



INTERNATIONAL
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Shipping E-Brief

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Shipping

The High Court clarifies and updates the law on renunciation

SK Shipping (S) Pte Ltd v Petroexport Ltd (The Pro Victor) [2009] EWHC 2974 (Comm)

In *SK Shipping v Petroexport (The Pro Victor)*, the High Court has provided a helpful restatement of the law on what can constitute a renunciation of a contract. Renunciation is a form of anticipatory breach: where a party clearly, unequivocally and absolutely evinces an intention, by words or by conduct, not to fulfil their part of a contract, the other party may elect to treat the contract as at an end and bring a claim for damages. This is often termed a 'repudiatory breach' or a 'repudiation'.

Background facts

The *Pro Victor* was voyage chartered to carry a cargo of naphtha from Karachi to either Taiwan, Korea or Japan. Following conclusion of the charter, there were exchanges of correspondence and telephone calls between the parties, as a result of which owners became doubtful of the charterer's intention to perform the charter. These exchanges included the following:

- The charterer proposed that the voyage charter be converted to a time charter trip with delivery in Jordan and redelivery in the Singapore/South Korea range.
- The vessel was ordered to slow steam en-route to the load port.
- On arriving at the load port, the vessel was ordered to wait at the outer anchorage because of a supposed problem in issuing a letter of credit required under the sale contract.
- The charterer did not provide a signed copy of the charterparty, which was required to procure a freight tax exemption in Pakistan.
- The charterer put forward a second proposal that the voyage charter be converted to a six month time charter.
- A representative of the charterer called a representative of the owner and said that the buyer of the cargo had pulled out of the deal, no cargo could be stemmed and therefore the charterer had no use for the vessel.
- The owner sent a message to the charterer asking if a cargo was going to be loaded or not. In its response, the charterer stated that it might have to declare "*force majeure*" but that they would consider a mutual cancellation.
- The owner sent a message saying that they considered this to be a "declaration of non-performance". In their response, the charterer rejected the contention that they had declared non-performance, but said that the owner should "mitigate any alleged losses" by agreeing to convert to a time charter trip for a cargo loaded out of India and concluded by saying: "sincerely regret current circumstances".
- The charterer's broker called the owner's representative to explain again that the charterer had lost its buyer and would be unable to proceed with the charter.
- The owner sent a message asking the charterer to confirm "unequivocally and unconditionally" that they would provide a cargo, otherwise they would assume that the charterer did not intend to perform the charter and would treat this conduct as repudiating the charter. The owner gave a deadline for a response and, although the charterer protested against this "ultimatum", they did not give the confirmation requested and so the owner elected to treat the charterer's conduct as repudiating the charter.

Commercial court decision

Mr Justice Flaux found that the charterer's on-sale of the cargo had fallen through and that the charterer had been looking to engineer a cancellation of the charter by consent. Although the charterer, for the most part, was careful not to say that they would not perform the charter, the Judge found that when everything said and done was put together, the charterer had evinced an intention not to perform. He viewed the charterer's suggestion that owners should mitigate their losses by converting the voyage charter to a time charter as a threat to the owner and the charterer's expression of regret at the current situation as an apology for not being able to perform. The Judge was particularly influenced by the failure of the charterer to give a clear and unequivocal statement that they were ready, willing and able to perform once the owner said they considered that the charterer had given a declaration of non-performance. He considered that, by the time of termination, the owner subjectively believed that the charterer was saying that they would not perform the charter.

In giving his judgement, Flaux J provided clarification on two important issues concerning the law of renunciation:

- (1) The court can look at the totality of the words and conduct of the defaulting party, adding them together to arrive at a conclusion that the defaulting party had evinced an intention not to perform the contract. To use the analogy discussed in the case, even where

the individual bricks are not renunciatory, it is possible to use them to build a wall of renunciation.

- (2) In addition to it being necessary to assess whether objectively the defaulting party's words or conduct would lead a reasonable person in the position of the innocent party to the conclusion that the defaulting party intended not to perform the contract, it is also relevant to judge whether, subjectively, the innocent party believed that the defaulting party had evinced an intention not to perform the contract.

The case therefore provides a helpful clarification of the law in this area and useful practical guidance on the type of circumstances where the court will find that the totality of a party's conduct evidences an intention not to perform.



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Substitution of a vessel: where must the substitute be delivered?

Gas Natural Aproveisionamientos SDG SA v Methane Services Limited (The Khannur) [2009] EWHC 2298 (Comm)

This was an appeal to the Commercial Court from an arbitration award which had determined that a vessel had been validly substituted under the time charter and remained on-hire. The Judge upheld the Tribunal's findings and dismissed the appeal by charterers.

Facts and Original Arbitration Award

At first instance, the Arbitration Tribunal considered a claim by charterers for damages and/or restitution of overpaid hire following what charterers considered to be an invalid substitution of a vessel. Owners counterclaimed for the hire deducted by charterers as a result of the alleged invalid substitution.

The charterparty was a time charter entered into in 2001 for a vessel called the *Khannur*. The relevant terms of the charterparty for the purposes of the issues in the appeal are as follows:

"59. Substitution

- (a) *If the vessel ceases, whether before or after redelivery, to be available for service under this charter, or shall otherwise be off hire... not arising from owners' wilful default, owners shall have the option of substituting the vessel during the term of this charter with another vessel, which shall include the... "GIMI"*

...

- (d) *The substitute vessel shall enter into service under this charter when in the same position in relation to the next loading port, and in the same state of readiness (including with regard to the temperature of cargo tanks) that the Vessel was or would have been in."*

Three years after the commencement of the charterparty, the *Khannur* was substituted with the *Gimi*. This was following a separate agreement between the parties in 2004, whereby owners had the option to switch the vessels back following the *Khannur's* "next requisite drydocking".

Charterers used the vessel to take cargo under a long term FOB LNG sale agreement with Qatargas. Under that sale agreement, a basic 12 cargoes per annum from Ras Laffan terminal were for charterers' account on a 'take it or pay' basis.

In 2007, it was necessary for the *Gimi* to undertake a periodical drydocking. Owners decided that during the drydocking period, they would switch back the vessels, that is substitute the *Khannur* for the *Gimi*. Owners gave notice of their intention to substitute the *Khannur* for the *Gimi* in January 2007 and in February 2007, owners stated their intention to deliver the *Khannur* at Barcelona, where the *Gimi* was scheduled to drydock.

The *Gimi* completed discharge on 5 June 2007 in Barcelona, at which time owners alleged the *Khannur* was delivered into service in Algeciras. The *Khannur* was rejected for loading by charterers' suppliers Qatargas and waited at Algeciras for orders before proceeding towards Suez on owners' orders. On 26 June 2007, a message was sent by charterers to owners saying that they expected a vessel (not named) to be in position to load at Ras Laffan on 10 July 2007.

The arbitration tribunal concluded *inter alia* that:

1. Owners were entitled to substitute the *Khannur*, i.e. to switch the vessels back and that, subject to positioning issues, she was validly substituted and came on-hire on 5 June 2007.
2. The fact that the *Khannur* was not ordered to Barcelona was not a fatal objection to her delivery into service. They considered that Clause 59(d) was to be interpreted simply as a formula in order that the necessary accounting exercise could be carried out to ensure that charterers were not financially disadvantaged by a substitution of the vessel.
3. Charterers were under an obligation to give orders when the *Khannur* was delivered on 5 June 2007.
4. The message of 26 June 2007 sent by charterers was not an order to the vessel and charterers had not provided voyage instructions to owners.

Appeal to the Commercial Court

Permission was granted for three questions of law to be raised in the appeal as follows:

1. Can a shipowner under a charterparty with a provision such as Clause 59(d) lawfully deliver a substitute vessel into time charter service when that substitute is not at the place where the previously chartered vessel went off-hire or at an equivalent position, so that the geographical position is irrelevant in law to her entering into service under the charter?

2. Where there is a dispute as to the validity of the delivery of a vessel into service under a charter, whether the charterer is nonetheless obliged in law to give orders "without prejudice" to that dispute;
3. If a charterer tells shipowners that the chartered vessel is to proceed to a named port and be ready to load by a given time, is that an order as to the employment of the vessel, even if there is a dispute about the identity of the chartered vessel?

As concerns question 1:

Mr Justice Walker agreed with the Tribunal that a requirement that a substitute vessel be positioned in exactly the place where the substituted vessel was withdrawn could well lead to wasted time, effort and money and that commercial parties would not have intended their agreement to have been interpreted in this way. Therefore, the substitute vessel did not have to be delivered at the exact geographical location where the substituted vessel had been, even where no next voyage orders had been received from charterers.

The Judge also agreed with the Tribunal that a clause such as 59(d) protected charterers where, prior to substitution, charterers had identified the next loading port: as a consequence of that clause, the substitute vessel would not have entered into service under the charter until she was in the same position in relation to the next loading port that the substituted vessel was, or would have been, in. He stated that if, prior to the substitution, charterers have not identified the next loading port, then there is at that stage no certainty that any difference in position of the substitute and substituted vessels will adversely affect charterers. Substitution can only sensibly take place once cargo has been discharged, by which time charterers ought in the normal course to have given orders identifying the next load port. Any risk of an "absurd consequence" whereby charterers would have to pay hire and bunkers for a journey around the world which would not have been necessary had the vessel not been substituted would arise only by virtue of charterers' default in failing to give voyage orders.

As concerns questions 2 and 3:

Mr Justice Walker found that the statement by the Tribunal that charterers' message of 26 June 2007 was not an order to the vessel was a finding of fact by the Tribunal. The Tribunal had not made a finding that charterers were under a legal obligation to give orders "without prejudice" but had simply expressed the view that such an action might have been commercially appropriate. No error of law could be identified underlying the arbitrators' factual conclusion. Charterers' appeal to the High Court on questions 2 and 3 therefore failed on its merits.

Charterers' appeal was therefore dismissed.



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The power of South African courts to order the taking of evidence of Master and Crew

The Owner of the cargo lately laden on board the MV Ioannis NK v The Master and Crew of the MV Ioannis NK and Others (not yet reported)

This recent decision of the High Court of South Africa (Western Cape High Court, Cape Town) arose pursuant to an urgent application brought on an *ex parte* (without notice) basis. Cargo interests sought to restrain the Master and Crew of the vessel from leaving the jurisdiction of the Court until they had given evidence before a commissioner with regard to the circumstances surrounding the sinking of the vessel on 23 July 2009. The outcome of this case is likely to have a significant effect upon the manner in which shipowners and their insurers manage a serious casualty occurring in the vicinity of South Africa.

The facts and issues

On 23 July 2009, the *MV Ioannis NK* sank some 98 nautical miles off Cape Columbine, situated near the west coast of South Africa. At the time of the sinking, the ship was carrying 22,500 metric tonnes of raw cane sugar to a port in India pursuant to a voyage charterparty concluded between the shipowners and cargo interests. It was common cause between the parties that any disputes arising under the charterparty would be determined by way of arbitration in London.

All of the crew members were brought ashore in South Africa shortly before the ship sank, and the majority of them were later repatriated without incident. However, immediately prior to boarding the aeroplane to return home, the Master, Chief Mate, Chief Engineer and Second Engineer were served with a court order stating, *inter alia*, that they be interdicted and restrained from leaving the jurisdiction of the Court until such time as they had given evidence to cargo interests before a commissioner with regard to the circumstances surrounding the sinking of the ship and all matters related or incidental thereto. This order was made in the form of a *rule nisi* (unless order) granting the crew five days to oppose the application and to show cause why the order should not be made final.

The application was opposed and Mr Justice Cleaver had to determine whether or not the cargo interests had shown that “*exceptional circumstances*” existed which justified the court making an order for the taking of evidence from the crew for the purposes of determining a claim which may be brought before an arbitrator in London.

The power of the Court to make such an order is derived from section 5(5) of the Admiralty Jurisdiction Regulation Act 1983, which provides:

“(a) A court may in the exercise of its admiralty jurisdiction at any time on the application of any interested person or on its own motion –

(i) if it appears to the court to be necessary or desirable for the purposes of determining any maritime claim or any defence to any such claim, which has been or may be before a court, arbitrator or referee in the Republic, make an order for the examination, testing or inspection by any person of any ship, cargo, documents or any other thing and for the taking of the evidence of any person;

....

(iv) in **exceptional circumstances**, make such an order as is contemplated in sub-paragraph (i) with regard to a maritime claim which has been or may be brought before any court, arbitrator, referee or tribunal elsewhere than in the Republic...”

The Decision

In his judgment, Mr Justice Cleaver was alive to the fact that there are no reported judgments in which leave has been granted for evidence to be taken on commission pursuant to the provisions of section 5(5)(a)(i) and (iv) of the Act, let alone one where such an order has been coupled with an order restraining witnesses from leaving the jurisdiction of the court before their evidence has been taken.

By way of illustration, the Court had regard to the case of *The C Tashin* in which an application had been made for an order that certain crew be prohibited from leaving the jurisdiction of the court, pending finalisation of the issue as to whether they should be compelled to give evidence as to the circumstances in which that ship was lost at sea. Despite the fact that the Court was prepared to accept that exceptional circumstances existed in that matter, the Court nevertheless expressed its concern as to the invasion of the crew members' right of freedom of movement, dignity and privacy. The Court refused to grant the order inasmuch as it sought to restrain their movements.

As to the question of the test to be applied in determining whether exceptional circumstances are said to be present, the Court considered the relevant authorities on the point and took the view that an applicant would have to establish that there was a real possibility that specific evidence may be lost and that the legislature must have intended that circumstances over and above the need to preserve the evidence should exist. The Court went on to say that no hard and fast rule can be laid down as to what constitutes exceptional circumstances and that each case must be considered on its merits. Thus, in deciding this issue, the Judge found that the Court must have regard to the whole series of events or, put differently, the "factual matrix" which led to the application.

The Court then highlighted the points advanced by the cargo interests which it considered relevant to the "factual matrix" of the case. The Court considered, *inter alia*, the following allegations:

- The ship was lost with all of the material documents including the log books
- The Master and Officers all reside in South America and are employed by the ship's technical and commercial manager. The manager will not be a party to the arbitration proceedings and there is no means of knowing whether, when the arbitration takes place, the shipowner will be able to procure the co-operation of the managers and of the Master and Officers for the purposes of giving evidence at the arbitration

- The ship's classification society records are unlikely to be of any assistance in determining the condition of the ship at the time that the charterparty was concluded and during the voyage
- There is no certainty that the ship's flag state will carry out an investigation into the loss of the ship and, if such investigation is carried out, that the report will be made available to third parties such as the cargo interests
- There are no steps that an English arbitrator can take in terms of the Arbitration Act 1996 or in terms of the Rules of the London Maritime Arbitration Association to compel foreign witnesses to attend arbitration proceedings in England to give evidence. Accordingly, such a witness cannot be cross-examined
- There was no indication forthcoming from the owner, the employers of the crew or the crew members themselves that the witnesses would be available to give evidence in arbitration in London.

Finally, on the question of the infringement of the Master and Officers' constitutional rights of privacy, freedom of movement and dignity, the Court noted that while the crew's freedom to leave the country had been briefly curtailed, they were free to move about Cape Town.

The Court found that it was able to distinguish the present matter from *The C Tashin* on the grounds that the cargo interests in this case had sought an order which set out the framework in which the evidence would be taken, i.e. by the appointment of counsel as Commissioner to take the evidence, and for the cargo interests' attorneys, in consultation with the Commissioner, to make proper arrangements for the taking of evidence, including the arrangement for a suitable venue, the time and date for taking of evidence and for the appointment of a reputable transcription service to compile a record of the evidence.

The Judge concluded that exceptional circumstances existed in this case and that in the circumstances it was necessary to preserve the evidence which might otherwise be lost or not available if the crew were not detained in South Africa for the purposes of taking that evidence.

Conclusion

It is clear that this decision, being the first of its kind in South Africa ordering the detention of crew at the behest of a third party to take evidence, sends a strong

warning to shipowners and their insurers that crew may, depending on the circumstances of the case, be compelled by the Court to give evidence should they find themselves in South Africa following a serious casualty at sea. This may be so even where, as in this case, the substantive issues will be dealt with in another jurisdiction and the casualty occurred outside of South African territorial waters.



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Admiralty Court upholds appeal against LOF Appeal Arbitrator's salvage award

The Owners of the vessel Ocean Crown, her bunkers, stores and cargo & others v Five Oceans Salvage Consultants Ltd (The Ocean Crown) [2009] EWHC 3040 (Admlty)

In a recent decision, the Admiralty Court had the opportunity to consider whether the quantum of the salvage award made by the Appeal Arbitrator under an LOF was altogether out of proportion to the salvage services actually rendered. The Admiralty Judge upheld the moderating principle as stated by the Privy Council in *The Amerique* and confirmed that it applied equally to all cases, irrespective of their complexity or comprehensiveness. That principle recognised that although a high value fund was a significant element in the assessment of a salvage award, it must not be allowed to raise the quantum of a salvage award to an amount altogether out of proportion to the services actually rendered.

Facts

The M.V. *Ocean Crown* was a modern, handy sized, geared bulk carrier of 54,347 DWT. In August 2007, she was carrying a cargo of copper concentrates in bulk from Chile to India when she ran aground in the Canal Darwin, Chile. An LOF standard form of salvage agreement (the "LOF") was signed with the contractors, Five Oceans (the "Contractors").

The salvaged fund was high, namely US\$166,185,830.79. The casualty was immobilised until assisted by a professional salvor with the resources to perform the service. A lengthy period of immobilisation was itself a serious danger for the ship and cargo. In respect of physical danger, hold no. 1 had flooded and the casualty was hard aground on her port side from about the aft end of no. 3 hold and the forward end of no. 4 hold to about midships. The first instance arbitrator and the Appeal Arbitrator agreed that the dangers to the casualty were significant. There was a short term risk of further damage and flooding of no. 3 hold, which would become more serious towards the end of September, carrying with it a risk of flooding no. 4 hold and the prospect of the casualty in the future become incapable of being salvaged. There was also some pollution risk.

The salvage services were lengthy, taking 66 days to redelivery of the ship and about 107 days until completion of redelivery of the transhipped cargo. Nonetheless, they were successful and the appeal arbitrator held that the Contractors' services had been rendered "with exemplary speed and efficiency in a remote and difficult location". The vast majority of the salvage services were performed by sub-contractors engaged by the contractors. The cost to the Contractors of the sub-contracted services was a little under US\$18 million exclusive of account financing costs. The Contractors' position was that they had taken a very significant commercial risk in undertaking the salvage operations.

The first instance arbitrator awarded the Contractors US\$34,500,000 plus interest and costs. The Appeal Arbitrator increased the award to US\$40,750,000 plus interest and costs. The ship and cargo interests were granted permission to appeal on three questions of law arising out of the appeal award: (1) whether the Appeal Arbitrator had been correct to take into consideration as an enhancing feature the possibility that the salvor and/or salvage industry may experience difficult economic conditions in the future; (2) if it was relevant to take such a factor into consideration, was it permissible to take into account the actual economic conditions experienced between the date of termination of the services and the date of the award and (3) whether the principle in *The Amerique* (1874) LR 6 PC 468 was applicable to all types of salvage cases, including complex and comprehensive cases, or whether, as the Appeal Arbitrator found, a different principle applied in such cases.

Admiralty court decision

Mr Justice Gross allowed the appeal in respect of all three questions of law. He dealt firstly with the principle of encouragement, which is expressly mentioned in Article 13 of the London Salvage Convention 1989 and which confirms the public policy of encouraging salvage operations when assessing the salvors' remuneration.

The Appeal Arbitrator had highlighted the following factors underpinning the principle of encouragement: (i) generous awards encouraged salvors to continue to respond to casualties; (ii) salvors were to be encouraged to keep tugs on permanent salvage station, so incurring idle time, at the expense of the salvors but to the benefit of the maritime community; (iii) salvors were to be encouraged to look favourably on future investment in salvage personnel, craft and equipment; (iv) encouragement was necessary because salvage was a high risk business, extending to the financial risks arising from inadequate rewards where the salvaged fund was low and (v) LOF was a "no cure no pay" contract.

The Appeal Arbitrator had also stated that when these salvage services were performed, the market was buoyant and hire rates were high. Since then, there had been a dramatic collapse and the difficult economic climate meant that salvors faced a financing problem in larger cases. This was a factor to be borne in mind, according to the Appeal Arbitrator, when making awards that would "cushion" professional salvors in difficult times.

Mr Justice Gross conceded that there was necessarily a future element in the principle of encouragement because "you can only encourage someone for the future". Cyclical economic conditions could be anticipated to form part of the future. However, it did not follow that the risk of future economic downturns was or should be a specific factor serving to enhance salvage remuneration. He added that, for very good reason, the law of salvage had adopted the date of termination of services as the relevant cut-off point. Subsequent fluctuations in the salvaged fund were therefore irrelevant. If the Appeal Arbitrator had regard to the risk of a future economic downturn and the actual economic conditions experienced post-termination as specific factors enhancing his award, then he was taking into account factors which should not have been taken into account. Accordingly, he held that the appellants were entitled to relief in respect of questions (1) and (2).

Turning to the third question of law, the Judge considered the principle in *The Amerique* and the approach to be taken to high value funds. The Privy Council in *The Amerique* stated that "though the value of the property salvaged is to be considered in the estimate of the remuneration, it must not be allowed to raise the quantum to an amount altogether out of

proportion to the services actually rendered". Mr Justice Gross described this as "the moderating principle" and held that it was equally applicable to all cases, whether straightforward or involving high dangers, including complex and comprehensive cases.

In the Judge's opinion, deciding whether an award was altogether out of proportion to the services actually rendered had to involve a consideration of the applicable dangers and the nature of the salvage services. Thus, an award that was altogether out of proportion in a case of low dangers, involving short and simple salvage services, might not be disproportionate where the dangers were significant and complex salvage services had been provided. The Judge therefore took issue with the Appeal Arbitrator's view that the principle in *The Amerique* did not apply, in terms, in complex cases, and allowed the appeal in respect of this issue also. The appeal award was consequently remitted to the Appeal Arbitrator for reconsideration in the light of the judgment. The Appeal Arbitrator subsequently reduced the award by US\$750,000.

Conclusion

The date of termination of the services is the cut off date when considering economic conditions in the context of the principle of encouragement, so difficult economic conditions after the date of termination should not be taken into account. The moderating principle in *The Amerique* remains good law in cases where there is a high salvaged fund.



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New LOF Arbitrators and Appeal Arbitrator appointed

As was widely reported last year, Lloyd's Salvage Arbitration Branch undertook a review of the use of the Lloyd's Open Form agreement and announced changes to the arbitration arrangements. The objective was to improve and modernise the system, with the aims of achieving transparency and meeting market requirements. The review process included the appointment of a new panel of LOF Arbitrators, who are Elizabeth Blackburn QC, Timothy Brenton QC, Simon Kverndal QC, Lionel Percy QC and Jeremy Russell QC. The Appeal Arbitrator is Mr Justice Teare.

Matthew Moore

China's new marine pollution regulations

On 1 March 2010, the Regulations of the People's Republic of China ("PRC") on the Prevention and Control of Marine Pollution from Ships (the "Regulations") will come into force. The new Regulations, which were promulgated by the PRC State Council in September last year, will replace existing regulations dating back to 1983 and will cover a wide range of matters relating to pollution from ships. Some of the new Regulations are of uncertain effect and rapid action may be needed to ensure timely compliance when further information becomes available.

Overview

The Regulations apply to any ship-source pollution and any ship-related operation where pollution damage is caused (or may be caused) to PRC internal waters, territorial seas, contiguous zones, exclusive economic zones, continental shelves and all other sea areas under the jurisdiction of the PRC.

The Maritime Safety Administration ("MSA") is responsible for the supervision and administration of the prevention and control of marine pollution and will be the designated authority for enforcing the Regulations.

The Regulations deal with various issues concerning the prevention of pollution from ships, including discharge and reception of ships' waste, dumping of waste, and supervision of the loading, lightening and discharging of polluting cargoes. They also provide for reporting of incidents, emergency response planning, and contingency arrangements with clean-up contractors (i.e. Oil Spill Response Organisations, or "OSROs").

Moreover, the Regulations are not confined (as their title might suggest) to the prevention and control of pollution but extend also to liability, compensation and insurance arrangements. Provisions in the latter category broadly reflect those relating to oil tankers as set out in the Civil Liability Convention 1992 ("CLC 92"), and those relating to bunker spills from other vessels in the Bunkers Convention 2001. Both Conventions have been ratified by the PRC and incorporated into its national legislation. However, the relationship between the Regulations and corresponding international rules is in some respects complex and uncertain.

Provision is also made for a domestic compensation fund to cover ship-source oil pollution, contributions being provided by receivers of persistent oil cargoes (or their agents) which have been transported by sea to a PRC port.

Ship Operational Requirements

The Regulations include various general provisions detailing the procedures for discharge and receipt of ship's waste and for certain ship operations such as scrapping, ship to ship transfers of oil, dumping of waste and the supply and receipt of bunkers. Unless pre-approval from the Environment Authority is obtained, the carriage of dangerous waste in PRC internal and territorial seas is prohibited.

Shipowners, operators or managers must develop formal emergency response plans to prevent and control potential pollution incidents. It is expected that a ship's MARPOL Shipboard Oil Pollution Emergency Plan (SOPEP) will suffice. Any pollution arising or likely to arise from an incident must be reported to the local MSA office in the form of an accident report as detailed in the Regulations. The MSA will maintain overall control of any emergency response activities and also retain the right to detain ships while investigating such incidents.

Operators of all ships carrying bulk hazardous and pollutant liquid cargoes, and the operators of all ships over 10,000 GRT, will be required to conclude a pollution clean-up contract with an MSA-approved OSRO before entering a PRC port. The 'operator' of a ship is not defined by the Regulations. As matters stand, information is still awaited from the MSA on the identity of approved clean-up contractors, the classification of their response capabilities and the level of response capability which different classes of ship are required to arrange. Once this information is available, there will be only a short period of time available to conclude the required contracts prior

to the implementation of the Regulations on 1 March 2010. It is thought likely that the effective date of this requirement will be postponed, but this has not been confirmed. The possibility therefore remains of very rapid action being required by shipowners and operators in order to ensure timely compliance.

Liability, Compensation and Insurance Issues

The Regulations contain provisions dealing with liability for pollution, notably in respect of clean-up and other response costs incurred by the MSA. They also require all ships in PRC waters, apart from those of less than 1,000 GRT and carrying non-oil cargoes, to maintain insurance or other financial security in respect of liability for oil pollution. After consulting with the Insurance Regulatory Commission of the State Council, the MSA will determine and publish a list of competent insurance institutions that are permitted to insure these liabilities.

These requirements correspond broadly to those set out in the CLC 1992 in respect of oil tankers and in the Bunkers Convention 2001, both of which are in force in the PRC. Both Conventions require states to recognise and accept insurance certificates issued by the competent authorities of other contracting states. Accordingly, the Regulations should not affect foreign flag ships calling in PRC waters with certificates of insurance issued by such authorities and based on cover with insurers of which they approve.

What remains to be seen is how the Regulations will apply to ships flying the Chinese flag and requiring certificates of insurance issued by the Chinese authorities – such certificates being necessary both to comply with the Regulations in Chinese waters and indeed to trade internationally in compliance with the pollution conventions. Whilst it is expected that certificates based on the February 2010 renewal will continue to be recognized, further information awaited from the MSA should make it clear what new conditions, if any, will apply from February 2011.

The certification requirements appear to go further than the international regimes inasmuch as they apparently apply to all oil tankers however small. Under CLC 92, only tankers carrying more than 2,000 tons of oil in bulk as cargo are required to carry certificates of insurance covering liabilities under that Convention, and under the Bunkers Convention only ships of 1,000 GRT or more must have certificates relating to liability for bunker pollution. The Conventions do not prevent contracting states from imposing more stringent requirements on their own flag vessels, but foreign flag tankers with a carrying capacity of below 2,000 dwt should in principle not need to carry certificates in respect of liability for oil pollution arising from an escape or discharge of cargo (actual or threatened), and no foreign flag ship of less than 1,000 GRT should need a certificate in respect of bunker pollution. It is not known how many ships

in these categories are in practice trading in or to PRC waters, but further information may clarify whether the Regulations affect any such ships.

China belongs to a limited number of states where CLC 92 is in force but not the Fund Convention 1992 – the latter having been ratified in respect of Hong Kong alone and not mainland China. This presents a risk of compensation being insufficient in the event of a major oil pollution incident which involves a tanker and in which the admissible pollution claims exceed the ship's liability limit under CLC 92. The PRC has so far preferred to run this risk rather than burden its domestic oil receivers with the obligation to pay contributions levied by the International Oil Pollution Compensation Fund (the "IOPC" Fund), which it evidently fears would be greater than the economic benefits gained in the event of a major spill. Instead it has now provided in the new Regulations for a domestic fund to be established, and to be financed by cargo interests in a similar manner to the IOPC Fund, save that it would respond only to incidents in China.

This development is in some respects to be welcomed, as it reduces the risk of contentious claims issues which may arise more readily when the shipowner and his insurers are the only sources of compensation, and when the CLC 92 limit is insufficient. However, the fact that "second-tier" compensation is to be provided from domestic sources rather than the IOPC Fund means that claims issues will continue to fall outside the scrutiny of the international community through the governing bodies of the IOPC Fund. This in turn means that shipowners and insurers may continue to face claims which do not necessarily appear consistent with internationally accepted norms.

A specific instance of apparent inconsistency with the international regimes is contained in provisions of the new Regulations which stipulate that claims by the MSA for its own emergency response costs take priority over all other claims. Pressure for such claims to be prioritised has not been unknown in previous incidents and is not necessarily problematic if it is clear that all admissible claims will fall within the CLC 92 limit. If, however, the limit is exceeded, or there is a risk that this may prove to be the case, difficulties can result from the fact that the Convention provides for all parties with claims for pollution damage, including costs of clean-up and other preventive measures, to be treated equally and to receive proportionate shares of the available compensation.

It is possible that some of these potential conflicts between the Regulations and international regimes will prove to be more apparent than real, as the Regulations do provide for precedence to be given to international rules where applicable. However, there is room for possible misunderstanding as to whether

and when the need for such precedence will be recognised, and steps have been taken by shipping and insurance industry representatives to clarify these issues with the PRC authorities.

Similar considerations apply to other provisions of the Regulations which appear to go further than CLC 92, notably those which stipulate that the MSA's costs must be paid (or acceptable security provided) before the ship will be allowed to commence her next voyage. CLC 92 provides that ships are to be immune from detention or released from arrest where a limitation fund available to all claimants has been established, and that no other security is to be required in respect of such claims. As a practical matter, the availability under CLC 92 of rights of direct action against approved insurers generally means that claimants derive no real advantage from the arrest of vessels or provision of specific security. If nonetheless such security is required, the official approval of the ship's insurer should in principle signify that a standard letter of undertaking from the insurer is sufficient for this purpose. Again, it is understood that clarification is being sought that such letters will indeed be acceptable.

Summary

The new Regulations contain important information on how the PRC intends to manage pollution incidents, as well as requirements for prevention of pollution and response to incidents, together with rules governing liability, compensation and insurance arrangements.

The operation of the Regulations is not explained in full, and further implementing regulations are expected. It is thought to be unlikely that the MSA's approval of pollution response companies will be completed by the entry-into-force date of 1 March, and it is understood that the Ministry of Transport will issue a formal notice if further time is allowed to meet the requirement to contract with such companies. Shipowners, operators and their insurers should therefore monitor the situation for further developments.



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Validity of notice of readiness

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

This was a case where the relevant charterparty clause, a "clearance clause", was poorly drafted and left room for conflicting interpretations by the parties as to when laytime and demurrage would begin to run. The Commercial Court concluded that the clause should be given a fair and reasonable commercial construction, so far as the language used permitted.

Background facts

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

SAC 22, headed "clearance clause", provided *inter alia* that if the owners failed to obtain free pratique

and/or customs clearance either within the 6 hours after NOR was originally tendered or when time would otherwise normally commence to run under the charterparty, then the original NOR would not be valid. However, the clause further stated that “*where the authorities do not grant free pratique or customs clearance at the anchorage or other place but clear the vessel when she berths*”, the NOR would be valid unless the failure to obtain timely clearance of the vessel for customs or free pratique was caused by the fault of the vessel.

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

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

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

Commercial Court decision

Mr Justice Walker was of the view that SAC 22 was poorly drafted and the language imprecise. He stated that the parties could not sensibly have intended that the exception contained in SAC 22 regarding the granting of free pratique within 6 hours would apply only where free pratique was obtained when the vessel berthed and not before (in this case, whilst the vessel was at anchorage), because then the owners would be in a better position if customs boarded later rather than sooner. The Judge thought such an interpretation would be absurd. The absence of free pratique before the vessel berthed would cause no loss of time to the charterers if free pratique was obtained on berthing or earlier. Therefore, he held that the original NOR was valid.

In the circumstances, the Judge did not need to come to a conclusion on whether either or both of the two e-mails sent after free pratique had been granted constituted valid NORs. However, he did comment

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



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Ship mortgage enforcement

This article considers the action which may be taken by a bank to enforce its mortgage over a vessel.

The first step that the bank takes in enforcing its security is to serve on the borrower a demand which complies with the terms of the loan agreement. There are then three main methods of enforcement, the first of which can be used in conjunction with the other two:

- (1) entry into possession
- (2) private sale
- (3) arrest and court sale.

(In appropriate circumstances, the bank may also resort to other elements of security, such as assignments of earnings/insurance, parent guarantee and, frequently, a share pledge in respect of the borrower.)

Entry into possession

This happens where the bank takes over control of the ship from the shipowner, pursuant to an express power in the mortgage. In doing so, the bank assumes the obligations of a shipowner as from the moment of entering into possession. These include not only obligations to pay crew, port fees etc, but also liability to third parties for any damage done or contracts breached. Running the ship commercially for a long period of time is, from the bank's perspective, generally regarded as being impractical and undesirable.

However, a bank will often enter into possession in order to get the vessel to a jurisdiction that is suitable for an arrest, an option which is examined in the final section of this article.

Private sale

If the borrower is co-operative, it may be possible to persuade him to arrange a private sale of the ship. Another method is for the bank to sell the ship in its own right, or as attorney of the shipowner. These powers of sale will normally be given to the bank in the mortgage, but a right of sale also exists at common law. In favourable circumstances, a commercial sale will have the advantages of speed and economy.

However, a sale by the bank is clearly a distress sale, and may also have a number of disadvantages: the borrower's other creditors may try to protect their position by arresting the ship, which would make a commercial sale of the vessel very difficult. The bank may have to pay off those creditors so that the sale can go ahead.

In addition, a mortgagee must sell for the best price reasonably obtainable. Failure to do so could result in the mortgagee's liability to the borrower and creditors, so at least two independent valuations should be obtained by way of precaution.

If the borrower/shipowner is not co-operative, there may be difficulty in securing physical control of the ship.

Arrest and sale by the Court

If a commercial sale cannot be arranged on favourable terms, a bank may need to exercise its right to arrest the ship and to sell it through the court. The principal benefit of a court sale is that it gives a clean title to the purchaser, extinguishing all prior claims against the vessel (and transferring them to the proceeds). This unique feature of a court sale may also enhance the sale price. The other main advantages of an arrest and judicial sale are:

- (i) The co-operation of the shipowner is not required
- (ii) The bank does not need to settle with the creditors
- (iii) The proceeds of sale will be distributed to the creditors in accordance with an order of priorities in which mortgages rank fairly high.

The above is only a brief summary of the methods of enforcement, intended to give an overview of the essential options available to a mortgagee bank. If you have any questions concerning the detail of enforcement in a particular case, please contact Bill Amos or your usual Ince & Co contact.



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Piracy – a review of 2009

The IMB's report on the piracy incidents of 2009 reveals, in hard figures, the significant level of activity off Somalia over the past 12 months. There were some 214 attacks reported to the IMB Piracy Reporting Centre in 2009 of which 47 resulted in a hijacking. This is a sobering reminder of the human cost of piracy: 867 ordinary crew members were held hostage by pirates during that period.

What can we learn and can we expect 2010 to be any different?

It is not appropriate to compare 2009 on a "like-for-like" basis with the previous year. In 2008 it took the pirates a number of months to build up a head of steam and the sub-clans operating out of Haradheere (whose hunting grounds are the Somali Basin) were not particularly active until the autumn of 2008, when the *Faina* and *Sirius Star* hauled the international community out of its complacency.

The first part of the 2009 saw most activity and attacks in the Gulf of Aden but, until the recent hijackings, the last successful attack there was on 10 July 2009. For the next six months it was almost quiet, until the sudden increase in attacks and a cluster of hijackings at the end of the year and early into 2010 reflected a similar pattern to the previous year. If there is any encouragement to be drawn from the figures then it is the fact that attacks in 2010 are running at half those of the corresponding period in 2009. The weather and naval activity is never a constant and play a huge part, so it is too early yet to make a prediction on future trends.

The relative calm of the Gulf of Aden in the second half of 2009 was in dramatic contrast to the spike in activity in the Somali Basin in October/November (following a similar spike in April/May). This reflected not only periods of better weather making small boat operations possible, but a general failure to respond to the developing threat outside the Gulf itself.

Attacks

The tactics and weaponry of the pirates have remained fairly constant, armed as they are with AK47s and RPGs. But some of the distances from shore at which the attacks take place defy belief when considering that some of the mother vessels being used are not much bigger than the attack skiffs. There is evidence that the pirates go to sea prepared to spend a month away. However their survival can depend on their ability to seize a ship in order to secure food, water and a passage home. This also means that attacks are often pressed home with a degree of desperation.

Lines continue to be "drawn" at sea marking the parameters of areas deemed to be of greater risk. At present the Additional Premium area set by war risk underwriters is 600 miles from the east coast of Somalia. However, attacks have taken place beyond this demarcation and it has to be asked whether Masters are becoming overwhelmed or confused with the information received and perceive themselves to be safe once beyond those limits. The concern remains that pirates who are equipped with GPS equipment simply wait beyond the 600 mile limit in the hope of attacking ships that believe themselves to be safe. The area between the easterly limit of attacks (around 61 degrees E) and the coast of India means that one attack in the Arabian Sea was only 350 miles from Mumbai.

By the end of the summer 2009 the pirates were having to attack seventeen ships to hijack one. While the coalition forces took some credit for this, they admitted they intervened only in about 20% of attacks and much of the success against attacks was down to the crew themselves. It was therefore worrying to see that ratio slip back to less than one in three by the end of November. This no doubt reflected the fact most hijacks at that time were around the Seychelles, where the Naval reach was limited and where there is no Group Transit Scheme. But it must also be due to the fact that crews transiting the Indian Ocean are not at the same level of readiness and preparation as those in the Gulf. Admiral Hudson's criticism that the majority of shipping is not complying with the Best Management Guidelines is probably unjustified, but the threat posed outside the Gulf is greater than realised as the pirates push the limits of their operating capability.

In all discussions little is said about whether more could be done to disrupt the pirates' ability to navigate so far offshore, possibly by disrupting or jamming the GPS signal in vulnerable areas. Merchant crews could go back to their sextants and remember how things used to be. We know the pirates carry GPS, but if they have no idea where their skiffs are then the ocean suddenly becomes a very difficult place in which to operate, particularly over 600 miles from shore.

For those hijacked the experiences have been varied and no two hijackings have been the same. Somalia is not a benign place in which to conduct negotiations and they never progress on a linear basis. So much remains out of the owners control: skirmishes and killings ashore, arguments between pirates settled at gunpoint, key gang members dying at inopportune moments all add to the mix. On board there have been injuries, threats and mock executions which make for real trauma. It is encouraging to see that steps are being made to address the effect long term on hijacked crew.

Release

The length of time vessels are held varies considerably, with the average hijacking lasting 60-80 days. Of the released vessels, the *Bow Asir*, released after 15 days, still stands as a record for the shortest period held with the *Ariana* and *Charelle* at 222 and 174 days respectively topping the league for the longest held, although the *Winfar 161*, hijacked on 6 April 2009, still remains hijacked after 309 days.

Ransoms

Published ransoms of vessels released show a seemingly unstoppable upward trend from an average of around US\$1.5m at the beginning of 2009 to US\$3.5m at the end. Some vessels have been released for significantly higher amounts. The *Maran Centaurus* was reported in the press to have been released for a ransom of between US\$5.5m and US\$7m, albeit after only 50 days.

The legality and indeed morality of paying a ransom is still debated and there is no doubt that the reward side of the equation remains in the pirates' favour. Payment is legal as long as there is no reasonable doubt that the money is funding terrorism. Changing the law to render such payments illegal simply condemns the crews being held to an uncertain future.

Response

More must be done to balance the equation by increasing the risk to the pirates. The pirates know that if they ditch their weapons they will not be arrested. It has been admitted that the UK Royal Navy has caught and released 66 pirates during their operations off Somalia. Across the world's Navies that figure is said to be near 400. This "catch and release" policy means that over 60% of pirates captured are simply allowed to go home to try again. Despite agreements with Kenya and the Seychelles, this is a poor track record and reflects a collective lack of political will to arrest and prosecute pirates in courts.

In 2007/ 2008 the UK government published its intention for new laws (the Transport Security Bill). These would have defined and extended the role of the Royal Navy and given them further powers, which would no doubt be invaluable in maritime security generally. However, these have since been shelved and parliamentary records show that whilst it was the intention of the military operation to "deter and disrupt" pirate activity, it was never the intention to bring pirates back to the UK for prosecution. It begs the question why?

This apparent lack of political will is not limited to the UK. There have been a few exceptions with other nations involved in the prosecution of pirates, but these have generally followed high profile hijackings such as the *Maersk Alabama* and the *Alakrana*.

Agreements have been reached with Kenya to prosecute pirates, with the emphasis on funding regional courts and centres. Kenya has 112 pirates awaiting trial. Others await prosecution in Holland and France, but Kenya is being asked to bear the brunt. There has been no increase in the numbers held by Kenya since October 2009. Whilst there has been no official announcement, the implication is that they are refusing to take any more. The Seychelles have announced steps to build a new Court and high security prison, which will hold 40 people but will not be ready until the end of the year.

The recent military intervention on the *Ariella*, where the crew had locked themselves in the citadel seems to be a step in the right direction, although it is apparent that the pirates left before the military forces arrived. Further it is not the unprecedented action that it is claimed to be, as we are aware of an almost identical situation on the *Theoforos* in November 2009. After recent and unjustified criticism involving the failure of the Royal Navy to intervene during the transfer (and not the actual kidnapping) of the Chandlers from their yacht to the *Kota Wajar*, the military no doubt need some good press. None of the press coverage about that story acknowledges that the *Kota Wajar* was itself a hijacked vessel with 23 crew whose lives were also at risk from the enhanced gang of pirates on board that vessel.

Armed guards

The lack of political will and general resolve to prosecute pirates is reflected in a perceived hardening of the view that the best way to protect ships is by having armed guards. This has caused a schism in the maritime industry, with industry bodies and governments urging caution, but with shipowners bowing to the apparently inevitable. Certainly by the end of 2009 fire fights between armed guards and pirates were widely reported and it remains a fact that no ship armed with guards has been captured. However, the risk of escalation remains, with crew members injured and killed at the point of hijacking. It is inevitable that this will continue as attacks are pressed home with increasing force and we would advise shippers to seriously consider these risks when contemplating employing armed guards on their vessels.

2009 saw the advent of maritime private security companies offering the “very best” in training and security. Accreditation of these companies remains a distant hope and shipowners have to rely on instinct and word of mouth to try and sort the wheat from the chaff. 2009 was also the year of the anti-piracy device. We have seen new robotic hoses, spinning hoses (from a company that specialises in tank cleaning), acoustic devices, crude cannons firing golf balls and netting and more latterly lasers designed to induce sickness at a range of two miles (as if sitting in a skiff would not be enough), all presented as effective anti-piracy devices. But as Captain Stapleton found when his vessel the Boularibank was attacked, self-help can still be the cheapest and most effective response, as he showed by dropping 200 kilograms of timber from the bows of his vessel into the wake and path of the attacking skiffs.

Success

There has no doubt been much that has gone right. The IMO working Group coordinates a truly global response and many countries have committed naval assets to help. However, little has been achieved on the ground in Somalia and without that there is little hope of stopping the pirates in the short term. The international community has no influence in towns like Haradheere and Hoboye, very few ships are processed as crime scenes and little evidence has been accumulated for use in future prosecutions. It is still remarkable that for all the talk of shadowy investors outside the country no ransom or part thereof has been recovered.

On a commercial level the Best Management Practice Guidelines stand as the bench mark for good practice and are now backed by insurers who are able to insist on their compliance by including warranties to that effect in insurance policies. However, in our experience there is still more that can be done in the management of a hijacking itself. Piracy is a universal crime and cries out for a universal response, not least to relieve the suffering of the crews involved. There is still a feeling that it is seen as only an owner’s problem, yet the dynamic of a maritime hijacking is different to a kidnapping. There is always a number of stakeholders in a maritime venture, some of whom may pay more than the ransom itself for losses incurred as a direct result of the hijacking. If a ransom is to be paid then the accepted argument is that it should be the minimum, so no encouragement is given to others. But a target-driven approach comes at the expense of time and in shipping that costs money. Care must be taken that the narrow interests of the ransom payer do not squeeze out the interests of others, as to do so is likely to raise the overall cost of the hijacking itself. This is a debate which we would encourage the industry to have.

There can be no doubt that piracy will continue. There can be no doubt that 2010 will see more of the same and the hope is that the Somali model is not copied elsewhere. Our response to piracy is co-ordinated by Stephen Askins. For further information or advice in relation to piracy please visit our website, or contact Stephen or your usual Ince & Co contact.



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Practicalities of ship arrest in Hong Kong and Mainland China

Until recently, ship arrest had been supplemented or, in some cases, replaced by the use of Rule B attachments of electronic funds transfers passing through New York. In 2002, it was held in the case of *Winter Storm Shipping v TPI* that an electronic fund transfer in the hands of a third-party intermediary bank was attachable property belonging to a Rule B defendant. However, on 16 October 2009, this decision was overruled by the US Appeal Court in *The Shipping Corporation of India Ltd v Jaldhi Overseas Pte Ltd*, thereby re-establishing ship arrest as the primary method of obtaining pre-judgment security for maritime claims.

Understanding the differences in the law governing arrest, as well as the procedures for arrest in the various jurisdictions will be important in ascertaining the most appropriate forum for an arrest and sale. With China being one of the mainstays of global trade, now is an appropriate time to review the procedures for arrest of vessels calling there. The table below illustrates some important features of ship arrest practice in the Hong Kong Special Administrative Region and Mainland China.

Issues to consider	Hong Kong	Mainland China
1. Is it a signatory to any of the International Conventions on ship arrest? If so, which one?	Yes, the 1952 Brussels Arrest Convention.	No, but the law relating to ship arrest is generally in line with the provisions of the 1999 Arrest Convention.
2. For what types of claims can you arrest a ship?	<ul style="list-style-type: none"> • Possession or ownership of, or mortgage on, a ship; • loss of life or personal injury because of a defect in a ship; • damage done by or to a ship; • loss or damage to goods carried by ship and other claims relating to the carriage of goods by ship; • use or hire of a ship; • salvage, towage and pilotage; • goods and materials supplied to a ship; • construction or repair of a ship; • wages owed to a ship's master or crew; • acts of general average; • bottomry; • collisions, etc. 	<ul style="list-style-type: none"> • Possession or ownership of, or mortgage on, a ship; • loss of life or personal injury in connection with ship operation; • loss of or damage to property caused by ship operation; • agreements in respect of the employment or chartering of a ship; • salvage, towage and pilotage; • provision of supplies or rendering of services in respect of ship operation, management, maintenance or repair; • construction or repair of a ship; • crew's wages; • acts of general average; • disputes arising out of a ship sale contract; • insurance premiums for a ship (including P&I Club calls), etc.

<p>3. What is the procedure for an arrest?</p>	<ul style="list-style-type: none"> • Claimant's solicitor applies to issue a warrant of arrest, supported by an affidavit; • a written application is made to the registrar for leave to search the <i>caveat</i> book for <i>caveats</i> against arrest; • the warrant is issued and filed with the bailiff, together with a request to execute the warrant and an undertaking to pay the costs of arrest; and • the bailiff effects service of the warrant and writ. 	<ul style="list-style-type: none"> • Claimant's lawyer files a written application with the relevant maritime court, accompanied by supporting documentation; <p>[NB: Original copies of the supporting documents are not usually required, but the claimant is normally required to submit an original arrest application, which must be properly executed by an authorised director of the claimant. When a lawyer is involved in the arrest, a set of power of attorney documentation (a power of attorney, a certificate of the identity of the legal representative and a certificate of the claimant company's incorporation) should also be submitted. These, if issued by a foreign company, should be notarised and legalised at the place of the claimant company's incorporation and/or where its authorised director resides. Normally, due to the usually urgent nature of arrest applications, the court will accept faxed/scanned versions of the power of attorney documentation, but will set a time limit within which the original copies of the notarised and legalised documents should be submitted to the court.]</p> <ul style="list-style-type: none"> • the arresting party usually has to provide counter-security (see the answer to question 12, below); • the court issues an arrest order; and • a bailiff and a court officer serve the arrest order.
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4. How quickly can an arrest be effected?	Arrest documents can normally be issued within hours of our firm receiving the file.	It normally takes less than a day to complete the documentation. An arrest order will be granted (or denied) by the court within 48 hours of receipt of the arrest application but counter-security for the arrest will usually need to have been provided before the application will be granted.
5. What expenses are incurred?	Court fees: typically no more than USD 297 (HKD 2,300) Solicitors' fees: variable Bailiff's expenses: variable but usually about USD 451 (HKD 3,500) per day	Court fees: 0.5% of the amount of the claim, the maximum being USD 732 (RMB 5000) Lawyers' fees: variable Bailiff's expenses: variable All other expenses incurred during the course of the ship arrest are paid by the respondent, but are recoverable in the event of a wrongful arrest.
6. How do you obtain a ship's release?	<ul style="list-style-type: none"> • The relevant party files for release with <i>praecipe</i> (i.e. the writ demanding an order for release); • solicitors give an undertaking to pay the bailiff's costs; • the agreement of the claimant and all <i>caveators</i> are obtained; and • the bailiff releases the vessel. <p>A release can usually be obtained promptly provided the requirements for release are satisfied, particularly the provision of adequate security.</p>	<ul style="list-style-type: none"> • Appropriate security is provided by the respondent; • the relevant party files an application for release; • all expenses incurred during the course of the arrest are paid; • the agreement of the claimant is obtained; and • the bailiff releases the vessel.
7. Can you arrest a ship to obtain security for both court judgments and arbitral awards?	For court judgments, yes; for arbitral awards, yes where the law of the place governing the arbitration permits this.	Yes.
8. Can bareboat-chartered ships be arrested?	Whether a bareboat-chartered ship can be arrested depends upon the type of claim being brought.	Yes, but only if the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer at the time of the arrest.
9. Can time-chartered ships be arrested?	Whether a time-chartered ship can be arrested also depends upon the type of claim being brought.	Rarely; time-chartered ships cannot be arrested unless, at the time of the arrest, the time-charterer is the owner of the ship.
10. Can legal sister ships be arrested?	Yes. Merely associated ships cannot be arrested.	Yes, except for claims relating to the ownership or possession of a ship. Merely associated ships cannot be arrested.

<p>11. Is counter-security required? If so, in what form and how much?</p>	<p>No.</p>	<p>The courts almost invariably request that counter-security be provided. Acceptable forms of counter-security include cash deposits, guarantees issued by first-class local banks and letters of undertaking issued by first-class local insurance companies. Letters of undertaking issued by P&I Clubs (other than China P&I Club) are not normally accepted. The amount of the counter-security is at the court's discretion but is usually in line with the losses the shipowner may suffer as a result of the arrest. In practice, the amount payable is likely to be 30% of the amount of the claim or 30 days' hire of the ship to be arrested plus reasonable maintenance costs.</p>
<p>12. What maritime liens are recognised?</p>	<ul style="list-style-type: none"> • Salvage; • collision damage; • seaman's wages; and • Master's wages and "disbursements on account of a ship". 	<ul style="list-style-type: none"> • Wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew and others; • loss of life or personal injury suffered during the ship's operation; • vessel's tonnage dues, pilotage dues, harbour dues and other port charges; • salvage; and • loss or damage to property resulting from tortious acts committed during the ship's operation.
<p>13. How soon after the arrest is effected will the claimant have to take action on the merits?</p>	<p>The writ is issued at the same time as the arrest warrant, so there is no delay between the arrest and the action on the merits.</p>	<p>If a ship is arrested before legal action on the substantive claim has been commenced, the claimant must commence proceedings within 30 days of the arrest, otherwise the court will release the ship or return the security provided by the respondent.</p>
<p>14. Will the courts that ordered the arrest accept jurisdiction over the substantive claim?</p>	<p>In general, yes, unless there is a valid jurisdiction or arbitration agreement between the parties to the contrary.</p>	<p>In general, yes, unless there is a valid jurisdiction or arbitration agreement between the parties to the contrary.</p>

15. Do the courts acknowledge wrongful arrest? If so, what is the test?	Yes. The defendant must prove that the action was so unwarrantedly brought as to imply malice or gross negligence on the part of the plaintiff.	Yes, but the test for wrongful arrest has not been clearly laid down in the law or judicial practice.
16. Do the courts acknowledge the piercing and lifting of the corporate veil?	Yes, but the courts will only lift the corporate veil in limited circumstances e.g. where the corporate structure is used to evade an existing legal obligation or to defraud.	Yes, but the courts rarely lift the corporate veil, as the burden of proof is hard to discharge, e.g. one of the main factors to consider is whether the relevant parties have commingled assets, and this is difficult to prove.
17. Is it possible to have a ship sold prior to obtaining a judgment? If so, how long does such a sale take?	Yes, but the court will only make an order for sale if there is a good reason e.g. where the costs of maintaining the arrest may exceed the value of the claim, thereby diminishing the value of the claimant's security. Such a sale would normally take approximately three months to complete.	Yes, where a ship has been kept under arrest for over 30 days and it would not be appropriate to allow the arrest to continue, the court may, at the request of the parties concerned, order that the ship be sold by auction. Such a sale would normally take several months to complete.

In summary, ship arrest in Hong Kong is predominantly based on principles of English law. It is both quick and cheap to arrange and does not require the provision of counter-security. In contrast, the procedure for arrest in Mainland China is somewhat less convenient and more expensive, requiring a set of power of attorney documentation to be provided, as well as counter-security. Nevertheless, the procedure can be completed relatively expeditiously when necessary.



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Shipping Litigation & Arbitration

Parent company guarantee for performance of a time charter – what happens if the Director who signed lacked actual authority?

Rimpacific Navigation Inc. v Daehan Shipbuilding Co Ltd (the MV Jin Man and the MV Jin Pu) [2009] EWHC 2941 (Comm)

What happens when a company based outside the EU seeks to avoid paying under a guarantee on the grounds that the director who signed it did not have actual authority, under the local law, to do so? If the guarantee is expressly subject to English law and the jurisdiction of the High Court, can the English Court decide if the guarantee is valid? Is the law and jurisdiction clause a severable part of the guarantee that stands alone or is it a matter for the local Court to decide? These were the questions that arose in the *Jin Man-Jin Pu* case when, following the collapse of the dry freight market in 2008, the Korean charterers stopped paying hire and our clients, the shipowners, sought to enforce a parent company guarantee. According to Mr. Justice Steel, for the purposes of obtaining permission to serve English proceedings out of the jurisdiction in Korea, the law and jurisdiction clause was **not** severable from the guarantee, so the claimant had to show that there was a valid contract. However, although the question of whether the director had actual authority was governed by Korean law, the issue of “ostensible authority” was governed by English law. The claimants had much the better of the argument that the director had ostensible authority, so the claimants were entitled to have the matter resolved by the English Courts.

The facts

The claimant shipowners time chartered two vessels to Daehan Shipping, a Korean charterer. The defendant, Daehan Shipbuilding Co Ltd, provided performance guarantees in support. The guarantees were signed by a Mr Oh, identified as the “CEO/President”, and each had what appeared to be an official stamp and contained a jurisdiction clause providing for all disputes to be resolved exclusively by the High Court in London under English law. Shortly

after the dry freight market collapsed, the charterers stopped paying hire, so the shipowners terminated the charters and commenced proceedings in the High Court in London to recover their losses under the guarantees. The defendant contested the jurisdiction of the English Court on the basis that Mr Oh did not have actual or ostensible authority under Korean law to sign the guarantees, so the guarantees were void.

The decision

As regards the issue of “severability”, readers of our E-brief will recall the decision in the *Fiona Trust* case, where the House of Lords decided in 2007 that a London arbitration clause in a time charter survived, notwithstanding the allegation that the charter itself was invalid due to bribery. That decision was followed in the context of a High Court jurisdiction clause. However, for the purposes of obtaining permission to serve a Claim Form out of the jurisdiction, the Court’s Rules say that this will be allowed where “*a claim is made in respect of a contract*”. The Judge preferred the defendant’s argument that in the context of an application for permission to serve out, it was not enough to show that if there was a contract, it contained a law and jurisdiction clause. The claimants had to show that they had by far the better of the argument that there was a binding contract.

As regards whether there was a binding contract, Section 36 of the Companies Act 1985, as modified by the Foreign Companies (Execution of Documents) Regulations 1994, provides that a foreign company may make a contract “*by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company.*” It was accepted by all parties, solely for the purposes of the hearing, that Mr Oh did not have actual authority to execute the Guarantees, but did he have ostensible authority? The defendant’s argument was that, applying these Regulations, ostensible authority was solely a matter of Korean law, but the Judge disagreed. He held that the claimants had much the better of the argument that ostensible authority was governed by English law and that Mr Oh, as a director, had ostensible authority to execute the guarantees. Therefore, the defendant’s attempt to challenge the jurisdiction of the High Court failed.

*“Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case, his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation.” Lord Denning MR in *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549 at p583*

Although he had already made his decision, the Judge had considered extensive expert evidence on the legal position in Korea, so he also addressed this point, in case he was wrong about English law applying. Mr Oh was a director of both the charterers and the defendants. Under Korean law, this meant he needed the approval of the Board to execute the guarantees, but the claimants would be protected unless the defendant showed that the claimants were aware that this was an interested director transaction *and* that Board approval had not been obtained - or they were grossly negligent in remaining ignorant. The Judge was satisfied that the claimant had by far the better of the argument on this point and, unless there is a successful appeal, the matter will now proceed to a hearing in London on the merits. The Judge also granted the claimants an anti-suit injunction to refrain the defendants from advancing the proceedings they had commenced in Korea.

Ince & Co represented the successful shipowners who were part of the Jinhui Shipping & Transport group.



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The post-*Jaldhi* landscape and alternatives to Rule B for securing claims and enforcing judgments in New York

Following a decision by the US appellate court, maritime claims no longer may be secured by stopping US-Dollar wire transfers being cleared in New York. Claimants in pending secured claims are dealing with the aftermath. Meanwhile, prospective and successful claimants are considering alternatives for security and collection in New York.

As many readers will be aware, late last year the US Court of Appeals for the Second Circuit (the "Second Circuit"), an intermediate federal appellate court, determined in *Jaldhi v Shipping Corporation of India*, No. 08-3477 (2d Cir. Oct. 16, 2009) ("*Jaldhi*") that US-Dollar wire transfers of funds, being cleared through intermediary clearing banks in New York, cannot be frozen to secure maritime claims.

This put an abrupt stop to the previously very popular procedure for attachment of electronic funds transfers in New York pursuant to the Second Circuit's previous decisions in *Winter Storm* and *Consub Delaware*. Although *Jaldhi* does not preclude attachment of other assets pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule B"), it does now prevent attachment of wire transfers at the clearing stage. We are not New York lawyers, but have followed developments in this area with great interest.

Existing attachments

Secured claimants' immediate concerns following *Jaldhi* included whether security obtained following interception of wire transfers could be retained. The Second Circuit followed up quite swiftly with a ruling that *Jaldhi* applies retroactively to attachments made under Rule B (*Hawknet, Ltd. v Overseas Shipping Agencies, et al.*, 09-2128-civ (2d Cir. Nov. 13, 2009)).

However, in practice, this has not resulted in the release of all security for claims in which claimants invoked Rule B.

Substitute security being debated

In many cases where wire transfers were attached at the clearing stage pursuant to Rule B, the parties agreed, as with ship arrests, that a bond, escrow arrangement or P&I Club letter of undertaking be provided in exchange for release of the attachment.

Claimants have argued in these cases that the parties have reached agreement on security (and in many instances, counter-security) which should remain undisturbed under well settled admiralty rules and/or contractual principles. Defendants have argued that such security should be released because it was obtained through what has now been deemed to be an improper application of Rule B. In a number of cases, the more than forty District Judges of the Southern District of New York have reached different conclusions.

The claimants in *Central Shipping Company Ltd. v Internaut Shipping Ltd.*, No. 09-civ-6222 (VM) (S.D.N.Y. Nov. 25, 2009) argued successfully that a bond substituting attached wire transfer funds should remain to secure their claim, regardless of the *Jaldhi* decision. Judge Marrero concluded that equitable considerations favoured leaving the bond in place – in particular, that (i) the bond was a contract between the parties, and was independent of the attachment and (ii) the claimants had agreed to forego attaching or arresting the defendants’ assets in exchange for security being provided.

As matters stand, there is no clear rule on whether substitute security may remain in place. We understand that a dispute over money held in the District Court’s registry has been appealed to the Second Circuit and temporary stays preventing the release of the security have been granted at the District Court and appellate level. A decision in that case may not necessarily apply to all other cases of substitute security, as funds are not always held in the court registry.

Funds actually frozen by a clearing bank

Jaldhi states that wire transfers being cleared through intermediary banks in New York are not at that time the property of the sender or beneficiary and cannot be required to be attached pursuant to Rule B. However, the status of such funds may be different if a clearing bank actually stopped the transfer and held the funds in segregated accounts such that the funds could then be re-attached with an order of attachment.

The claimants argued in *Rimpacific Navigation Inc. v Daehan Shipbuilding Co. Ltd.*, No. 09-civ-00444

(LAK) (S.D.N.Y.) that New York law does not prohibit intermediary banks (i.e. clearing banks facilitating US-Dollar transactions) from freezing wire transfers. They argued that intermediary banks are immune from liability if they happen to do so based on a belief that the monies should have been stopped because of a court order or restraining notice, for example. They acknowledged that New York law also does not expressly permit intermediary-bank wire transfers to be restrained.

In practice, when a clearing bank freezes funds being transferred electronically pursuant to a federal maritime court order (or a New York state court restraining notice), the funds are put into a suspense account of the clearing bank. The claimants argued that, once the funds are in a suspense account, they become property held by the bank, and the defendant has an interest in those funds. It was argued that, under US admiralty practice, any property in which a defendant has an interest may be attached. Therefore, it was argued that a clearing bank can be re-served with a writ of attachment after interrupting the wire transfer and placing the funds into a suspense account, whereupon the funds are available as security for the underlying claim.

These arguments in *Rimpacific* were not accepted by the US District Court for the Southern District of New York. The court refused to order retention of the attached funds, on the basis that it had not been demonstrated that the defendant beneficiary of the wire transfer had consented to the placement of the funds into the clearing bank’s segregated suspense account.

Similar arguments for retention of wire transfers are understood to be pending in other cases in New York, some of which will be considered on appeal by the Second Circuit.

Arbitration claimants seek to attach assets pursuant to New York law

Following *Jaldhi*, the New York maritime bar is also turning to an alternative basis for attachment of assets to secure claims under New York state law.

A New York state statute, NY CPLR § 7502(c), allows courts in New York (both state and federal) to attach assets there prior to the commencement of proceedings if it can be demonstrated that an award would be ineffective. However, the court has discretion on whether an attachment is to be granted. There are two requirements for relief under CPLR § 7502(c):

1. A claimant must show that an arbitration award entitling a claimant to money damages “may be rendered ineffectual without such provisional relief”; and

2. Traditional requirements for a restraining order must be satisfied, including that (i) without an order there will be irreparable injury, (ii) it is likely that the claimant will succeed on the underlying claim and (iii) considerations of fairness favour the party seeking the order.

W.T. Grant Co. v Srogi, 52 NY2d 496, 517 (1981); *New York City Off-Track Betting Corp. v New York Racing Assn.*, 250 AD2d 437, 441 (1998).

For years, *Cooper v Ateliers de la Motobecane SA*, 57 NY 2d 408 (1982) had stood for the proposition that the remedy was not available in international arbitrations. However, New York law was changed in late 2005 to extend the court's power to attach assets to secure claims in arbitrations involving non-US parties and/or taking place outside the state of New York.

It is still not clear, however, under what circumstances an attachment of assets under CPLR § 7502(c) will be granted. A recent effort to utilise CPLR § 7502(c) to secure an arbitration dispute arising from a ship sale contract did not succeed (*Crimson Marine Company v Korea Line Corporation*, 09-civ-9841, (S.D.N.Y., Dec. 14, 2009)). In *Crimson Marine*, it was argued that Korea Line was in financial difficulties, and had unjustifiably missed a number of payments on a three-year time charter. The claimant sought an order attaching Korea Line's assets in New York prior to the commencement of arbitration, pursuant to CPLR § 7502(c).

In a ruling not binding on other US judges in the Southern District of New York, Judge Holwell denied attachment of Korea Line's assets in New York. Judge Holwell decided that an award would not be rendered "ineffectual" without attachment – the standard set out in the statute. The two-page order said nothing about what evidence might be sufficient to support an attachment.

Revisiting potential enforcement of judgments or awards against New York assets under Koehler

The *Jaldhi* decision warrants reconsideration of last summer's development in the enforcement of court judgments and arbitration awards in New York. Successful claimants seeking to enforce an arbitration award or court judgment in their favour might seek to attach assets pursuant to the June 2009 decision of the New York Court of Appeals (the highest state court in New York) in *Koehler v The Bank of Bermuda Limited*, 2009 NY Slip Op 04297, No. 82 (June 4, 2009).

Koehler confirmed that a court in New York may order a person over whom it has jurisdiction to hand over assets to satisfy a judgment – including assets outside New York and the US altogether. The

assets could be a judgment debtor's property held by another person, such as the judgment debtor's non-US bank. *Koehler* is not limited to maritime claims; an arbitration award or judgment for any type of claim could be enforceable using the *Koehler* process.

The difficulty some judgment creditors might have with seeking to rely on *Koehler* to enforce judgments is that the court in New York (ordering assets to be handed over) must have jurisdiction over the person in possession of the assets. Courts in the US usually determine whether they have jurisdiction over a person on the basis of that person's contact with, or activity in, the court's territory or in the maritime context based on contacts throughout the US.

If a non-US bank holds a judgment debtor's assets, a court in New York must have jurisdiction over that non-US bank before ordering it to surrender assets to a judgment creditor. Usually, New York branches of non-US banks are separate companies, and the presence of a branch in New York will not necessarily give a court in New York jurisdiction over the non-US affiliate bank. However, it is possible that the court in New York could take jurisdiction over the non-US affiliate based on a close relationship with its New York branch.

New York attorneys acting for claimants have suggested that the *Koehler* decision presents a potential strategic opportunity. Specifically, where a judgment debtor does business in the US, that judgment or award could be recognised in the relevant US state, entitling it to recognition in New York. A judgment recognised in New York remains enforceable for 20 years. A New York court could then order the judgment debtor to satisfy the judgment – either by paying assets held in New York or transferring assets the judgment debtor holds anywhere in the world. Even a very reluctant judgment debtor could come under substantial pressure by way of fines or contempt rulings by a court in New York should it try to ignore the court's orders. This would necessarily result in prejudice to their current US-based interests or prospective business interests while the judgment remains unsatisfied.



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Jurisdiction issues and towage contracts

Polskie Ratownictwo Okretowe v Rallo Vito C SNC and another (The Catone) [2009] EWHC 2249 (Comm)

This case addresses the issue of whether or not the presumption under the Brussels Regulation that a party should be sued in the Member State in which it is domiciled may be displaced by the English courts jurisdiction clause of the TOWHIRE form.

Parties should take care when standard terms are mentioned during the course of negotiations for commercial contracts. If a party does not wish to be bound by such terms then it should make this very clear to its contracting counterparty. Further, in the context of towage contracts, it is very important to ensure that any objections and/or any corrections to the terms of a recap are made immediately.

Background

The claimant was the owner of the tug *Posejdon*. The first defendant was the owner of the fishing vessel the *Catone* and the second defendant was the *Catone's* hull and machinery underwriter. On 4 February 2009, the *Catone* grounded outside the port of Lampedusa, Italy and a number of tug companies, including the claimant, were contacted with a view to hiring a tug to refloat her. It was common ground between the parties that a contract for the hire of the *Posejdon* was concluded between the claimant and the first defendant later that same day.

A dispute then arose between the parties in which the first defendant alleged that the *Posejdon* failed to follow the instructions that it had been given, causing both additional damage to the *Catone* and the loss of her cargo. The claimant denied that it caused any such loss or damage and issued a Claim Form in the English Courts on 18 February 2009, seeking a declaration of non-liability as against the first or second defendants.

The defendants contested the jurisdiction of the English courts on the grounds of Article 2(1) of the Brussels Regulation, which provides that subject to the provisions of the Brussels Regulation, "*persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*". The defendants argued that as they were both domiciled in Italy, an EU Member State, they should therefore be sued in the Italian courts.

The claimant relied on Article 23 of the Brussels Regulation, which sets out one of the exceptions to the general rule provided for in Article 2(1). Article 23 provides that if the parties (one or more of which must be domiciled in a Member State) have agreed that a particular court or courts of a Member State are to have jurisdiction then, provided that the formalities

of Article 23 are complied with, that court or courts shall have exclusive jurisdiction to hear all disputes between the parties. Accordingly, the claimant relied on Clause 25 of the TOWHIRE form, which provided for English court jurisdiction and which the claimant alleged formed part of the contract between the parties.

The Terms of the contract

The contract was concluded over the course of 4 February 2009, via the parties' brokers (Marint on behalf of the claimant and Cambiaso Riso Service Srl ("CRS") on behalf of the first defendant). During the initial exchange of e-mails between the parties, CRS informed Marint that the first defendant was short of funds and would not be able to pay for the claimant's services immediately. In order to solve this funding issue, the second defendant agreed to guarantee the payment of 80% of the sums owed to the claimant by the first defendant.

Negotiations continued throughout 4 February, and it was the unchallenged evidence of the Marint broker that he had mentioned the TOWHIRE form on more than one occasion during telephone conversations with the CRS broker. CRS had also sent an e-mail to Marint in which they stated that the defendants were "*keen to move forward on a Bimco Towhire basis*". Following these conversations and this e-mail, CRS sent an e-mail confirmation to Marint, setting out the first defendant's "order". That order set out certain, limited details in respect of the charter, but made no mention of the TOWHIRE form. Upon receipt of this email, Marint informed the claimant of the instructions and told them to instruct the *Posejdon* to sail as soon as possible. Marint then sent CRS a recap of the parties' contract, swiftly followed by a corrected version, to CRS: both recaps stated "*Bimco Towhire, suitably amended to include the following clauses:.....*".

The first defendant argued that the only terms it agreed to was the "order" sent by CRS to Marint, which did not refer to the TOWHIRE form and that, accordingly, the TOWHIRE form did not form part of the contract such that the first defendant was not bound by the TOWHIRE form's English jurisdiction clause.

Commercial Court decision

The Judge spent some time discussing the factual background and evidence that led to the conclusion of the contract. He concluded that the claimant and the first defendant had agreed a contract on the TOWHIRE form. The Judge's decision made it clear that in reaching this conclusion he had relied on, *inter alia*, (1) the fact that commercial parties and their brokers would expect towage contracts to be

concluded on standard terms, (2) all charters previously negotiated between Marint and CRS had been concluded on TOWHIRE or TOWCON forms, (3) Marint had informed CRS that TOWHIRE was to be used on a number of separate occasions, (4) the recap sent to CRS on 5 February made it clear that TOWHIRE was to be incorporated and both CRS and the first defendant failed to raise any objection to this until 9 February, *“well after services had been performed and disputes had arisen”*.

In addition, the Judge made it clear that he considered the first defendant’s argument surprising as, if the TOWHIRE form was not incorporated, then it would result in a contract which failed to address *“a number of fundamental issues”*, including two major issues raised during the negotiations that were in the interests of the first defendant, namely the need for a “no salvage” clause and the fact that the hire and refloating rates agreed included a significant amount of address commission.

However, the Judge held that the second defendant was not party to the contract on the grounds that at no point during the oral discussions between Marint and CRS was there any suggestion that the second defendant should contract as hirer and *“indeed it would be unusual for an insurer to do so”*. All that had been discussed was the fact that the second defendant would guarantee 80% of the sums due. Although the recap and pro-forma charter did include the second defendant as hirer, the Judge was not satisfied that this was ever agreed by the parties. Accordingly, the second defendant was not bound by the exclusive jurisdiction clause of the TOWHIRE form.

The Brussels Regulation

The Judge spent some time considering the relevant legal principles of Article 23 of the Brussels Regulation, and the judgment sets out some useful guidance in this regard. Critically, the Judge made it clear that there were two elements to Article 23: firstly, there must have been agreement between the parties to confer jurisdiction on the English court and secondly, that agreement must have satisfied the requirements as to formality set out in sub-paragraphs (a), (b) or (c) of Article 23.

As set out above, the Judge held that there was such an agreement between the claimant and the first defendant. Moreover, the Judge found that the recap, expressly incorporating the TOWHIRE form, amounted to the evidence in writing required by Article 23(a) of the Brussels Regulation, such that the first defendant was bound by the English court jurisdiction clause of the TOWHIRE form.

Conclusion

A party negotiating a commercial contract should be careful when standard terms are mentioned by their opposite number, and should ensure that they either propose alternative terms or expressly reject the other party’s standard terms if they do not wish to become bound by them.

In the context of towage contracts, the judgment makes it clear that it would be unusual for a towage contract not to be concluded on standard terms, i.e. the initial presumption is that the parties will have intended to have concluded the contracts using standard terms. Further, given the urgency of the circumstances in which towage contracts are usually concluded, if a party believes that a recap contains errors and wishes to object to any of the terms of the recap, then it should do so as soon as possible so as to avoid being bound by such terms.



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Defendant's contributory conduct leads to time extension for claimants

Lantic Sugar Ltd & Anor v Baffin Investments Ltd (The Lake Michigan) [2009] EWHC 3325 (Comm)

The Commercial Court granted the claimants an extension of time for commencement of arbitration proceedings pursuant to section 12 of the Arbitration Act 1996 because it considered the defendant's P & I Club had acted in such a way that its conduct was causative of the claimants' failure to comply with the time bar. Time bar disputes arise frequently in maritime arbitration and this judgment highlights the circumstances in which the Court might exercise its discretion to grant an extension of time. It also serves as a useful reminder to arbitration claimants to ensure that they serve the correct party within the permitted period to avoid subsequent time bar arguments.

Background Facts

The claimants in this case had a cargo claim against the shipowners under a bill of lading. The bill of lading incorporated the Hague-Visby Rules and provided for disputes to be resolved in London arbitration.

The Defendant shipowner was incorporated in Barbados, but also had registered offices in Hong Kong and the Marshall Islands. The owners' P&I Club granted time extensions with respect to commencement of arbitration by the claimants up to and including 12 March 2009.

A dispute subsequently arose as to whether arbitration proceedings had been commenced in time, namely before 12 March. The claimants applied to the Court for a declaration that arbitration proceedings were commenced on or before 12 March. Alternatively, if the arbitration proceedings were not commenced in time, the claimants sought an extension of time to commence arbitration. Section 12 of the Arbitration Act 1996, provides as follows:

- “(1) *Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished unless the claimant takes within a time fixed by the agreement some step –*
- (a) *to begin arbitral proceedings*
- The court may by order extend the time for taking that step....*
- (3) *The court shall make an order only if satisfied –*
- (b) *that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.”*

In summary: on 6 March, the claimants' lawyer addressed a Notice of Arbitration to the Club. This was followed by a telephone conversation between him and the Club on 11 March, the contents of which were disputed. The Club said that it had advised the claimants' lawyer that it was taking instructions on his fax of 6 March but that pending express instructions, it did not have authority to accept service on behalf of the owners. However, the claimants' lawyer said he did not recall being told that the Club was not authorised to accept service. On 12 March, the claimants' lawyer sent a further fax to the Club reiterating the previous Notice of Arbitration. The Club responded the same day, stating that it was not authorised to accept Notice of Arbitration.

The claimants' lawyer then took immediate steps to identify the registered owners of the vessel and served them with a Notice of Arbitration without prejudice to the validity of the previous Notices of 6 and 12 March. The Notice was despatched to owners' offices in the Marshall Islands and Hong Kong on 12 March but the time difference meant that the earliest Notice was not served in the Marshall Islands until the following day, 13 March. It was not disputed that the relevant time was local time at the place of receipt (see *The Pendrecht* [1980] 2 Lloyds Rep. 56). This was 8 ½ hours after the expiry of the time limit.

Commercial Court decision

The defendants' evidence was that (i) all the Club's dealings on behalf of its member (which included providing LOUs and negotiating settlements and extensions of time) were done in accordance with the defendants' express instructions, and (ii) as a matter of usual practice, the defendants do not authorise their P & I Clubs to accept formal service of proceedings on their behalf. Mr Justice Gross accepted this evidence. He said that the Club had no actual authority to accept service on behalf of this member. He also rejected the claimants' argument that even if the Club did not have actual authority, it had apparent authority to accept service. The Club's role in dealing with a wide range of other matters (settlements, LOUs, extensions of time and so on) was not enough to create apparent authority.

Consequently, the defendants had not been properly served with the notices sent to the Club on 6 March and 12 March.

The Judge went on to comment more generally that a P & I Club's authority is similar to a solicitor's, where even a wide general authority to deal with a case on behalf of a client would not (without more) translate into authority to accept service of proceedings. He said that it is not an uncommon mistake to assume that a Club has authority to accept service on behalf of its members, but it is a mistake nonetheless.

Turning to whether the claimants were entitled to an extension of time under Section 12 of the Arbitration

Act, Mr Justice Gross emphasised that the Court can no longer extend time simply because it concludes that it would be just to do so (as it had been able to do under Section 27 of the old Arbitration Act 1950). Under the stricter test in section 12 of the new Act, the Court could only grant the extension requested if the conduct of the defendant (or someone acting on the defendant's behalf) made it unjust to hold the claimants to the time bar. Some conduct by the defendant or its Club, causative of the failure to comply with the time bar, was needed. Mere silence on their part was not enough.

Mr. Justice Gross concluded on the evidence that during the telephone conversation of 11 March, the Club had created the reasonable impression in the mind of the claimants' lawyer that it was taking instructions as to the substance of the 6 March Notice, rather than on whether it had authority to accept service on behalf of the owners. The Judge considered the Club's conduct to have been misleading and that its effect was to reinforce the claimants' lawyer's own error as to the Club's authority to accept service. If the Club had made it clear that it was seeking express instructions on authority to accept service, the Judge believed that the claimants' lawyer would have reacted immediately and proper service would probably have been achieved in time. Consequently, although the Judge acknowledged that the claimants' lawyer was at least partly responsible for the claimants' predicament in that he left the dispatch of the 6 and 12 March Notices until late in the day, nonetheless he was persuaded that the just course of action was to extend time.



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Jurisdiction provision in slot charter not incorporated into freight forwarding agreement

Africa Express Line Limited v Socofi S.A. (1) and Plantations DAM S.A. (2) [2009] EWHC 3223

This decision considered whether an arbitration and jurisdiction clause could be incorporated into a new, wholly separate contract by the use of general words of incorporation. Whilst the Judge acknowledged that the objective intention of the parties was paramount, he found that general words would not normally have the effect of incorporating such a clause, which he considered to be ancillary to the services provided under the freight forwarding agreement.

Facts

The first defendant, Socofi S.A. ("Socofi"), was a fruit importer based in France. The second defendant, Plantations DAM S.A. ("DAM"), was a fruit grower based in the Ivory Coast. In January 2005, Socofi and DAM entered into an agreement on FOB terms under which Socofi agreed to purchase all fruit produced by DAM.

The claimants, Africa Express Line Limited ("AEL"), were carriers operating refrigerated vessels between Europe and West Africa. In April 2007, AEL entered into a slot chartering agreement with DAM, which provided that DAM would ship its produce exclusively on AEL's vessels. This agreement also contained an arbitration and jurisdiction clause, providing for LMAA arbitration for claims of up to US\$125,000 and for higher value claims to be submitted to the English High Court.

Initially, a French company, LV Fruits, provided Socofi with the relevant freight forwarding and stevedoring services at ports in France and Belgium. Subsequently, that relationship ended and Socofi agreed with AEL that AEL provide Socofi with the necessary freight forwarding and stevedoring services for DAM shipments to Europe. Negotiations were initially conducted via AEL's French sister company, Transit Fruits. AEL subsequently wrote to Socofi, stating *inter alia* that:

"We are prepared to offer you transport services from Cote d'Ivoire to on truck in Europe in the ports of Port-Vendres and Anvers..."

This offer includes... Free In/Liner Out (FILO) maritime transport under the conditions of the aforementioned charter agreement between AEL and DAM..."

Socofi responded *inter alia* as follows:

"...We acknowledge receipt of your mail sent today and confirm our acceptance of the following points

1) The maritime transport service under the conditions of the contract of affreightment between AEL and DAM..."

AEL subsequently brought proceedings in the High Court against Socofi and DAM for unpaid freight, arguing that the jurisdiction clause in the slot charter with DAM had been incorporated into their agreement with Socofi.

Socofi sought a declaration that the jurisdiction clause had not been incorporated into that agreement. Socofi argued *inter alia* that only those terms relating to payment were intended to be incorporated. The other terms in AEL/DAM's agreement were pertinent to a slot charter, but were not relevant to the provision of freight forwarding services.

Pursuant to Article 23 of Council Regulation No 44/2001 (the "Judgments Regulation"), the English court would have jurisdiction to hear the action against Socofi if it could be demonstrated that the parties had agreed it should have jurisdiction to determine their disputes. Community law requires "actual acceptance" of a jurisdiction clause, which must be "clearly and precisely demonstrated".

Commercial court decision

Mr Justice Christopher Clarke found in favour of Socofi. AEL had failed to demonstrate that they had a much better argument than Socofi that the clause conferring jurisdiction on the English court was the subject of consensus between the parties.

The Judge stated that where terms are being incorporated from an earlier, separate contract, existing case law demonstrates that the objective intention of the parties is the key factor in determining whether any particular term has in fact been incorporated. Where the purported incorporation provision employs general wording, terms that are ancillary to the services being provided under the new contract are presumed not to be incorporated.

Clarke J considered that the wording used in the immediate case ("*under the conditions of the contract of affreightment between AEL and DAM*") was apt for the purpose of incorporating the payment terms under the slot charter into the new freight forwarding agreement, but not for incorporating the arbitration and jurisdiction clause, which he considered to be an ancillary provision. The freight forwarding agreement would not be left 'without meaningful content' were the arbitration and jurisdiction clause not carried over.

The commercial context of the deal was also cited as a factor in Clarke J's decision. A French company was looking to replace the freight forwarding services provided by another French company in France and Belgium. The relevant shipments were between Francophone countries and the negotiations regarding the freight forwarding agreement had taken place between French companies in Marseilles. None of this supported the inference that the parties had intended that the English High Court should have jurisdiction.

Comment:

This judgment highlights the importance of providing expressly for law and jurisdiction clauses in international contracts. Otherwise, where an incorporation clause is worded in very general terms, the court may find that the commercial context of the parties' agreement does not evince an intention to incorporate an arbitration or jurisdiction clause contained in a separate contract.



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Rome I Regulation on Law applicable to contractual obligations in force as of 17.12.09

On 17 December 2009, the Rome I Regulation (EU Regulation 593/2008) on the law applicable to contractual obligations came into force and became directly applicable in all EU Member States with the exception of Denmark. When we last reported on the draft Regulation (Ince Shipping e-brief, May 2008), the UK was still considering whether to opt in. It decided to do so and a statutory instrument, The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations, adopting the EU Regulation into national law, also came into force on 17 December. This replaced the Contracts (Applicable Law) Act 1990, which now only applies to contracts concluded before 17 December 2009.

Parties' freedom to choose law governing their contracts

The Rome I Regulation replaces the Rome Convention 1980 in the EU Member States and applies to all contracts concluded as from 17 December 2009. To a large extent, Rome I replicates the provisions of the Rome Convention. In particular, Rome I preserves the parties' right to choose the law that will govern their contract where this choice is expressly made or clearly demonstrated by the terms of the contract or the circumstances of the case (Article 3(1)).

The retention of this freedom of contract has been welcomed by the shipping industry, as represented by the European Community Shipowners' Association, the International Chamber of Shipping, BIMCO and the International Group of P & I Clubs in their published comments on the proposed Regulation. These representative bodies have pointed out that maritime contracts are essentially a matter of private rather than public law and that one of the prime concerns for commercial entities engaged in international trade is certainty, particularly with regard to their rights and obligations under their contracts. That is why maritime contracts usually contain an express choice of law clause.

Governing law in the absence of choice

The Rome Convention

Article 4(1) of the Rome Convention set out a default position whereby, in the absence of choice of law by the parties, the contract would be governed by the law of the country with which it was most closely connected. According to Article 4(2), this was the country where the party effecting

the performance which was characteristic of the contract had its habitual residence or, in the case of a body corporate or unincorporate, its central administration. Article 4(5), however, provided that this presumption could be displaced if the circumstances as a whole indicated that the contract was more closely connected with another country.

The Article 4(2) presumption did not apply *inter alia* to contracts for the carriage of goods. In such contracts, if the carrier had its principal place of business in the country where loading or discharging of the goods took place or where the consignor had its principal place of business, it was presumed the contract was most closely connected with that country (Article 4(4) of the Rome Convention).

Rome I

Article 4(1) of Rome I lists eight specific types of contract and makes express provision for determining the law governing those types of contract in the absence of choice. These types of contract include a contract for the sale of goods which will be governed by the law of the country where the seller has its habitual residence.

Contracts of carriage

Article 5 of Rome I deals with contracts of carriage and states that, insofar as the parties have not chosen the law applicable to their contract, the law applicable shall be the law of the country of habitual residence (as to which see below) of the carrier, provided that the place of receipt or the place of delivery of the goods or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed between the parties is situated shall apply.

As regards contracts for the carriage of passengers, in the absence of choice the law applicable is the law of the country where the passenger has his or her habitual residence, provided that either the place of departure or the place of destination is situated in that country. Otherwise, the law of the country where the carrier has its habitual residence shall apply. As regards choice of law by the parties to a contract for the carriage of passengers, the parties are restricted to choosing between the country of the passenger's habitual residence, the carrier's habitual residence, the carrier's place of central administration, the place of departure or the place of destination.

Article 19 of Rome I defines "habitual residence" as being the place of central administration in the case of companies and other corporate or

unincorporated bodies. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment or performance under the contract is the responsibility of a branch, agency or other establishment, the place where that branch or agency or establishment is located shall be the place of habitual residence. For a natural person acting in the course of a business, the habitual residence is his or her principal place of business.

However, both Articles 4 and 5 of Rome I contain a “catch-all provision” which states that in the absence of choice of law, where it is clear from all the circumstances of the contract that it is manifestly more closely connected with a country other than that provided for in those Articles, then the law of that other country shall apply.

Insurance contracts

Article 7 of Rome I deals with insurance contracts. Other than for life insurance, it provides for free choice of law for the insurance of large risks (as defined in Article 5(d) of the First Council Directive 73/239/EEC), whether or not the risk is situated in a Member State. If the applicable law has not been chosen by the parties, the insurance contract will be governed by the law of the country where the insurer has its habitual residence. Again, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country will apply (Article 7(2)).

For insurance contracts covering “non-large” risks situated in a Member State, the parties may choose, amongst other things: the law of the Member State where the risk is situated at the time of conclusion of the contract; the law of the country where the policy holder has his habitual residence; and, in the case of life assurance, the law of the Member State of which the policy holder is a national. A full list of the options is set out in Article 7(3).

It is important to note that Article 7 does **not** apply to reinsurance contracts. They are governed by the general provisions regarding freedom of choice and applicable law in the absence of choice (Articles 3 and 4 respectively).

Conclusion

In order to preserve their freedom of choice, commercial parties entering into international transactions should incorporate an express choice of law clause into their contracts.



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Employment Law

Legislative Changes

The Equality Bill 2010

The Equality Bill 2010 is due to receive royal assent later this year. The Bill aims to unify and re-state existing discrimination legislation concerning sex, race, disability, sexual orientation, religion or belief and age, adopting a common approach where appropriate. The Bill introduces some significant changes particularly in relation to gender pay discrimination and the introduction of new types of disability discrimination.

The House of Commons Report stage was completed on 2 December 2009. The most significant amendment was the insertion of a new clause dealing with employers' pre-employment health enquiries. This is designed to assist disabled people in making direct discrimination claims where their job applications falter following employers' pre-employment health enquiries. It will do this by shifting the burden of proof to the employer to show that no direct discrimination has taken place, except in certain specified circumstances including where, despite the pre-employment health questions, the disabled person's job application proceeded to the next stage following interview or assessment, where the employer asked the health questions in order to ascertain whether it needed to make reasonable adjustments for the applicant in connection with an assessment (such as an interview) and where pre-employment health questions were asked to monitor diversity or take positive action in respect of disabled persons.

Immigration Bill

The draft Immigration Bill, published on 12 November 2009, has been described by the Home Office as an attempt to "simplify and consolidate" 40 years of immigration law and is intended to complement the points-based immigration system which was introduced in November 2008. The Bill will replace the five current categories of permission for entry to the UK (highly skilled, skilled, low skilled, students and temporary/exchange workers) with the concept of one "immigration permission", which may be temporary or permanent. The new temporary permission will be given for a particular purpose i.e. to visit, work or study and will be subject to conditions such as access to work or public funds. Currently, migrants are able to vary the duration or purpose of their leave but, under the Bill, a new immigration permission would have to be sought if the purpose or duration of the leave was to be changed. The Bill will be introduced into Parliament this year.

Rules on Advertising for Skilled Workers

Under immigration rules, employers are allowed to recruit non-EEA nationals where a vacancy cannot be filled by the UK resident labour force. In order to demonstrate this, previously the employer had to advertise the role for a period of two weeks (if the salary was under £40,000) and one week (if the salary was over £40,000). This has been increased to four weeks from 14 December 2009, to give the resident labour force greater employment opportunities.

Discrimination on the grounds of religious or philosophical belief

Grainger plc and others v Nicholson

In November 2009, the Employment Appeal Tribunal upheld a tribunal's decision that a "philosophical belief" for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 could include a belief in man-made climate change and the existence of a duty to live in such a way as to mitigate or avoid it. The EAT suggested that a philosophical belief must be established, not just asserted, so cross examination is likely to be needed, to show that the belief is actually held and the extent of the belief. In contrast, to establish a religious belief, a claimant may only need to show adherence to a particular religion.

The case will now proceed to a hearing on the substantive merits to determine whether the employee was in fact discriminated against on the grounds of this philosophical belief when he was dismissed on the ostensible grounds of redundancy.

Religious discrimination

Eweida v British Airways Plc

The Employment Appeal Tribunal has upheld a finding that a Christian employee did not suffer indirect discrimination on the grounds of religion or belief where her employer, in accordance with its uniform policy, insisted that the cross on her necklace be hidden. It held that it was not a religious requirement of the Christian faith that a visible cross be worn and that the employee had failed to adduce sufficient evidence to suggest that the policy requiring non-uniform items to be concealed placed Christians "at a particular disadvantage" within the meaning of the Employment Equality (Religion or Belief) Regulations 2003. The EAT also affirmed the tribunal's view that if Christians had been placed at a particular disadvantage by BA's policy, the company's defence would have failed. The employee has appealed to the Court of Appeal which is due to hear the case on 19 and 20 January 2010.

The employment group at Ince & Co produces regular updates outlining development in this area. If you would like to receive these, or wish to discuss any of the issues raised above or if you would like advice and assistance with any employment issues please contact the authors.



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Other News

Ince Singapore gains new partner

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

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



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Ince & Co advises Islamic Shipping Fund Safeena (L) Ltd on first investment

Our Singapore office recently advised Islamic shipping fund Safeena (L) Ltd on its first investment made through an Istisna'a and Ijarah mawsufah fi zimmah structure (a deferred purchase and forward lease arrangement), in a 19,900 dwt stainless steel chemical carrier with Jimbaran AS, a Norway-based entity which owns and operates chemical carriers.

Safeena, a joint venture between Asian Finance Bank Berhad and Amanah Investment Bank (L) Ltd, is the first shipping fund to enter into an investment using such a structure, which was arranged by RS Platou Finans.

Ince advised Safeena in structuring the investment, ensuring the transaction was Shariah compliant and that it complied with the fund's obligations to investors. Ince also advised on the drafting of the purchase and lease documentation, its security in a sister vessel and conformity with the conventional financing arrangements in place in respect of the sister vessel.

Safeena is a private fund. It aims to raise US\$300 million through equity and debt participation to invest in structures and/or acquire a portfolio of vessels.

For further details please visit our website www.incelaw.com

International Trade and Commodities Legal Update

We are delighted to introduce the first edition of our relaunched International Trade and Commodities Legal Update. This publication provides case summaries dealing with the kind of issues we see on a regular basis in international trade disputes that may also be relevant to our shipping clients.

In this edition, we summarise decisions from 2009 in relation to the following:

- Letters of credit, documentary discrepancies and the application of UCP 600
- Implied terms in sale of goods contracts
- Consequences of the failure to open a suitable letter of credit under a sale contract
- “Payment first” clause and how this impacts on a counterclaim by the buyer
- FOB contract and readiness of vessel to load
- Excluding rights of appeal to the court from an arbitration award
- Incorporation of law and jurisdiction clause from JVA into sale contract
- Validity of notice of readiness given pursuant to a voyage charter
- Cargo claims under bills of lading and title to sue

The International Trade and Commodities Legal Update can be found in the ‘Our Knowledge’ section of our website. If you would like to receive a copy by email, please contact Chris Telford (chris.telford@incelaw.com)

Ince & Co is an international commercial law firm which practises in seven broad strands:

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