



INTERNATIONAL
LAW FIRM

Shipping E-Brief

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Shipping

Hague Rules: dangerous goods and negligent stowage

Compania Sud Americana de Vapores S.A. v Sinochem Tianjin Import & Export Corp. (The Aconcagua) [2009] EWHC 1880

The *Aconcagua* is the first dangerous goods case to deal directly with a carriers' right to recover an indemnity under Art IV rule 6 of the Hague Rules where loss arises from a combination of the shipment of dangerous cargo and a breach of the carriers' obligation to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods under Article III rule, 2.

On 30 December 2008, an explosion took place in the no 3 hold of the *M.V. Aconcagua* off Ecuador causing widespread damage to the vessel and her cargo. The cause of the explosion was self-ignition of a container of calcium hypochlorite, which is a dangerous cargo and had been declared as such. The IMDG Code required the cargo to be stowed "away from" sources of heat. Despite this, the cargo was stowed in a position where it was surrounded on three sides by a bunker tank, which was heated during the voyage.

The vessel was on time charter to CSAV, who paid US\$27,750,000 in settlement of the shipowners' claim. CSAV then pursued a claim against Sinochem, the shippers of the container, for breach of the terms of the bill of lading. The bill of lading was subject to the Hague Rules, under Art IV, rule 6 of which the shipper is liable for all damages and expenses directly or indirectly arising out of or resulting from the shipment of dangerous cargo to which the carrier has not consented, with knowledge of the nature of the goods.

CSAV admitted that the storage of the container next to the bunker tank was negligent. However, they contended that:

- the stowage of the cargo was not the cause of the explosion as it was a rogue batch of calcium hypochlorite with an abnormally high thermal instability, that exploded at temperatures ordinarily to be expected on board the vessel during the voyage.
- if the cargo had not been abnormal, it would not have exploded and any self heating would have been negligible.
- when the cargo was loaded at Busan in Korea, bound for San Antonio, the vessel was not unseaworthy because the bunker tank in question was not needed for the voyage. The

tank was heated because of a decision of the Chief Officer to use it as opposed to others available. His negligent decision did not mean that the vessel was unseaworthy at the commencement of the voyage. Additionally, his decision was "an act, neglect or default in the management of the vessel", in respect of which the carrier was exempt from liability under Article IV, Rule 2(a).

Sinochem contended that:

- the cargo was not abnormal or, at the least, had not been shown to be so.
- the heating of the bunker tank on the voyage was either the or a cause of the explosion.
- the bad stowage of the container and its contents amounted to unseaworthiness and that, even if the cargo was a rogue cargo, CSAV was not entitled to relief under Article IV, rule 6, because it had failed to take due care to make the vessel seaworthy.

Having considered very extensive factual and expert evidence the judge concluded the material shipped was likely to have been a rogue batch of calcium hypochlorite with the capacity to explode at an abnormally low temperature, far lower than that which a prudent carrier would expect from the description of the material. CSAV did not know, nor should it have known, that the cargo could explode at temperatures of 40°C or below. Therefore, it was a cargo of a dangerous nature of which CSAV neither had nor ought to have had knowledge and CSAV had not knowingly consented to the shipment of a cargo of this nature.

The judge then went on to deal with the following questions:

Who bore the burden of proof as to the causative effect (or the lack of it) of the negligent stowage?

If the goods had had only the characteristics which a prudent carrier should have been aware of, the explosion would not have occurred. Therefore, Sinochem were seeking to avoid a liability to which it would be subject unless bad stowage was a cause. It was, therefore, for Sinochem to establish that the bad stowage was causative. It followed that once CSAV had established that the casualty resulted from the shipment of goods, the true danger of which it was unaware, the burden was on Sinochem to establish that the negligent stowage of the container had a causative effect.

Was the stowage of the calcium hypochlorite next to the bunker tank a breach of the carriers' seaworthiness obligations under Article 3, rule 1(a)?

Although Sinochem was not able to show that the negligent stowage had a causative effect, the judge went on to consider what the position would be if the negligent stowage had been causative.

In this case the vessel was only in danger if the fuel tank was heated on the voyage to San Antonio. If no heating had taken place the container would be entirely safe. In these circumstances the vessel would not be unseaworthy at the commencement of the voyage unless the heating was bound to occur because the fuel tank had to be used on the voyage; or if heating was pre-programmed to occur, or the crew was incompetent because they were so ill trained they did not know they had to protect heat sensitive cargo. That was not alleged.

Whether or not the fuel tank was used depended on an operational decision made during the voyage. The fault lay not in the stowage but the decision to use and heat the tanks and the failure of the crew to appreciate that a cargo described as one to be stowed away from sources of heat, ought not to be heated by the bunker tank around it, and that bunkers from other tanks should be used. The Chief Officer had the information that the cargo was UN1748 and therefore should be stored away from heat. There was a system for addressing the question as to which tanks should be bunkered at different stages of the voyage. The Chief Officer could and should have assessed the acceptability of heating the tank next to the container and objected to the heating of the tanks. He did not do so nor did the Master or the Chief Engineer, but it was not suggested that they were incompetent and the obligation to take care to make the vessel seaworthy did not mean the ship must be immune from the negligence of her crew.

If not a breach of the seaworthiness obligation, did CSAV's fault amount to an "act, neglect or default in the management of the vessel" within Article IV, rule 2 (a)? If so, is CSAV still liable under Article IV, Rule 6?

Subject to the provisions of Article IV, CSAV was bound under Article III, rule 2 "properly and carefully to keep, care for and carry" the cargo. Heating the fuel tanks when a container of calcium hypochlorite was stowed on top of it was a failure properly to care for and carry that cargo. However, the heating of that cargo was an act, neglect, or default in the management of the ship. The risk of loss arising therefrom was, therefore, an excepted peril and CSAV was under no liability in respect of it.

If CSAV's fault did not fall within Article IV, rule 2 (a), was CSAV precluded from claiming under Article IV, rule 6, because the indemnity under that Article is to be construed so as not to apply in the case of causative negligence?

If the Article IV, rule 2 (a) exception was not applicable, and the casualty was caused by a combination of (a) the shipment of dangerous goods and (b) the heating of the bunker tanks, then CSAV would not be able to recover an indemnity. On those facts the casualty would in part be caused by the operation of a non-excepted peril for which CSAV was responsible. The exclusions and indemnities in Article IV are predicated on the carrier showing that the loss for which he is said to be liable, or in respect of which he claims an indemnity, was alone caused by a peril falling within Article IV (e.g. an act in the management of the vessel or the shipment of dangerous cargo). They are not to be construed as applying to loss caused in part by the negligence of the party which seeks to invoke the Article.

Conclusion

The outcome in *The Aconcagua* is illustrative of the significant protection conferred on carriers by the exemption from liability in respect of damage caused by an "act, neglect or default in the management of vessel" under Article IV rule 2(a) of the Hague and Hague Visby Rules.

Notably, if the Rotterdam Rules, signed by 17 states on 23 September 2009, were to apply to the facts of this case, the outcome would have been very different. Under the Rotterdam Rules the carrier is obliged to exercise due diligence "at the beginning of, and during the voyage to make and keep the ship seaworthy". The carrier cannot therefore avoid liability simply because the event resulting in the loss or damage to cargo has occurred during the voyage. Nor, as a result of the omission from the Rotterdam Rules of the nautical fault defence would the carrier be able to avoid liability because the loss has been caused by the negligence of the master or crew.



Fionna Gavin

Senior Associate, London
fionna.gavin@incelaw.com

Koehler – New York court confirms the availability of a powerful remedy for judgment creditors

Koehler v Bank of Bermuda Ltd., 2009 NY Slip Op. 04297 (Jun. 4, 2009).

The New York Court of Appeals held on 4 June 2009 by a close 4-3 majority that courts in New York have the power to order banks to turn over assets held on behalf of their customers – including those held outside of New York – to creditors with court judgments or arbitration awards converted into judgments.

The ruling, which is of great interest to international commercial business generally, was requested from the Court of Appeals (a state court) by a US (federal) court on the basis that the question was controlled by New York state law. New York statutory law defines the rules for the enforcement of judgments in any court within the State of New York (including federal courts). The New York Court of Appeals is the highest court of the State of New York and the ultimate arbiter of New York law.

Background

In June 1993, Lee Koehler obtained a default judgment from a US court in the state of Maryland for more than US\$2 million against his former business partner, David Dodwell, a resident of Bermuda. Mr Koehler registered his judgment with a US court located in New York in order to enforce the judgment against Mr Dodwell's assets. Mr Dodwell owned shares in a Bermuda company, which he had pledged to Bank of Bermuda Limited ("BBL") of Bermuda as collateral for a loan. In October 1993, Mr Koehler requested an order from the US court that BBL turn over Mr Dodwell's share certificates, which BBL held in Bermuda, or money sufficient to pay the US\$ 2 million judgment. The US court in New York granted that order.

For about ten years, BBL disputed the US court's jurisdiction over BBL – the court's authority to exercise its power over BBL. However, in October 2003, BBL agreed that it was subject to the US court's jurisdiction.

In March 2005, the US court dismissed Mr Koehler's claim, stating that the court had no in rem jurisdiction (that is, jurisdiction over the property, the type of power out of which ship arrests originate) over the assets because they were not located in New York. Mr Koehler appealed to the Second Circuit Court of Appeals (the federal appellate court). As a question of New York law was involved, the Second Circuit Court of Appeals referred the matter to the New York Court of Appeals for an advisory opinion on that issue.

Reasoning

The Court of Appeals distinguished pre-judgment and post-judgment orders made in relation to assets of the debtor which might satisfy the creditor's claim.

The statute considered was Section 5225(b) of the New York Civil Practice Law and Rules. Section 5225(b) provides that a creditor with a judgment may commence legal proceedings against a person, such as a bank, who is in possession of the debtor's assets. This statute is located within the provisions providing for the power to make orders for the enforcement of *existing* court judgments. The New York Court of Appeals distinguished these rules from those setting out the power to make orders preserving property *before* a judgment has been obtained.

Prior to judgment, a court in New York will not order a debtor to hand over assets to a creditor, as the court has not yet made a determination that the creditor is entitled to those assets. At the pre-judgment stage, the court may order that the state take control of the assets within the state's territory so that those assets can be preserved and later satisfy a judgment in favour of the creditor. The Court of Appeals held that the basis for a court's power to make this type of order is the fact that the property is within New York – that is, jurisdiction is over the property, or in *rem* jurisdiction.

This remedy was distinguished from the situation in which a creditor has already obtained a judgment (or an arbitration award) against a debtor. The Court of Appeals concluded that the statute empowers a court in New York to order a person who holds property owned by a judgment debtor to hand over that property or pay money to a person holding a judgment. The basis for the court's power to do so was held to be its power over the person holding the property – that is, jurisdiction over the person, or in *personam* jurisdiction.

Three Judges of the Court of Appeals dissented, noting that the relevant New York statutes do not expressly confer on the courts power to make orders with such extraterritorial effect. In addition, the dissenting Judges questioned whether such power was beyond the limits of the US Constitution, which require that a party have sufficient contact with a state before its courts exercise their power over that party.

On the basis of its jurisdiction over BBL, which BBL had accepted after a decade of litigation over that point, the Court of Appeals concluded that courts in New York (both state and federal) have the power to order a party subject to their jurisdiction to hand over assets – whether or not those assets are within New York or anywhere else in the world.

Impact

BBL may make efforts in the (federal) Second Circuit Court of Appeals and the US Supreme Court to challenge the ruling of the New York Court of Appeals on US Constitutional grounds (building on the comments of the dissenting Judges). However, if the *Koehler* rule remains as it stands, it could make New York as popular for enforcement of judgments as it has become for maritime attachments.

The potential scope for application of *Koehler* is remarkable, particularly in relation to banks, which in the course of their business hold the assets of their clients in diverse locations. Any party over whom a court sitting in New York (whether federal or state) accepts jurisdiction will be subject to an order which applies to their assets anywhere in the world. This could include the affiliates or branches of banks operating in New York City. Such parties could be ordered to hand over assets they hold anywhere for their clients who become subject to judgments or arbitration awards.

Some maritime companies have registered a presence in the State of New York in an effort to avoid having their US Dollar electronic funds transfers seized pursuant to a US court order made under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims. There was already a risk to this strategy in that such a company could become subject to proceedings in US and New York courts, as well as to the authority of governmental agencies such as the tax authority of the US Internal Revenue Service. Following *Koehler*, there is now a risk that a company registered in New York will be subject to a court order to pay, out of its worldwide assets, money to satisfy any judgment (or arbitration award) against it.

In recent years, the maritime world has seen pre-judgment attachment remedies in US courts in New York emerge as popular and powerful tools in the pursuit of maritime claims. This has resulted largely from the use of the US Dollar as the currency of choice in many fields of international business, and the position of New York as a centre for US Dollar transactions. However, *Koehler* could apply to any judgment (or arbitration award converted to a judgment) – not merely maritime claims.



Juan Sierra

Solicitor, London

juan.sierra@incelaw.com

Piracy – Update and Overview

This time last year, we were into the second week of the hijacking of the *MV Faina*. It was one of a cluster of ships taken in September 2008 and held near Hobyo, Somalia, and would take until January this year to be resolved. Other ships were being held near Eyl, Somalia, and one in three attacks in the Gulf of Aden and in the seas to the east of Somalia was proving successful. A year on, where are we?

There have been frequent attacks by pirates during this past September and, with the monsoons abating, it does not take a soothsayer to predict an increase in the intensity of those attacks over the next few weeks. At the time of writing, there are four ships under pirates control. The latest to be hijacked, on 2 October, was the *Alakrana*, a Spanish trawler, which took the hijacked number to five, but this small increase lasted only until the next day, when the *Horizon 1* was released.

The summer lull has seen renewed efforts on the part of the international community, which are discussed below. The pirates have begun to appear on YouTube, interviewed by various news outlets and we have learned a little more about what motivates them (apart from money). They have confirmed that they see this as a business but, worryingly, that crews from Europe are more highly prized. The death of the Syrian master of the *Barwaqo*, whatever the circumstances, was a tragic reminder that the crew's safety cannot be taken for granted and that they remain very much in the front line.

In the past, we have seen the pirates prepared to adapt their tactics to meet the threat they face from the naval forces. The recent attack on the French supply vessel, the *Somme*, caused some mirth in the press but is more understandable because it happened in the dead of night when attacks have usually taken place in daylight. We have seen attacks in the past (such as on the *Tanit*) that appear almost desperate; operating hundreds of miles off shore, the lack of water and food has

driven pirates to take risks they may otherwise have avoided. The concern must be that any more failed attacks may lead to more extreme measures on the part of the pirates. This may manifest itself by way of attacks in areas unaffected to date, such as off the coast of Oman, or attacks being pressed home by a greater number of skiffs.

Furthermore, whilst the headlines are dominated by Somalia, we must not overlook the continued problems both in the South China Seas and the Gulf of Guinea.

International initiatives

The Best Management Practice (“BMP”) guidelines have been revamped slightly and received international recognition when the US, UK, Japan and Cyprus, amongst others, showed their commitment by signing the New York Declaration. The BMP has no legal standing, but it is at least an affirmation of the intent of those countries to deal with the problem. Some commentators (particularly in the US) see the BMP as “soft” but they miss the point. It is not meant to be a charter for the absolute defence of a ship but a template for good practice, ensuring the owners and their crews are in the best position to avoid capture and to stay safe. For example, BMP advises the crew to surrender if the pirates board (although the crew of the *Zhen Hua 4* would no doubt have something to say about that). Contrast that with the advice issued by the US Maritime Administration (“MARAD”) which implores ships to defend themselves and to “...not surrender at the first sign of a threat”. A cry for ships to toughen up. In May this year, it became compulsory for US flagged vessels to have a USCG approved plan for the transit of the Gulf of Aden, including a requirement to have a security team on board.

The BMP and the MARAD guidelines will no doubt become the benchmark against which vessel operators will be measured when it comes to cargo and chartering interests looking at seaworthiness issues and examining whether owners have exercised due diligence.

It is said that the risk reward ratio is heavily weighted in favour of the pirates. Ransom payments hover around the US\$2m mark and some efforts have been made to increase the risk to pirates. Yet less than 50% of all pirates captured by naval forces are actually brought to face charges. Some pirates have been transferred to non-African jurisdictions such as the US, France and Holland, but Kenya is still being asked to bear the brunt of the prosecutions. At present, some 112 pirates are in Shimo El Tewa prison awaiting trial. Kenya has demanded financial help and has made it clear that it cannot take many more pirates. The UNODC has taken steps to improve conditions in the prisons, but other governments are going to have to show more will to prosecute pirates under national laws.

Therein lies the issue. The international conventions which should allow prosecution, not only for attacks but also for demonstrating an intention to attack, are in place. However, several nations have still not enacted local law incorporating, for example, the Suppression of Unlawful Acts Convention (1988) or the Hostage Taking Convention (1979). Even in the UK, the Transport Security Bill formalising the Royal Navy’s powers of detention in this area has not yet reached the statute books. Without that political will, pirates will continue to be released more often than not, free to re-arm themselves and go back out to sea. Having said that, there is still the issue of timing. We shall have to see whether the two pirates involved in the hijacking of the *Alakrana* recently arrested by Spain become an aggravating factor in the negotiations for the vessel’s release. The pirates on board are already reported to be refusing to negotiate until their two friends are released.

Kenya has now enacted its own Maritime Shipping Act, which formalises its laws on hijacking. However, this is not retrospective and in repealing the relevant piracy provision of their penal code, there are some who believe that Kenya may have inadvertently removed piracy as an offence from its statute books.

Two funds have been set up with the backing of the UN. One, supported by Germany, is a sensible initiative designed to pay for the expenses of witnesses attending trials in Kenya. This may help persuade crew members to give evidence, although the unpredictability of the Kenyan process and the propensity to adjourn hearings at short notice make this another contentious area. Crew cannot be expected to miss out on work and future employment because they may be required to give evidence in the future. The second initiative, being pushed by Japan, is to fund “regional centres” in Djibouti, Kenya and Ethiopia to pool resources and knowledge in the fight against piracy. The prospect of an International Piracy Tribunal is often debated, but the difficulty is that some nations will not give up their right to prosecute pirates that attack their interests. Additionally, issues over where such pirates would be imprisoned make this an unrealistic option at the present time.

Here in the UK, a House of Lords EU Committee on money laundering looked at the issue of ransoms and confirmed that, as a matter of English law, there was nothing unlawful in paying them. It reflected on an internal report that found there was no proven connection between pirates and the militant Somalian Islamist group, Al Shabab, but suggested that this was only because the government had not looked for it. There is still no proven link between the criminal acts of the pirates and the funding of terrorism, which remains the key hurdle set by UK law in terms of determining the legitimacy of ransom payments.

Commercial and legal Developments

The issue of armed guards still polarises opinion. BIMCO and other industry bodies continue to take the line that weapons on ships should be avoided. In the UK, a poll of UK shipowners found an overwhelming number against the idea. Yet after the three attacks on Spanish trawlers in early September (including one on the *Alakrana*), the Spanish government gave approval for weapons to be deployed on its fishing fleet. This approval came too late for the *Alakrana*, although it is impossible to know if that would have made a difference. One argument used by the providers of armed security is that it deters attacks, yet the attack on the *MSC Melody* back in the spring and more recently on the *BBC Portugal* and the French fishing vessels (the *Glena* and the *Dennak*) perhaps prove this not to be the case. It is no surprise that the pirates are prepared to meet force with force despite warning shots and that they will exchange fire. In all cases so far, the pirates have backed off, but the risk of escalation remains a real one.

On the legal side, we have seen the case of the *Danica White* reach the courts in Denmark, where the owners were sued by the crew for a breach of their duty of care. The master but not the owner was found negligent and the action failed. However, the *Danica White* was hijacked early in 2008, so it may be that with the BMP now in place and the greater knowledge that is now available, a similar case would lead to a different finding. It is certainly the case that the ITF are concerned about placing what seems to be a very high burden on a ship's crew.

Recently, a London arbitral tribunal considered whether a vessel chartered on NYPE terms where Clause 15 was unamended (i.e. where there was no "...*whatsoever*" inserted) was off-hire during a hijack. The issue was whether a hijacking was an "*average accident*" or was caused by the negligence of the crew and therefore was a "*default of men*". The Tribunal concluded that the vessel remained on hire, finding that "*average accident*" must involve damage to the ship. The decision gives some certainty as to where the risk lies in NYPE time-chartered ships.

In the meantime, the industry waits to see what the next few weeks bring. There is no doubt that the problem shows little sign of disappearing.



Stephen Askins

Partner, London

stephen.askins@incelaw.com

Owners entitled to compensation for costs incurred as bailees of cargo; bank guarantee expenses recoverable as costs

E.N.E. Kos v Petroleo Brasileiro S.A. (Petrobras)
[2009] EWHC 1843 (Comm)

The facts giving rise to the dispute

The claimant owners chartered the *M/T Kos* to the defendant charterers for 36 months. Hire under the charterparty was payable monthly in advance, failing which the owners had the usual right to withdraw the vessel. The charterparty had no anti-technicality clause (a clause which requires owners to give notice to charterers prior to withdrawing the vessel).

The vessel was delivered into the charterparty in July 2006. The June 2008 hire instalment was not received by owners by the deadline of midnight on Saturday 31 May 2008. Accordingly, on Monday 2 June 2008, after checking with their bank that the hire had not been received, owners gave charterers notice of withdrawal of the vessel from the charterparty. Absent the withdrawal, there would have been a further year left to run on the charterparty.

At the time of withdrawal, the vessel was at Angra dos Reis, Brazil, where she had been ordered to proceed by the charterers for discharge and back loading. By the time of owners' withdrawal notice on Monday 2 June 2008, the vessel had already taken on bunkers and loaded a parcel of cargo on Sunday 1 June 2008 and was waiting to load a second parcel.

Charterers disputed the validity of owners' withdrawal notice, asserting that owners had waived their right to withdraw the vessel by taking on bunkers and loading the first parcel of cargo on Sunday 1 June 2008, after the deadline for payment of the June hire instalment had already passed. Charterers asserted a counter-claim for

wrongful termination in the sum of US\$18 million and demanded security for their claim by way of a first class bank guarantee/Club letter, failing which charterers threatened to take steps to arrest the vessel and/or owners' assets elsewhere. A bank guarantee in the sum of US\$18 million was duly provided by owners to charterers.

In the meantime, steps were taken to off-load the first parcel of cargo which had been loaded onboard the vessel prior to withdrawal. The vessel remained at Angra dos Reis for 2.64 days (valued by owners at US\$410,274.00) and consumed some 80.11 MT of IFO at a cost of US\$504.50 per MT (US\$40,415.00) following notice of withdrawal, until she was cargo free and sailed.

Owners commenced High Court proceedings against charterers for recovery of their claims for (i) compensation and/or damages and/or remuneration for the period of detention and the bunkers consumed during that time and for discharging the cargo, and (ii) an indemnity for the expenses incurred by owners in providing and maintaining the bank guarantee demanded by charterers.

Charterers put owners to proof that the withdrawal was lawful and valid and, should it be found that the withdrawal was not valid, advanced their US\$18 million counter-claim.

Owners applied for and obtained summary judgment in owners' favour on the question of whether the withdrawal was valid, thus dismissing charterers' US\$18 million counter-claim. Owners then proceeded to trial for determination of their claims.

Commercial Court decision

Claim for detention and bunkers consumed

In respect of the first head of claim advanced by owners for detention and bunkers, Mr Justice Andrew Smith held that owners' claim succeeded in full. Owners had put forward various arguments in support of their claim. The one which ultimately found favour with the judge was that owners had become gratuitous bailees of the cargo. One of the authorities on which owners relied was *The "Winson"* [1982] AC 939, a House of Lords case where owners of a consignment of salvaged wheat had delayed in giving instructions to salvors regarding delivery to them of that wheat. The court held that the salvors were entitled to recover from cargo owners their reasonable expenses, including for warehousing of the salvaged goods, during the relevant period of bailment. As bailees of the goods, the salvors had a duty to take reasonable steps to preserve the cargo from deterioration and therefore a correlative right to charge the cargo owners for the expenses reasonably incurred in doing so.

In the present case, the judge held that owners were entitled to be compensated for their costs incurred in fulfilling their duties as bailees, which costs extended to cover not only their out of pocket expenses but also the time involved.

Claim for bank guarantee expenses

In respect of the second head of claim advanced by owners for the bank guarantee expenses, Mr Justice Andrew Smith first had to determine whether owners could recover the bank guarantee expenses as litigation costs incurred as a consequence of defending charterers' counter-claim (which by then had been dismissed by summary judgment). If the expenses could not be recovered as costs, owners' alternative argument was that they were recoverable as damages.

The judge referred to section 51 of the Supreme Court Act 1981, which provides that "the costs of and incidental to" proceedings in the High Court are in the discretion of the court and the court has full power to determine by whom and to what extent costs are paid. However, there is no statutory definition of the word "costs" or the expression "costs of and incidental to". In considering whether the costs of the guarantee were recoverable within the meaning of section 51, the judge took into account the dominant purpose for which the expense was incurred and whether the expense, in fact, proved useful in subsequent litigation.

The judge found that, as a matter of ordinary use of language, the original provision of the guarantee and the expense of doing so proved to be incidental to these proceedings. Consequently, he agreed with owners' primary argument and held that the bank guarantee expenses were recoverable as part of owners' costs of defending charterers' counter-claim, to be assessed if not agreed on the standard basis.

Charterers have obtained permission to appeal both aspects of the judgment. If pursued, the appeal is likely to be heard in first quarter 2010.



Michael Volikas

Partner, London

michael.volikas@incelaw.com



Jeremy Biggs

Solicitor, London

jeremy.biggs@incelaw.com

Hong Kong – two year delay results in dismissal of cargo claim

Nanjing Iron & Steel Group International Trade Co. LTD. v STX Pan Ocean Co. LTD. (07/09/2009, HCAJ177/2006)

Hong Kong reformed its civil justice system in April of this year. The underlying objectives of the reforms include the need to ensure that cases are dealt with “as expeditiously as is reasonably practicable”.

The present decision reflects a new approach by the Hong Kong courts to the conduct of litigation, in particular, the need for claims to be advanced without delay. In that regard, the Court ruled that a two year delay by the cargo claimants was “inordinate delay” and justified the dismissal of their claim for want of prosecution. The decision is noteworthy not only for the length of delay which the Court found inordinate, but also the fact that the Defendant did not need to show that he had suffered prejudice as a result of that delay.

Facts

The case concerned a cargo of wire rods which was carried by sea from Nanjing to Liverpool. Upon arrival, the cargo was found to be rust-damaged and crushed as a result of lack of proper care in the course of stowage or carriage. The plaintiff owners of the cargo brought an action against the defendant shipowners.

The plaintiff owners of the cargo issued a Writ in August 2006 within the applicable limitation period as extended by agreement of the parties.

Nothing happened in the proceedings until December 2008 when the Plaintiffs’ solicitors requested the Defendants’ solicitors to consent to an extension of time for the filing of a Statement of Claim. On 25 March 2008, the plaintiffs’ solicitors

filed a Notice of Intention to Proceed. On 14 May 2009, the Plaintiffs’ solicitors applied to file their Statement of Claim out of time. On 25 May 2009, the Defendants’ solicitors applied to strike out the claim for want of prosecution.

The decision

The issue before the Court was whether there had been inordinate delay by the plaintiffs. The judge, Mr. Justice Reyes, observed that in cargo claims the normal period of limitation is one year:

“That is to enable a defendant to know what is being claimed against it as soon as possible, to make all necessary investigations, and to collect material evidence at the earliest possible opportunity. Otherwise, the volume of sea-related trade being enormous, the evidentiary trail in relation to a particular shipment will grow cold and it will be extremely difficult to determine just what happened in relation to any particular consignment.”

The judge considered that a delay of two years, under the new CJR regime, was in itself sufficient cause to strike out the claim in light of the underlying objectives set out in the new Order 1A of the Rules of the High Court:

“In the absence of some compelling reason, it is contrary to the underlying objective in Order 1A, Rule 1(b) (“to ensure that a case is dealt with as expeditiously as is reasonably practicable”) for a party to allow an action to languish for 2 years once the same has been commenced. I am unable to see any compelling reason in this case. There simply is no excuse for such a long delay.”

The Court’s express finding shifted the burden on the plaintiffs to show a compelling reason for the two year delay, which the plaintiffs in this case failed to show.

The judge commented that the claim would have been struck out even under the old rules, on grounds of an abuse of procedure and the substantial prejudice suffered by the defendants. The following remarks were made by the judge:

- the plaintiff’s account for the delay, namely settlement negotiations between the parties, was not a good excuse for a delay in Court proceedings of over 2 years
- the fading of memories over two years is a substantial prejudice to the defendants and can be assumed simply because of the passage of time.

The significance of the decision

Prior to the Civil Justice Reform, it was relatively difficult to dismiss an action even where the plaintiff had delayed for a number of years. The defendant generally had to demonstrate a significant number of years of inactivity, together with cogent evidence that the delay caused, or was likely to cause, serious prejudice to the defendant.

In *Nanjing Iron*, the express finding by the judge that a delay of two years was contrary to the CJR's underlying objective and justified dismissing the plaintiff's action represents a significant development post-CJR. The case is particularly relevant to cargo claims, given the emphasis placed by the judge on the Hague-Visby Rules' time limit of one year. The decision sends a strong signal to litigants that delays will not be tolerated unless "compelling reason" can be shown. While it remains to be seen whether this decision will be endorsed by a higher Court, or followed by other High Court judges, this decision is certainly one to be heeded by cargo claimants.



Bill Amos

Partner, Hong Kong
bill.amos@incelaw.com

Western Neptune v Philadelphia Express – some interesting points arising in a collision case

[2009] EWHC 1274 and 1522 (Adm)

Facts and original dispute on liability

This case, heard by the Admiralty Court in London, involved a collision in September 2007 between a seismic survey vessel, *Western Neptune*, and a container vessel, *St Louis Express*, in the Gulf of Mexico. The *Western Neptune* was towing a spread of gun arrays and streamers (the former send out sound waves generated by compressed air and hydrophones and the latter record the echo) at night, when the *St Louis Express* crossed astern of the *Western Neptune* and collided with the array.

The claimant owners of the *Western Neptune* alleged that the collision was caused by the negligence of the *St Louis Express* and they brought proceedings against

the defendant owners of the *St Louis Express* claiming damages of about £25 million. The *St Louis Express* suffered no damage and consequently there was no counterclaim.

The defendants conceded during the trial that they bore the majority of the blame for the collision because the *St Louis Express* had entered the "safety box" around the *Western Neptune* (3 miles ahead, 3 miles on each side and 6 miles astern). This had been requested by one of the vessels supporting the *Western Neptune* acting as a "guard" vessel for the convoy by contacting approaching vessels on behalf of the *Western Neptune*. It was accepted that the *St Louis Express* had altered her course to port improperly, crossed the array's path and had not recognised the significance of warning lights on the buoys attached to the end of the array.

There was, however, a dispute as to whether the claimants were partly to blame for the collision. The question also arose as to whether the array was to be treated as part of the *Western Neptune* for the purposes of the collision avoidance rules. Having consulted with the nautical assessors sitting with him in the Admiralty Court, Mr Justice David Steel accepted their view that the tow must always be treated as part of the towing vessel for the purposes of collision avoidance. In this case, the *Western Neptune's* array, as a tow (part of which was on the surface) was to be considered an integral part of the vessel.

The judge also drew attention to the fact that, after the collision, the claimants and the master of the *Western Neptune* introduced some significant changes to navigational procedure during surveying operations, including the introduction of a new arrangement for guard vessels whereby, if two vessels were available, the second would be placed one mile astern of the tail buoys, with all approaching vessels being required to pass astern of that vessel. In addition, the master's standing orders in relation to traffic monitoring and broadcasting of the exclusion zone were amended.

However, Mr Justice David Steel emphasised that this did not of itself mean the original practices were deficient. Rather, he said that "*nothing is so perfect that it can not be improved*" and referred to the 19th century case of *Hart v L & Y Railway*, quoting Brownwell J, who said that "*people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident*".

Giving judgment on liability, the judge found that it should be apportioned as follows: 2/3 *St Louis Express* and 1/3 *Western Neptune*. A dispute then arose as to what extent *Western Neptune's* owners' costs should be recovered from the *St Louis Express* owners.

Dispute on costs

The claimants argued that they were the winning party and were entitled to the entirety of their costs. They relied on *The Antares II* [1996] 2 LLR 482 in support of the proposition that the fact that they had been found one-third to blame for the collision and thus could only recover two-thirds of their claim was not in itself a sufficient reason to reduce the level of recoverable costs.

The judge started his analysis by stating that the court's discretion as to the award of costs had to be exercised in accordance with Civil Procedure Rule (CPR) Part 44.3, namely that the successful party in the litigation is entitled to an order for costs and that any consideration of a departure from that starting point must have regard to all the circumstances of the case, including the conduct of the parties – see *The Krysia* [2008] EWHC 1880 (Adm).

The defendants, on the other hand, argued that the claimants should only recover a proportion of their costs consistent with the apportionment of liability for the collision and the claimants' allegedly unsatisfactory conduct in respect of settlement proposals and disclosure. In particular, the defendants made a settlement offer in April 2008, before significant costs had been incurred, proposing apportionment of liability at 60/40 in favour of the claimants, with costs in the same proportions. Yet it was not until January 2009 (just over a month before the trial) that the claimants reverted with their own settlement offer on the basis of liability being apportioned 80/20 in their favour, together with payment to them of all their (by then) substantial costs.

Additionally, there was a significant amount of very late disclosure by the claimants of highly relevant material. In particular, this material included documents relating to the defendants' case that the *Western Neptune* had failed, as the situation developed, to dive her streamers to a depth such that the *St Louis Express* could safely pass over them. This reflected a change in the claimants' case, very late in the day, from an argument that diving was not practical, to a position that diving could not be achieved in time (the claimants lost the argument in any event). The judge found that this was an additional factor that the court had to feed into the question of apportionment pursuant to CPR 43.3(7).

The decision

Mr Justice David Steel held that the apportionment of liability in the substantive dispute was a relevant factor to the issue of costs, but it was not determinative. Rather, the court was entitled to exercise its discretion as to costs flexibly.

The judge found that there were a number of circumstances that justified a departure from the starting point. First, as regards proposals for settlement, the claimants' offer was substantially wider of the mark than the defendants' earlier offer (and £3.5 million more than the claimants eventually recovered) and had been made almost a year later, by which time most of the costs had been incurred.

As to the late disclosure, this related largely to the diving issue, which represented the bulk of expert evidence and occupied a significant proportion of the trial.

Taking into account these factors, the judge held that the claimants should recover only 65% of their costs, with no order as regards the defendants' costs.

Lessons to be learned

In addition to the court's comments on the application of the collision regulations to tows and the introduction of post collision precautions by the claimants, a number of interesting issues arose in relation to good litigation practice.

A party making a settlement offer should do so as early as practicable and before significant litigation costs are incurred. The offer made should be pitched at a realistic level and should be based on as accurate an assessment of the merits as is possible.

Any disclosure orders made by the court should be complied with in a timely and comprehensive fashion. Where there is an order for specific disclosure which a party considers is unduly wide, it is important to apply to the court for restriction of the scope of disclosure sought, for example on the grounds it is immaterial or disproportionate. In the present case, no such application was made by the claimants.

Finally, the parties should identify the individual issues relevant to their case as early as possible and endeavour to avoid any changes in their argumentation that might lead to unnecessary waste of costs.



Kevin Cooper

Partner, London

kevin.cooper@incelaw.com

Reema Shour

Professional Support Lawyer, London

reema.shour@incelaw.com

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)

The *MV Pace* discharged her cargo without production of bills of lading, presumably pursuant to an LOI. The cargo receivers, having acquired the bills of lading shortly after discharge from their bank, brought a claim against the shipowners for damage and short delivery. There is nothing out of the ordinary about this scenario, but the cargo receivers needed two arbitration awards and two visits to the High Court just to prove that they had title to sue. Having cleared this hurdle, they can now turn their attention to the cargo damage/shortage – if they still have the energy!

This recent judgment does not make new law, but it provides a good example of how a Court will apply The Carriage of Goods by Sea Act 1992. The cargo claimant will need to show that the immediate reason and proximate cause of the endorsement and delivery of the bills of lading were contractual or other arrangements that were made before the goods were discharged from the vessel.

The claimants (“CN”), a Nigerian company, purchased bagged rice from A Ltd and B Ltd. CN requested its bankers, Guaranty Trust Bank, 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 Tribunal held that NBIC probably obtained title to the goods from the shippers, but CN acted at all times as principals under the sale contracts .

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 claim was referred to arbitration in London (Mr. Bruce Harris, Mr. Roger Rookes and Mr. Ben Leach). For a claim under a bill of lading to get off the ground, the claimant needs to prove that it had title to sue and in this case the shipowners took issue on this point.

The legislation at the heart of this dispute is the Carriage of Goods by Sea Act 1992. The key part is Section 2(2)(a) which 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;”

The reason for this provision is to cater 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 bills of lading cannot continue to be the “keys to the warehouse”, because the cargo is no longer on the ship. 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, so COGSA 1992 expressly allows rights to be transferred even after the cargo has been discharged. However, the drafters recognised that by allowing this there was a possibility that bills of lading could be negotiated for cash on the open market, without any dealings in the goods. In other words, trafficking in bills of lading simply as pieces of paper which give causes of action against sea carriers. Hence the requirement in Section 2(2)(a) that the claimant has to become the holder of the bill of lading due to a contract entered into before the goods are discharged from the ship.

It is apparent from the judgment in this case that the evidence surrounding the sale contracts and transfer of the bills of lading was incomplete. The lack of evidence appears to have allowed the ship owners to argue that CN had failed to show that they acquired the bills of lading “pursuant to the sale contracts” because the Tribunal had found, as a matter of fact,

that NBIC, rather than CN, acquired property in the goods from the shippers. It followed from this that CN had no entitlement to receive the bills of lading pursuant to the sale contracts when the bills of lading were endorsed because at this stage the sale contracts were “exhausted”. In response to this CN submitted that the endorsement needed to be something which the pre-existing contract contemplated would happen, whether expressly by referring to bills of lading being endorsed or because of the nature of the way the trade is carried on. CN did not appear to put forward any evidence to explain why their bank endorsed the bills of lading to them. The Tribunal found in CN’s favour, but with Mr Bruce Harris dissenting.

The shipowners appealed the Tribunal’s decision and the matter eventually found itself before Mr Justice Teare. Agreeing with the comments of Aikens J in *The Ythan* [2006] 1 Lloyds Rep. 457, he noted that the purpose of section 2 (2) (a) was to stop trafficking in bills of lading. He said as follows:

“Bearing that purpose in mind I consider that the words “in pursuance of” can most appropriately be understood to mean that the contractual or other arrangements must be the reason or cause for the transfer of delivery of the bills. In this regard I respectfully agree with Aiken’s understanding [that section 2(2)(a) requires “the contractual or other arrangements” to be the reason or cause for the transfer”]. Of course that test will usually be satisfied where the holder receives the bills because he has 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. Those will be the typical circumstances in which the test is satisfied.”

He did, however, point out that section 2(2)(a) was potentially wider than this.

“But I do not consider section 2(2)(a) should be restricted to cases where there is such a contractual entitlement. First, section 2(2)(a) does not use such words. Second, the objective or aim of section 2(2)(a) to avoid trafficking in bills of lading will be achieved if the reason or cause of the transfer is the contractual or other arrangements in existence before the bills were spent. Such an interpretation may have a wider scope than one based upon contractual entitlement in that it may be satisfied in the absence of a contractual entitlement but it is nevertheless consistent with the aim or object of section 2(2)(a). It will avoid trafficking in bills of lading.”

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.

The lesson from this case, in the undersigned’s view, is as follows. If you are defending a cargo claim under a bill of lading, make sure that you ask the claimant 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. If the claimant cannot do this then the claim will probably not even get off the ground. However, do not expect the claimant to 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.



Ted Graham

Partner, London

ted.graham@incelaw.com



Shawn Kirby

Solicitor, London

shawn.kirby@incelaw.com

Dangerous cargoes: the beetles and the rats

Readers may recall that the issue of dangerous cargoes in the context of the Hague Rules was explored in *The Giannis NK* [1998] A.C. 605 HL, in which a cargo of ground-nuts infested with beetles was held to constitute dangerous goods. In the recent case of *The Darya Radhe* [2009] EWHC 845, a cargo of soyabean meal pellets infested with live rats was held NOT to constitute dangerous goods. This is surprising: are beetles more dangerous than rats? The following is an analysis of the similarities and distinctions between the two cases.

The Giannis NK

Facts

The defendants shipped a cargo of ground-nut pellets from Senegal to the Dominican Republic on board the carriers' vessel, *The Giannis NK*, under a bill of lading which incorporated the Hague Rules. Unknown to both parties, the cargo was infested with beetles. The vessel was also carrying a cargo of wheat, although there was no risk of the infestation spreading to that cargo. Part of the wheat cargo was discharged in San Juan before the vessel proceeded to the Dominican Republic where the infestation was discovered. Consequently, the vessel was placed in quarantine. Following unsuccessful fumigations, the vessel was ordered to leave port. She returned to San Juan where the authorities demanded that she either return the cargo to its country of origin or dump it at sea. Faced with little choice, the carriers dumped all the cargo, together with the remainder of the wheat cargo. The vessel then returned to San Juan where further fumigation was carried out, resulting in a delay of two and a half months before the vessel was cleared to load under her next charter. The carriers claimed damages against the shippers for the loss caused by the delay as well as the expenses of fumigation. The House of Lords, upholding the decisions of the lower courts, found in favour of the carriers.

Legal principles

The term "dangerous" in the context of Article IV, r. 6 of the Hague Rules (which states that the shipper must bear all damages and expenses directly arising out of the shipment of inflammable, explosive or dangerous goods to which the carrier has not knowingly consented) must be given a broad meaning. Dangerous goods are not confined to goods of an inflammable or explosive nature. The term "dangerous" is not restricted to goods which are liable to cause direct physical damage to the vessel or to other goods; goods which are liable to cause physical damage in an indirect manner might also be considered "dangerous". Accordingly, the nuts were

dangerous because they could give rise to the loss of other cargo loaded on the same vessel, namely the wheat cargo, by dumping at sea.

The Darya Radhe

Facts

The appellants, time charterers of the vessel, appealed against arbitration awards issued in relation to a dispute concerning the shipment of allegedly dangerous goods. Pursuant to bills of lading incorporating the Hague Rules, a cargo of soyabean meal pellets was due to be shipped from Paranagua to Iran. The vessel was also carrying a cargo of maize. However, during loading, a number of rats were discovered in the soyabean cargo. Consequently, fumigation was carried out at the order of the Brazilian authorities. Concerned that the cargo might be rejected on its arrival in Iran, the appellants arranged for the vessel to proceed to a terminal at Lisbon, where the cargo could be re-inspected and the vessel re-fumigated and for her then to proceed through the Mediterranean and the Suez Canal instead of by the route originally intended via the Cape of Good Hope. Following the re-examination, the vessel sailed to Iran where she discharged her cargo without incident.

The appellants submitted that the discovery of the rats resulted in their having to incur extraordinary expenditure and delay in dealing with the matter. They claimed to have suffered loss in excess of US\$2 million. They argued that the cargo of pellets loaded with accompanying rats constituted dangerous goods. As such, the shippers were in breach of Article IV, r. 6 of the Hague Rules. The arbitrators found in favour of the shippers and the court, dismissing the appeal, upheld their decisions.

Legal principles

Goods may be "dangerous" for the purposes of the Hague Rules if they have the capacity to cause physical damage in either a direct or an indirect manner (confirming *The Giannis NK*). However, the court clarified *The Giannis NK* in holding that goods which merely cause delay to the carrier are probably not to be regarded as dangerous. In other words, the term "dangerous" in this context is not intended to bear a meaning going beyond physical danger. Thus, there is no conflict on this point between *The Giannis NK* and *The Darya Radhe*. The latter merely confirms the principle in the former and, in doing so, clarifies the definition of "dangerous" by explaining that the term relates only to *physical* danger.

The appellants submitted that the rats in the cargo of pellets presented an obvious physical danger to the maize cargo on board the same vessel. However, such a submission was precluded by the factual findings of the arbitrators. Such findings included:

- i) that fumigation of the cargo at Paranagua was entirely routine;
- ii) that fumigation could be expected to be 100% effective;
- iii) that rats which are “mummified” as the result of phosphine fumigation may be regarded as no more than a cosmetic problem;
- iv) that the cargo was not in fact rejected by the Iranian receivers;
- v) that the soyabean cargo did not pose a physical danger to the maize cargo in that no evidence of rat infestation was noted either in the maize cargo or the holds into which it was loaded; and
- vi) that the imposition of quarantine or dumping of the entire cargo was not to be expected.

In light of these factual findings, the court held that the arbitrators had been correct in coming to the conclusion that the appellants could not establish a breach of contract, or liability under the Hague Rules, even assuming that they could discharge the burden of proof by showing that one or more of the shippers was responsible for the introduction of one or more rats.

The above factual findings can be contrasted with those in *The Giannis NK*. In that case, fumigation of the ground-nut cargo was neither routine nor a requirement under any sale contract. Fumigation had also been unsuccessful in eradicating the beetle infestation. Furthermore, the cargo was in fact rejected by the receivers in the Dominican Republic. The ground-nut cargo posed no physical danger to the wheat cargo in the sense that there was no risk of the infestation spreading from one to the other. However, as previously noted, the ground-nut cargo posed a physical danger in the sense that it was likely to, and did in fact, cause the vessel to be placed in quarantine and the wheat cargo to be disposed of at sea. Thus, the ground-nut cargo, unlike the soyabean cargo, was likely to, and did, involve the vessel in unusual danger and delay. Such danger and delay arose in consequence of statutory importation powers exercised by the authorities in the Dominican Republic to ban vessels and cargo infested with beetles.

At common law there is a principle (discussed by Longmore J. in *The Giannis NK* at first instance and by Atkin J in *Michell Cotts & Co v Steel Bros & Co Ltd* [1916] 2 K.B. 610 KBD) which provides that goods may be dangerous if *owing to legal obstacles (my emphasis)* as to their carriage or

discharge they may involve detention of the ship. The court rejected the appellants’ argument that this principle operates independently of legal obstacles. It also rejected the appellants’ associated submission that shippers are liable if they load a cargo which is at risk of rejection which in turn causes cost and delay, in the shape here of the time spent fumigating the cargo and otherwise dealing with the cargo in order to reduce or eliminate the risk. The court held that all or most cargo is at risk of rejection on discharge, whether justifiably or not, and the allocation of the risk of delay arising therefrom is dealt with in contracts of carriage quite independently of the regime as to dangerous cargo. This principle is concerned with the violation of or non-compliance with some municipal law which is of direct relevance to the carriage or discharge of the specific cargo in question.

The House of Lords in *The Giannis NK*, having concluded that the cargo infested with beetles was “physically dangerous”, thought it unnecessary to go on to consider whether the cargo was “legally” dangerous under this principle. It is worth noting, however, that the Court of Appeal agreed with Longmore J in holding that the cargo was dangerous under this principle because, owing to provisions of Dominican law, the shipment of the beetle-infested cargo was likely to involve detention and delay of the vessel.

The appellants in *The Darya Radhe* submitted that the rats presented a legal danger in the shape of the risk, particularly in a voyage to Iran, of the arrest of the ship and condemnation of all cargo on board. However, the appellants did not before the arbitrators rely upon any principle of Iranian or indeed any other system of law. It is this crucial difference, it would seem, that distinguishes the two cases in relation to this common law principle. The situation would have been different had there been a principle under Iranian law, which the appellants had relied upon before the arbitrators, providing, for example, that cargo infested with live rats was prohibited from being imported into Iran. If this had been the case, the court is very likely to have held that the cargo infested with live rats constituted “legally” dangerous goods under this principle.

Conclusion

The legal principles in relation to the issue of dangerous goods addressed by the two cases do not actually conflict. In fact, both cases confirmed that goods may be “dangerous” for the purposes of the Hague Rules if they are liable to cause direct or indirect physical damage. *The Darya Radhe* further clarified the definition of “dangerous” by emphasising the physical aspect of such damage. The two cases were also consistent in setting out

and applying the common law principles. So why, then, do we have two disparate results? The cases can be distinguished on their material facts as opposed to their legal principles, and the factual findings by the arbitrators in *The Darya Radhe* simply did not support the appellants' position.



Bill Amos

Partner, Hong Kong
bill.amos@incelaw.com

Shanghai People's High Court upholds the validity of a Hong Kong arbitration clause

The facts of the case

Disputes arose in a fixture between Sinotrans Guangdong (the "owners") and Lu Qin (Hong Kong) Co. Ltd. (the "charterers") which provided "*Arbitration in Hong Kong and English Law to apply*". Such a combination of mixed law and jurisdiction is becoming increasingly popular. Ironically the charterers, a Hong Kong entity, commenced a claim in the Shanghai Maritime Court (the "SMC"), ignoring the arbitration clause, and the owners applied to contest the jurisdiction of the SMC in favour of arbitration in Hong Kong.

The SMC ruled that PRC law was the governing law in determining the effectiveness of the arbitration clause and rejected the owners' application on the basis that the arbitration clause failed to stipulate the arbitration tribunal and specify the number of arbitrators and accordingly it was invalid under PRC Arbitration Law. However, on appeal, the Shanghai People's High Court concluded that the arbitration clause was valid and binding on the parties under English Law and Hong Kong Law, and that the SMC did not have jurisdiction over the merits of the disputes.

The High Court's reasoning was as follows. On the interpretation of the arbitration clause, English law should be applicable. Under English law, there can be more than one national system of law bearing upon an international arbitration: the substantive law and the procedural law. In this case, the substantive rights and duties of the parties were governed by English Law and the procedure of the arbitration was

governed by Hong Kong law (Hong Kong being the seat of the arbitration). Hong Kong law requires the parties to send an application to the Hong Kong International Arbitration Centre to determine the number of arbitrators.

The Implications

This case has provoked a certain amount of interest despite the fact that the High Court's decision simply followed the general law in China that the right of parties to agree law and jurisdiction should be respected by the Chinese courts. In the past, the courts in China have had a reputation for preferring to retain jurisdiction, in contradiction to the arbitration clause agreed between the parties. This latest decision, important because it is from a higher court, indicates a move away from that approach.

Practical advice

In practical terms, parties carrying or trading goods to China should be aware of the general principles usually applied by the Chinese courts when deciding whether or not to recognise an arbitration clause. In brief, the courts should generally recognise a clause that has been expressly negotiated between the parties. In charterparties, this is not often a problem as the law and jurisdiction clause is often an express rider clause.

However, bills of lading can be problematic as it is common in a short form bill of lading to incorporate the terms and conditions of the governing charterparty. In order for the terms of that charterparty, and therefore its arbitration clause, to be validly incorporated into a bill of lading in the eyes of the Chinese courts, the charterparty should be clearly identified (preferably by date, names of parties, reference number, etc.) on the front side of the bill of lading and the incorporation clause should have a wide scope, for example "all terms, conditions and exceptions contained in the charterparty, including the arbitration clause, shall be incorporated". This is supported by Article 98 of the Guidelines in respect of Trials of Commercial and Maritime Disputes Involving Foreign Elements issued by the Supreme Court of China in 2004, which provides that "*clauses in respect of arbitration, jurisdiction and governing law in the charterparty shall not be binding upon a bill of lading holder (who is not the charterer) unless the incorporation clause expressly says that these clauses shall be incorporated*". There have been cases in which it was held that wordings like "*freight payable as per charterparty dated XXX*" are merely for the purpose of freight payment and are therefore not sufficient to incorporate, in particular, an arbitration clause from the charterparty.

Of course, whether a charterparty arbitration clause can be successfully incorporated into a bill of lading will depend upon the surrounding facts of each

particular case and the court will also have some discretion in this regard. The point to note for shipowners and their P&I Clubs is that in order to have the best chance to successfully stay Chinese court proceedings in favour of a foreign arbitration, the charterparty must be clearly identified in the bill of lading and the incorporation clause must be wide enough to expressly include the arbitration clause.



Philippa Langton

Solicitor, Shanghai

philippa.langton@incelaw.com

Shirley Li

Legal Assistant, Shanghai

shirley.li@incelaw.com

The new Supreme Court

As of 1 October 2009, the House of Lords has lost the judicial role that it has exercised in different ways over six centuries and in its current form for 133 years and, for the first time, the United Kingdom has a Supreme Court. The decisions of the House of Lords extend far beyond the parties involved in any given case. They have shaped our society, and have directly affected our everyday lives. Therefore, any change to its role or structure is one which has the potential to impact upon every level of business and society.

Background

The functions of the highest courts in the land are presently divided between two bodies: the Appellate Committee of the House of Lords which is the last possible avenue for appeal in the majority of UK decisions; and the Judicial Committee of the Privy Council which, in addition to its overseas and ecclesiastical jurisdiction, considers questions as to whether the devolved administrations, the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly are acting within their legal powers.

As members of the House of Lords, the Law Lords not only sit judicially, but are also permitted to

become involved in judicial debate and the subsequent enactment of Government legislation. This has obviously provided some cause for concern as the Lords are members of both legislature and judiciary. However, by convention, the Law Lords have excused themselves from sitting or voting on most issues.

A Consultation Paper was published in July 2003 which argued that the creation of a new Court was necessary due to the current system raising questions with regard to transparency and independence. The government's view in this Consultation Paper was that the highest court had to be clearly independent of the legislature to avoid any perception that its decisions could be politically motivated. Despite the reservations which were expressed by a number of the Law Lords, the government announced in 2003 that it would end the constitutional anomaly under which a House of Lords Committee served as Britain's final court of appeal, and replace it with a 12-member Supreme Court located in its own building.

The New Supreme Court

The resulting Supreme Court opened for business on 1 October 2009 in the newly renovated Middlesex Guildhall Crown Court building on Parliament Square. The new Supreme Court's functions will be:

- the final court of appeal for all United Kingdom civil cases, and criminal cases from England, Wales and Northern Ireland;
- hearing appeals from civil cases in Scotland;
- hearing appeals on arguable points of law of general public importance;
- maintaining and developing the role of the highest court in the United Kingdom as a leader in the common law world;
- hearing appeals on arguable points of law of general public importance; and
- assuming the devolution jurisdiction of the Judicial Committee of the Privy Council, while the Commonwealth jurisdiction of the Council will remain unchanged.

The most notable change is the conclusive separation of the different arms of the British state: Parliament will make law on behalf of the electorate and the Justices will assess if it is being fairly applied. Although the new Justices will be

disqualified from sitting or voting in the House of Lords, they can return to the House of Lords as full members upon retiring from the Supreme Court. New appointees, who will be selected by a newly appointed commission, will not be members of the Lords.

What changes will be seen?

There has been a great deal of interest and speculation into how the highest court will change under its new guise. A few of what we see as the most interesting suggested changes are:

- Lord Falconer, the Lord Chancellor, who saw the reforms through Parliament, agreed that the new court would strengthen the judiciary: *"The Supreme Court will be bolder in vindicating both the freedoms of individuals and, coupled with that, being willing to take on the executive,"* he said. There has, however, been some opposition of this view from other senior Law Lords who do not consider that there will be changes of this forceful nature.
- Lord Collins, one of the law lords who moves to the new court in October, predicts that his colleagues will evolve over time into a different type of body – *"perhaps not so pivotal as the American Supreme Court, but certainly playing a much more central role in the legal system and approaching the American ideal of a government of laws and not of men"*.
- Lord Neuberger fears the new final court of appeal could assert itself in opposition to the government. He has said that he sees there being a real risk of *"judges arrogating to themselves greater power than they have at the moment"*. Lord Neuberger, who has declined to move to the Supreme Court and has instead been appointed Master of the Rolls, said in the same interview that the far-reaching change to the legal system appeared to have been dreamt up *"over a glass of whisky"* by former Prime Minister Tony Blair. The new court's president, Lord Phillips, has since replied to these comments and said such an outcome was *"a possibility"*, but was *"unlikely"*.
- In the interests of "open access", the Supreme Court's two court rooms will feature increased seating capacity in order to encourage public access. Furthermore, the Court will permit its proceedings to be televised from inside its Court room when it begins hearing cases later this year. This is part and parcel of the overall aim which is to

make the Supreme Court transparent. However, whether or not this opportunity will be seized is another question - there was little interest from broadcasters when the House of Lords allowed its final hearings in July to be televised, even though this would have been the first opportunity to show English cases being argued in court.

In short, the aim is that the new Supreme Court will bring some fresh changes into a body that is renowned for its traditionalism. It will now be a matter of time to see whether or not the creation of a Supreme Court will achieve its core aims of independence and transparency and deliver on its promise of being a constitutional milestone. Public perception will not change overnight but the system will benefit from being perceived to be more open. The Supreme Court was due to consider its first case on 5 October, when the Government would face a challenge under the Human Rights Act over powers to confiscate money from alleged terrorists.



Paul Herring
Partner, London
paul.herring@incelaw.com



Heloise Clifford
Solicitor, London
heloise.clifford@incelaw.com

Mortgage Enforcement: HK court sale update

The current difficulties in the shipping markets have re-focussed attention on mortgage enforcement. This article outlines the court sale process in Hong Kong, in particular the viability of court sales by private treaty.

When is a court sale needed?

For a bank facing a default situation, a court sale of the ship is an option of last resort.

If the ship is not encumbered with trade debt (and if the borrower is co-operative), then the bank will be able to use its power of private sale under the mortgage. A private sale by the bank is a fast and low-cost option.

However, if the ship is heavily encumbered with trade debt and other claims, then a court sale increases in attraction. The unique feature of a court sale is its ability to wash the vessel free of claims, thereby transferring a clean title to the purchaser, and enhancing the sale price in the process.

It is also the case that an arrest of the ship by a third party can force the bank's hand.

If, therefore, a court sale is required, it is necessary to consider the *method* of sale. There are essentially three methods of court sale: auction, public invitation to tender, and private treaty. As regards the last of these methods, although referred to as "private treaty", it is nevertheless a sale by the court.

Court sale: public tender or private treaty?

A bank that has already extensively marketed the vessel through brokers etc. will have identified the potential buyer and established the market price. In such circumstances, a court sale by private treaty to the purchaser is preferable to the slower public sale process.

However, it cannot be assumed that the court will necessarily agree to this approach. The previous Admiralty judge in Hong Kong delivered a judgment in a case called *The Margo L* (1997) in which he highlighted two essential steps/objectives:

- (i) the ship must be sold at the best possible price (so that the proceeds can satisfy as many claims as possible);

- (ii) the public sale of the ship must be made known to the maritime world (so that potential claimants can come forward).

The conclusion reached by the judge was that a sale by way of public tender (i.e. sealed bids) would, in the normal course, realise the best possible price. This was because the competitive nature of a tender process would result in bidders submitting the best price they could afford. The judge however acknowledged that a private treaty sale could be considered where there were "powerful special features".

In order to seek a private treaty sale it would be usual to obtain three independent valuations, with the purchaser agreeing to pay the highest. The factors in favour of a private treaty sale may include the following:

- experience shows that the court's public tender, being viewed as a distress sale, may attract only bargain hunters. The highest (or only) bid is generally that of the bank's nominee;
- the court bailiff's own appraisal is unlikely to exceed the independent valuations obtained, given that the court's valuation would be made after an actual inspection of the vessel (and would therefore take into account any defects);
- the cost of maintaining the vessel under arrest during the public sale process will diminish the sale proceeds available to the bank, other creditors and, ultimately, the owners;
- a lower sale price would be likely to be achieved on a "forced sale" basis;
- the absence of claims ranking in priority to the bank;
- the bank's mortgage debt exceeding the proceeds of sale;
- the low value of the vessel, or other special characteristics.

The viability of a private treaty sale by the court will thus depend in large part on the individual circumstances and characteristics of the ship to be sold, as well as the independent valuations obtained.



Bill Amos

Partner, Hong Kong
bill.amos@incelaw.com



Chris Grieveson

Partner, Singapore
chris.grieveson@incelaw.com

Liberalisation of Singaporean legal market

As part of the recent liberalisation of the Singaporean legal market, Ince & Co Singapore is now allowed to advise parties on international arbitration disputes involving Singaporean law whenever arbitration is contemplated. Now we can advise clients on their legal rights and liabilities in disputes involving matters of Singapore law whenever arbitration seems likely. The definition of international arbitration is very wide and so will cover nearly all shipping disputes, trading cases and issues relating to sale and purchase or shipbuilding.

There is a team of Singapore-qualified lawyers at Ince & Co Singapore who hold local practising certificates - they advise clients on their legal rights and liabilities in Singapore law agreements which meet the above requirements.

There is no doubt that the liberalisation of the legal market will strengthen Singapore's position as an international arbitration hub. We are witnessing a growing willingness of clients doing business in Asia to have their agreements governed by Singapore law and to have their disputes resolved by arbitration in Singapore, although English law and Singapore as a venue is often a more popular choice for the maritime industry.

One interesting development is that the Singapore Chamber of Maritime Arbitration ("SCMA") has drafted new SCMA rules to encourage parties to arbitrate in Singapore (www.scma.org.sg). These rules mirror the LMAA rules in not requiring parties to pay hefty sums as administrative fees at the outset. Like the LMAA rules, a small appointment fee is paid to the arbitrator to commence arbitration under the new SCMA rules.

If you require any advice on Singapore law agreements which provide for arbitration or any other aspect of arbitrating in Singapore, please contact us.



Clara Tan

Senior Associate, Singapore
clara.tan@incelaw.com

Deck carriage: contracting for the carriage of goods on usual terms and obtaining appropriate insurance

Geofizika DD v MMB International Limited [2009] EWHC 1675 (Comm)

The English Courts have recently considered a deck carriage case in a world where the containerisation of the carriage of manufactured goods is now well established. The case, which gave rise to what the Judge described as an "*unusual combination of facts*", is interesting not only for the points that were decided but also those that were not.

The facts

In early October 2006, the claimant, Geofizika DD ("Geofizika"), agreed to buy from the defendant, MMB International Limited ("MMB"), three Land Rover ambulances for delivery to Libya. The contract was "CIP Tripoli" (carriage and insurance paid) and subject to Incoterms 2000, such that MMB was to contract for the carriage of the goods "*on usual terms*" and "*in a customary manner*", and was obliged to "*obtain...cargo insurance...such that the buyer...shall be entitled to claim directly from the insurer*". MMB approached the Third Party, freight forwarder Greenshields Cowie & Co. Ltd ("GSC"), for a quotation. GSC in turn contracted with a line it had not used before, Brointermed Lines Ltd ("Brointermed").

On 14 November, Brointermed sent GSC a booking confirmation stating, amongst other things, that *“ALL VEHICLES WILL BE SHIPPED WITH ‘ON DECK OPTION’ this will be remarked on your original bills of lading...”* Around 28/29 November, GSC was sent the draft bills of lading containing the usual details only. GSC did not ask to see Brointermed’s standard terms, to be included on the reverse of the bills. The original bills subsequently arrived with Brointermed’s standard terms printed on the back, clause 7 of which gave the carrier liberty to carry the cargo on deck. The vessel sailed on 29 November. The vehicles were stored on deck and two were washed overboard in the Bay of Biscay. On 4 December, GSC sent the normal documents to MMB, including an insurance certificate and an invoice for insurance cover. The insurance certificate stated *“Warranted shipped under Deck”*.

The issues and the decision

In the litigation, all three parties agreed that the contract of carriage should have provided that the cargo be carried below deck. MMB and GSC claimed that it did, in effect, so provide.

Did MMB fail to procure a compliant contract of carriage?

Geofizika argued that MMB had breached its duties in that the contract of carriage procured permitted the carrier to carry the cargo on deck, as demonstrated by clause 7 of the bills of lading and the booking confirmation. MMB argued that, before the bills were issued, there was an *“antecedent agreement”* that the cargo would be carried below deck. The booking confirmation, which provided for an on deck option, took priority over the standard terms of the bills such that the contract of carriage did not allow the cargo to be carried on deck without the bills being specifically claused to that effect. The Court found in favour of Geofizika, concluding that the wording in the booking confirmation was too ambiguous to constitute an agreement overriding the written terms of the bills. The terms of a contract of carriage would not be considered *“usual”* or a means of carriage *“customary”* if they provided for storage on deck when all parties have agreed that the cargo should be carried below deck.

MMB alternatively argued, in its closing submissions, that the contract of carriage was both usual and customary as Brointermed had no legal right to carry the vehicles on deck. Article III(2) of the Hague-Visby rules obliges a carrier to properly and carefully care for its cargo, a duty that cannot be excluded by contract (Article III(8)). It was not proper for the carrier to carry the vehicles on

deck, therefore clause 7 of the bills cannot validly permit such carriage. Geofizika countered that the on deck option was not an exclusion prohibited by Article III(8), but an aspect of service that the carrier undertook to provide properly and carefully. Article III(2) is concerned with the manner in which obligations undertaken (such as the on deck option) are carried out, and the shipowner is prevented from excluding liability for doing what he undertakes properly and with care. Judge Mackie QC was inclined to agree with Geofizika, but declined to pass judgment on this issue until addressed in more detail by both sides.

Did MMB fail to procure a contract of insurance?

Geofizika argued that MMB had failed to procure a contract of insurance that matched the contract of carriage, as once the carrier exercised its option to ship on deck the policy was voidable given the term that the cargo was *“warranted shipped under Deck”*. The Court found in favour of Geofizika, rejecting MMB’s contention that it was only obliged to procure insurance to cover the whole period of the contract of carriage. MMB also argued that the insurance was only invalid due to Brointermed’s breach of contract, for which MMB could not be held liable. Whilst Judge Mackie QC agreed that a seller is not bound to insure against losses arising out of breaches of the contract of carriage by the carrier, the buyer’s remedy being against the carrier and not the seller, the seller remains under an obligation to procure insurance documents that are valid at the time they are obtained. On the facts of the case, there was never a proper contract of insurance as the policy was *“doomed from the start”*.

MMB’s claim against GSC

MMB brought third party proceedings against GSC for an indemnity on the basis that, by giving a warranty that the goods would not be carried on deck, GSC had breached its obligations as a freight forwarder to use reasonable skill and care. GSC argued that it was entitled to expect the carrier to perform its normal duties competently, and that it had discharged its own responsibilities by identifying Brointermed in Lloyd’s Loading List, a publication widely relied upon within the industry. Brointermed had advertised a RORO service where *“RORO”* necessarily meant carriage under deck, GSC’s witness evidence describing RORO and on deck carriage as *“completely exclusive concepts”*. Judge Mackie QC found in favour of MMB. Although GSC may have genuinely believed that any RORO contract necessarily involved shipment under deck, there was no evidence that this was the case. If GSC had checked Brointermed’s website, it would have been clear that it was at least in doubt that carriage would be on a RORO basis. The wording of the booking

confirmation was ambiguous and the position should have been verified before the insurance warranty was given.

Comments

The outcome of this judgment is a lesson that any party to a contract of carriage should never make assumptions as to the manner in which the contract of carriage is to be carried out. This case also highlights the fact that, where cargo insurance procured by a CIP seller does not cover the carrier's breach of the contract of carriage (on the basis that a seller ought not to be responsible for events occurring after the policy's inception), it is the buyer who is most exposed. Although the fact that the policy was void from inception meant that this issue was not fully discussed, we hope that the point is clarified in more detail by the Courts in the future. This case also raises the potentially significant issue as to whether the on deck option was an exclusion prohibited by Article III(8) or an aspect of service which the carrier undertook to provide. We and the industry await with interest to see if this point receives further judicial consideration.



Jeremy Farr

Partner, London
jeremy.farr@incelaw.com



Jennifer Hughes

Solicitor, London
jennifer.hughes@incelaw.com

Business & Finance

Opportunities in tough times - Steering a right course

At the height of the credit crunch and at a time when many shipping companies were struggling to raise new finance, one client of Ince & Co was bucking the trend and proving that investment is still obtainable in the shipping market.

The corporate team at Ince & Co recently acted for a long standing client, a large international shipping group, in a US\$100 million investment by a US finance house. In what was otherwise a very demanding environment, this was an extremely attractive proposal for our client, and it was important for the lawyers at Ince to ensure that our client's interests were best protected, whilst also ensuring that the interests of the finance house, as the provider of the equity, and our client's interests, as the executor of the agreed investment strategy, were fully aligned.

It was agreed that this alignment would be best achieved by the equity provider taking an initial subscription for shares in our client company, coupled with providing ongoing investments through a series of special purpose limited partnerships incorporated in the British Virgin Islands. The transaction involved the lawyers at Ince instructing and co-ordinating lawyers in New York and the British Virgin Islands, and this multi-jurisdictional element to the transaction added an extra layer to what was already a complicated and unusual transaction.

Initial Subscription

The initial investment made by the finance house was for US\$5 million, for a 26% shareholding in our client company. Furthermore, an option was taken to subscribe for a further 25% of the company (for an additional US\$7.5 million), which would, if exercised, give the finance house a controlling interest of 51% in our client company. In addition to drafting and negotiating a lengthy share subscription agreement, the Ince team was also responsible for drafting a shareholders' agreement to govern the relationship between the existing shareholders of the company and the new equity provider.

Ongoing Investment

With the remaining pot of funds made available to our client, the company will use its knowledge of the shipping market to find shipping projects to invest in over the coming three to five years. The further investments will take place through special purpose limited partnerships, incorporated in the British Virgin Islands, the profits of which will be shared between the equity provider and our client company. The Ince team was involved in drafting the terms of the limited partnership agreements governing the administration

of these profit sharing vehicles, and also the terms of the gain sharing plan setting out the basis on which the profits will be distributed. It is hoped that these investments will project our client into a substantial shipping company.

This transaction is just one example of the work that the corporate team at Ince & Co has been carrying out in recent months for Ince's shipping clients.



Stephen Jarvis

Partner, London

stephen.jarvis@incelaw.com



Lindsay Jordan

Solicitor, London

lindsay.jordan@incelaw.com

Companies Act 2006 – important changes to your company's constitution finally implemented

Overview

The final provisions of the Companies Act 2006 (2006 Act) came into force on 1 October 2009. Some of these provisions deal with changes to a company's constitutional documents. Under previous company law, the constitution of a company was divided between its Memorandum and its Articles of Association. Under the 2006 Act, the Memorandum will cease to exist in its current form. For any new company, the Memorandum will be a simple document showing only the subscribers' intention to form a company. For all existing companies, as from 1 October, the information contained in the Memorandum will be treated as forming part of the company's Articles.

Directors and members of existing companies will not be required to make any changes to their Articles of Association as a result of the final implementation of the 2006 Act.

However, the 2006 Act contains numerous changes from previous legislation dealing with a company's Articles. We would suggest existing companies review their current Articles and consider whether changes are appropriate for some or all of the following reasons:

- (i) to take advantage of relevant new provisions in the 2006 Act;
- (ii) to ensure that the implementation of the 1 October 2009 changes will not affect the operation or validity of any existing provisions of their Articles;
- (iii) to eliminate redundant provisions and out of date references to sections of previous legislation; and
- (iv) to remove unnecessary restrictions and obligations.

A company reviewing its articles should consider whether or not changes may be required to take account of any of the following matters which are altered by the 2006 Act:

- (i) electronic communications with shareholders and others;
- (ii) directors' conflicts of interest;
- (iii) the notice period for general meetings;
- (iv) the process of written resolutions;
- (v) annual general meetings and the retirement of directors by rotation;
- (vi) extraordinary general meetings;
- (vii) company secretaries;
- (viii) a chairman's casting vote.

In addition, the following questions should be considered:

1. Should the company update its articles? If so, should the company amend its existing articles or adopt the newly introduced form of Model (standard) articles as its default set of articles?
2. Does the memorandum set out specific objects of the company and if so, should

they continue in whole or in part, or be removed entirely?

3. Does the company have only one class of shares? If so, should the directors themselves have power to allot further shares of that single class without the need for further shareholder approval?
4. Does the company want to retain its current statement of authorised share capital? If so, this becomes the maximum until altered or removed entirely by ordinary resolution.



Nick Gould

Partner, London
nick.gould@incelaw.com



James Gilbertson

Solicitor, London
james.gilbertson@incelaw.com

Employment Law

Legislative Changes

Increase in statutory redundancy pay

It was announced in the 2009 budget that from **1 October 2009** a week's pay for the purposes of calculating statutory redundancy pay will be increased to £380 (resulting in a maximum potential payment of £11,400). The annual up-rating of this figure in February 2010 will be suspended and the next review will be in February 2011.

National minimum wage

The annual national minimum wage increase takes effect from **1 October 2009**. The new standard adult hourly rate has risen from £5.73 to £5.80 per hour. This is significantly less than the increases for the last four years, no doubt due to the impact of the recession.

Additional paternity leave to be introduced in April 2011

The Government has announced plans to introduce "additional paternity leave" for parents of babies due on or after **3 April 2011**. This will apply where the mother ends her maternity leave early and will effectively transfer to the father the remainder of that leave, up to a maximum of six months, three months paid at the statutory rate and three months unpaid.

The proposal to increase statutory maternity pay from 39 to 52 weeks, which the Government originally hoped to implement at the same time as the new paternity right, is understood to be on hold.

The Equality Bill 2008-2009

The Equality Bill 2008-2009 was published on **27 April 2009**, following over four years of reviews, discussions and consultations.

The Bill, designed to harmonise and strengthen discrimination law, will unify and re-state existing discrimination legislation concerning sex, race, disability, sexual orientation, religion or belief and age, adopting a common approach where appropriate. It will also make some significant changes, including:

- proposals to make gender pay discrimination more transparent;
- a new type of claim for gender pay discrimination based on hypothetical comparators;

- new types of disability discrimination and a widening of the definitions of direct discrimination and **harassment** to cover claims based on "association" and "perception".

The Bill also broadens the scope of permitted **positive action** to allow employers to choose between two equally-qualified candidates by selecting one from an under-represented minority.

The Bill is expected to have its first reading in the House of Lords this Autumn and to receive Royal Assent in Spring 2010, with the first provisions coming into force in Autumn 2010.

Recent Cases

Default Retirement Age Is Legal – For Now

R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills

On 25 September 2009, the English High Court gave its decision in the case known as the 'Heyday challenge', ruling that it is legal for employers to force their employees to retire when they reach the age of 65.

The case had been brought by Age UK against the Government (in the form of the Secretary of State for Business, Innovation and Skills). Age UK argued that the default retirement age of 65 contained in Regulation 30 of the Employment Equality (Age) Regulations 2006 (relating to age discrimination) should be struck down as unlawful on the basis that there was not a clear and consistent social policy aim underlying it.

The Court held that the default retirement age had been implemented to pursue legitimate social policy objectives in relation to the integrity of the labour market. However, the Court also considered it significant that shortly prior to trial the Government announced that it would conduct a review of Regulation 30 next year. If the Government had not so indicated, the Court would likely have found for Age UK. The Court gave strong indications that the position would have to change following the Government's review.

The result is that, for the time being, it is lawful to have a default retirement age of 65, but that this is likely to change once the review takes place early next year.

Part-Time Employees and Pro Rata Salaries

Keenan v Barclays Bank Plc

Mrs Keenan worked as a cashier for a building society and then, following a TUPE transfer in

February 2006, as a complaints officer for Barclays. Prior to the TUPE transfer Mrs Keenan received a basic salary of £9,000 per year. Following the TUPE transfer she was advised that her basic salary was £17,000. However, Mrs Keenan worked part-time and this was the rate intended for a full-time employee in her position. Mrs Keenan assumed she had been given a long overdue and generous pay rise and neither party realised the mistake until much later. The employment tribunal held that Barclays was bound to continue paying Mrs Keenan at the full time rate. In particular, the tribunal rejected Barclays' argument that the term of the contract relating to salary was void and should be substituted by the correct salary information, since Mrs Keenan had no knowledge of the mistake.

In cases where there is a TUPE transfer and whenever employing a part-time employee, employers need to be very careful regarding employees' correct terms and conditions and should always ensure that either the actual part-time salary is stated or, if a full-time salary is stated, that it is expressed to be "pro-rata".

Holiday Pay For The Long Term Sick

HM Revenue & Customs v Stringer

In the case of *HM Revenue & Customs v Stringer* the House of Lords considered whether employees on sick leave were entitled to take paid leave even though they were not at work. Following the House of Lords referral, the European Court of Justice (ECJ) decided that workers continue to accrue annual leave during periods of sickness absence and that it is for each EU member state to determine whether annual leave can actually be taken during sickness absence. In the event that a member state does not allow annual leave to be taken during sickness absence, workers must be permitted to carry over the accrued leave to subsequent years.

When the case returned to the House of Lords, HM Revenue & Customs conceded (and the House of Lords implicitly agreed) that, following the ECJ's decision, the Working Time Regulations must be interpreted as allowing annual leave to be taken during sick leave, since they expressly prevent annual leave being carried over.

Employers should consider implementing policies for managing the payment of holiday pay for employees on sick leave. In order to prevent the accrual of significant liabilities, employers should ensure that employees on extended sick leave take annual leave at the appropriate time. Employers should be wary of terminating employees on long term sick leave to avoid paying ongoing holiday pay as this could lead to unfair dismissal and/or disability discrimination claims.

Workers Can Claim Back Holidays Ruined By Illness

Pereda v Madrid Movilidad

The European Court of Justice (ECJ) has held that workers who are ill during their holidays can now claim the time back from their employers so that it does not count towards their annual leave entitlement.

Mr Pereda, a specialist driver, suffered an accident at work shortly before the commencement of his four week holiday. The injury incapacitated him for six weeks, thus almost entirely overlapping with his planned holiday. He requested an additional period of annual leave which was refused.

The ECJ held that the Working Time Directive (implemented in Great Britain by the Working Time Regulations 1998) requires workers on sick leave during a period of scheduled annual leave to be given the right to take annual leave at a later date.

Although the case related to an employee who had booked his holiday and became unwell before it began, the judgment specifically said that if a worker does not wish to take annual leave during a period of sick leave, additional annual leave must be granted for a different period.

Employers should consider adopting policies for the reclaiming of holiday time lost due to illness to avoid abuse of this right.



Charlotte Davies

Partner, London

charlotte.davies@incelaw.com



Katy Carr

Senior Associate, London

katy.carr@incelaw.com

Other News

Ince Dubai and Piraeus each gain shipping Partners

Ince & Co's teams in Dubai and Piraeus have each been supplemented with the arrival of a senior shipping partner from London.

Graham Crane has transferred from London to Dubai, whilst Nick Shepherd has moved from London to Piraeus. Graham joined the firm in 2001 bringing more than 20 years' experience as a shipping partner. Nick has spent the last decade in London and is now returning to the Piraeus office where he spent five years as a partner in the 1990s. Both have a significant number of international shipping clients.



Graham Crane

Partner, London

graham.crane@incelaw.com



Nick Shepherd

Partner, London

nick.shepherd@incelaw.com

Our Global Ship Finance Team

Our ship finance team advises banks and owners on all aspects of asset financing for the global shipping and offshore energy markets. We advise borrowers and lenders on ship finance transactions, primary and bareboat registration, refinancing and workouts and related advisory work. We also advise on sale and purchase for trading or scrap of second hand tonnage and on the acquisition of newbuildings. Our expertise extends to the preparation and negotiation of loan and security documents, the enforcement of ship mortgages by attachment and the enforcement of judgments, along with associated corporate and company matters.

HAMBURG



**Jan Hungar
Georg Lehmann**

LONDON



**David Baker
Dean Norton
Peter Measures**

LE HAVRE



PARIS



**Fred Vroom
Jérôme Cohen**

PIRAEUS



Robin Parry

DUBAI



Bob Deering

SINGAPORE



**Martin Brown
Tricia Tong**

SHANGHAI



**Peter Murray
Paul Ho**

HONG KONG



**David Beaves
Bill Amos**

Email: firstname.lastname@incelaw.com

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Dubai	Hamburg	Hong Kong	Le Havre	London	Paris	Piraeus	Shanghai	Singapore
T:+971 4 3598982	T:+49 40 38 0860	T:+852 2877 3221	T:+33 2 35 22 18 88	T:+44 20 7481 0010	T:+33 1 53 76 91 00	T:+30 210 4292543	T:+86 21 6157 1212	T:+65 6538 6660
F:+971 4 3590023	F:+49 40 38 086100	F:+852 2877 2633	F:+33 2 35 22 18 80	F:+44 20 7481 4968	F:+33 1 53 76 91 26	F:+30 210 4293318	F:+86 21 6170 3922	F:+65 6538 6122

E: firstname.lastname@incelaw.com

24 Hour International Emergency Response T +44 20 7283 6999

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