted leave to appeal. That said, it would appear that sufficiently clear wording in an arbitration agreement could effectively exclude the parties' right to appeal. For example, the Rules of the LCIA and the ICC have achieved such a result.

## Litigation

### Law and jurisdiction applicable to JVA where no express provision made in agreement

*Choil Trading SA v Addax Energy SA* [2009] All ER (D) 45

#### Background to dispute

The parties were Swiss oil trading companies based in Geneva. They entered into an oral joint venture agreement (JVA) that encompassed the sale and purchase of both low and high sulphur fuel oil (LSFO and HSFO), as well as a large number of oil futures and other oil-based derivatives contracts. The parties subsequently entered into written sale contracts for LSFO and HSFO that expressly provided for English law and the exclusive jurisdiction of the High Court in London.

Disputes arose between the parties regarding alleged breaches of the JVA including *inter alia* profit share claims. The claimant, C, argued that the English court had jurisdiction over the claims on the grounds that they fell within the law and jurisdiction agreement in the sale contracts. The defendant, A, submitted that the disputes arose under the JVA and that no applicable law or jurisdiction had been agreed in respect of the JVA. Consequently, A sought a declaration from the High Court that it did not have jurisdiction to hear C's claims.

Article 2 of the Lugano Convention 1988, to which both England and Switzerland are parties, provides for a party domiciled in a contracting state to be sued in that state. However, Article 17(1) of the Lugano Convention permits the parties to agree that the courts of another contracting state should have exclusive jurisdiction over their disputes.

### Commercial Court decision

Mr Justice Field rejected C's argument that there was no inconsistency as to jurisdiction between the sale contracts and the JVA since the JVA contained no jurisdiction clause. The judge stated that the sale contracts and the JVA were legally quite distinct from one another and the claim for profit share was brought under the JVA and not under the sale contracts. Furthermore, the disputes likely to arise under the JVA were of a quite separate character than those likely to arise under a contract for the sale of a cargo of fuel oil. Consequently, he held that the jurisdiction clauses in the sale contracts did not apply to claims made under the JVA but only to claims in contract or in tort in respect of the rights and obligations created by those contracts.

The judge also rejected C's alternative argument that the JVA contained an express, alternatively implied, term to the effect that it should be subject to English law and jurisdiction. On the evidence, C had failed to prove that there was such an express term in the JVA. Furthermore, no such term needed to be implied into the JVA "to give business efficacy to the contract". The relevant background was that the parties were based in Geneva, and Switzerland had a mature legal system well used to dealing with financial disputes. In the judge's opinion, it could not be said that considered against this background, the JVA could reasonably be understood to provide for the English courts to have jurisdiction over disputes arising out of the agreement. Put another way, C did not have "the better argument" that the parties had agreed by way of an implied term that the English courts were to have jurisdiction to settle disputes arising in connection with the JVA.

Consequently, A were entitled to a declaration that the English court did not have jurisdiction to determine C's claims.

## Shipping

### Validity of notice of readiness

*AET Inc Ltd v Arcadia Petroleum (The Eagle Valencia)* [2009] EWHC 2337 (Comm)

#### Background facts

The *Eagle Valencia* was chartered on a Shellvoy 5 form as amended, with Shell Additional Clauses (SAC). Clause 13 of the charter party provided *inter alia* that time at each loading/discharge port was to commence to run six hours after the vessel was in all respects ready to load or discharge and written notice had been tendered or the vessel was securely moored at the specified loading or discharging berth whichever first occurred. Additionally, if the vessel did not immediately proceed to such berth, time to commence six hours after (i) the vessel was lying in the area where she was ordered to wait or, in the absence of such a specific order, in a usual waiting area and (ii) written NOR had been tendered and (iii) the specified berth was accessible.

SAC 22 provided *inter alia* that if the owners failed to obtain free pratique and/or customs clearance either within the six hours after NOR was originally tendered or when time would otherwise normally commence to run under the charter party, then the original NOR would not be valid. However, the clause further stated that "where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths", the NOR would be valid unless the failure to obtain timely clearance of the vessel for customs or free pratique was caused by the fault of the vessel.

At the time the original NOR was tendered, the berth was occupied so the vessel was required to wait at anchorage. The port health authorities granted the vessel free pratique more than six hours after the NOR was tendered but whilst she was still at anchorage. On the same day that free pratique was granted, the master sent two e-mails to the charterers, "repeating" the original NOR.

When the owners presented their demurrage claim in due course, the charterers argued that the owners were not entitled to calculate their claim based on time running six hours after the original NOR, because this had been invalidated by the failure to obtain free pratique within six hours in accordance with SAC 22.

The owners' alternative case was that the two subsequent e-mails constituted valid NORs and

they could claim demurrage with time calculated to run six hours after the sending of one or other of those e-mails. The charterers contended that those e-mails were not valid NORs and that even if they were, the owners would be time-barred pursuant to the demurrage time bar provision in the charter party which specified that the claim should be notified within 60 days and full supporting documentation provided within 90 days from discharge.

### Commercial Court decision

Mr Justice Walker was of the view that SAC 22 was poorly drafted and the language imprecise. He stated that the parties could not sensibly have intended that the exception contained in SAC 22 regarding the granting of free pratique within six hours would apply only where free pratique was obtained when the vessel berthed and not before (in this case, whilst the vessel was at anchorage), because then the owners would be in a better position if customs boarded later rather than sooner. The judge thought such an interpretation would be absurd. The absence of free pratique before the vessel berthed would cause no loss of time to the charterers if free pratique was obtained on berthing or earlier. Therefore, he held that the original NOR was valid.

In the circumstances, the judge did not need to come to a conclusion on whether either or both of the two e-mails sent after free pratique had been granted constituted valid NORs. However, he did comment that had the owners been obliged to rely on their alternative case, then their demurrage claim would have been time-barred. He stated that whilst the owners did not need to quantify their demurrage claim so long as notification of the claim was given within 60 days, in this case the insuperable difficulty for the owners was that they had not provided full supporting documentation within the 90 day period specified. The judge said it was fundamental to any demurrage claim that the stage when time started to run for the purposes of the claim was clearly identified. The documentation submitted to the charterers clearly identified a claim where time started to run 6 hours after the original NOR was tendered. There was no hint that the owners had a claim that time started to run six hours after one or other of the subsequent e-mails. It followed that the owners would have been barred from asserting such a claim, had their primary case failed.

## Cargo claims under bills of lading - title to sue and the Carriage of Goods by Sea Act 1992 – *The Pace*

*Pace Shipping Co. Ltd v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm)

### Background facts

CN purchased bagged rice from A Ltd and B Ltd. CN then requested its bankers, GTB, to open letters of credit in favour of a company called NBIC, which in turn arranged for letters of credit to be issued in favour of A Ltd and B Ltd. The bills of lading named CN as the notify party and the letters of credit issued by NBIC to the sellers named CN as the notify party. The sellers were paid for the cargo under the letters of credit opened by NBIC.

The rice was shipped from Indonesia and discharged in Nigeria, presumably pursuant to an LOI that was given to the ship owners. Shortly after completion of discharge, the bills of lading were endorsed by GTB and handed over to an employee of CN. There was nothing to suggest that CN obtained the bills of lading other than lawfully. CN alleged a claim for cargo damage and short delivery in the sum of about US\$500,000. The ship owners argued that CN had no title to sue. The claim was referred to arbitration in London.

Section 2(2)(a) of the Carriage of Goods by Sea Act (COGSA) 1992 provides as follows:

*“Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill - (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill...”*

This provision caters for the common practice of cargo being discharged to the correct person but pursuant to an LOI and without production of bills of lading. In that situation, the cargo is no longer on the ship and the bills of lading are “exhausted”. So when the cargo receiver eventually receives the bills of lading, often months later via banking channels, the bills are not capable of transferring any rights. This is inconvenient because cargo receivers need to be able to bring claims against the carrier under the bills of lading in this situation. Therefore, COGSA 1992 expressly allows rights to be transferred even after the cargo has been discharged. However, in order to avoid bills of lading being negotiated for cash on the open market, without any dealings in the goods, section 2(2)(a) requires the claimant to become the

holder of the bill of lading due to a contract entered into before the goods are discharged from the ship. This prevents a company buying a bill of lading solely in order to be able to bring a claim against the carrier under the bill of lading.

The Arbitral Tribunal found by a majority of two to one that NBIC probably obtained title to the goods from the shippers, but CN acted at all times as principals under the sale contracts. The ship owners appealed.

### Commercial court decision

Mr Justice Teare, agreeing with the comments of Aikens J in *The Ythan* [2006] 1 Lloyds Rep. 457, noted that the purpose of section 2 (2) (a) was to stop trafficking in bills of lading and that the words “in pursuance of” in the provision could most appropriately be understood to mean that the contractual or other arrangements had to be the reason for the transfer of the bills of lading.

That test would normally be satisfied where the holder received the bills because he had a contractual entitlement to receive them (or “to call for them”) under the contractual or other arrangements that were in existence before the bills were spent. However, the judge considered that section 2(2)(a) was potentially wider than this and could extend beyond an interpretation based strictly on contractual entitlement.

Adopting this purposive construction of the Act, the Judge said that the two arbitrators were entitled to conclude that the immediate and proximate cause of the transfer of the bills were the sale contracts and the payments made thereunder to CN’s respective sellers.

In conclusion, a cargo claimant under a bill of lading will have to prove that he is the lawful holder of the bill of lading and that he acquired it pursuant to contractual or other arrangements entered into before the cargo was discharged, otherwise the claim will probably not even get off the ground. However, the claimant should not have to go too far in proving this if it is reasonably clear from the facts that there was nothing unlawful about the transaction and there appears to be no intention on the cargo receivers’ part to sell a claim to a third party once the goods are off the ship. Where the sale contract to purchase the goods is earlier than the date of discharge, this would seem to be prima facie evidence that there was no intention to traffic in bills of lading.

## Other News

### Ince Singapore gains new partner

As of January 2010, leading International Trade & Commodities and Energy partner Denys Hickey has transferred to our Singapore office. Denys qualified as a barrister before re-training as a solicitor. He became a partner with Ince & Co in London in 1986.

Denys advises clients with a wide range of oil and gas interests, including oil traders. He has extensive commodity trading experience, including oil and gas, biofuels and metals. Denys combines his industry expertise with many years of arbitration experience. A member of the Chartered Institute of Arbitrators and of the Arbitration Club – Oil and Gas Branch, he has arbitrated under ICC, LCIA, UNCITRAL, LME, GAFTA, FOSFA and LMAA rules. He has also acted as an arbitrator and as a mediator.



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