

Shipping E-Brief



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Shipping

Commercial Court provides further guidance on remoteness of damage in breach of charterparty cases

Sylvia Shipping Co Limited v Progress Bulk Carriers Limited [2010] EWHC] 542 (Comm) (The *Sylvia*)

This recent decision of Mr Justice Hamblen in the Commercial Court provides further useful guidance on the measure of recoverable damages in breach of charterparty cases. The House of Lords decision in *The Achilles* in 2008 resulted in much debate and discussion on remoteness of damage and whether a new test of “assumption of responsibility” for a particular type of loss had been introduced by at least a majority of their Lordships. In the *Amer Energy* [2009] 1 Lloyds Rep 293, Mr Justice Flaux did not consider that any new test as to recoverability of damages in contract and remoteness different to the classic rule in *Hadley v Baxendale* (as refined in subsequent cases) had been laid down. Mr Justice Hamblen in this case takes a similar view and indicates that the orthodox approach to remoteness of damage remains the “standard rule” and that it is only in relatively unusual cases such as *The Achilles* itself where a consideration of assumption of responsibility may be required.

Background

The dispute between the parties in this case was originally dealt with by arbitration, where the arbitrators held that the owners had failed to exercise due diligence and had breached their maintenance obligations under a time charter leading to a delay in readiness of the vessel to load cargo. The resulting delay led to charterers missing the laycan for a sub-charter which was subsequently cancelled by the sub-charterers. The charterers re-fixed the vessel but the new sub-charter was less profitable and charterers claimed the resulting loss of profit from the owners. The arbitral tribunal found that the loss of profit under the sub-charter was recoverable. The owners appealed to the court, relying *inter alia* on the House of Lords decision in *The Achilles* to argue that the appropriate measure of recoverable damages was limited to the difference between the market and charter rates during the period of delay.

The Achilles related to the late redelivery of a time chartered vessel following a legitimate final voyage. The follow on charter was lost as a result and owners were forced to renegotiate a substantially reduced rate of hire with the new charterers. They sought to claim damages for the difference between the original and re-negotiated rates of hire for the entire duration of the follow on charter, which was for 4-6

months. The House of Lords however held that the owners’ damages were limited to the difference between the market rate of hire and the rate of hire agreed in the contract which was breached and only for the period during which owners were deprived of the vessel by late delivery. However, their Lordships differed in the approaches they took to remoteness of damage and this divergence of opinion has given rise to some uncertainty as to the applicable test.

Commercial Court decision

Mr Justice Hamblen considered the relevant case-law on remoteness of damage, starting with the classic statement of the rules regarding remoteness as laid down in *Hadley v Baxendale* and as refined in subsequent decisions such as the House of Lords decision in *The Heron II*. He stated that the generally accepted test for remoteness “has been whether the loss claimed was of a kind or type which it would have been within the reasonable contemplation of the parties at the time that the contract was made as being not unlikely to result”. He added, however, that the House of Lords decision in *The Achilles* “has called into question whether that remains a sufficient test”.

Having reviewed *The Achilles*, Mr Justice Hamblen concluded that it “results in an amalgam of the orthodox and the broader approach. The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be “unusual” cases, such as *The Achilles* itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.”

He added that this conclusion was consistent with other recent cases, for example *Classic Maritime v Lion Diversified Holdings* [2010] 1 Lloyd’s Rep 59, where the judge stated that he would be “highly surprised” if *The Achilles* had established a new test for the recoverability of damages for breach of contract.

Mr Justice Hamblen distinguished *The Achilles* from the present case. Whereas a lost follow on fixture made at the end of a charter could be for any period, a lost sub-charter could never be for a longer period than the time charter itself. It was less likely, therefore, that an “unquantifiable, unpredictable, uncontrollable or disproportionate” loss would arise

in the latter case. Furthermore, there was no finding of a general market understanding that damages arising from delay during the period of a time charterparty were limited to the difference between charter and market rates during the period of delay. On the contrary, the judge said, the general understanding is that a lost voyage fixture is a well recognised measure of damages in charterparty cases.

As regards the tribunal's findings in this case, the judge found nothing surprising in the arbitrators' conclusion that the loss of a fixture during the course of a charterparty due to delay in meeting a laycan caused by the owners' breach of charterparty was foreseeable and was a loss of the kind arising naturally and in the ordinary course of things. Vessels were chartered in order to be traded and trading would frequently involve subletting (in fact, time charters would normally include an express liberty to do so). Simple ordinary vessel trading often involved fixtures for the carriage of specific cargo, usually by voyage charter or by a time charter trip and the lifting of these cargoes almost invariably involved a laycan or a cancelling date. In the judge's opinion, therefore, "one would expect it to be well within the reasonable contemplation of an owner that delay of significance in arriving or being ready to load at the designated load port may result in the loss of a fixture, as the Tribunal found. If so, lost profit on such a fixture would equally be well within their reasonable contemplation."

Furthermore, in *The Derby* [1984] 1 Lloyd's Rep 635, it was clearly recognised that a claim for lost profits on a voyage charter which could not be performed because of delay due to owners' breach of a time charterparty could properly be made, so long as the loss could be proven.

Consequently, the owners' appeal was dismissed and leave to appeal was also refused.

Comment

In our February 2009 e-brief, we reported on the decision in *The Amer Energy* and commented that that decision suggested there was no new test for remoteness of damage as a result of *The Achilles* and that if that was correct, *The Achilles* might be limited to its own (special) facts. The decision in the present case would appear to bear out that view and as such, may be welcomed as reducing uncertainty in this area.



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Enforcing covenant not to sue in Himalaya clause did not fall foul of Article III rule 8 of the Hague Rules

Whitesea Shipping and Trading Corporation & Anr v El Paso Rio Clara LTDA & Ors (The Marielle Bolten) [2009] EWHC 2552 (Comm)

In October 2009, Ince & Co successfully obtained an interim anti-suit injunction on behalf of Whitesea Shipping (owners), restraining cargo interests and their insurers from suing third parties to the bills of lading outside of the English courts, in breach of the covenant not to sue third parties and the exclusive English law and jurisdiction clause in the bills.

Brief facts

The *Marielle Bolten* grounded off Puerto Plata, Dominican Republic in January 2006, laden with cargo carried under a number of bills of lading. General average was declared and cargo interests put up average bonds and guarantees. The GA adjustment was published in June 2009, following which owners sought to recover GA contributions from cargo interests.

However, prior to the publication of the adjustment, cargo interests under a number of bills of lading commenced proceedings against owners

in Brazil (most notably), claiming damages on a number of different grounds. These actions were in breach of exclusive English law and jurisdiction clauses contained in the bills of lading, average bonds and average guarantees.

Cargo interests admitted that they intended to circumvent the Hague Rules (which applied to the bills on account of a clause paramount), in circumstances where owners argued that they were entitled to recover GA contributions because the grounding was caused by negligent navigation and/or perils of the sea, which gave rise to defences under the Hague Rules. As the Hague Rules do not apply in Brazil, the Hague Rules defences would not be available to owners before the Brazilian court.

Mr Justice Flaux had little difficulty in finding that owners were entitled to an anti-suit injunction to prevent cargo interests from suing them abroad. The more difficult question, and the one which this judgment addresses, is whether cargo interests could also be enjoined from suing third parties outside of England. This question arose because the Brazilian action was also filed against owners' managers, P&I insurers, charterers and sub-charterers.

Owners' case for an Injunction

In asking the High Court to grant an anti-suit injunction restraining proceedings against third parties, owners relied on clause 3(b) of the bill of lading which stated:

1. that the merchant undertook not to bring any claims against any servant, agent, stevedore or subcontractor of the carrier (the covenant not to sue);
2. if it did, the merchant further undertook to indemnify the carrier against all consequences (the circular indemnity clause); and
3. that every servant, agent, stevedore or subcontractor of the carrier nevertheless had the benefit of all the provisions in the bills benefiting the carrier, including all limitations of and exonerations from liability provided to the carrier by law (the Himalaya clause).

Owners argued that the third parties sued in Brazil were all either owners' servants, agents or subcontractors (within the definition in the bills of lading) and that the cargo interests were bound by their covenant not to sue, and owners were entitled to an injunction to enforce the covenant.

The defence based on Art III r 8 and the Court's decision

The cargo interests contended that the covenant not to sue in clause 3(b) was null and void because it amounted to conferring on the third parties a blanket immunity from liability, which would be contrary to Art. III r. 8 of the Hague Rules. Art. III r. 8 states:

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

The cargo interests argued that the covenant not to sue, as it appeared in the bills, was enforceable not just by the contractual carrier, but also by those third parties who were protected by clause 3(b) under the so-called "Himalaya contract". However, as soon as a third party performed "carriage" obligations, the Himalaya contract itself became a contract of carriage to which the Hague Rules, including Article III r.8, applied. The judge disagreed. He carefully considered the decision of Lord Justice Rix in the Court of Appeal in *The Starsin*, and applied his reasoning that a similarly worded covenant not to sue was only enforceable by the contractual carrier to prevent the shipper from suing third parties. The third party was only intended to have the benefit of such defences and immunities as were available to the carrier to defend itself from incurring liability.

The cargo interests further argued that even if the covenant not to sue could only be enforced on behalf of a third party, if a third party had performed "carriage" obligations, any attempt to grant that third party total protection from being sued contravened Art. III r.8, again because the Himalaya contract itself became a contract of carriage to which the Hague Rules applied. The cargo interests said that this argument was supported by the decision on this point of the House of Lords in *The Starsin*. Again, the judge disagreed. After analysing each of the five judgments given by the Lords in *The Starsin*, Mr Justice Flaux held that the real reason the Court in that case found that the Himalaya contract was a contract of carriage was not because the third party had performed "carriage functions", but because the Himalaya clause in the particular bill of lading included a "deeming" provision. This said that to the extent that parties were protected by the Himalaya clause, they should be deemed to be parties to the bill of lading contract. There was no such deeming provision in the bill of lading issued for cargo shipped onboard *The Marielle Bolten*.

Finally, the cargo interests submitted that even if both of the previous propositions were wrong, the contractual carrier should not be allowed to enforce the covenant not to sue because this would have the effect of circumventing Art. III r.8. The judge held that there was no authority in support of this submission. Having considered the functions which the relevant third parties were in fact performing, he was firmly of the view that although the managers, P&I insurers, charterers and sub charterers all performed services incidental to the carriage of goods, none of them had actually undertaken the carriage of the goods.

Furthermore, the judge was persuaded that on the facts, by commencing proceedings in Brazil, in breach of the exclusive English Court jurisdiction clause, it was the cargo interests, and not owners, who were seeking to circumvent the application of the Hague Rules.

Consequently, the anti-suit injunction restraining proceedings from being commenced or continued against the third parties was granted.



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Express warranty in the charterparty: elements required to prove damages for breach of warranty by the owners

Al Dawood Shipping Lines Limited v Dynastic Maritime Incorporated (MT Napa) [2010] EWCA Civ 104

This decision of the Court of Appeal highlights the elements of a claim that charterers need to prove in order to succeed in an action against owners for breach of express warranty by the owners. Faced with the owners' claim for unpaid hire and damages, the charterers put forward the defence of breach of warranty and counterclaimed for the loss of profit that they would have made on the sub-charter had the owners complied with the warranty. To succeed, charterers needed to demonstrate that the owners breached the warranty, that they would have been able to have concluded the sub-charter but for the breach and that the hire rate of such sub-charter would have been higher than the charter hire rate.

The case is also an important illustration of the fact that a party who fails to comply with procedural deadlines and court orders risks losing an opportunity to put forward its case.

Facts

The *MT Napa* charterparty was for a period from November 2006 to November 2007 on BPTIME 3 form. The original cancelling date of 30 November 2006 was later amended to 8 December 2006.

The charterparty stated that it included "...OCIMF Vessel Particulars Questionnaire or Q88 current at the date hereof (together referred to as the "Questionnaire") as attached hereto."

Clause 9.6.5 of the charterparty expressly provided that the certificates confirmed by the owners "shall be maintained in force during the currency of the Charter." The Q88 was attached to the charterparty and included the International Oil Pollution Prevention Certificate ("IOPP Certificate") in the list of certificates confirmed by the owners. The Q88 also contained a reference to paragraph 2.6 of the OCIMF Revised Ship Inspection (SIRE) Programme form (the "SIRE form"). The standard SIRE form was completed for *MT Napa* and contained paragraph 2.6 which stated that the IOPP Certificate was issued on 20 November 2006 and that it expired on 20 November 2007. The Court found that the SIRE form was most likely completed after the charterparty was signed.

On 6 December 2006, the owners produced the IOPP certificate, which was called an "Interim Certificate" and which was valid until 15 May

2007. Prior to the certificate being provided, in November 2006, the charterers chased the brokers for the certificate and told them that the potential sub-charterer was awaiting it prior to making a decision whether or not to sub-charter the vessel.

The vessel was delivered on 8 December 2006. The first instalment of hire was not received by the owners and the vessel was withdrawn shortly afterwards.

Procedural history

The owners commenced an action for hire due, the cost of bunkers and damages for wrongful repudiation.

The charterers' main defence was that the owners breached an express warranty that the vessel's IOPP Certificate would be issued on 20 November 2006 for a period of validity of three years until 20 November 2009 and that as a result of such breach, the charterers were unable to sub-charter the vessel, which led to their inability to pay the hire. In effect, the charterers alleged that any failure to pay hire by them was the result of the owners' own breach of the charter.

The charterers also counterclaimed damages arising from their inability to secure a sub-charter due to the owners' failure to provide an IOPP Certificate in accordance with the charterparty.

Following the exchange of pleadings between the parties, the charterers took no further part in the proceedings. This ultimately resulted in a court order dismissing their counterclaim and ultimately in judgment being entered in favour of the owners for the sum of US\$ 3,034,970.75 plus interest.

This judgment prompted the charterers into action and they applied to set aside the court order dismissing their counterclaim and also to set aside the judgment entered against them. Mr Justice Cooke commented that the charterers brought this situation on their own heads by their own actions and that they were "*reckless in allowing judgment to be entered against them.*" Whilst he refused to set aside the order dismissing the counterclaim on the basis that it had no prospect of success, he agreed to set aside the judgment entered against the charterers on condition that part of the claim relating to unpaid hire (about US\$136,000), costs to date and future costs of the action be paid by the charterers. The charterers failed to comply with these conditions, but applied for and obtained permission to appeal the decision of Mr Justice Cooke setting aside their counterclaim and laying down conditions for setting aside the judgment.

The Court of Appeal decision

In the Court of Appeal, the charterers had to persuade the Court that they had a reasonable prospect of success in demonstrating their entitlement to damages arising from the alleged breach by the owners of the express warranty to provide a valid IOPP certificate. The charterers accepted that the correct measure of damages for such a claim would be the loss of profit that they would have made if they had been able to sub-charter the vessel.

The Court of Appeal found that the SIRE form was not incorporated into the charterparty by mere reference to paragraph 2.6 in Q88. That was found to be a reference to a standard SIRE form and not the form as completed for this particular vessel. Therefore, the owners did not warrant that there would be a single IOPP Certificate valid for 3 years from 20 November 2006 to 20 November 2009.

The only warranty given by the owners was a clause in the charterparty that stated that certificates confirmed by the owners in Q88 "*shall be maintained in force during the currency of the Charter.*" The "*currency of the charterparty*" means the time from delivery of the vessel under the charter until its expiry. The above wording of the clause does not require a valid IOPP certificate in advance of delivery of the vessel or that there must be one single IOPP certificate that is valid from start to finish of the charter period as long as the owners maintain the certificate in force throughout the charter period.

The Court of Appeal proceeded to state that even if there was such a warranty as alleged by the charterers and the owners breached it, then the charterers still failed to prove that this breach meant that they were unable to conclude a sub-charter for the vessel for this very reason. In particular, there was no recap exchanged between charterers and potential sub-charterers indicating that agreement was reached between them and was subject to satisfactory production of the vessel's IOPP certificate.

Furthermore, the Court of Appeal found that even if the charterers could demonstrate that sub-charterers would have sub-chartered the vessel, they still failed to demonstrate that the failure to sub-charter the vessel resulted in a loss, i.e. that the sub-charter rate of hire would have been higher than the charter rate of hire.

In light of this, the Court of Appeal confirmed that Mr Justice Cooke was right to conclude that the charterers' counterclaim had no prospect of success. The Court of Appeal also held that the judge had been correct in setting down conditions that charterers had to comply with before being able to argue their defences. The appeal was therefore dismissed.



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The *Merida* - port or berth charter?

Novologistics SARL v Five Ocean Corporation (The Merida) [2009] EWC 3046 (Comm)

Most voyage charterers we come across are “port” charters. That is good news for the shipowners concerned because it puts the risk of the congestion at ports on the charterers. Normally, it is easy to tell whether the charter is a port or berth charter, but this is not always the case, as this rather strange fixture recap for the *Merida* demonstrates. This case highlights the need for those who negotiate voyage charters to be clear about whether the fixture is a port or berth charter and, in particular, to ensure that the specific details of the laytime regime or references to it do not confuse the primary distinction between port and berth charters.

Facts and original Arbitration Award

On 5 February 2007, the owners of the *MV Merida* (“the vessel”) entered into a voyage charterparty with charterers in relation to the carriage of steel plates from Xingang to Cadiz and Bilbao. The vessel arrived at Xingang and tendered NOR on 10 March. She waited at the anchorage for 20 days and then berthed, loaded and sailed in the space of just over a day.

Owners subsequently brought a claim in London arbitration for demurrage against charterers for just over US\$500,000. The main issue before the Tribunal was whether the charterparty in question

was a port or berth charterparty. If it was a port charter, owners’ demurrage claim would succeed. If it was a berth charter, it would fail.

The charterparty was contained solely in a recap form which, unusually, did not refer to a pro-forma (i.e. it did not say, for example, “all terms and conditions as per Gencon “94”). It said as follows:

“One good and safe chrts’ berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao” (the “opening term”).....

“n.o.r./time-counting as per below c/p terms....

DETAILS TO THE C/P

CLAUSE 2

(1) *The vessel to load at one good and safe port/one good and safe charterers’ berth Xingang and to discharge at one good and safe port/one good and safe charterers’ berth Cadiz and one good and at one good and safe port/one good and safe charterers’ berth Bilbao.*

(2) *Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners’ account, but all time used to count as laytime...*

CLAUSE 4

At Port of Load and at Port of Discharge Notice of Readiness to be given and accepted in writing and only during the periods from 08:00 hours to 17:00 hours Mondays to Sundays...

CLAUSE 6

...at Port of Load and at Ports of Discharge time to commence to count at 14:00 hours if written Notice of Readiness is given during ordinary office hours before noon or at 08:00 hours the next day if written Notice of Readiness is given during ordinary office hours after noon”.

The Tribunal held that the charterparty was a port rather than a berth charterparty and allowed owners’ claim for demurrage. The arbitrators stated that the charterparty was to be read as a whole and that Clause 2 clearly provided for a port charter in that it qualified the wording contained in the opening term by referring to both safe ports and berths. The Tribunal also held that Clause 2 provided for shifting time from the anchorage to the berth to count as laytime which, they decided, must have been on the basis of the master’s ability to tender a valid NOR upon arrival. The Tribunal reasoned that if the charterparty in question had been a berth charter, there would have been no need for any such provision.

The charterers appealed to the Commercial Court, arguing that if the opening term stood alone, then it was clear that the charter was a berth charterparty. The opening term defined the contractual destination and this, they argued, formed part of the “main terms” of the charterparty which, in the event of inconsistency, should prevail over the later terms which amounted to “details”. Charterers contended further that Clause 2(1) was not inconsistent with the opening term as it did nothing more than add a safe port warranty and had nothing to do with the contractual destination. They also argued that, in any event, had Clause 2(1) stood alone, the charterparty would still have been a berth charterparty. Furthermore, in relation to Clause 2(2), charterers submitted that the arbitrators had erred in that the provision as to time spent shifting only made sense in a berth and not a port charterparty.

Owners, on the other hand, argued that the charterparty should be construed as a whole and that there was no difference between the so-called “main terms” and the terms as to “details”. Furthermore, they submitted, the opening terms should be seen as a short summary or recital, whereas Clause 2 of the charterparty contained the actual operating provisions and should prevail in the event of a conflict with the opening terms.

Commercial Court decision

Mr Justice Gross’ starting point was the analysis of the essential characteristics and stages of a voyage charterparty set out by Lord Diplock in *E.L. Oldendorff v Tradax Export (The Johanna Oldendorff)* [1974] AC 479. He concluded that the “opening term” of the charterparty was sufficient to make the charterparty a berth charterparty in that:

- (a) it was in a form that identified the destination as the berth, as the specified destination was “good and safe...berth...Xingang” (see *The Radnor* (1955) 2 Lloyd’s Rep. 668, *The Finix* (1975) 2 Lloyd’s Rep. 415 and *The Puerto Rocca* (1978) 1 Lloyd’s Rep. 252) and;
- (b) on its true construction, it expressly provided for charterers to nominate the berth at Xingang, the express right being provided by the words “chrs’ berth” (see *Stag Line v Board of Trade* (1950) 83 Ll L Rep.356 and *The Isabelle* (1982) 2 Lloyd’s Rep.81)

Furthermore, in relation to Clause 2(1) of the charterparty, the judge concluded that if this clause had the meaning attributed to it by the Tribunal, then the opening term would be deprived of any meaning or purpose, which would be odd having regard to the structure of the charterparty. Instead, he preferred the approach that Clause 2(1) introduced a safe port/s warranty and reiterated the safe berth/s warranty, and

noted that this construction would ensure that there was no inconsistency between the opening term and this clause.

As regards Clause 2(2), the judge decided it should be treated as neutral, because it signified nothing more than the parties making express provision for the costs and for the time involved in shifting and warping. If that interpretation was wrong, then the judge said that the Tribunal was in further error in stating that had this been a berth charter, there would have been no reason for a provision such as Clause 2(2). On the contrary, the judge found that if the charter was a *port* charter, then Clause 2(2) may have been unnecessary as it dealt with time counting in that the vessel would likely have been an arrived ship throughout. However, if the charter was a berth charter, then Clause 2(2) would have real meaning as absent some other express clause, no time would have counted prior to the actual berthing of the vessel. In fairness, the judge did recognise that this was an “*apparent oddity*”, but said that it was “*perhaps best not to speculate*”.

The judge therefore concluded that the charterparty was a berth and not a port charterparty. The appeal was allowed, and owners’ claim for demurrage consequently failed.

Further comment

Mr Justice Gross endorsed the principle – as set out by Mr Justice Jackson in *Kendrick v Kendrick* [2006] EWHC 727 (TCC), which forms part of what has become known as the “Jackson” test - that the court will only reverse the decision of a commercial arbitrator who has relied on his experience in construing contractual documents or correspondence passing between members of his own trade or industry if it is satisfied that, despite the benefit of his relevant experience, the arbitrator came to the wrong answer. Nonetheless, the judge found that notwithstanding their experience, the arbitrators had got it wrong in the present case. However, he did emphasise that the arbitration had been dealt with on documents alone and therefore the arbitrators had not had the benefit of the arguments developed before the court.



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Court favours commercial construction of time deadlines in advance payment guarantee

Ostfriesische Volksbank EG v Fortis Bank [2010] EWHC 361 (Comm)

It is common for shipbuilding contracts to provide for a builder to be paid in instalments at key points during the construction. As security for the payments it makes before construction of the vessel having been completed and delivery to it having taken place, the buyer will normally be provided with a refund guarantee issued on behalf of the builder. This refund guarantee will provide for the repayment of pre-delivery instalments made by the buyer in the event of contractual termination of the shipbuilding contract. The English courts have traditionally been reluctant to interfere with the irrevocable obligations assumed by banks in these cases except, for example, in cases of fraud or a failure to comply with the procedural requirements of the guarantee. The decision in the present case reflects this approach, with the Commercial Court applying a commercial interpretation to the provisions of an advance payment guarantee provided by a Belgian bank on behalf of a Turkish shipbuilder.

Background facts

The claim that came before the Commercial Court in this case related to an advance payment guarantee that had been given by Fortis Bank to repay €1,000,000 paid in advance to a Turkish shipbuilding company for the construction of a vessel under a shipbuilding contract. The entitlement under the guarantee was assigned by the owner to Ostfriesische Volksbank EG, who then sought to enforce the guarantee against Fortis.

The event on which the advance payment would be repayable under the guarantee was the rejection of the vessel by the owner or termination of the contract because the vessel was not delivered by 28 February 2009. The expiry date of

the guarantee was expressed to be 15 March 2009. The guarantee was governed by English law and provided for the jurisdiction of the English courts.

Grounds of dispute

The material terms of the guarantee for the purposes of making a demand under it were as follows:

1. That Fortis would pay the beneficiary (in this instance, Ostfriesische) under the guarantee 12 banking days in Brussels after receipt of Ostfriesische's first demand without regard to the merits of the demand, together with Ostfriesische's signed written declaration, stating that the owner had rejected the vessel and/or "rescinded" the construction contract on the grounds that the vessel had not been delivered prior to 28 February 2009 and the claimed amount had not otherwise been paid.
2. However, if within eight banking days in Brussels after receipt of this demand, Fortis received a notice of dispute from the builder's Turkish bank, certifying that the owner's right to reject the vessel and/or rescind the construction contract was in dispute between the owner and the builder, then the demand had to be further supported by a written decision signed by a surveyor of the Lloyd's Register of Shipping, stating expressly that the vessel had not been completed before 28 February 2009 and/or the vessel was not in conformity with the construction contract before 28 February 2009.
3. Provided that these additional conditions for a valid demand under the guarantee were complied with, Fortis would pay Ostfriesische immediately without regard to the merits of the demand or of the decision of the surveyor of the Lloyd's Register of Shipping.
4. The advance payment guarantee would expire and "*become automatically null and void*" on 15 March 2009, unless Fortis received a valid claim as detailed above before the expiry date.

A notice of rescission was given on 1 March 2009. A notice of dispute was subsequently served on 19 March 2009 and on 20 March 2009, Fortis wrote to Ostfriesische, stating that the latter's demand under the guarantee had to be further supported by a written and signed decision of a Lloyd's surveyor as per the terms of the guarantee. The

Lloyd's decision was eventually delivered to Fortis under a covering letter dated 4 May 2009.

Fortis declined to pay under the guarantee and the matter came before the Commercial Court.

Commercial court decision

Fortis' primary argument was that on a true and proper construction of the guarantee, if a notice of dispute was served and there was then a requirement for a Lloyd's decision, that Lloyd's decision would have to be delivered by 15 March 2009, failing which the guarantee would be null and void. Mr Justice Burton disagreed. He said that the starting point of the guarantee was 28 February 2009. No notice of rescission could be given before that date and no demand under the guarantee could be made until after that date because such a demand had to be accompanied by a declaration that the contract had been rescinded. The demand had to be made before the expiry date of the guarantee, namely 15 March, but the notice of dispute certifying a challenge by the builder of the rescission could be made any time within eight banking days after receipt of the demand. There was no requirement that the notice of dispute had to be served on Fortis before 15 March.

The judge added that there was a period of 15 days between 1 March (i.e. the soonest a notice of rescission could be sent) and the expiry of the guarantee. During that time, Ostfriesische would have to put in a notice of rescission and serve the demand in strict compliance with the terms of the guarantee. However, he said that it was "*simply impossible*" to suggest that Lloyd's could inspect a vessel in Turkey and report so as to produce a decision letter by 15 March. Furthermore, Ostfriesische was not obliged to pre-instruct a Lloyd's surveyor and/or to obtain a Lloyd's decision prior to making a demand under the guarantee or prior to the receipt of a notice of dispute. The judge also highlighted the fact that Lloyd's was a third party and not under Ostfriesische's control. As a "*highly responsible body*", Lloyd's would not be willing to cut corners in order to provide a certificate and, in the judge's opinion, it was difficult to think that even the full 15 days would be sufficient for a Lloyd's decision.

Therefore, in his judgment, "*the only conceivable commercial construction*" of the guarantee was that if there was a valid demand by 15 March, the guarantee continued in place. So long as a notice of dispute was served within eight banking days of receipt of the notice of demand, whether before or after 15 March, then that triggered the need for a Lloyd's decision which was then an additional condition for a valid demand that had to be complied with. However, the provision of the Lloyd's letter was not required to be given - and in the event could almost inevitably not be given - prior to 15 March.

Fortis' alternative argument was that there was an implied term in the guarantee that Ostfriesische was obliged to provide the Lloyd's decision within a reasonable period of time of the notice of dispute and that it failed to do so in not delivering the decision until 4 May 2009. The judge accepted that there had to be an obligation to provide the Lloyd's decision within a reasonable time because Fortis could not be left on risk after 15 March for an indefinite period of time. In the present case, however, taking into account the evidence before him, the judge concluded that Ostfriesische was not in breach of an implied term to procure the Lloyd's decision within a reasonable time, or indeed to use reasonable endeavours in doing so, given they were dependent on the services of an independent third party.



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Is there a claim where wrongful termination of a contract results in a windfall for the innocent party?

Dalwood Marine Co v Nordana Line A/S (The Elbrus)
[2009] EWHC 3394 (Comm)

This case involved an appeal to the High Court from an arbitration award and related to the appropriate measure of damages recoverable by the owners as a result of the wrongful termination of a charterparty. Although the tribunal found that charterers had wrongfully terminated the charterparty, they concluded that owners had suffered no loss because, on any calculation, the early redelivery of the vessel resulted in owners earning more from the vessel than

if charterers had fully complied with their charterparty obligations. Owners appealed to the Commercial Court under section 69 of the Arbitration Act 1996, which allows an appeal to the court on a question of law arising out of an arbitration award. Owners contended that the tribunal had made an error of law by taking into account earnings after the date when the repudiated charterparty would have ended. While the court dismissed the appeal, the case is a very useful restatement of the principles governing the assessment of damages in this context, as well as general principles of mitigation of loss.

The *Elbrus* was chartered on an amended NYPE 1993 form for a period of 5 – 7 months with an option, which was exercised, for a further 5 – 7 months. Charterers, however, wrongfully terminated the charter on 4 April 2005, and redelivered the vessel 39 days earlier than the fixed termination date of the charter, i.e. 13 May 2005.

On redelivery, owners claimed that there was no available market for The *Elbrus* off the West Coast of Africa, where she had been redelivered, and decided to proceed to dry dock. After her drydocking she was delivered into a new charter with Navimed on 6 May 2005, thereby overlapping with the original charter by 7 days. Under the Navimed charter, the vessel was fixed at a daily rate of US\$18,100 compared to the original charter rate of US\$10,800.

It should be noted that the Navimed charter contained a “freshly drydocked” clause and, had the original charterparty not been terminated early, the vessel would have missed her laycan under the Navimed fixture and Navimed might not have agreed to extend the cancelling date.

The tribunal held as follows:

1. the normal measure of damages for early redelivery under a time charter is the difference between the contract and the market rates of hire as at the date of the breach;
2. therefore, the measure of damages was the sum that would put the owners in the same financial position as if the charter had been performed;
3. there was no available market in this case;
4. the owners acted reasonably in proceeding to dry dock when faced with early redelivery, and then delivering her to Navimed, thereby ensuring that that fixture was not lost and earning the higher rate of hire under the Navimed fixture earlier than would otherwise have been the case; and

5. the various permutations of calculation of earnings for the vessel during the period from 4 April 2005 until the date when the vessel was likely to have been delivered to Navimed (had there been contractual termination) showed that owners “*did not lose as a result of the cancellation of the charter party but in fact made a gain to a greater or lesser extent*”.

In the appeal owners argued that, as a matter of law, the tribunal should have assessed what the owners had lost under the original charterparty for the remaining 39 days of that charterparty and then deducted from that figure the amount the owners in fact earned during that period. Owners relied on two cases in support:

The Concordia C [1985] 2 LLR 55, where Mr Justice Bingham held that the correct measure of loss, in the case of repudiation of a voyage charter, was the net revenue that the owners would have earned under the original voyage charter less the net earnings under the substitute charter for the overlap period between the two fixtures.

The Noel Bay [1989] 1 LLR 361, where Mr Justice Staughton held that the owners were entitled to be placed in the same financial position as they would have enjoyed if the contract had not been breached. The judge also highlighted the common problem that almost invariably arises where there is a substitute fixture, namely that the substitute voyage lasts longer than the voyage under the original charter party. The solution commonly adopted is to take a proportion of the profits on the substitute voyage to set off against the profits lost on the original voyage: “*otherwise one would be involved in calculations to the end of the ship’s working life.*”

In response, the charterers relied on *The Golden Victory* [2007] 2 AC 353, where Lord Scott stated that an award of damages was designed to put the innocent party, insofar as possible, in the position he would have been in had the contract been performed. The charterers also argued that any benefit an innocent party gained from mitigating its loss should be taken into account in calculating damages. Thus, in this case, proper credit should be given for the benefit owners received as a result of the vessel being at their disposal much earlier than it would have been if the original charterparty had not been repudiated.

Commercial Court decision

In his judgment, Mr Justice Teare concluded that the cases mentioned above recognised that where the substitute voyage conferred a benefit on the owner which it would not have had if the charterparty had not been repudiated, account could be taken of that benefit when assessing damages. There was no reason in principle to limit

the type of benefit that might be taken into account. Depending on the nature of such benefits, it might be necessary to calculate their financial value by referring to earnings after the notional date on which redelivery would have taken place under the original charterparty. Therefore, where the vessel was better placed for future employment at the end of the substitute charter than at the end of the original charter, that benefit might be calculated by reference to earnings at a period later than notional redelivery under the original charter.

The judge held that it was a matter for the fact-finding tribunal to assess the monetary value of any such benefits. Whilst other tribunals might not have been persuaded that being able to earn the higher rate on the Navimed fixture earlier than would otherwise have been the case was ultimately more beneficial to the owners, he did not consider the tribunal's decision in this case to demonstrate an error of law. The appeal was therefore dismissed.

Comment

The calculation of measure of damages in wrongful charterparty termination cases remains a very difficult issue, as was recognised by the judge in this case. As the most accurate calculation of the innocent party's losses would require taking into account earnings up to the end of a vessel's working life, and that is clearly impractical in all but the rarest of cases, the end-date for calculation of the measure of losses is usually set at the date the original charter would have ended. That said, where a party has managed to persuade arbitrators to apply different principles, as can be seen from this case, the courts will be very reluctant to (and may not consider themselves able to) interfere with the award. This is because English courts are inclined not to interfere in arbitration proceedings, in order to preserve party autonomy. Therefore, to demonstrate that the tribunal had erred in law, the owners would have had to show that the tribunal's interpretation of a point of law was obviously wrong or, if the point was of general public importance, that the tribunal's decision must be open to serious doubt.



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Ship arrest in the UAE: is it worth the hassle?

Ince & Co Dubai has been instructed in a series of arrest cases over the past several months. All have been successful but, nevertheless, not as straightforward as would be the case in many other jurisdictions. It is therefore relevant to ask if arrest in the UAE is worth the hassle.

Since none of the major Conventions are in force in the UAE, ship arrest in the UAE is governed by the provisions of the UAE Maritime Code, otherwise known as Federal Law No. 26 of 1981. Articles 115-134 are loosely based on the provisions of the 1952 Arrest Convention, however, and list out arrestable claims as follows:

- damage caused by a vessel as a result of collision or other accident
- death or physical injuries caused by a vessel
- aid and rescue
- contracts for the operation or use of a vessel
- contracts for the transportation of goods pursuant to a charter contract, bill of lading or other documents
- loss or destruction of goods or baggage transported by a vessel
- towing or piloting a vessel
- replenishment of supplies to a vessel
- building, repairing or supplying a vessel and the costs of its stay in dock
- cash spent by the Master, charterers or agents on behalf the ship owner
- the wages of the Master, officers, seamen or other persons who work on board the vessel pursuant to a maritime employment contract
- disputes over a vessel's ownership
- disputes concerning the joint ownership, tenure or utilisation of a vessel or rights to profits arising from such utilisation
- marine mortgages

All of the above claims are referred to as “Marine Debts”. Those listed below are classified under Article 84 as “Priority Rights”, the importance of this being that they both rank above ordinary Marine Debts and attach to the vessel, regardless of who owns it.

- legal costs spent on keeping, selling and distributing the value of a vessel, fees for ship port operations i.e. pilotage, lighthouses
- compensation for damage incurred to the installations of ports
- crew employment contracts
- aid & rescue
- joint maritime damage
- compensation for collisions, other marine accidents, physical injuries, loss/damage of goods
- debts arising from contracts concluded by the master and operations carried out by him
- breakdowns and damage for which the charterers must be compensated
- insurance premiums (hull)

Article 116(1) also permits the arrest of a sister ship owned by the debtor if this other vessel was also owned by him at the time the debt arose. This is with the exception of claims concerning disputes over ownership, joint ownership and mortgages, when the arresting party is only entitled to arrest the vessel to which the debt refers. The wider category of associated ship arrest is not allowed for under the UAE Maritime Code.

In theory at least, the UAE Court ought only to grant an arrest if it has jurisdiction by dint of the following:

- the arresting party’s usual address or office is in the UAE
- the marine debt originated in the UAE
- the marine debt arose during a voyage when the vessel was arrested
- the marine debt arose from a collision or salvage where the relevant UAE court has jurisdiction to hear the claim or if the marine debt is secured by a mortgage against the vessel

In practise, however, the UAE Court allows vessels to be arrested in the UAE simply on the basis of the vessel’s presence in UAE territorial waters.

As an absolute minimum, to file an arrest application in the UAE, the Court must be provided with the following documents as evidence of the *prima facie* claim. If the arrest is urgent, the Urgent Matters Judge can be approached for the issuance of an arrest order within the same day.

- a notarised and legalised power of attorney
- all the relevant documents indicating the debt together with Arabic translations and all legalised by an approved Court translation company
- evidence that the ship is a sister vessel if applicable
- payment of the appropriate Court fees, levied as a percentage of the claim but capped at a total of AED 30,020

There are no provisions in the UAE Maritime Code setting out the arresting party’s obligation to provide counter-security and this is dealt with at the discretion of the judge. This is a difficult aspect of the process because the claimant does not know with certainty whether or not he will be required to put up counter-security and, if so, how much. The UAE Court will not accept P&I letters of undertaking as forms of security, so counter-security normally takes the form of a local bank guarantee.

In the event that an arrest is overturned, the wronged party may not claim damages unless he can show that the application for arrest was malicious or insignificant in comparison with the damage caused to the owner of the vessel [Article 283(2) UAE Civil Code of 1985].

The arrest application must be followed up within eight days with a further submission to the Court of First Instance detailing full particulars of the claim. Without this submission, any arrest order previously given will lapse.

So where is the catch ? The uncertainty over counter-security clearly adds an ingredient of difficulty, but the real hassle comes before the arrest application is even made. This is because a power of attorney must be provided to the claimant’s local lawyer and the formalities that go along with this where the claimant is foreign can often test patience, particularly if the timeline is urgent, which an arrest it often is. It is also necessary to translate all the supporting documents into Arabic. This is because all UAE Court proceedings are conducted in Arabic and also because the process (like all UAE Court proceedings) is very document focused. Translating the documents takes time and costs money. It is also right to say that there is a degree of inherent uncertainty in Court proceedings in the UAE such that even a well grounded arrest application may not succeed, as on its merits it should.

The upshot is that the UAE is probably not the place to arrest a vessel on very short notice; by the time the power of attorney is in place and the documents translated, the ship making a quick call will be gone. The chances of not getting an arrest are also greater than in the well known

jurisdictions where the decisions of the Court are more predictable. Nevertheless, if time permits the necessary preparation, once the arrest application has been filed, the UAE Court can move quickly. The Urgent Matters Judge may grant an arrest order within a few hours and this can be presented immediately afterwards to the Harbour Master of the port in question resulting in an immediate ban on the ship's ability to sail - and this has been our experience over the past several months. Indeed, our experience is that once a ship is arrested in the UAE, the claimant may be in a stronger position than would be the case elsewhere because the uncertainty inherent in the system can make it difficult for a defendant to get his ship un-arrested.

Overall, therefore, although the UAE cannot be regarded as a first tier arrest jurisdiction, it has more going for it than is often realised, particularly in a case where time permits the necessary preparation. Given the importance of Dubai and Abu Dhabi as trade hubs and with Fujairah a key bunkering location, the UAE should not be disregarded as an arrest jurisdiction.



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EU Directive on low sulphur fuels – 1 September 2010 approaching fast!

European Union Directive 2005/33/EC of 6 July 2005 came into force on 1 January 2010. The Directive establishes an EU wide regime, requiring all ships at berth in EU ports or using inland waterways to burn low sulphur fuel with a maximum sulphur content of 0.1% by mass. The sale of marine gas oil with a sulphur content greater than 0.1% is also banned in EU Member States from the same date. At present,

only Low Sulphur Marine Gas Oil ("LSMGO") complies with the specified limit, but the implications of this legislation have to some extent been postponed by the EU Commission's Recommendation to allow ship owners further time to comply. This discretionary "grace period" comes to an end on 1 September.

Implementation, enforcement and exemptions

The Directive is similar to the SOx Emission Control Areas ("SECAs") declared in accordance with Annex VI of the Convention for the Prevention of Pollution from Ships 1973, ("MARPOL"), pursuant to which vessels sailing within a SECA (the Baltic Sea, North Sea, and English Channel) must use fuel with a maximum sulphur content of no more than 1.5%.

Implementation of the Directive is the responsibility of Member States. In the United Kingdom, implementing regulations recently came into force on 20 April 2010. Member States are responsible for enforcement at least in respect of vessels flying their flag and, in the case of Member States bordering SECAs, vessels of all flags while in their ports. However, they have some latitude in deciding how individually to deal with enforcement issues. Under Article 12 of the Directive, Member States are left to determine the applicable penalties for breach, subject to the requirement that these be effective, proportionate and dissuasive.

Vessels may be exempted if they switch off all engines and connect up to shore power while alongside. This is also known as "cold-ironing". They may also be exempted if, according to published timetables, they are due to be at berth for less than 2 hours. There are also territorial exemptions, relating to the Canary, Madeira, and Azores Islands, and French Overseas Territories.

Furthermore, vessels may, instead of burning LSMGO, be allowed to use an approved emission abatement technology, defined as "an exhaust gas cleaning system, or any other technological method that is verifiable and enforceable". Approval is by the relevant department of the Administration of each Member State in whose ports that equipment is to be used. This technology is still at the trial stage, however, with manufacturers testing their equipment on a number of vessels.

The Directive does not apply to any use of fuels in a vessel necessary for the specific purpose of securing the safety of a ship or saving life at sea; or to any use of fuels in a ship necessitated by damage sustained to it or its equipment, provided certain criteria are met.

Ships can sail to EU ports using non-compliant fuel but the Directive requires a change-over to compliant fuel oil to be undertaken as soon as possible after arrival at the port and as late as possible prior to departure from it.

Possible “grace period” until 1 September 2010

Recommendation 2009/1020/EU was issued on 21 December 2009 by the European Commission in response to concerns that few vessels had undergone the necessary modifications to burn compliant fuel, and concerns that there were risks to safety if unmodified vessels burned compliant fuel in boilers not designed for the purpose. The Recommendation suggests Member States consider the existence of a class-approved retrofit plan when applying enforcement penalties. The Commission considers that completion of the retrofitting process should not take more than eight months.

The Recommendation is not binding on Member States. However, several have formally or informally indicated that they will follow it when enforcing the Directive. By way of example, Bremen, whilst not specifically following the Recommendation, has in its implementing law exempted vessels from burning compliant fuel other than for electricity generation, and exempted vessels berthing for less than two hours, even if this is not in accordance with published timetables as the Directive requires. On the other hand, the Italian port of Trieste, having previously followed the Recommendation, announced on 2 March 2010 that non-compliant vessels would be fined between €15,000 and €150,000, and that they might ban repeat offenders from all European ports for up to 24 months! It appears, however, that Trieste will still take retrofit plans into consideration when levying fines for non-compliance.

Some issues arising

Until vessels are modified, charterers may require reduced rates if they cannot trade non-compliant vessels within the EU without incurring penalties. We understand there are already reports of fixtures failing on subjects because vessels are non-compliant, and, conversely, of compliant vessels obtaining higher charter rates in the cross-Mediterranean trade.

We have been involved in a dispute as to whether vessels unable to burn compliant fuel could be tendered for delivery by the shipyard without modification.

As regards long-term time charters, issues have arisen as to whether owners are obliged to incur costs to modify the vessel so that they can trade to the EU without risk of fines or refusal of entry. Aside from the physical ability to burn LSMGO another issue that has arisen in this context is whether the vessel should have more than one storage tank for MDO and what the implications are if she does not.

Other considerations could include the availability of compliant fuel outside the EU when the vessel's next voyage is to an EU port. Also, whether an anchorage off the port where the vessel is ordered to wait is an area where this EU Directive applies. The party paying for the fuel (be that the owner of an unfixed vessel/voyage chartered vessel or a time charterer), might be advised to take local advice as to whether this waiting place is subject to the Directive. The financial implications for a short stay may not be large, but if there is a significant waiting time then the cost differential between burning the different types of fuel may become significant.

The primary concern for both voyage and time charters is of course the allocation of costs and other risks in respect of complying with the Directive. There are some standard clauses, e.g. BIMCO and INTERTANKO but in our experience these may not cater for all the issues that may arise and parties should bear this in mind when negotiating future charter parties.



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Piracy - US Presidential Order on payment of ransoms and recent developments

At the time of writing the shipping and marine insurance industries are still trying to digest and understand the full ramifications of the US Presidential Order signed on April 13th 2010.

Confusion reigns, which is unsurprising in the face of a lack of written clarification from the US State or Treasury Departments. The fact that a non-attributable, off the record briefing took place on Friday 16th April has been widely reported, but given that the criminal sanctions include a twenty year prison sentence and the civil sanctions a fine twice that of the value of the transaction, the industry (especially those with any type of US

nexus) can be forgiven for approaching the payment of ransoms or the indemnification of owners who have paid ransoms with anything other than absolute caution.

In what must have been a co-ordinated initiative the US and the UN Sanctions Committee (whose role includes naming designated groups and individuals under UN Resolution 1844) both issued lists on 13 April naming Al Chabab as a group and nine others described as members of Al Chabab or similar groups, whose activities (in the language of both the Presidential Order and Resolution 1844) undermine the security and stability of Somalia. The US went further and named two men said to be connected with piracy, an activity that the US Order expressly stated as undermining Somalia's security. Why these two men were singled out is unclear. There are others whose prominence in the piracy world is also widely reported who, for the moment, have slipped through the net.

Those designated by the UN are to have their assets frozen, and are forbidden to travel. Whilst the US Order makes similar sanctions against those named on its list, the effects on those wishing to pay a ransom or give support to those needing to pay a ransom is less clear. The Order makes no specific reference to ransoms and the US authorities say they remain sympathetic to owners caught up in a hijacking and who are forced to pay a ransom to release, in particular, their crew. The aim, it is said, therefore is not to prevent the payment of ransoms, but to lay the groundwork to bring action against those who may be supporting piracy. We can expect, surely in the future, further names to be added to the list, although those named will only be pirates or terrorists.

This is very much a US issue and anyone involved in a hijacking must take US legal advice, but picking up on the issues and common themes reported in the press and by US legal commentators, it seems that a ship owner with no US nexus can pay a ransom, as long as it is not paid to one of the designated people or groups. In respect of Al Chabab, given its naming as a terrorist organisation by the US, this is nothing new. In the UK anti-terrorist legislation means that no payment can be knowingly made to a terrorist organisation (i.e. one motivated by politics, ideology or religion). No direct link (in terms of funding) has been established between the pirates and Al Chabab and the industry remains prepared to make payments or indemnify those that make payments. The move by the US to name piracy as an activity undermining Somali stability seems to have been a game changer.

Implications

Insurers (and especially those with US connections) still reeling from the severity of the Iranian sanctions should approach this latest Order with caution. Fundamental to falling foul of the Order is if payment

goes to one of the designated people. But for owners and insurers the question is how do you know if the ransom is going to one of the designated people? What level of due diligence will the US authorities require? In practical terms it is nigh on impossible to know with any certainty to whom a ransom is being paid. Pirates rarely use their real names and often hide behind nicknames. That can be seen in the US list where Mohammed Abdi Garaad is named. Garaad means "white beard", which for obvious reasons is unlikely to have been bestowed on him by his mother, while the UN named "Afweyne" which means "Big Mouth". Even the translators employed by the pirates use generic names like Ali or Chermake and will change them from ship to ship. Beyond this, the names of pirates may be learned from the hijacked crew, but these are generally foot soldiers who patrol the vessel acting as guards, and not the "investors" ashore that form the committees who control the negotiations are shadows whose identities can only be guessed at.

For non-US entities problems may arise where cargo or other interests are being asked for a contribution in GA or other indemnity to cover the ransom and ancillary costs. US insurers and even intermediary banks will hesitate before payments are made without clarification from the relevant US department. It is unlikely that the intention of the US government was to give US interests a public policy type defence to all payments that may be deemed to be funding a ransom. That would be protectionism at its worse and would severely impact on those with a US nexus to underwrite a marine policy which may cover piracy. That would impact not only on K&R insurance, but also hull and war cover where ransoms may form legitimate sue and labour costs. We would hope that the Order will be explained and clarification given and are optimistic that the ramifications of this may not be as wide reaching as they first appear.

Other Developments

Recent IMB headlines suggest that piracy incidents are decreasing. Applied to Somalia that is surely misleading, given that half the reported cases took place off east Africa. January and February gave some cause for comfort but the levels of activity for March and April are now in excess of the corresponding period of last year. Attacks are taking place further south and further east than have previously been seen. Indeed, this is fast becoming piracy off India with the last attack on a tanker being at 68 degrees East. In the last few days at 69 degrees East two fishing vessels were taken, some 350 miles off India. It will be interesting to see if this leads to a reaction from the War Risk Committee and whether the Additional Premium (AP) area is also pushed further East. The AP area is moved to take into account new pirate activity but the pirates react to that by moving their operations to the east of that line. Vessels are running out of sea and it would be interesting to

know how many ships other than those calling at Somali ports have been attacked and hijacked whilst in the AP area as it existed at the time of the attack.

The military has begun to take the fight to the pirates but a greater appetite to arrest pirates coincided with Kenya making it clear that it had taken its share and would accept no more. At one stage the French had forty pirates on board one of their naval vessels, who were distributed between Puntland, Seychelles and Kenya (the last to be allowed in). The Dutch Marines received well-deserved plaudits for their recapture of the German flagged *Taipan*, with special forces fast roping onto the vessel when the pirates were on board. The crew had retired to a citadel and the Dutch placed themselves back under national control in order to carry out the attack, thereby circumventing the more bureaucratic central command of EUNAVFOR. It is thought the pirates captured in this incident are being sent to Germany for prosecution.

The last quarter also saw the capture of another VLCC, the *Samho Dream* with a second tanker evading capture with the use of an armed security team. There is no doubt attitudes on the use of arms on board are hardening as the industry faces up the fact that no ship has been taken where armed guards have been deployed. But there has also been the first reported shooting of a pirate by a private security company raising again the spectre of escalation. So far the pirates have shown no willingness to use anything other than the AK 47 and an RPG and it is to be hoped that this will not change. The stakes remain high for all, not least the crew who bear much of the risk to ensure trade gets through. With over two hundred being held the final thoughts should be with them and their families and for Rachel and Paul Chandler who were taken on their yacht in October 2009 and still await release.



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Shipping litigation and arbitration

US corporate veil-piercing test allowed for enforcement of English judgment

Vitol S.A. v Capri Marine Limited and Others (No 2) (The Thor) [2010] EWHC 458 (Comm)

A one-ship company has failed in its attempt to prevent the charterer of its vessel from enforcing an English court judgment against it by arresting a vessel under common beneficial ownership in Maryland in the United States. The judge held that the English law and jurisdiction clause in the charterparty did not prevent the charterer commencing proceedings in Maryland to enforce the judgment. The Court also allowed the charterer to use documents disclosed in the English proceedings for the purposes of the foreign enforcement proceedings.

Background facts

Vitol SA claimed against Capri Marine Limited, the then-owner of the tanker *Alambra*, under a 2000 charterparty, for cargo losses in relation to the carriage of petroleum products from Tallinn to Singapore. The charterparty was governed by English law and disputes arising under it were subject to the exclusive jurisdiction of the English courts.

Capri is a Maltese company whose only asset was *Alambra*. Capri was managed from Greece by Starlady Marine Limited, which was under common beneficial ownership. In March 2005, Vitol obtained a freezing order against Capri and in April 2005, judgment was entered against Capri in the amount of US\$6.25 million, only a part of which was paid by Capri.

The Commercial Court also issued a number of disclosure orders between 2005 and 2008, requiring Capri to provide documents and information regarding its assets. However, pursuant to the wording of one of the orders and CPR 31.22 (1), Vitol was entitled to use any document disclosed “only for the purpose of the proceedings in which it is disclosed” unless *inter alia* the court gave permission. In December 2009, Mr Justice Blair made an *ex parte* order permitting Vitol to use the documents disclosed by Capri in the English proceedings in Maryland (in the United States), where Vitol had obtained a “Rule B” attachment (under the US admiralty rules) over the vessel, *Thor*, as a means of enforcing the English judgment and recovering some or all of the moneys owed to it.

The *Thor* was owned by Spartacus Navigation Corporation of the Marshall Islands, which was in

turn managed by Piraeus-based Primerose Shipping Co. Ltd. Vitol argued that, pursuant to applicable US law, because Spartacus and Primerose (interested in *Thor*) were held by the same beneficial owners as Capri and Starlady (interested in *Alambra*), Vitol should be able to enforce the English judgment against *Thor*.

Despite the different registered owners, Vitol intended to ask the court in Maryland to pierce the corporate veil on the basis of the applicable test in Maryland, rather than the English-law test for alter ego companies. Vitol presented evidence that the applicable test was of the type found in a number of US jurisdictions, where a parent company which disregards the separation of itself and its subsidiaries may find that the court will look beyond the corporate form and hold related entities liable in order to prevent injustice.

The matter came back before the Commercial Court, which was asked to consider:

- (a) whether Vitol was permitted to pursue enforcement in Maryland pursuant to the applicable local law, rather than English law, where the underlying contract was governed by English law. In relation to this point, Capri sought an anti-suit injunction against Vitol; and
- (b) whether Vitol was permitted to use the documents disclosed in the English proceedings for the purpose of the enforcement proceedings in Maryland. In relation to this point, Capri sought to have the original order of Mr Justice Blair allowing such disclosure set aside.

Anti-suit injunction seeking to prohibit enforcement in Maryland

Capri argued that the charterparty applied English law, and therefore Vitol should be prevented from having the court in Maryland apply a different law of corporate *alter ego*. The Court disagreed and concluded that the law and jurisdiction clause in the charterparty between Vitol and Capri could not serve as a basis for an anti-suit injunction against the parties interested in *Thor*. Mr Justice Tomlinson stated that the claim in Maryland had not given rise to a dispute arising out of or in connection with the charter of *Alambra*. Rather, the dispute in Maryland arose out of or in connection with Vitol's judgment against Capri, the rights and obligations of Vitol and Capri under the charter having merged into the judgment.

Furthermore, he said, as neither Vitol nor Capri had a presence in England, they would have contemplated that enforcement of a judgment of the English court would have taken place wherever answerable assets might be found as per English conflicts law and

European jurisprudence. In this regard, the judge relied on a similar conclusion having been reached in *Bulk Transport Ltd v Spot On Shipping Ltd* [2009] 2 Lloyd's Rep. 115 (relying upon *Fiona Trust and Holding Corporation v Privalov* [2008] 1 Lloyd's Rep. 254), where a judgment creditor sought to enforce by pursuing a similar corporate veil-piercing argument in New York.

The judge concluded that the proceedings in Maryland against the *Thor* were not vexatious or oppressive and that, in any event, Capri lacked the necessary standing to apply for an anti-suit injunction in this regard.

Use of documents disclosed in the English proceedings

Capri also failed in its attempt to set aside the order permitting documents disclosed in the English proceedings to be used in the proceedings in Maryland. The Court ruled that enforcement of a judgment is not collateral to the purpose for which disclosure was ordered. Rather, the proceedings in Maryland were a continuation of enforcement of the English judgment. Disclosure in the English proceedings followed judgment and was meant to aid enforcement anywhere in the world. The Court had the power, pursuant to section 37(1) of the Supreme Court Act 1981, to order such disclosure after judgment to render judgment effective.

The judge also rejected Capri's argument that use of the documents in the court in Maryland would be inappropriate if that court were to allow enforcement of the English judgment against a party which under English law would not be considered to be the judgment debtor. Although Mr Justice Tomlinson suggested that there may be differences in the alter ego test in England and that applicable in the court in Maryland, he stated that "*it would be an extraordinary act of insularity or parochialism to refuse the court's assistance to an attempt to enforce its judgment in reliance upon principles such as those which will be applied in Maryland*".

Comment

Following the end in 2009 of the attachment of wire transfers of US dollars (EFTs) whilst being cleared in New York as an available measure to secure maritime claims under the Rule B procedure, those seeking to enforce maritime judgments and awards internationally have had to find alternative solutions. This decision serves as a reminder that the classic maritime attachment procedure under Rule B of the US admiralty rules (attachment of vessels, cargo, bunkers etc) remains available and effective where the relevant criteria are met. Moreover, in certain circumstances, the more liberal US corporate veil-piercing tests can assist a claimant which has

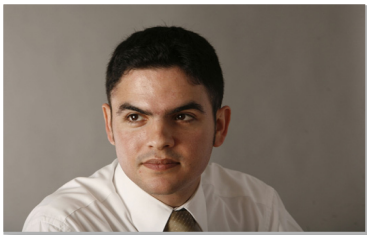
obtained an English court judgment or arbitration award in its favour in enforcing that judgment or award.



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Freezing injunction: full and frank disclosure

Linsen International Ltd & others v Humpuss Sea Transport PTE Ltd & another [2010] EWHC 303 (Comm)

The four claimants were the owners of a number of ships chartered to the defendant charterers. Owners obtained a worldwide freezing order against charterers to provide security of about US\$ 90 million in respect of their claims for outstanding hire and damages following the alleged repudiation of a number of charterparties. Charterers subsequently sought to set aside the freezing order on the grounds that there was a failure to make full and frank disclosure and because there was no real risk of dissipation of assets.

In dismissing charterers' arguments in this regard, the Court gave valuable guidance as to what evidence will be taken into account when deciding whether to grant or set aside a freezing injunction.

Background

Charterers had fallen behind in paying hire due under a number of charters. In early 2009 owners agreed, against the threat of early redelivery by

charterers, to reduce the hire rate under each charter. Charterers continued to fail to pay hire in full and on time throughout the remainder of the year and by mid-September 2009, around US\$8 million was outstanding.

Owners considered making Rule B attachments against charterers, but discovered this was not possible because charterers had registered themselves as a foreign business corporation in the State of New York. Owners managed to obtain some payments by exercising liens on sub-freight and securing payment from sub-charterers. By November 2009, owners elected to treat owners as being in repudiatory breach of the charters.

Full and frank disclosure

Charterers contended that owners had failed to make full and frank disclosure of material facts when applying for the freezing injunction. In particular, charterers alleged that owners should have disclosed the existence of 'without prejudice' discussions which had taken place between the parties two days before the worldwide freezing injunction was put in place.

Mr Justice Clarke considered the substance of this 'without prejudice' meeting and concluded that there was nothing arising out of that meeting that the Court needed to be informed about which would have impacted upon the decision to grant the injunction. The Court concluded that considerable care needed to be taken in holding that a claimant is bound to disclose without prejudice material. A claimant would be bound (and therefore entitled) to refer to without prejudice discussions if, by failing to do so, the Court might be misled. Unless there is a risk that the Court would be misled, then there is no requirement to disclose 'without prejudice' discussions or material.

The judge was influenced in reaching his conclusion on this point by the fact that no agreement was reached at the meeting nor was any offer made which was capable of being accepted. No security was offered and charterers made the deliberate choice of ensuring that the meeting was not open, with the likely intention to ensure that its content should not be put before the Court. The judge also concluded that the content of the meeting would not cast any light on whether or not there was a risk that charterers would remove their assets from the reach of owners. Indeed, revealing the contents of the meeting would, most likely, have benefitted owners given concessions made by the charterers within the meeting. In particular, indications had been given by charterers during that meeting that arrangements were being made to shift assets from one company to another.

Good arguable case

Charterers contended that, when assessing if a claimant seeking a freezing injunction has a good arguable claim, the Court should consider the strength of any defence. Mr Justice Clarke held that the existence of a defence does not impact upon the Court's consideration of whether there is a good arguable claim. However, the judge considered that the existence of a defence might have an impact on the question of risk of dissipation of assets, saying that the Court may "*depending on the circumstances, be disposed to regard a defendant with no defence at all as more likely to dispose of assets in order to defeat the claim than one who has a perfectly respectable defence*".

Risk of dissipation of assets

The judge held that there was sufficient evidence of a risk that charterers were dissipating their assets. There were persistent delays in the payment of hire from the commencement of the various charters. Funds that should have been paid directly to the charterers were diverted away from the company. The entire board of one of the defendant companies was summarily dismissed in 2009 for corruption.

Mr Justice Clarke also considered that charterers' registration in New York was a wholly artificial means of preventing creditors from gaining security for claims and therefore was also a factor in favour of showing a risk of dissipation.

Finally, the judge considered that restructuring efforts, whereby charterers were seeking to relocate their business from Singapore (where an arbitration award or court judgment could readily be enforced) to Indonesia (where, the evidence showed, foreign court judgments are not enforceable and owners would have to re-litigate the issue before the Indonesian courts) evidenced a risk of dissipation.



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Commercial Court dismisses attempts to appeal arbitration awards in charterparty dispute

Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd (Hilal I) [2010] EWHC 442 (Comm)

In this charterparty dispute, the Commercial Court dealt with applications for leave to appeal from two arbitration awards under sections 68 and 69 of the Arbitration Act 1996 ("the Act"). Its conclusion, namely that there were no good grounds for granting the applications under either or both above-mentioned sections, reflects the English courts' reluctance to interfere with the decisions arrived at by commercial arbitrators unless those decisions are clearly unsustainable. The case also highlights the need for parties to properly develop and advance the arguments on which they intend to rely and which they wish the arbitrators to deal with expressly in their Award.

Background facts

This litigation arose out of two separate time charterparties for two consecutive charter periods for the *Hilal 1*, both on an amended NYPE (1946) form (the "2004 charterparty" and the "2005 charterparty"), the terms of which were substantially the same. The dispute related primarily to the owners' refusal to carry a cargo of HBI (hot moulded briquettes of direct reduced iron) from Misurata in Libya under the 2004 charterparty and a cargo of DRI (direct reduced iron) from Trinidad to New Orleans under the 2005 charterparty. The charterers alleged that they relied on those orally agreed variations to enter into two sub-charterparties for the loading and carriage of HBI and DRI out of the stated loadports, so that when the owners refused to go to those ports to load those cargoes, the charterers suffered substantial loss and damage.

In LMAA arbitration proceedings, the Tribunal issued two Awards but one set of Reasons covering the disputes under both charterparties. The arbitrators held as follows:

1. That both charterparties had been orally varied by the parties, entitling the charterers to carry HBI and DRI, notwithstanding rider clause 38 of each of the charters which had specifically excluded from the categories of permitted cargoes to be loaded any DRI cargoes in any form (this exclusion would have covered the HBI cargo also). Owners were therefore in breach of charterparty contracts in refusing to carry these cargoes.
2. That there had been a misdescription of the vessel in that the charterparties stated that the vessel's moulded depth was 14.05 metres, whereas in fact it was 16.1 metres. If the vessel's actual moulded depth had complied with the charterparty description, her air draft would have come within the applicable restrictions at both ports. In the event, however, the vessel would not have been able to load the HBI and DRI because the vessel's actual air draft exceeded the air draft restrictions at the load ports by some margin. There was therefore a breach of contractual warranty by the owners.
3. That the two breaches, namely refusal to perform the voyage and the misdescription rendering performance physically impossible, when combined, entitled the charterers to damages based on the difference between the notional voyage the vessel should have performed and the business she did instead.

Owners' arguments on appeal

Owners did not seek to challenge the tribunal's findings on the oral variations of charterparty agreements. However, they sought to appeal to the court on two grounds. Firstly, they alleged that the Tribunal was responsible for a serious irregularity within the meaning of 68(2)(d) of the Arbitration Act 1996 ("the Act") in that it did not deal with all of the critical issues put to it by the parties and that this had caused the owners serious injustice because the charterers were not entitled to the damages awarded to them even if there had been a breach of oral agreement to load the HBI/DRI cargoes. In the alternative, they applied under section 69 of the Act, arguing that the Tribunal had erred in law in awarding damages to the charterers because there could be no actionable breach as the vessel could not physically or safely have loaded at either load port. Given that the owners' applications for leave to appeal had been made out of time, they also sought extensions of time to make their applications.

Commercial Court decision

In dealing with the application under section 68(2)(d), the judge considered that the primary issue which might arguably not have been dealt with by the Tribunal was the question of whether the charterers had waived the breach of the description warranties by reason of their being in possession of information concerning the real moulded depth and/or having received air draft calculations from the master which demonstrated that the vessel would not be able to load at either loadport. There was no mention of this issue in either the Award or the Reasons.

Whilst the judge said that it was sufficient to show that if the issue had been dealt with, the Tribunal might have reached a different view in favour of the applicant (*ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1), in this case he did not consider it to be reasonably arguable that the charterers waived the breach of the description warranties in the charterparties. Quite apart from the fact that the waiver defence had only been made in owners' closing submissions in the arbitration but never properly explained or developed, the judge said that the possession of information as to the real moulded depth and the air draft calculations was in and of itself inadequate and insufficient to make it arguable that the charterers had unequivocally represented to the owners that they would not rely on the charterparty description of the vessel and would not insist on their strict legal rights to claim damages for misdescription. Consequently, the judge found that even if there had been an irregularity, it was not a serious irregularity within the meaning of section 68(2)(d).

Turning to the application under section 69, the judge considered the owners' argument that there can have been no breach to load the HBI/DRI cargoes if it was unsafe or impossible to do so and consequently in breach of the safe berth/port warranties in the charterparties. The judge disagreed and said that the owners agreed to load those cargoes on board a vessel that was warranted to have the described characteristics as set out in the charterparties. If the vessel had been as warranted, there could be no basis on which the owners could have contended (after the event) that the charterers could not recover damages because the vessel could not physically or safely have loaded those cargoes. Under each charterparty, as varied, there was both a breach of agreement and a breach of warranty and it was perfectly understandable, in the judge's opinion, why in those circumstances the Tribunal concluded that the combination of those breaches entitled the charterers to recover damages of the nature claimed. The Tribunal's decision was not therefore obviously wrong.

Therefore, the judge refused the owners' applications for extensions of time to challenge the Awards under both sections 68 and 69 and also stated that had extensions of time been granted, he would have rejected the applications to challenge the Awards under either or both sections.



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London arbitration clauses and the Brussels Regulation – practical way forward

National Navigation Co v Endesa Generacion SA (Wadi Sudr) [2009] EWCA Civ 1397

Over the last year, the powers of the English Court to compel parties to adhere to their agreements to submit disputes to London arbitration have been significantly undermined. First came the decision of the ECJ in the *Front Comor*, prohibiting the English Court from issuing an anti-suit injunction where proceedings are threatened or started in another EU Member State in breach of an arbitration clause. More recently, the decision of the Court of Appeal in the *Wadi Sudr* has further limited the protection afforded to London arbitration. Ince & Co represented the shipowners in both proceedings. In this article, we seek to summarise the implications of the decision of the Court of Appeal and to suggest some practical steps that parties can take to safeguard their election of London arbitration.

Background facts

The vessel *Wadi Sudr* sustained damage during a voyage from Indonesia to El Ferrol, Spain, while laden

with 64,000 metric tonnes of coal. The cargo was delivered short of destination at Carboneras in south east Spain. The bills of lading incorporated the terms of "the relevant charterparty". Both the head time charter and the sub-voyage charter provided that disputes should be referred to arbitration in London and subject to English law.

Cargo receivers, Endesa, commenced proceedings on the merits before the Court in Almeria, Spain. In an effort to prevent the Spanish Court from accepting jurisdiction in this matter, owners commenced proceedings before the Commercial Court in London seeking a declaration that the arbitration clause was validly incorporated into the bills, a declaration of non-liability and an anti-suit injunction restraining Endesa from proceeding with a claim in Spain.

The Almeria Court issued a decision stating that, as a matter of Spanish law, no arbitration clause was incorporated from any charterparty into the bill of lading and that Spanish law applied to the dispute. However, it agreed to stay the Spanish proceedings pending a decision by the Commercial Court as to whether it was competent to hear the action in London and would accept jurisdiction.

First instance and Court of Appeal decisions

At first instance, Mrs Justice Gloster was compelled to dismiss owners' application for an anti-suit injunction in light of the ECJ's ruling in the *Front Comor*, which immediately pre-dated her judgment. However, she concluded that owners were entitled to a declaration that the dispute was subject to English law and London arbitration, on the grounds that the London arbitration clause in the voyage charter was validly incorporated into the bills. Although the Spanish judgment was a "Regulation Judgment" within the Brussels Regulation, in the Judge's view the English Court was not bound to recognise it. This was because the English proceedings concerned arbitration and were outside the Regulation – arbitration being specifically excluded from the Regulation by Article 1(2)(d). Further, she held that it would be contrary to English public policy to recognise a judgment by the Court of another EU Member State if obtained in breach of an arbitration agreement that is valid by the proper law of that agreement. To give effect to that judgment would result in the United Kingdom being in breach of its obligations under the New York Convention, which imposes duties on contracting states to recognise arbitration agreements.

Regrettably, the Court of Appeal has reversed Mrs Justice Gloster on the recognition and public policy points. The Court of Appeal's conclusion is that the Spanish judgment is required to be recognised in England, as that judgment is within the scope of the Regulation. Article 33(1) of the Regulation imposes a duty on Member States to recognise the judgments

given in other Member States. The Spanish judgment is therefore to be recognised, no matter that the proceedings before the English Court are excluded from the Regulation and notwithstanding the New York Convention. Accordingly, the English Court is, so the Court of Appeal has decided, duty bound to recognise the Spanish judgment and Mrs Justice Gloster's declaration has been set aside.

Implications of the decision - practical steps

The decision of the Court of Appeal erodes the power of the English Court, faced with competing proceedings in the EU, to protect arbitration as the contractually agreed forum to resolve contractual disputes. The decision also shows the problems of reconciling a party's right to uphold an agreement to arbitrate, the obligation to recognise arbitration agreements under the New York Convention and the obligation to recognise judgments of Courts in other EU Member States.

In practical terms, the worrying trend towards forum shopping in the Courts of EU Member States by parties who would previously have been compelled to honour their agreement to arbitrate in London, seems set to continue. If there is any suggestion that such tactical proceedings may be commenced, then a party wishing to rely on the agreement to arbitrate may wish to consider making an urgent application to the English Court for a declaration that the arbitration clause is validly incorporated into the contract and that the dispute should be referred to arbitration, before the Court in the other Member State makes a ruling.

The scope of the arbitration exception in Article 1(2)(d) of the Brussels Regulation has attracted much debate and a review of the Regulation is currently underway. However, it is unlikely that a re-draft of the Regulation will be available for another year. So, in the short term, what can a party do to ensure that a right to arbitrate is protected?

One option which may be considered is to amend the wording of the law and jurisdiction clause when concluding contracts. It has been suggested that a hybrid law and jurisdiction clause may assist, adopting the structure of the Shelltime 4 clause. This would involve agreeing that English law be the governing law and that exclusive jurisdiction should be given to the High Court in London, subject to the right of either party to elect to refer the matter to London arbitration within a certain time. A clause of this sort would enable the English Court to be first seized of any action, so as to block proceedings in other EU Member Courts. However, the need for a Court action to be started simply to block other Member Courts from interfering with the operation of a London

arbitration clause is a highly unsatisfactory state of affairs.

Conclusion

The undesirable effect of the *Front Comor* decision by the European Court has been taken a stage yet further by the English Court of Appeal in the *Wadi Sudr*.

If your counter-party may breach a London arbitration clause by litigating elsewhere in Europe, it is no longer safe to ignore him. In those circumstances, urgent consideration needs to be given to making an application to the English Court for an order that the arbitration clause is binding.



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Parliament approves amendments to third party rights against insurers

After more than 80 years, the law governing the rights of third parties against insurers has finally been given an overhaul, with the passing of the Third Parties (Rights Against Insurers) Act 2010. The aim is to make it easier, quicker and cheaper for third parties to recover compensation from the insurer of a defendant who is insolvent or subject to an insolvency procedure.

Background

The original right of third parties to recover compensation from insurers in such circumstances was granted by the Third Parties (Rights Against

Insurers) Act 1930. The mischief that the Act was designed to cure was the application of the proceeds of an insurance policy for the benefit of creditors generally, when in fact the insured's entitlement to the proceeds only arose as a result of the third party's claim.

The Act, however, has long been criticised as ineffective and in need of reform. It is simply too difficult for third parties to succeed with claims against insurers under the current regime. Amongst the problems are:

(a) The technical hurdles: under the 1930 Act, there were numerous technical hurdles for the third party claimant to overcome. These included the requirement to establish liability against the insured before bringing a claim against the insurer, which was felt to be a waste of costs and time. Connected to this was the need to restore an insolvent company to the Register of Companies before bringing a claim, a requirement which was also felt to lack justification;

(b) Information: the manner in which the Courts interpreted the 1930 Act caused delay and expense for third party claimants. For example, the third party did not have the right to information about the policy until the liability of the insured had been established and quantified (*Woolwich B. S. v Taylor* [1995] 1 BCLC 132). It has therefore proved difficult for prospective claimants to know whether it is worth bringing a claim, because of the lack of information as to the existence of the policy and its terms and level of cover; and

(c) Policy defences: the effectiveness of the 1930 Act was diluted by the Courts upholding the validity of a number of policy defences available to insurers. The amended Act seeks to limit their application, whilst being careful to ensure that the third party claimant is not given greater rights under the policy than the insolvent insured would themselves have had.

The changes

The Act was passed on 25 March 2010 and brings about a substantial number of changes to the existing legislation. The most important of these can be summarised as follows:

(a) The technical hurdles: in an effort to save time and costs, the need to prove the liability of the insured before bringing a claim against the insurer has been abolished. In the event of the insolvency of the insured party, the third party claimant is given a statutory transfer of the benefit of the policy. The claimant can thus bring a claim directly against the insurer although recovery will, of course, still require them to show that the insured was liable for their loss. There is also no longer a need to restore a defunct company to the Register before proceeding with any claim.

(b) Information: the Act allows a party who reasonably believes that a transfer of rights has occurred to obtain information from parties such as brokers; and

(c) Policy defences: the Act removes the ability of insurers to rely on a number of defences that would be available against the insured, such as the requirement that the insured give the insurer notice of a claim. One of the more interesting, and widely discussed, changes is the curtailment of the pay to be paid rule.

The pay to be paid rule is most often seen in P&I insurance. Its effect is that P&I Clubs are only obliged to indemnify a member once the member has discharged a liability. Whilst in reality this requirement is often waived, it operates as an important part of P&I cover, helping to keep costs down and is part of the system of mutuality upon which the Clubs are based. The validity of such a pay to be paid rule was established in the case of *The Fanti/Padre Island* (No.2) [1990] 2 All ER 705.

During the consultation stage, much of the commentary surrounding the proposed Act suggested that its enactment would radically curtail the pay to be paid rule and that the Clubs would be adversely affected. The concern is unfounded. The Act exempts contracts of marine insurance (under which P&I cover falls) from the restrictions on the pay to be paid rule, except in cases of personal injury and death.

Even so, one might criticise this limited change as being contrary to the principle of mutuality since it puts insolvent members in a better position than their solvent colleagues. However, this change is far from radical and we doubt it will come as a big shock to the managers of P&I Clubs, who have long-accepted that, in practice, they are unlikely to rely on the pay to be paid rule in respect of personal injury and death, whether in respect of their members or third parties. Indeed, the Clubs have been on notice ever since the *The Fanti/Padre Island* when comments from Lord Goff gave them a firm indication that, should they attempt to rely on the rule in cases of personal injury or death, Parliament might be obliged to step in to remedy the situation through legislation.

Likely effects

Although pay to be paid rules remain largely intact in marine insurance wordings, the Act may still have an impact on insurers. One can anticipate an increased number of third party claimants will be successful in recovering against insurers when the party liable is insolvent. There is also likely to be an increase in requests for information by potential third party claimants, leading to increased costs and expenditure of time for the insurance industry.



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Charterparty Indemnities and the meaning of a “Subsidiary”

Enviroco Limited v Farstad Supply A/S (The MV Far Service) [2009] EWCA Civ 1399

In *The MV Far Service*, the Court of Appeal considered the issue of whether a company was an affiliated company for the purposes of an indemnity clause in a charterparty. The case turned on the definition of a “subsidiary” as found in the Companies Act, as incorporated into the charterparty. This case serves as a caution against the use of boilerplate wording without giving due consideration to the corporate structures in place, although the particular issues in this case are unlikely to arise in general circumstances.

Facts

In 1997, Farstad Supply A/S (“Owners”) chartered the oil rig supply vessel, *MV Far Service* (“the Vessel”) to Asco UK Limited (“Charterers”). In 2002, Enviroco Limited (“Enviroco”), was appointed to clean the tanks of the Vessel prior to its sailing to one of BP’s North Sea oil platforms.

During the cleaning operation, oil which was being removed from the tanks came into contact with an ignition source and caused a serious fire in the engine room which killed one of Enviroco’s employees and caused substantial damage to the Vessel. The owners commenced proceedings in Scotland against Enviroco for damages for negligence. Enviroco added the charterers as a third party to the Scottish proceedings, and then commenced proceedings in the High Court in London seeking a declaration that they were entitled to benefit from an indemnity found in the charterparty, which provided for English law and jurisdiction.

Clause 33 of the charterparty contained a series of indemnities by owners in favour of charterers and their “affiliates”, including one in respect of all claims and liabilities resulting from loss and damage to the Vessel, even if caused by negligence. The charterparty defined “Affiliate” as follows:

“Affiliate” means any subsidiary of the Charterer or Customer or a company of which the Charterer or Customer are a Subsidiary or a company which is another Subsidiary of a company of which the Charterer or Customer is a Subsidiary. For the purposes of this definition “Subsidiary” shall have the meaning assigned to it in Section 736 of the Companies Act 1985.”

Enviroco contended that it was an affiliate of the charterers, and therefore entitled to rely on the indemnities in the charterparty. In fact, Enviroco and the charterers were both subsidiaries of a third company, ASCO plc. In 2005 however, ASCO plc had charged its shares in Enviroco under a deed of pledge to the Bank of Scotland as security, which required the shares to be registered in the name of the bank or its nominee. It was common ground that, but for the existence of the pledge and the registration of the bank as the holder of the shares, Enviroco and the charterers were both “subsidiaries” of the same parent company and therefore “affiliates” as defined in the charterparty.

The question for the courts therefore turned on the interpretation of the definition of “subsidiary” as found in s. 736 of the Companies Act 1985 [now s. 1159 of the Companies Act 2006]. As a result of the bank becoming the registered owner of the shares, was Enviroco no longer a “subsidiary” of ASCO plc, and therefore not entitled to benefit from the indemnity found in the charterparty?

The High Court decision

The High Court held that Enviroco was an affiliate of the Charterers despite the existence of the pledge, and therefore was entitled to the benefit of the indemnity. In essence, the High Court reasoned that such a security arrangement would not prevent ASCO plc from continuing to act as a parent company.

The Court of Appeal decision

The Court of Appeal allowed the appeal. Based on its interpretation of the applicable provisions of the Companies Act, which in brief provide that a company is a “subsidiary” of another company, if the holding or parent company is, *inter alia*, “a member of it”, the Court of Appeal found that Enviroco had in fact ceased to be a subsidiary of ASCO plc once the bank became the registered owner of the shares. The reasoning was based

partly on s. 22 of the Companies Act 1985 (which has been modified by s. 112(1) of the Companies Act 2006), which provides that to be a member, a person must have its name entered in the register of members. The Court of Appeal held that as the statutory definition required membership as a condition, if a parent is no longer a member then the underlying company could not be its “*subsidiary*”. The Court of Appeal recognized that this interpretation may produce uncommercial results, however it stated that a court does not have the power to revise the provisions of a statute simply on these grounds.

Conclusion

The Supreme Court has granted leave to appeal the Court of Appeal’s decision and we understand the Supreme Court will hear the appeal in October of this year. In the meantime, although this case will only impact on contractual provisions if (i) a lender or its nominee has taken security over the issued share capital of a company and registered those shares in its name, and (ii) the contract incorporates the definition of “*subsidiary*” as found in the Companies Act, it is nevertheless a caution in respect of two matters. First, allowing the registration of shares held by way of security, and secondly, ensuring that contractual provisions that refer to affiliates or subsidiaries, such as indemnities, assignments, representations, and change of control provisions, are drafted in a manner that accounts for the existing corporate structure.



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Finance

Sharia law: non-compliance and enforcement of contracts governed by English law

The Investment Dar Company KSCC v Blom Developments Bank SAL [2009] EWHC 3545 (Ch)

Few cases involving Islamic Finance contracts have come before the English Courts but where they have, the Courts have traditionally been reluctant to examine issues of Sharia compliance when looking at the enforceability of an English law contract. However, in a recent High Court decision, it was held that there was an arguable case that a *Wakala* (agency) agreement did not comply with Sharia law and was therefore void. Summary judgment was denied to the Claimant bank on this issue and the Islamic Investment Company in question will be able to run this argument at trial. Discussed below are the implications of this decision.

Previous authorities

In *Islamic Investment Company of the Gulf v Symphony Gems NV & Others* [2002], the Islamic investment company, IICG, entered into a *Murabaha* Agreement with Symphony Gems. Under a *Murabaha* Agreement, the Islamic financial institution (“IFI”) purchases an asset identified by its customer from the seller/manufacturer and then immediately sells the asset to the customer on deferred terms at a mark-up to the original purchase price. The mark-up is regarded as profit earned by the IFI. The payment to the IFI by its customer may be made as a single payment or by instalments. Most such instruments have a 6 - 12 month maturity.

The Agreement in that case was expressly subject to English law and jurisdiction. In addition the Agreement stated “*the purchaser wishes to deal with the seller for the purposes of purchasing supplies under this agreement in accordance with Islamic Shariah*”. A dispute arose as to who took the risk of a failure to deliver. Under Sharia law (and according to the principles of a *Murabaha*), the risk of a failure to deliver falls on the IFI (IICG in that case) as it receives a profit for accepting that risk. However, the wording of the Agreement did not support that position and the judge held that “*...it is a contract governed by English law. I must simply construe it according to its terms as an English law contract*”. He rejected the arguments that it was not in compliance with Sharia law, did not bear the hallmarks of a *Murabaha* Agreement and was therefore illegal because (a) the parties had chosen English law as the governing law without any restriction or limitation and (b) the Agreement was not to be applied in a jurisdiction where Sharia law was the law of the land.

In that case, it was also argued that the terms of the *Murabaha* Agreement contradicted IICG's constitutional documents which required that IICG carry out its business in a "*manner which is consistent with Islamic laws, rules, principles and traditions*". The Agreement was therefore *ultra vires* or beyond the powers/capacity of IICG to enter into. In the UK, statute intervened many years ago to bring to an end the external operation of the *ultra vires* doctrine in invalidating transactions entered into by a company beyond its objects and powers as a protection for third parties who, when contracting in good faith, are entitled to assume that their counterparty has the requisite power/capacity to enter into the contract concerned. The Bahamas, where IICG was incorporated, has enacted a similar law. In any event, English Courts have shown some reluctance to apply the doctrine (described as a "technical" rule in another case) to enable a party to avoid its contractual obligations.

Shamil Bank of Bahrain v Beximco Pharmaceuticals Limited and Others [2004] 2 Lloyd's Rep 1 also involved a *Murabaha* Agreement. In that case, there was a payment default by the defendants. The Agreement contained the following wording regarding the choice of law – "*Subject to the principles of Glorious Shariah, this agreement shall be governed by and construed in accordance with the laws of England.*" The Appeal Court held that "*there could not be two separate systems of law governing the contract*". Statute in the UK only contemplates the choice of the law of a country to govern contractual obligations. Whilst it is possible to incorporate specific provisions of foreign law into an English law contract (subject to certain limited restrictions), this Agreement referred to Sharia law in general and not to any specific provision that was intended to be incorporated. Principles of Sharia, it was pointed out, are not simply principles of law but relate to other aspects of life and behaviour and, in any event, are susceptible to differing interpretation depending upon the strictness with which they are interpreted or applied. Furthermore, it was said that it was highly unlikely that the parties had intended that an English Court should determine any dispute as to the nature or application of religious principles. English Courts, in other words, determine disputes on the basis of English law (although there may be occasions where they also accept expert evidence of foreign law, this will be the law of a country and not religious law).

Latest developments

In the latest case, the question of capacity arose again. Blom made deposits with Investment Dar Company KSCC ("TID") under a Master *Wakala* Agreement. In essence TID, as *Wakeel*

(agent), would accept deposits from investors such as Blom and would pool the deposits, using the *Wakala* capital in *Wakala* assets of a prescribed type. TID would invest the deposits as agent for the investors including Blom.

The Master *Wakala* Agreement was expressed to be governed by English law and precluded TID from taking any point on non-compliance with the Sharia. In this case TID was a Kuwaiti company whose constitutional documents stated that the "*objectives for which the company is established shall be Sharia compliant. None of the objectives shall be construed and interpreted as permitting the company to practice directly or indirectly any usury or non-Sharia compliant activities.*" One such objective specifically stated that the company was to "*carry out all financial transactions in a Sharia compliant manner*".

Despite the terms of the agreement, TID argued that the contract with Blom was non-compliant because TID was taking deposits at interest. Blom pointed to the Sharia Committee approval and said the argument being advanced by TID was nonsense. On an application by Blom for summary judgment, the judge said there was an arguable case that the transactions entered into by TID were *ultra vires* TID. As, moreover, questions of capacity of a corporate entity are governed by the law of the place of incorporation, the fact that the Master *Wakala* Agreement was governed by English law was irrelevant. On appeal to the High Court, this view was not challenged.

It seems clear that the TID/Blom case is distinguishable from the *Shamil Bank/Beximco* case, although the issue of capacity/power to enter into a transaction was referred to in the *IICG/Symphony* case and was rejected primarily it seems on the basis that Bahamian law (like English law) had enacted statutory protection for third parties and in any event English Courts were reluctant to allow parties to invoke *ultra vires* as a means to avoid contractual obligations. TID is a Kuwaiti company where no similar statutory protection is available and when this comes back to court, evidence will need to be produced as to what Kuwaiti law says about Sharia compliance in the light of TID's constitutional documents. However, weight will also have to be given to the fact that (a) the Sharia Committee in this case appears to have approved transactions which it is now alleged are non-compliant and (b) TID has stated in the Agreement that it would not at any time assert the arrangements made under the Agreement contravene the Sharia.

Comment

There is no suggestion in this recent case that the English Courts will do anything other than look at

English law when construing the terms of an English law document (the decision in *Shamil Bank v Beximco* will therefore be followed) and they will not, therefore, say that a document is unenforceable because it does not comply with some aspect of Sharia law (particularly since this is open to differing views). However, they might entertain an *ultra vires* argument if evidence is adduced that this is relevant as a matter of the law of incorporation of the Defendant.

In the writer's view, the way that the capacity issue can be addressed is to express the financing obligation or investment to be conditional upon the production of an opinion (or *fatwa*) as to Sharia compliance. This could be issued by the Sharia Committee of the obligor or by the Bank's Sharia Committee and should in any event be coupled with representations as to Sharia compliance and to the effect that there is no conflict with the entity's constitutional documents, together with the insertion of a waiver of defences based on Sharia law issues (as was the case in the Master *Wakala* Agreement). If one wanted to go further one might consider bolstering the representations by obtaining a legal opinion as to the capacity of the contracting party from a local lawyer.



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Property

Does your lease contain a break right?

A tenant's break option in a lease is often seen as a straightforward way for a tenant to end its tenancy before the contractual expiry date, but tenants should not be under the misconception that breaking their lease will be straightforward.

Break clauses are usually conditional and are always construed strictly in accordance with their terms. A failure to meet any of the conditions could result in the break being ineffective. Following a strategic approach in checking pre-conditions to a break right considerably in advance, together with good general planning and advice, are vital to ensure a clean break.

The vast majority of break clauses in commercial leases will require written notice served on the

landlord in advance. The notice provisions must be followed precisely as an error could result in the break being ineffective. There have been cases where break notices have been held ineffective due to lack of clarity, service on the wrong party, misnaming of the landlord or tenant and other procedural aspects.

In addition, most tenant break rights will be conditional upon the payment of "Rent" by the tenant to the landlord. It is important to be aware that a lease can define "Rent" to include rent, service charge and insurance rent, as well as other sums payable under the lease. A prudent tenant should contact their landlord well in advance of the break date to seek confirmation of the sums due and whether there are any outstanding arrears.

A further common pre-condition is vacant possession. The landlord will normally expect the premises to be handed back free from sub-tenancies, with all the tenant's fixtures and fittings and chattels removed (which will include waste and rubbish) and any alterations reinstated.

One of the most difficult pre-conditions that a tenant may face is one requiring that the tenant has observed and performed all of its obligations under the lease. It is crucial that a tenant correctly identifies the obligations that it needs to comply with. Most often these obligations involve repairs, alterations and decoration. Even a breach of a relatively trivial matter can prevent a valid break. For example, a recent case involved a tenant decorating the property with two coats of paint when the lease required three, and it was held that the break option had been invalidated.

To summarise, it is important for a tenant to decide well in advance whether they wish to exercise their break and to obtain expert advice on what is required to do so effectively. The consequences of missing the opportunity to break can be severe, with a tenant 'locked in' to a lease of premises that it does not want for many more years. It is always worth obtaining professional advice where exercise of a break clause is proposed.

It is also worth pointing out that if you are a tenant who has the benefit of a break right but you are prepared to remain in the premises, then this is a good opportunity to seek to negotiate more favourable terms with your landlord in respect of the remainder of the term of the lease.



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Assured Tenancy. Threshold and Deposit Rules

By virtue of "The Assured Tenancies" (amendment) (England) Order 2010, the rental threshold has been increased for dwelling houses from £25,000 to £100,000 with effect from 1 October 2010. Landlords whose tenancy was "common law tenancy" because it was above the £25,000 threshold will now where the rent is below £100,000 become assured shorthold tenancies. The obligations with respect to deposits will have to be in place by then as there are no transitional provisions. There are two schemes, one deposit-based the other insurance-based. Tenants need to be notified on or before 1 October 2010. There are significant penalties for failure to comply. Landlords, particularly non- resident landlords will need to review the holding of deposits on their properties.



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Employment

The Equality Bill 2010

The Equality Bill received Royal Assent on 8 April 2010 and became the Equality Act 2010. The majority of its provisions will come into force in October 2010. This is arguably the most important and long-anticipated piece of employment legislation due to come into force this year.

The Act 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. It introduces some significant changes particularly in relation to gender pay discrimination and the introduction of new types of disability discrimination.

Obviously it is important that all employers are familiar with their obligations under the Act and it may be necessary to issue new workplace policies setting out the employer's anti-discrimination policies. We will be issuing further bulletins on this during the course of the year.

New "Fit Notes"

Under the Social Security (Medical Evidence) Regulations 2010, with effect from **6 April 2010**, the traditional sick note will be replaced with a 'fit note'. This means a GP will indicate whether an employee is fit for work and suggest actions that an employer can take to facilitate an employee's return to the workplace. This is designed to tackle the problem of employees' long-term absences from work by making it easier for partially-fit employees to return to work. Suitable adjustments for a partially fit employee could include allowing a phased return to the workplace, altered working hours or permitting working from a different place. The Government intends to publish more detailed guidance for individuals, employers and healthcare professionals shortly.

Employers should therefore now be able to encourage partially fit employees to get back into the workplace. However, there may be increased potential for disputes with employees regarding the scope of adjustments that may be required to accommodate their return and careful consideration should be given to making these adjustments as reasonable as possible.

Sickness during holiday

Shah v First West Yorkshire Limited

In our October 2009 Employment Law Update we reported on the case of *Pereda v Madrid Movilidad* in which the European Court of Justice (ECJ) held that the Working Time Directive (implemented in Great Britain by the Working Time Regulations 1998) requires workers on sick leave during a period of scheduled annual leave to be given the right to take annual leave at a later date. This has now been considered and applied by the domestic courts.

The Working Time Regulations 1998 give workers a right to 5.6 weeks leave per year. At least four weeks of that leave can only be taken in the leave year to which it relates.

In this case, Mr Shah's holiday year under his contract of employment ran from 1 April to 31 March. Mr Shah booked a four week holiday from 22 February to 21 March 2009 (accounting for 12 days of his annual holiday entitlement as he worked a three day week). However, Mr Shah broke his ankle and was absent from work between 15 January and 18 April 2009. His sickness absence therefore overlapped with his holiday period. In April 2009, Mr Shah asked his employer if he could reclaim his 12 days holiday but was refused on the basis that this holiday related to a previous holiday year and had therefore been lost.

The Tribunal held that national law must follow the ECJ decision in *Pereda* and permit an employee who falls sick during a period of annual leave to take that annual leave subsequently within the holiday year or, if time does not permit, within the following leave year.

As a result of this decision, employers may wish to consider implementing policies and procedures for the reclaiming of holiday time lost due to illness.



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Yachts & Superyachts

Owning a Superyacht in the UAE: new regulations for the large private yacht sector

The UAE's National Transport Authority (the "NTA") has recently published its new regulations ("**Regulations**") for larger private yachts, bringing much needed clarity and depth to the existing local regulatory structure. The NTA gave consideration to the existing international conventions but has confirmed that it did not believe such conventions adequately addressed the larger size segment of private yachts that are now regular sights in local marinas within the UAE i.e. *"those above 24 meters not intended for commercial use, without any restriction with respect to the number of persons on board, not the maximum size of the yacht."*(Article 1.1)

The Regulations deal almost exclusively with the operation and fitting out of the yacht itself, with

sections covering issues such as buoyancy and stability (Part 2), structural integrity (Part 3), pollution prevention (Part 5), navigation and control (Part 7), life saving (Part 9) and manning (Part 11). The Regulations also touch upon issues regarding the ownership of UAE flagged yachts in relation to their scope of application. The Regulations apply to all types of new UAE registered private yachts of 24 meters or over in length engaged in international or domestic voyages, the keels of which are laid or at a similar stage of construction on or after 1 July 2010 (Articles 1.2.1 & 1.2.2) as well as existing UAE registered private yachts (Article 1.2.3).

These new Regulations are a clear indication of the UAE's ambitions to increase confidence and bring transparency to a burgeoning business sector. The Regulations, however, do not apply to yachts engaged in commercial trade or those available for lease (Article 1.1). **So what exactly is the present situation for new players to the country who are looking to set up a charter business?**

Registration

According to the UAE Maritime Code (Federal Law No. 26 of 1981), the requirements for registration on the UAE Registry are currently as follows:

- 1) completion and submission of the application form obtained from the Ship Details Department;
- 2) Ship Building Certificate for new ships or certified Contract of Sale;
- 3) duly attested Ship Deletion Certificate (if it is not new); and
- 4) the yacht must be classified with one of the approved supervision authorities for at least the past five years.

Once the application has been approved and following the publication of an announcement in two local newspapers, the yacht will be issued with a 60 day temporary registration. If no objections are raised within the 60 day period, the registration will be considered permanent and the official Certificate of Registry will be issued accordingly. These requirements (for any type of yacht) have not been changed as a result of the issuance of the new NTA Regulations.

Ownership issues

A UAE citizen or national or a qualified foreign maritime entity registered with an address in the UAE can register a yacht for commercial use with the UAE Registry, renewable on an annual basis. The terms "citizen" and "national" include corporations, limited liability companies, partnerships, limited partnerships and associations of individuals, in accordance with UAE laws (Articles 1.4.2 & 1.4.3). Whilst this may

seem straightforward, in accordance with Article 14 of the UAE Maritime Code (Federal Law No. 26 of 1981) only a UAE National or UAE National-owned company is permitted actually to own a yacht flying the UAE flag and/or lease this yacht for commercial charter (Article 16, UAE Maritime Code). This means that any foreign-owned vessel hoping for charter business in the UAE has to be at least 51% owned by a national of the UAE. This may not be desirable in all circumstances.

Financing

For an expatriate looking to set up a yacht charter business in the UAE the yacht ownership issue presents a tricky situation when it comes to financing the purchase of any yacht. In order to operate here, the vessel needs to fly the UAE flag which is not always acceptable to international mortgage lenders. Elsewhere in the world, a standard requirement of such a financing package would be that an encumbrance is placed on the ship's register, thus giving the bank a priority right. Whilst a mortgage or pledge is a well recognised financing vehicle under UAE law, as far as we are aware, a mortgage may only be registered against a UAE-flagged yacht when it is 100% owned by a national of the UAE or a UAE national-owned company.

Since it is commonplace for a yacht available for charter to be only 51% owned by a UAE national, the most widespread solution we have seen to this problem is for financing to be sourced from a local bank which is aware of the limitations of the local laws and, where security over the vessel is required to be given by an individual to the bank, the bank may use various forms of security including a pledge over movables and post dated cheques. At present, failing to honour a cheque is a criminal offence under the UAE Penal Code, Article 401. Where the mortgage is given to a local LLC or a free zone entity, in our experience the bank would normally secure this type of loan through a pledge over movables, a business mortgage against the company's trade licence and post dated cheques.

The future

The UAE is keen to create an attractive shipping registry akin to those of Malta and the Isle of Man. If this is to become a reality, then the types of ownership issues addressed in this article will need to be overcome. There are rumours that the government of Abu Dhabi is working on an Amended Maritime Code, possibly with this aim in mind. If this is indeed true then you are advised to watch this space!



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Other News

Ince & Co's four new partners - all trained with the firm

Effective from 1 May 2010, Ince & Co will promote four solicitors to the partnership, increasing the number of partners from 86 to 90.

The new partners are:

Jeremy Biggs (London)

Brian Boahene (Dubai)

Fionna Gavin (London)

John Simpson (Singapore)

The four new partners advise in the following areas:



Jeremy Biggs – Jeremy specialises in dispute resolution with a particular focus on shipping litigation, as well as international trade and insurance & reinsurance. He has experience

handling high value claims in court and arbitration proceedings, both in London and abroad.

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Brian Boahene – Brian’s practice covers the breadth of the firm’s contentious and non-contentious areas. He acts in all aspects of commercial litigation and arbitration for clients with interests in shipping, aviation, energy, insurance and construction. On non-contentious matters he advises on company establishment, share sale and purchase agreements, joint ventures, insurance issues and real estate transactions.

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Fionna Gavin – Fionna specialises in shipping and insurance dispute resolution both in the High Court and arbitration. She has been heavily involved in the recovery aspects of a number of major shipping casualties and regularly advises on jurisdiction and limitation issues. She has spent time on secondment with a large international insurer and a P&I Club.

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John Simpson - John specialises in dispute resolution in the fields of shipping and international trade. He has extensive experience in London High Court proceedings and arbitrations in London and Singapore. He regularly advises on shipping derivatives, having been involved in a large number of high value disputes in this area.

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

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