

Shipping E-Brief



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Shipping

Commercial Court construes one trip time charter

Ispat Industries Ltd v Western Bulk Pte. Ltd (Sabrina 1) [2010] EWHC 93 (Comm)

Ince & Co represented the successful Owners in this dispute arising under a one time charter trip. The majority of the LMAA Tribunal and subsequently the Commercial Court upheld the Owners' claim for repudiatory breach of the charter and awarded them damages in the amount of hire which would have been earned on the estimated duration of the charterparty.

Background facts

Owners chartered the *Sabrina 1* to Charterers under an NYPE charter for one time charter trip containing the usual Clause 16 exceptions (*"the act of ... enemies always mutually excepted"*). The charter provided among other things that *"the vessel shall be employed for one time charter trip from Vizag to Mumbai lawfully trading between safe port(s), safe berth(s) and safe anchorages"*

On 24 December 2007, Charterers sent voyage instructions to the Master detailing the load port as Vizag. On 26 December 2007, after subjects were lifted but prior to the laycan, Charterers informed Owners that they would have to cancel the fixture due to civil unrest and insurgency preventing the cargo arriving at the loadport. Owners accepted Charterers' repudiatory breach of the fixture and stated that they were looking for alternative employment for the vessel.

The vessel was not refixed until 15 January 2008. Owners commenced arbitration to claim damages in the sum of the hire which would have been earned on the 12 day time charter trip.

Prior to the commencement of arbitration proceedings, Owners obtained two Rule B attachments in New York to secure their claim. Both attachments were subsequently vacated and Charterers counterclaimed in the arbitration a sum in excess of US\$1million equivalent to the attached sums.

The Tribunal's decision

A majority of the arbitrators held that Owners' claim succeeded and dismissed Charterers' counterclaim.

The Tribunal found primarily as follows:

- under a time charter, although the intended cargo was not available at Vizag because of *"enemy activity"* within clause 16 of the NYPE form, the Charterers were nonetheless obliged to find an alternative lawful cargo. The Charterers had made no attempt to do so and had simply cancelled the charter.
- there had been no failure to mitigate on the part of Owners.
- the Charterers' counterclaim would be dismissed on the grounds that neither the first nor second attachment proceedings in New York were a breach of the arbitration clause in the charterparty.

The Charterers appealed to the Commercial Court challenging the arbitration award on various grounds, including for serious irregularity under section 68 of the Arbitration Act 1996 and on questions of law under section 69 of the Act 1996. Mr Justice Teare dismissed the Charterers' challenges in full and found that, on the facts of the case, there had been neither serious irregularity nor error of law by the Tribunal.

The Commercial Court decision

The Judge held in essence as follows:

The Charterers had challenged the Tribunal's decision that the fixture was a time charter, arguing that having regard to the background matrix, the charterparty was in fact *"a voyage charter or at least a charter limited to a very specific trip only"*. The Judge disagreed and held that although the fixture note referred to the *"intended voyage"* and to the *"cargo intention"* of iron ore, those references were to the voyage and cargo intended by Charterers. They were not apt to define the time charter trip as being only a voyage from Vizag to Mumbai carrying iron ore, but merely identified the Charterers' intention at the date of the fixture recap.

He also dismissed Charterers' argument, relying on *The Kallang No 2* [2009] 1 Lloyd's Rep 124, that Owners had obtained security unreasonably in the form of the two Rule B attachments, in breach of the arbitration clause. The arbitrators' finding was confirmed by Mr Justice Teare, who held that ancillary applications for security were not a breach of an arbitration clause so long as there was no attempt to have the merits of the dispute determined other than in the agreed arbitration (*The Rena K* [1978] 1 Lloyd's Reports 545).

Finally, in relation to remoteness of damage, the Judge dismissed Charterers' assertion that there had been an alleged failure by the Tribunal to apply the "assumption of responsibility" test set out by the House of Lords in *The Achilleas* [2008] 2 Lloyd's Rep 275. He held that there had been no error of law by the Tribunal on this question. Owners had claimed damages measured by the hire that would have been paid for the expected minimum duration of the time charter trip, namely 12 days and accordingly, there was no basis upon which it could be said that such measure of damages was contrary to market understanding or expectations.

Comment

The decision in this case confirms that while a charter for a time charter trip might in some ways be a "hybrid" charter, its nature is essentially that of a time charter on a time charter form and not a voyage charter.



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To go or not to go? Boxship operators and owners face legal dilemma due to continued radiation threat in Japan

For a more detailed and general review of legal issues arising out of the Japanese disaster, please see the Ince & Co briefing at www.incelaw.com.

A number of major container lines are presently considering whether they are legally obliged to deliver containers to Japan's major container ports, Tokyo and Yokohama. Under most liner bills of lading, containers can be transhipped or re-routed, but the operator cannot refuse to deliver the cargo. For exports from Japan, issues arise as to whether cargo can be said to be "radioactive" and whether a carrier can refuse to load it because it might arguably be dangerous.

The position is much more fluid in terms of general trade to Tokyo and more southerly Japanese ports. Clearly, however, the situation in Japan needs to be monitored constantly as it continues to change.

Safe port issues

Most period charters contain a safe port warranty. This means that the owners will, in the absence of any other charterparty provision to the contrary, be entitled to refuse an order to proceed to the port in question if the vessel cannot reach it, use it and return from it without being exposed to danger which cannot be avoided by good navigation and seamanship. Therefore, assuming that the charterer is a container line, the container line can only order the vessel to a port that is prospectively safe, meaning safe for the vessel to reach, use and leave at the time that it is ordered there. However, if the container line complies with its primary obligation by ordering the vessel to a prospectively safe port but that port subsequently becomes unsafe, there is then a new and secondary obligation on the container line to issue fresh voyage orders to another port which is then prospectively safe.

Where the charterers' original order, although lawful when given, has become potentially unlawful due to a change of circumstances, the owners may refuse to obey that earlier order. However, if the owners refuse to comply with their charterers' legitimate orders to proceed to a safe Japanese port, they may, depending on the gravity of the breach, be in repudiatory breach of charter enabling the charterers to terminate the charter. Whether a port is safe or unsafe is extremely fact sensitive, so the owners must proceed on the basis of the available facts at the material time.

Radiation risk

In terms of the risk of radiation, this is a potential risk to the crew, the vessel and any cargo on board. Danger to the vessel may render a port unsafe. Risk to the crew may also render a port unsafe even where there is no danger to the vessel. The owners have a duty to their crew to ensure that they are safe and claims relating to radiation issues are often excluded from their usual insurance coverage, although this will need to be checked with the owners' insurers.

As to the risk of radiation contamination to the crew by calling at Tokyo or Yokohama, if there is a real risk of exposure to unacceptable levels of radiation, then the charterers may be in breach of the charter in ordering the vessel to proceed or to continue to proceed to a prospectively unsafe port. At that stage, the owners could potentially refuse to follow such orders.

However, the current information sources coming from Japan and elsewhere all suggest that, while there is increased radiation risk, this is not such as to lead to health risks. Furthermore, none of the advised exclusion areas extend to Tokyo or Yokohama and levels of radiation there are presently reported to be low and within acceptable levels. On this basis, those ports would not at the moment appear to be unsafe. However, the situation should be continuously monitored because if prevailing winds bring air from Fukushima to where a vessel is or may be and/or there is prospect of rain there, then this could increase the risk of radiation, possibly to unacceptable levels. Practically speaking, it might be difficult for the owners to assess how adverse weather conditions can be forecast or monitored to allow sufficient time to take avoiding action, for example by diverting the vessel and/or moving her off berth to a safe distance. In those circumstances, the charterers' secondary obligation to give new orders might come into play.

Comment

Owners are advised to carefully consider orders from charterers to proceed to Japanese ports. In addition to wider considerations such as the crew's safety, the owners' obligations as an employer and the insurance implications, there are also important contractual considerations such as whether a repeated refusal to proceed to contractually nominated ports may expose the owners to a claim by the charterers for repudiatory breach of the charterparty, potential loss of that charter and a significant claim for damages.

Ince & Co are continuing to advise clients on these and other issues on a case by case basis. For further information or advice, please contact Nick Burgess at nick.burgess@incelaw.com or your usual contact at Ince & Co.



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Consecutive voyage charter: commencement of the time bar period

X v. Y [2011] EWHC 152

The Commercial Court has recently given a judgment in the case of *X v. Y* (where, unusually even for an appeal from an arbitration award, the identity of the parties has been kept anonymous).

The case concerned the question of when time begins to run under a demurrage time bar clause containing two trigger points. The clause in question required that arbitration be commenced "*within 12 months of final discharge or termination of this Charterparty*". The court found that time ran from both trigger points, so the claimant only had to comply with the later one.

The facts

The owner (Y) and the charterer (X) agreed to a consecutive voyage charter (a "CVC") covering three voyages. Discharge of the cargo carried on the first voyage was completed by 08 February 2008. The owner submitted a claim for demurrage incurred on this first voyage and commenced an arbitration in respect of that claim on 23 February 2009. A dispute arose as to whether the 12 month time limit for commencing claims ran from the completion of discharge on the first voyage (i.e. 08 February 2009) or 12 months from the end of the CVC (14 June 2009).

The Commercial Court

Meaning of “final discharge”

The Judge went through the authorities concerning the meaning of the term “final discharge” under a CVC. In *The Simonburn* (1973), the Court of Appeal had determined that, under a CVC, the requirement to submit claims within a defined period after “final discharge” meant final discharge of the cargo on the voyage in respect of which the claim arises.

The Judge in this case followed the decision in *The Simonburn* and held that, in the present case, the trigger point for the 12 month period from “final discharge” was the discharge of the first cargo (since the demurrage claim arose out of that voyage).

This point was decided on the basis of settled law. Had this been the only trigger point, then the owner’s claim would have been time barred. The Judge then had to decide the effect of the additional words “or termination of this Charterparty”, which were not included in the time bar provision considered in *The Simonburn*.

Meaning of “termination of this Charterparty”

The Judge agreed with the owner that there were two trigger points for the commencement of the 12 month time limit. Arbitration either had to be commenced within 12 months of the “final discharge” or, alternatively, the termination of the charter. The Judge rejected the charterer’s argument that the clause required an arbitration to be commenced by the earliest trigger date.

Although the Judge found that, on the true construction of the clause, time ran from both trigger dates, the effective result in the case was that the arbitration had to be commenced within 12 months of the latest in time of “final discharge” and the end of the charter. In the present case, the owner had commenced its arbitration well within the 12 month period following the end of the CVC.

Comment

The case is a timely reminder of the existing law where a charter contains a time limit running from “final discharge”. This will be relatively easy to ascertain in the case of a single voyage charter. In the case of a CVC, “final discharge” will be read as meaning discharge of the cargo on the voyage in respect of which the claim arises and not the discharge of the last cargo carried under the CVC.

Where a clause is expanded to provide that the time limit runs from “final discharge” or the termination of the charter, and both events occur (it should be borne in mind that both events might not occur, for example where there is no discharge), the effective time bar period will run from the later of the two dates. The result would of course be different if the clause also used wording to the effect of: “whichever comes first”.

An owner may nonetheless wish to be prudent and take a cautious approach. When there are two trigger dates under a time bar clause, an owner would be well advised to protect time from the earliest possible date and not to simply rely on the possibility of an alternative later trigger date.



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Commercial Court interprets the meaning of “approved” by oil majors

Transpetrol Maritime Services Limited v SJB (Marine Energy) BV (MT Rowan), 2011 (unreported)

There are few reported English decisions relating to oil major approvals. Oil majors operate a system of vetting and approvals to ensure that the vessels they use or trade or buy cargoes from are of satisfactory quality. Owners and operators of tankers seek and collect as many written approvals as possible from top name oil majors, which are often required by charterers. Given the importance of such approvals in tanker charter parties for the purposes of trading a tanker profitably, the observations of the Judge in this case on the meaning of “approved” as provided for in the charter party are worth noting.

Background to dispute

This dispute arose out of a voyage charter for the carriage of vacuum gas oil (VGO). The charterer was a trader in petroleum products and had chartered the vessel to carry VGO from the Black Sea to the US Gulf, with an option to top up, discharge or reload at Antwerp. At Antwerp, the vessel was inspected by Shell and Conoco. Shell had, according to the charterer, agreed to buy the cargo subject to vetting. However, the inspections established that a low suction sea chest valve needed repair prior to sailing. There was no dry dock available at Antwerp so the Class surveyor issued an interim certificate allowing the deficiency to be repaired at the next port. As a result, however, the charterer claimed that Shell had rejected the vessel and refused to buy the cargo. Chevron also allegedly refused to deal with the vessel.

A claim was made by the owner for demurrage and port costs that arose during the voyage. The charterer counterclaimed that, due to the bad reputation the vessel gained in the market following the events at Antwerp, it had been unable to sell the cargo on satisfactory terms. The charterer sought to claim damages for the difference in price it had allegedly agreed with Shell and what the cargo actually realised. The success of the counterclaim depended in part on whether the owner had warranted that the vessel had the requisite oil major approvals referred to in the charter party and, if so, whether that warranty had been breached.

The Commercial Court

The construction of the charterparty

The recap stated under vessel information that “TBOOK WOG VSL IS APPROVED BY: BP/LITASCO/STATOIL – EXXON VIA SIRE”. The recap also incorporated Clause 18 of the Vitol standard chartering terms, which stated as follows: “Owner warrants that the vessel is approved by the following companies and will remain so throughout the duration of this Charterparty...”. In the recap, next to the reference that incorporated Clause 18, it was stated “TBOOK VSL IS APPROVED BY: BP/EXXON/LUKOIL/STATOIL/MOH”.

The owner argued that the wording in the recap overwrote and replaced the wording in the standard Vitol Clause 18 so that “WOG” (“without guarantee”) applied, meaning that there was simply an indication, without a contractual commitment, that the listed approvals were in place at the outset of the charter. The Judge, however, agreed with the charterer’s interpretation that the parties were adding to, not replacing, the standard term. The fact that a continuing warranty qualified by “Tbook” (“to best of owner’s knowledge”) might prove unworkable in a commercial situation, as contended by the owner, was of no significant weight, in the Judge’s view. It was not unusual for commercial parties to “make what are in retrospect bad bargains”. He added that there was also no express reference to deletion of Clause 18 in the recap as there was for a number of other standard Vitol clauses and he concluded that this meant the parties had not intended to delete that clause. Consequently, he held that the owner had warranted that the vessel was approved by the named oil majors and would remain so throughout the duration of the voyage charter.

Was it so approved? This depended on what “approved” meant and how long any such approval had continued.

Meaning of “approvals” or “approved”

The Court considered what constitutes an “approval” letter from an oil major. The charterer contended that the meaning of “approvals” or “approved” was a matter of plain and ordinary English and that the correct interpretation in this context is that the owner warrants that the vessel has indeed been approved and will continue to be so throughout the charterparty. This, when applied to the letters relied on in this case, with their reservations and conditions, would mean that the owner had

obtained no approvals at all. The charterer's case, if accepted, would have meant that this type of letter did not in fact constitute an approval in the context of the common charter requirement.

However, the court considered the charterer's argument to be "doomed by the overwhelming evidence". It was agreed by the experts for both sides that the word "approved" was used in the market at the relevant time (2007) to mean "acceptable to" oil majors who might or might not, when the prospect of a real transaction arose, decide to approve that vessel. It was not the practice of oil majors to grant approvals as such in advance. Express approvals were given only for specific voyages, not for a period of time. So the letters in the form relied on by the owner, it was agreed between the experts, are regarded in the industry as approval letters, despite the fact that they may often state that approval has not been granted and should not be assumed.

Applying this in the context of the present charter, the Judge concluded that the approval letters had to be in place throughout the charter as per the warranty in Clause 18. In other words, at any time when offered to cargo buyers, the vessel must not be in a state which to the knowledge of the owner would remove the comfort of the warranted approvals to the potential purchaser of cargo. There would be a breach of warranty, for example, if some event occurs which, to the knowledge of the owner, would, if known to the issuer of the approval letter, cause it to withdraw or cancel that approval.

Regarding the "tbook" ("to the best of owner's knowledge") qualification, the Judge observed that the term "tbook" cannot take an obligation beyond the extent of an owner's actual knowledge and does not require the owner to make enquiries in addition to those which would ordinarily be made in the course of its business. However, on the facts of this case, he held that the owner had breached its warranty that, to the best of its knowledge and belief, the vessel was approved by the specified oil majors and would remain so throughout the charterparty. In his view, it was inconceivable that the owner would have believed that the approval letters still applied in the light of the problems at Antwerp.



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The distinction between a “performance option” and a “contract option” under a time charterparty

London Arbitration 1/11, Lloyds Maritime Newsletter, 18 March 2011

In the first reported LMAA arbitration decision of 2011, the Tribunal considered a time charterparty on an amended NYPE 1946 form and whether the charterers were entitled to add 159 days off-hire onto the basic charter period. The issue was whether the option to do so in the charterparty was a “contract option” or a “performance option”. The distinction for the purposes of the present dispute was that the former would have required the charterers to give notice of their intention to exercise the option, whereas the latter would not. The Tribunal held that it was a performance option and it was not therefore necessary for charterers to expressly exercise the option and give notice of their intention to do so in order to be entitled to add off-hire to the basic charter period.

Background facts

The vessel was chartered out by disponent owners (“owners”) on the NYPE 1946 form, as amended, for a period of 13-15 months, +/- 15 days more or less at charterers’ option. During the basic charter period, the vessel was off-hire for about 159 days due to repairs undertaken by the registered owners. A dispute subsequently arose as to whether the charterers were entitled to add these 159 days on to the basic charter period.

The relevant charter provisions stated as follows:

Line 17: “Charterers’ option to add any off-hire period”,

Clause 58: “Charterers have the option to add any off-hire period to the charter period”.

Clause 13 of the NYPE printed form had been deleted. That clause provides for charterers to exercise an option to continue the charter period provisional on written notice thereof being given to owners a number of days in advance of the expiry of the basic charter period.

The owners argued that the charterers were in breach of charterparty because they continued to use the vessel after the time for redelivery. According to the owners, the option to add any off-hire period to the basic charter period was a “contract option” because every time charter must

have a final date and this contract option had to be exercised within a reasonable time and had to be communicated to the owners, which the charterers had failed to do.

The Tribunal’s decision

Contract or performance option?

The Tribunal found in favour of charterers and held that on a true construction of line 17 and clause 58 of the charter, the option in relation to adding off-hire was a performance option and accordingly, it was unnecessary for charterers to give notice of their intention to add on all or any of the off-hire which had accrued during the basic period of charter service.

In coming to their decision, the Tribunal found that had the parties viewed the off-hire “bolt-on” as a contract option, then they would have provided a mechanism for its exercise, which they did not do. This view of the parties’ intentions was reinforced by the deletion of clause 13 of the NYPE printed form.

As to the owners’ argument that all charterparties must have a final terminal date, the Tribunal referred to the case of *The Kriti Akti* [2004] 1 Lloyd’s Rep 712 which makes it clear that it is, in fact, not necessary for every time charter to have a final terminal date, ascertainable at the time the contract is made.

Finally, in the Tribunal’s view, there was no need to imply a term that the charterers had to give notice of the exercise of the option because the charterparty was workable without such a term. The arbitrators held that the redelivery notice provisions in the charterparty gave the owners as much notice as they could reasonably expect.

Was the option exercised in time?

The Tribunal then considered what the position would be if they were wrong and the option was a contract option. The Tribunal concluded that in those circumstances, the option had been constructively exercised by the end of the basic charter period because the charterers had given no redelivery notices and had paid hire for the next hire period without any relevant deductions. In the Tribunal’s view, in the current shipping environment, the fact that no deduction for bunkers on redelivery was made from that hire payment was held to be a clear indication to owners that charterers were intending to employ the vessel during the whole of the next hire period.

On any objective view, said the arbitrators, the owners could have been in little doubt by the end of the charter period that the charterers were intending to continue the charter, as the addition of off-hire was the only lawful basis on which they could do so. The owners were not entitled to assume that the charterers were in breach of their contractual obligations when they did not give their redelivery notices. The totality of the charterers' conduct indicated that they considered the charterparty was continuing.

Comment

Owners who want an express notice to be given by the charterers before they exercise an option to extend the charter period should ensure the charterparty says so expressly.



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Buyer entitled to refund of advance payments under shipbuilding contract: seller's claim time-barred

(1) *Nanjing Tianshun Shipbuilding Co Ltd and*
(2) *Jiangsu Skyrun International Group Co Ltd v Orchard Tankers PTE Ltd* [2011] EWHC 164 (Comm)

In this shipbuilding contract dispute, the Commercial Court Judge, Mr Justice Steel, reinforced that *"it is vital from the buyer's viewpoint to ensure that the contract incorporates a mechanism by which his advances can be recovered simply and quickly should the builder default on the performance of his obligations"*.

The contractual background

Shipbuilding contract

The shipbuilding contract was in a typical form and provided, among other things, that the contract price was to be paid in instalments, such payments were to be deemed to be advances to the seller and were to be repayable with interest in the event the contract was cancelled. The seller was also obliged to provide a refund guarantee as security for repayment of these advances. Furthermore, the agreed delivery date could be extended in the event of force majeure and / or permissible delays as defined in the contract. However, in the event of delay in delivery beyond the permitted contractual limits, the buyer was entitled to terminate the contract in accordance with Article X of the contract.

Article X provided that if the buyer terminated the contract, the seller should, on the buyer's demand, refund the amounts paid on account of the vessel and that if no such refund was made, the buyer would be entitled to claim under the refund guarantee. Article X further provided that the seller could dispute the buyer's cancellation or rescission by commencing arbitration within 30 days of the cancellation or rescission in accordance with the arbitration clause. In those circumstances, the seller would not have to refund the buyer until an arbitration award (in favour of the buyer) had been published. Article X.3 provided that upon refund of the relevant amounts, the duties and liabilities of the parties to the shipbuilding contract would be completely discharged.

Refund guarantee

The contractual scheme was echoed in the refund guarantee which provided that the guarantor was entitled to withhold and defer payment to the buyer under the guarantee in the event that the seller challenged the buyer's entitlement to be reimbursed its advance payments and the dispute was submitted to arbitration. The guarantee wording further provided that in the event of arbitration proceedings between the parties to the shipbuilding contract being commenced before expiration of the guarantee, the validity of the guarantee would be automatically extended until 90 days after the date of issue of a final arbitration award or in case of appeal, 90 days after the issue of a final court order in the buyer's favour.

The dispute

The buyer paid the first four instalments under the contract, a refund guarantee having been issued by a Chinese bank in the contractually prescribed form. Subsequently, the buyer gave the seller notice that it was exercising its right to terminate or cancel the contract under Article X by reason of delay in delivery. The seller sought to dispute the buyer's right to do so but did not institute arbitration proceedings until after expiry of the 30 day period prescribed by Article X.

Nonetheless, the seller contended that its failure to institute arbitration proceedings within 30 days did not bar its right to dispute the cancellation but only to obtain its remedy by way of an arbitration award. The seller therefore refused to refund the advance payments made to the buyer. The guarantor bank also refused to repay the advance instalments. The buyer, on the other hand, contended that a failure to comply with the 30 day deadline meant that the seller was barred from the right to dispute the termination or cancellation of the shipbuilding contract.

The Commercial Court

Mr Justice Steel, hearing an appeal from the arbitration award and a challenge to the arbitrators' jurisdiction, found in favour of the buyer. The Judge dismissed the seller's argument that if it failed to comply with the requirement under Article X to initiate arbitration within 30 days, it still retained its right to have the dispute resolved by the court. The seller contended that if arbitration was not commenced within 30 days, then the guarantor had no defence to a claim under the guarantee but this

did not prevent either the guarantor bank or the seller from claiming against the buyer for recovery of money paid under the guarantee in English court proceedings.

However, the Judge had little hesitation in finding there would be no commercial purpose in granting the seller an option to either commence arbitration within 30 days or, "*whether by choice or indolence*", commence English court proceedings after 30 days but within the six year time limit for bringing contractual claims under English law. It was hard to understand why, when the parties troubled to stipulate that all claims should be referred to arbitration, they should go on to provide that a stale claim should be litigated rather than arbitrated. The fact that express words extinguishing the right of suit (for example "the claim shall be deemed to be waived and absolutely barred") were not used was not conclusive.

As regards the refund guarantee, the Judge emphasised that the life of the guarantee was dependent on the existence of an arbitration, otherwise it was rendered null and void at a prescribed period after the delivery date. Failure to institute arbitration within the 30 day period would lead to recovery of all instalments under the bank guarantee. Once the instalments had been refunded, all the parties' obligations were discharged. The concept that the 30 day window was merely a period after which the guarantor bank could not resist a refund of the instalments, leaving the seller free to embark on court proceedings to challenge its own obligation to refund was inconsistent with the fact that the bank's liability under the guarantee only arises when the instalments have become repayable by the seller and the seller has failed to repay.

Comment

This decision emphasises the importance of carefully considering dispute resolution clauses in shipbuilding contracts and refund guarantees, in particular any applicable time limits and the procedure to be followed for the valid commencement of arbitration. If it is not intended that the guarantee should pay out immediately on demand following termination of the shipbuilding contract, the wording of the refund guarantee should also be carefully drafted to ensure that it remains valid while any disputes under the shipbuilding contract are resolved.



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Litigation and Arbitration

Expert witness immunity

Just before going to press, the Supreme Court announced its judgment in a case affecting paid expert witnesses. The case arose from a traffic accident which entailed mental illness ramifications for the motorcyclist victim. After discussing the matter, as she was required to do, with the defendant car driver's expert, the expert clinical psychologist retained by the victim signed a joint expert report including adverse comments about his credibility. That threw doubt on his symptoms. It is alleged she later admitted that she should not have signed that. The victim then settled with the driver and sued the expert alleging she had negligently damaged his case, forcing him to settle too low.

In considering whether the action against her should be struck out, the original judge, Blake J, concluded that he was bound by the Court of Appeal decision in *Stanton v Callaghan* in 1998. In that case, the expert's immunity from suit was upheld in respect of both the contents of his expert report and the joint statement of the experts and that principle was also held to cover pre-trial work "so intimately connected with the conduct of the case in court that it can fairly be said to be a preliminary decision affecting the way that case is to be conducted when it comes to a hearing". Since the Court of Appeal must also

follow its own decisions, the judge, not sure that *Stanton* was still good law after other cases in this area, granted a leapfrog certificate, which speeds bringing such issues to the Supreme Court.

The Supreme Court have decided, five to two, that there is no such immunity, either before or during trial. So the strike-out is reversed. A stop press headline claiming "**400 year rule on expert immunity abolished by Supreme Court**" overstates the matter wildly; at most the immunity for experts is only 105 years old - a time before expert evidence became a mainstream professional activity. Preserving that immunity was judged, by the majority, not to be sustainable compared with the most basic touchstone of justice - that every wrong should have a remedy. An expert does owe a duty, to both his client and the Court, to be careful and breach of that should be actionable. In short, the professional expert witness industry which has grown up in (relatively) recent years is no longer wrapped in cotton wool. However, the immunity for fact witnesses, which is over 400 years old, remains untouched - that can only be overridden in cases of perjury or conspiracy to pervert the course of justice.



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The *Fiona Trust* litigation and the Bribery Act 2010

Anyone considering a civil claim for corruption or fraud will need to consider the impact of the Bribery Act 2010 ('the Act') which will come into force on 1 July 2011 and of the *Fiona Trust* decision. In fact, the judgment in *Fiona Trust* provides a timely illustration of the distinction between the civil law concept of bribery and the criminal offences contained in the Act. Parties will need to keep a weather eye on its provisions although, as the discussion below shows, its impact on civil claims is likely to be minimal. Conversely, the civil law is unlikely to provide any significant pointers as to how the Bribery Act might be applied.

The key mischief, which both the civil and criminal law address, is the conflict between the interests of a principal and the interests of his agent where a third party makes an undisclosed payment to the agent personally. Under the Act, the intention of the payer as to the expected behaviour of the agent will be critical; for there to be an offence, the payer must intend to induce or reward *improper performance* of the agent's functions.

However, as the cases cited in *Fiona Trust* establish, in civil law an entirely "innocent" payment may have the same consequences as one made dishonestly. It is enough that a payment to an agent creates a potential conflict of interest between the agent's fiduciary duties to his principal, and his own interests. Because the principal is entitled to the undivided loyalty of his agent, the fact of the payment is enough to entitle the principal to set aside transactions the agent arranges between the principal and the payer, and the payment to be characterised as a "bribe" even if the payer and agent were entirely innocent of any dishonest intent, and both saw the payment as entirely innocuous; there is a presumption that the payment has influenced the payee's conduct. (See e.g. *Ross River v. Cambridge City Football Club Limited*).

In the *Fiona Trust* litigation (as explained in our article on that decision in the January 2011 shipping e-brief and also on our website at www.incelaw.com), the Claimants alleged that companies in the Sovcomflot group had entered into a series of disadvantageous and uncommercial transactions as a result of a dishonest conspiracy between Mr Dimitri Skarga, Sovcomflot's Director-General, and Mr Yuri Nikitin, the alter ego of the Standard Maritime group of companies. It was alleged that Mr Nikitin paid bribes to Mr Skarga and that

those bribes evidenced dishonesty, and hence the existence of a conspiracy. The benefits (which the Judge found as a fact to have been proved) took the form of payments to Mr Skarga by Mr Nikitin for holidays, and the provision to Mr Skarga of a credit card serviced by one of Mr Nikitin's companies. The arrangements were made in Russia, and the benefits delivered in various jurisdictions, raising the question of the applicable law.

Under the Act, considerations as to local law are of very limited relevance. The Act gives the UK Courts jurisdiction over payments made anywhere in the world if those payments would constitute bribes under the Act and the person concerned had a 'close connection' (as defined) with the UK.

However, in civil cases the applicable law will remain a primary consideration. In *Fiona Trust*, the Judge decided the alleged bribes were governed by Russian law because they were arranged in Russia. This made a significant difference because, as the Judge found, Russian law does not contain any presumption that the payment of a bribe would influence conduct. Rather, under Russian law, a claimant would have to show a causal connection between the payment and the transaction complained of. Such differences between English law and that of other jurisdictions in cases will continue to have a significant impact on civil cases involving cross-border corruption.

Despite his finding as to the applicable law, the Judge went on to address the question whether under English law the benefits provided by Mr Nikitin constituted bribes and, in particular, the arguments raised by the Defendants as to, first, the recipient's expectations and, secondly, the recipient's capacity.

As to the first point, the Defendants argued that Mr Skarga was "*accustomed to receiving generous hospitality in the course of [his] work and so the less likely to be impressed by such hospitality*", and that against that background, the holidays provided were of insufficient value to create a real risk of a conflict of interest. While the Judge accepted that Mr Skarga's expectations were a relevant consideration, he went on to hold that the provision of holidays was capable of giving rise to a conflict of interest and therefore, in English law, to constitute a bribe.

Secondly, the Defendants argued that the benefits conferred were simply a continuation of benefits provided by Mr Nikitin on a friendly basis before Mr Skarga took up his post with Sovcomflot. In other words, they were not made to Mr Skarga in his capacity as employee of Sovcomflot and therefore

not made to an agent “as such”. The Judge accepted that under English law, a payment has to be made to an agent “as such” and further accepted that the provision of neither the holidays nor the credit card were because of Mr Skarga’s appointment or position. Even so, the Judge held, these benefits still created a conflict of interest and infringed the “inflexible” equitable rule against such payments in the absence of full disclosure – i.e. disclosure not only of the benefit itself but to the source. It was enough that Mr Skarga was a fiduciary and in a position to profit personally.

Neither of these points are likely to feature in prosecutions under the Act. In considering hospitality payments, what will be relevant, if anything, will not be the recipient’s subjective experience or expectations but first, the payer’s intentions (as outlined above), and, perhaps (this remaining untested) objective industry norms as to what entertainment or hospitality is reasonable and proportionate. Similarly nice considerations as to the capacity in which the payee receives a benefit are likely at most to be a sideshow to the focus on the payer’s intention.

While the Judge’s approach in *Fiona Trust* opens up the possibility of a wider ranging enquiry in civil cases, the decision at the same time suggests that the impact of such points will be limited, as the Courts will be quick to identify the potential for a conflict of interest, which will trump questions of the recipient’s expectations or capacity.

Having reached the conclusion that, in English law, the holidays and credit card constituted bribes, the Judge found that there was no necessary causal link between those benefits and the transactions complained of, as required by Russian law. In contrast, as explained above, under English law, *the fact* of the bribes would be enough to entitle a claimant to set aside the transactions arranged by the agent. Here, at least, the Act does parallel the civil law in that the criminal offence lies in providing (or accepting) an advantage intending to procure improper performance, and it is irrelevant whether the briber achieves his objective.



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The Cross-Border Insolvency Regulations and their potential impact on charterparty disputes

Cosco Bulk Carrier Co Ltd. v Armada Shipping SA & Anor [2011] EWHC 216 (Ch)

It is not unknown in recent years for some of the largest and well known charterers to fail with little, if any, warning. When this happens, owners who are owed money by the charterers, for example for unpaid hire, may find themselves with limited options for recovering their losses. Where the charterers are insolvent, the owners may lodge a claim in the relevant insolvency proceedings although, in many cases, the likelihood of recovering anything other than a small fraction of the debt is remote. Alternatively, where the vessel has been sub-chartered, the owners may seek to exercise a lien on sub-freight or sub-hire. Although this is a useful remedy in the event of a failure to pay hire, legally and practically speaking it is a difficult area, particularly where there is an insolvent charterer in the middle. A recent English High Court decision deals with a lien exercised over sub-hire where the Charterer in the middle was in insolvency proceedings in Switzerland.

The Cross-Border Insolvency Regulations

By way of background, this case considered the interpretation and the application of the Cross-Border Insolvency Regulations 2006 (“Regulations”). The Regulations are the British enactment of the UNCITRAL Model Law on cross-border insolvency (“Model Law”) and apply to insolvency proceedings commenced in all countries, not just those that have implemented the Model Law. The aim of the Model Law was not to impose a global insolvency law, but rather to regulate the interplay and administration of cross-border insolvencies of non-EU companies in light of differing national insolvency laws. One key element of the Model Law is that there can only be one set of “main proceedings” in relation

to the insolvent party. The English High Court in the present case had to consider whether the proceedings relating to funds that were the subject of a lien over sub-hire were better determined in arbitration in London under the charterparty arbitration clause or in the insolvency proceedings in Switzerland.

Background to the dispute

Disponent owners Cosco Bulk Carrier Co. Ltd. (“Cosco”) had time chartered the *Spar Sirius* to Armada Shipping on an amended NYPE 93 form. Armada had in turn sub-chartered the vessel to STX Pan Ocean Co. Ltd (“STX”), also on an amended NYPE 93 form. Both of these time charters contained London arbitration and English governing law clauses. Both charters provided that hire was payable every fifteen days in advance.

Clause 23 of the Cosco/Armada charter provided for a lien on sub-freights and/or sub-hire in the following terms:

“The Owners shall have a lien upon all cargoes and all sub-freights and/or sub-hire for any amounts due under this Charter Party including general average contributions, and the Charterers shall have a lien on the Vessel for all money paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once...”

Clause 96 of the sub-charter contained a non-assignment provision in the following terms:

“Neither Owners or Charterers may assign the benefit of this contract or the benefit of any rights arising out of this contract in whole or in part without the prior consent in writing of the other party. The party who is named as Owner and the party who is named as Charterer in this contract shall always remain fully responsible for the due fulfilment of all the terms of this contract.”

Armada made a voluntary filing for liquidation with the Swiss court. This resulted in a Swiss bankruptcy order, which had broadly the same effect as an English winding-up order, and the appointment of a local Swiss Bankruptcy Office in a role equivalent to that of an English liquidator.

In the meantime, Cosco sought to exercise a lien pursuant to clause 23 of the time charter over the sub-hire payable by STX, in order to recover amounts said to be due to them from Armada including unpaid hire. Eventually they agreed with

the sub-charterers, STX, that funds should be placed in an escrow account by the sub-charterers, pending final resolution of the dispute over the sub-hire.

Two London arbitrations were then commenced: (i) an arbitration between Cosco and STX in respect of the sub-hire and (ii) an arbitration between STX and Armada, in which STX sought a declaration that they were not liable to Armada. The latter arbitration was subsequently stayed after the Swiss liquidator obtained a Recognition order pursuant to Article 17 of the Model Law from the English Court, with the effect that the bankruptcy order rendered by the Swiss Court was recognized as a foreign main proceeding.

In respect of the arbitration between Cosco and STX, there was a difference of opinion between the parties as to whether this had also been stayed as a result of the Recognition order. Cosco argued that it had not been automatically stayed.

The English High Court’s decision

The Court identified one of the principal issues as being the legal nature and effect of an owner’s lien on sub-hire. This question was governed by English law. The Judge referred to conflicting case-law as to whether the owner’s lien operates as an equitable charge on what is due from the shipper to the charterer, or whether it is a personal contractual right of interception similar to an unpaid seller’s right of stoppage in transit and not a charge or proprietary right at all. The significance of the distinction for present purposes was that if the owner’s lien operated by way of a security assignment, as a charge rather than a purely personal right, then arguably it was invalidated by the prohibition on assignment in clause 96 of the sub-charter.

The Judge conceded that although largely a matter of interpretation and application of the sub-charter, the issue could raise fact-intensive questions such as whether STX knew of the lien on sub-hire in the Cosco / Armada Charter. He concluded that it would be inappropriate for him to rule on this issue himself and that it should be decided at the same time as the other issues in the underlying dispute.

The Judge considered the relevant authorities and observed that the general position under English law is that proceedings against a company in liquidation are not generally permitted, as the aim is to achieve an orderly resolution of all matters for the benefit of the creditors as a whole. However the Judge said, the key question was “*which route for the resolution*

of the underlying dispute is likely to best serve the interests of justice, being that which is right and fair in the circumstances.”

Applying this approach, the Judge considered the liquidator’s arguments that resolving the proceedings in a Swiss bankruptcy court might be cheaper and possibly quicker but held nonetheless that the balance of fairness, convenience and justice lay strongly in favour of London arbitration. This was particularly in light of the fact that the overwhelming majority of the issues involved were questions of English shipping law, in relation to which London arbitrators are experienced and well qualified. A Swiss court would need to decide those matters on the basis of expert evidence on English law, as its own experience was limited to Swiss insolvency law. However, the Court did acknowledge that a fair and just resolution of the underlying dispute required Armada to be joined to the arbitration proceedings between Cosco and STX. This was because the underlying dispute involved two competing claims by Cosco and Armada in relation to the same asset, namely the sub-hire. The Judge was aware of a risk that the arbitration process arising from the arbitration clauses in the two separate charters might not be capable of adjustment to have all three parties (Cosco, Armada and STX) involved in one arbitration to determine the dispute. He therefore gave the Swiss liquidator permission to return to Court in the event they were unable to be joined into the arbitration through no fault of their own. The Judge also ordered that any eventual arbitration award should be stayed and the matter be restored to Court if the liquidator considered that any aspect of its interests or the interests of Armada’s creditors had not been addressed by the arbitrators.

Comment

The Judge in this case took a common-sense approach in circumstances where the Swiss bankruptcy court would have been less experienced in dealing with English shipping law issues than the London maritime arbitrators. He was also influenced by the fact that the escrow agreement between Cosco and STX had a London arbitration clause. So he refused to stay the London arbitration in favour of the Swiss insolvency proceedings, and ordered that the underlying issues in relation to the validity of the lien over sub-hire, should be decided in London arbitration.



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Commercial

Court of Appeal upholds no set-off clause and time bar provision in BIFA standard trading conditions

Röhlig (UK) Ltd v Rock Unique Ltd [2011] EWCA Civ 18

Time-bar provisions are commonly found in contracts for the carriage of goods by sea and road. The importance of complying with the one-year time-limit under Article III Rule 6 of the Hague-Visby Rules (“HVR”) is well-known to the shipping industry. Many potentially good cargo claims subject to the HVR have been known to fail because the claims were not brought within 12 months of discharge. The hard line taken by the English courts (and arbitrators) in respect of demurrage time-bar provisions contained in voyage charter parties is also well-established. In the present case, the Court of Appeal upheld the reasonableness of the nine-month time limit contained in the British International Freight Association (“BIFA”) standard trading conditions 2005 and found that it operated to bar the customer’s claims against the freight forwarder, even in circumstances where the customer may not have reasonably been able to discover its cause of action before the time-bar expired. The Court of Appeal also upheld the standard “no set-off clause”, which protected the company’s cash-flow, described as “the life-blood of the business”.

Background to dispute

The dispute in this case related to unpaid invoices issued by a freight forwarder, Röhlig, to a UK importer, Rock. Rock alleged that it had been overcharged, and denied that it was liable to pay the whole of the amounts shown in the disputed invoices. Röhlig sought summary judgment in respect of the unpaid amounts and Rock counterclaimed to recover amounts by which it said it had been overcharged in the past under other invoices.

The first instance decision

The first instance Judge refused to decide the matter summarily. He concluded, however, that the contract between the parties incorporated the BIFA standard trading conditions, the material provisions of which were as follows:

“21(A) The Customer shall pay to the Company in cash, or as otherwise agreed, all sums when due, immediately and without reduction or deferment on account of any claim, counterclaim or set-off.....

27(B) . . . the Company shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for the Customer . . . unless suit be brought and written notice thereof given to the Company within nine months from the date of the event or occurrence alleged to give rise to a cause of action against the Company.”

The principal issues were (i) whether clause 21(A) prevented Rock from setting off against its liability under the disputed invoices any claims it might have in respect of earlier charges, (ii) whether those latter claims were in any event time-barred by clause 27(B) and (iii) whether either or both of these clauses were unreasonable and therefore unenforceable under the Unfair Contract Terms Act 1977 (“UCTA 1977”). Among other things, UCTA 1977 applies where one party contracts on the other party’s (in this case Röhlig’s) standard terms of business.

The Judge held that clause 21(A) prevented Rock from setting up cross-claims in answer to Röhlig’s claim and that clause 27(B) was wide enough to discharge any liability in restitution in respect of any previous overcharging. The Judge also held that both clauses satisfied the requirement of reasonableness under UCTA 1977. Rock appealed.

Court of Appeal decision

Clause 21(A)

The Court of Appeal upheld the set-off clause. Lord Justice Moore-Bick, giving the leading judgment, stated that its purpose was to ensure that any sums due be paid without deduction so that a business’s cash-flow was not interrupted. The clause did not prevent the customer from pursuing its claims against the supplier by other means, but it did prevent him from withholding payment until its claims had been satisfied.

Whilst the clause did not prevent the customer from withholding payment on the grounds that the sum claimed has not fallen due at all, the amounts disputed under the present invoices were only a small proportion of the total. In the Judge’s view, the clause could not be interpreted to mean that if any part of the sum claimed in an invoice was disputed or could be shown not to be payable, this meant that nothing was due and the provision against set-off did not apply.

The Appeal Judge also found that the provision was reasonable. In particular, (i) Rock may have been a small organisation but it was commercially experienced, (ii) it could have contracted with any of a large number of competing suppliers but chose Röhlrig, (iii) the BIFA standard terms had been negotiated between representatives and suppliers and were likely to represent a fair balance of competing interests and (iv) Rock had done business with Röhlrig over a considerable period of time and could be expected to be aware of Röhlrig's use of the BIFA conditions.

Clause 27(B)

The Court of Appeal also upheld the time-bar provision. In the view of Lord Justice Moore-Bick, clause 27(B) had a similar effect to Article III, rule 6 of the Hague-Visby Rules, which has been held to discharge the carrier from substantive liability, not merely to operate as a procedural time-bar. In the Judge's view, clause 27(B) was deliberately framed in very broad terms and, on the natural and ordinary meaning of the words used, it was intended to discharge the company from all liability, once the nine months had expired.

The Appeal Judge also concurred with the decision in *Granville Oil & Chemicals Ltd v Davis Turner & Co Ltd* [2003] 2 Lloyd's Rep. 256 that this time bar clause applied equally to causes of action which could not reasonably have been discovered before the time-bar expired: it was a complete discharge from all liabilities, whether known or unknown. Although the clause probably did not extend to liability arising from the company's own fraud, it could, in the Judge's view, encompass liability arising out of accounting errors or misunderstanding of the meaning or effect of the contract which led to overcharging, as happened in the present case.

Relying again on *Granville Oil*, the Judge added that the time-bar provision was reasonable, having regard to the nature of the business that freight forwarders undertake and the prevalence of time-bar clauses in contracts of carriage of all kinds. He considered that the circumstances in which the present contract was entered into did not differ in any significant respect from those in *Granville Oil* and he did not believe that the court should draw fine distinctions between cases that were in broad terms very similar.

Comment

This judgment reflects Lord Justice Moore-Bick's view that *"it is important for those engaged in any commercial activity, whether as providers of goods or services or as customers, to know whether a particular clause will generally be regarded as reasonable in the context of contracts of a routine kind made between commercial parties."*



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Court of Appeal clarifies and restates test for repudiatory breach of contract

Eminence Property Developments Ltd v Kevin Christopher Heaney [2010] EWCA Civ 1168

Is a party, who served a notice to complete making the time for completion of the essence of the sale contract, and then, mistakenly, treated the contract as at an end prior to the expiry of that notice itself in repudiatory breach thereby entitling the other party to terminate the contract? The English Court of Appeal in *Eminence Property Developments Ltd v Kevin Christopher Heaney* has decided that it is not. By holding that an innocent mistake made by a party in its grounds for declaring the sale contracts to be at an end was not a repudiatory breach of contract because it did not demonstrate a clear intention by that party to abandon the contracts and/or refuse altogether to perform them, the Court of Appeal has brought some comfort to those of us who find the whole area of repudiatory breach of contract a potential minefield.

Background to the dispute

The dispute in *Eminence* arose out of a set of contracts for the sale and purchase of property made between the owner of an apartment block in Bristol (*Eminence*) and a property developer (Mr. Heaney). While the contractual completion date was not in dispute, the contract provided that time was not of the essence until a notice to complete had been served by one of the parties. Following the conclusion of the contracts the UK property market suffered a severe downturn, as a result of which, by December 2008, Mr. Heaney was having difficulty raising the capital to complete the purchase. Unsurprisingly, he entered negotiations with *Eminence* to try and obtain a lower purchase price. No agreement was ever reached and the day after the contractual completion date had passed, *Eminence's* solicitors served notices to complete on Mr. Heaney's solicitors. However, in drafting the notices, they made a "human error" and incorrectly calculated the final date for completion, stating that it was 15 December when, in fact, it should have been 19 December 2008. Mr. Heaney took no steps to complete.

On 17 December, *Eminence's* solicitors served notices of rescission in respect of each contract on Mr. Heaney and sought to exercise its termination rights under the contract, including claiming damages and retaining the deposits. On 18 December, Mr. Heaney's solicitors wrote back,

alleging that *Eminence* (as vendor)'s act of rescinding the contracts constituted a repudiatory breach of contract which was consequently accepted by Mr. Heaney, who then elected to rescind the contracts to consider himself discharged from all obligations under the contracts.

At first instance, the Judge found that the notices of rescission sent on 17 December 2008 constituted a repudiatory breach of contract and that the covering letter of 17 December 2008 accompanying the notices of rescission showed a clear refusal by *Eminence* to perform its future obligations that went to the very root of the contract. *Eminence* appealed.

The Court of Appeal

The Court of Appeal allowed *Eminence's* appeal, holding that the notices of rescission did not constitute a repudiatory breach of the contract. In handing down judgment, Lord Justice Etherton helpfully set out the basic underlying principles for repudiatory breach from the existing case law. These are:

1. The legal test for repudiatory breach is whether, looking at all the circumstances objectively from the perspective of a reasonable person standing in the position of the innocent party, the contract breaker has shown an intention to abandon and altogether refuse to perform the contract or to deprive the innocent party of a substantial part of the benefit to which he/she is entitled under the contract.
2. The question of whether there has been a repudiatory breach is highly fact sensitive and comparison with other cases is of limited value. Etherton LJ therefore distinguished the case from the decision of the House of Lords in *The Nanfri* [1979] AC 757. *The Nanfri* was a shipping case in which charterers made deductions from hire that owners did not accept were permissible. The owners instructed the master not to sign any freight pre-paid bills of lading and withdrew the authority of charterers and their agents to do so. The House of Lords held that charterers had been entitled to make the relevant deductions from hire and that by their conduct the owners had repudiated the charters, which repudiation the charterers had accepted. Etherton LJ observed that the innocent mistake of the vendor in *Eminence* could not be compared with owners' "cynical and manipulative conduct" in *The Nanfri*. Owners' conduct in the *Nanfri* was such as to lead the charterers reasonably to believe that

the owners would issue similar orders again in the future whenever they wished to force the charterers to comply with their demands in similar circumstances. On the other hand, in the present case, Eminence was willing and able to complete. Furthermore, Mr. Heaney's solicitors knew, and a reasonable person would have realised, that Eminence's solicitors had made something that was analogous to a clerical error. Objectively, the mistake was "*screamingly obvious*" and had it been pointed out to them, Eminence's solicitors would have conceded the mistake. Instead, Mr. Heaney's solicitors chose to do nothing but wait for the opportunity to "*fortuitously extricate*" their client from a bad bargain.

3. All the circumstances must be taken into account insofar as they bear on any objective assessment of the intention of the contract breaker. Thus (as Lord Wilberforce had observed in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277), subjective intention is not necessarily decisive. It may supply a motive but it does not remove the requirement to test whether, on an objective basis, the conduct showed an intention to abandon the contract.
4. Therefore, the application of the legal test to the facts of a particular case may not always be easy to apply (as was demonstrated by the divergent interpretations advanced by their Lordships in *Woodar* itself).

On the particular facts of the case before him, Etherton LJ added that the first instance Judge had erred in focusing solely on the rescission notices issued by Eminence. He held that all the circumstances must be taken into account insofar as they bear on an objective assessment of the contract breaker. While the contract breaker's motive might be irrelevant if relied upon solely to show his intention, it may be relevant if it reflects something that the innocent party ought reasonably to have been aware of and throws light on the way the alleged repudiatory breach ought to be viewed. In this case, the economic reality was that the downturn in the property market had made it highly advantageous for the vendor and commensurately onerous to the buyer to perform their respective contractual obligations. Therefore, it was impossible on the facts clearly to find any intention on the part of the Vendor to abandon and refuse to perform the contracts.

Furthermore, Etherton LJ pointed out that the notices of rescission were stated to be served in accordance with the terms of the contracts and purported to exercise the vendor's remedies under those contracts. Far from seeking to repudiate the contracts, therefore, Eminence was intending to implement the contractual procedure for terminating the contracts and exercising the remedies specified in the contracts. The fact that their service was inconsistent with those contracts because it was premature did not mean that Eminence was evincing an intention to abandon and refuse to perform the contracts.

Comment

Advising a client or colleague on whether or not a counterpart's actions can be treated as repudiatory and sufficient to entitle the contract to be terminated must rank as one of the most stressful and nerve-racking aspects of commercial practice. A wrong decision could see yourself, your company or your client on the receiving end of a claim for damages for repudiatory breach of contract from the purported contract breaker. This was the situation that Eminence and its solicitors found themselves in.

Any case that sets out the circumstances that may give rise to repudiatory breach is therefore to be welcomed. Elation should however be tempered because the down side of finding that such cases must be considered on their individual facts and with regard to their particular circumstances is that the test cannot be reduced to a simple "tick box" exercise.

Nevertheless, Lord Justice Etherton's observations still come as a helpful restatement of the factors that need to be taken into account when analysing whether or not a particular action by a contractual counterpart amounts to a repudiatory breach. It is a particularly helpful guide to interpretation given the controversial majority decision of the House of Lords in *Woodar*. Contracting parties everywhere can draw some comfort that innocent mistakes will not automatically give rise to a finding of repudiatory breach. That said, there is considerable ground between the "*screamingly obvious*" mistake in *Eminence* and "*cynical manipulation*" in *Nanfri* – and thus plenty of scope for future legal argument. Indeed, such troubles were flagged up in *Woodar* itself. In his dissenting judgment, Lord Salmon observed that where a mistake is alleged to be honest but not acknowledged to be so (especially where the market price had moved, making it

onerous for the “mistaken” party to perform), it could be very difficult to prove that such a “mistake” was dishonest. Eminence’s mistake was obvious. Future mistakes may not be. Lord Salmon’s misgivings survive for another day and another “mistaken” counterparty.

Therefore, any party seeking to terminate a contract should continue to exercise extreme caution in the way it does so and should seek legal advice before taking any steps that may in due course prove prejudicial.



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No breach of contract in relation to servicing of catamaran ferry engines

Wightlink Limited v. Mitchell Diesel Limited (T/A Mitchell Power Systems) [2011] EWHC 241 (Comm)

In *Alexander & Others v. Standard Telephones and Cables Ltd* (No. 2) [1991] IRLR 286, it was held that the fact that a document is not itself contractual does not prevent it being incorporated into a contract if that is the intention of the parties. However, it is necessary to consider whether any particular part of the document in question is apt to be a term of a contract. In this dispute, the Commercial Court had to consider whether the terms of the engine manufacturers’ Manual had been incorporated into the contract between the owners of two catamarans and the company they employed to overhaul the catamaran engines. Mr Justice Hamblen found that there had been no express incorporation of the terms of the manufacturers’ Manual. He also held that the Manual was not apt to form part of the service contract because it was not drafted as and would not easily function as a contractual specification. However, the service company remained under a general contractual duty to exercise reasonable skill and care in carrying out the overhaul of the engines.

Background to the claim

Wightlink Limited (“Wightlink”) operate ferry services between the Isle of Wight and the UK mainland. They purchased two (used) high speed catamarans which were both employed as passenger ferries. Three years after the catamarans were purchased, Wightlink instructed Mitchell Power Systems (“MPS”) to carry out a scheduled overhaul of the engines.

Subsequent to the overhaul by MPS, the vessels were returned to service. However, three of the four engines that MPS had overhauled subsequently suffered catastrophic failures. The engines were returned to the manufacturers MTU for inspection and repair. MTU carried out an unscheduled overhaul of the engines in accordance with their W6 Manual. A W6 overhaul is a major overhaul requiring complete engine disassembly.

Wightlink sued MPS for the cost of removal and repair of the four engines, along with storage charges. The Commercial Court had to consider among other things whether the terms of the service contract between Wightlink and MPS incorporated the provisions of the MTU Manual, so that MPS was contractually obliged to carry out a W6 overhaul of the engines.

The Commercial Court decision

Wightlink argued that (i) the terms of the MTU manual were incorporated into the contract, (ii) strict compliance with the manual by MPS was contractually required and (iii) MPS had not adhered to specific provisions in the manual relating to rebuilding the engines.

The Judge disagreed. He concluded that it was understood between the parties that the service would be carried out by reference to the MTU manual for W6 services but that there was no contractual agreement to perform a W6 service. There were quotations by MPS and an acceptance letter from Wightlink which evidenced the terms of the contract between the parties. The contract was for the “overhaul and rebuild” of the engines which was to be a “full overhaul, inspection, rebuild and full Dynotest programme” but there was no statement that this was specifically to be a W6 service.

The Judge also stated that the Manual was drafted as a guide, not a contractual specification. The Manual itself stated that where work listed in the Manual was not relevant to the engine equipment in question, that work could be disregarded. Furthermore, MPS were providing a “highly bespoke and intricate service, with adjustments and refinements as were specifically required.”

However, the Judge added that MPS nonetheless owed duties as a matter of contract to exercise reasonable skill and care in the work and service it carried out. This meant that while there was no contractual requirement on MPS that the Manual be strictly complied with, MPS should have used the Manual as a reference point because the Manual was the obvious and only specifically relevant reference document for such an overhaul.

On the basis of the factual and expert evidence before him, the Judge found that MPS had not breached their duty of reasonable skill and care. He further held that even if he was wrong about this and there had been a breach by MPS, that breach had not caused the engine failures and defects.

Although Wightlink’s claim against MPS for damages failed, the Judge did make some brief comments on quantum. Firstly, he stated that the repairs undertaken had been both necessary and reasonable. The evidence before the court in this instance was that if an engine had to be disassembled, it needed to be re-assembled in accordance with W6 requirements, which was

exactly what was done. Secondly, he highlighted the well-established fact that no deduction is to be made from damages if there is necessary betterment due to repair (*Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397).

Comment

This decision highlights the need for parties to think carefully about what terms are incorporated into their contract. In the absence of an express incorporating provision, there remains the potential for the Court to find that the character of the document or the relevant part of it is not appropriate to form part of the contractual document.



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Economic Sanctions

Sanctions against Libya - an update

This article is intended as an update to our previous article on sanctions against Libya which can be found on our website at www.incelaw.com. In addition to this update on Libya, we have also produced sanctions updates on Iran and the Ivory Coast which can also be found on our website.

We comment below on how the situation in Libya has developed in recent weeks and provide details of the latest round of sanctions that has been introduced by the international community. Since our last update in March 2011, the crisis has escalated significantly in the country with military intervention from various countries and an increase in internal fighting between forces loyal to Colonel Gaddafi and rebel fighters.

UN Sanctions

As a result of the increased violence across Libya, the UN Security Council adopted Resolution 1973 (2011) on 17 March 2011, which allowed the imposition of a no-fly zone over Libyan territory and which authorised States to take 'all necessary measures' to protect civilians and civilian populated areas while excluding a foreign occupation force. Shortly after this was passed, various countries in the international community began to conduct military action over Libya to enforce the terms of the Security Council Resolution. This has led to aerial bombardment from naval vessels and aircraft as well as the continued presence of aircraft patrolling Libyan airspace.

At the current time, forces loyal to Colonel Gaddafi continue to fight the rebels who are mainly based in the Eastern areas of Libya. Although various countries are reported to be trying to broker a peace deal between the rebels and Colonel Gaddafi, military action continues between the opposing forces within the country and with ongoing intervention by the NATO-led international coalition that is enforcing the UN Resolution.

EU Sanctions

On 3 March 2011, EU Regulation 204/2011 (the 'EU Regulation') entered into force. This prohibits the sale of military goods and other goods that can be used for internal repression in Libya. It also freezes funds belonging to 'sanctioned' individuals and entities.

Many Libyan banks and oil companies are listed as sanctioned entities. One of the highest profile sanction targets has been the Libyan Investment Authority, the sovereign wealth fund which is linked to Colonel Gaddafi. This has assets of, reportedly, around \$60 billion. Countries around the world have frozen a significant amount of these funds. The list of sanctioned entities is continually updated as the situation in Libya changes.

Article 5(2) of the Regulation also prohibits the provision of funds or economic resources directly or indirectly to those sanctioned persons. The terms of this EU Regulation are very similar to other sanctions legislation that has been adopted in relation to Iran and the Ivory Coast and Article 11(2) provides that no liability will arise if the person did not know and had 'no reasonable cause to suspect' that their actions would infringe the prohibition at Article 5(2).

Concerns were raised about the scope of the EU Regulation, which appeared to prevent non-designated entities that had shareholders who were designated entities from carrying on their business. As a result, on 26 March 2011, EU Regulation 296/2011 entered into force which provides further amendments to the Regulation and of these, the most notable is Article 6a. This is a concession which will allow a non-designated entity that has designated stakeholders to continue trading legitimately, provided that this business does not involve making funds or economic resources available to a designated person, entity or body and provided that they can demonstrate that no funds or economic resources will be provided to a designated person or entity.

UK Sanctions

After the Regulation was passed, on 3 March 2011, the UK introduced the Libya (Asset-Freezing) Regulations 2011 which freezes funds and economic resources belonging to designated persons. This broadly follows the EU legislation but imposes penalties in UK law for breaching the sanctions which may include a fine or, in some cases, imprisonment.

Continued Impact of the Libyan sanctions

Anyone who is conducting business with a Libyan entity or with those connected to the Libyan market must ensure that they abide by the relevant international sanctions. With the increasing use of front companies as a way to avoid sanctions regimes, it is important that due diligence is carried out to ensure that the corporate structure

of entities is considered carefully before business is concluded. If business is being conducted with new counterparties, it is even more important that compliance checks are carried out. The use of new companies in order to avoid sanctions is becoming more prevalent as those who are sanctioned set up these companies to continue trading with an international community that would otherwise refuse to do business with them.

With Libya's oil and gas reserves being subject to a significant decrease in production, the internal unrest coupled with other uncertainty in the region has led to increases in oil prices. Any trade imports or exports with Libya must be carefully considered to ensure that neither the Gaddafi regime nor any sanctioned individual is involved in the transaction. It has been reported in the media that Qatar has recognised the rebel council and is going to market oil under the control of the rebel forces to the international community. France and Italy are also reported to have recognised the rebel council and it is therefore likely that vessels will start to trade with some of the Eastern rebel-held ports. Therefore, if more countries recognise the rebels and the marketing of oil is successful, provided that the sanctions allow it, shipments of oil may start to resume from Libya.

While certain trade with rebel forces and entities in Libya may be permitted, care must be taken when conducting any types of transactions involving Libya to check the counterparties and end user of any goods. Even those entities controlled by rebel forces may still be listed on the various sanctions lists.

With severe penalties for breaching sanctions (including imprisonment), it is important that any business with Libya is considered against the various sanctions regimes. Records should be kept of any checks that are undertaken and we recommend seeking legal advice when there is any concern that a transaction may give rise to a breach of sanctions legislation.

Further information

This briefing is only intended to provide an overview of the latest sanctions on Libya. It is not intended to be a substitute for legal advice. The sanctions legislation is being continually updated as the situation changes and we will continue to produce updates, which will be added to the Our Knowledge section of our website www.incelaw.com. Where specific advice is needed on any aspect of the Libyan sanctions and their potential effect on your business, please contact Michelle Linderman or your usual contact at Ince & Co.



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Property

London real estate market attractive to overseas investors

Overseas clients, especially from China, the wider Asia Pacific region and Russia, are increasingly taking the opportunity to invest in high quality property in London and locations within easy reach of the capital.

In an uncertain world, prime property in London and south east England is perceived as a relatively safe asset class. Points in its favour include:

- Certainty as to ownership: title is effectively state guaranteed and disputes as to ownership are rare.
- Ease of entry to the market: there are no restrictions on foreign corporations or individuals owning real estate, unlike certain other jurisdictions.
- Favourable tax treatment for overseas investors.
- Flexibility: property can be acquired and held either as a stand alone asset or as part of the business assets of a company or other corporate vehicle.
- The “full repairing and insuring” lease model for commercial property. Broadly, English commercial leases are structured so that the tenants pay maintenance and running costs, leaving the rent as pure income in the hands of the landlord.

The Ince & Co real estate team in London has recently advised clients from China, Russia, Turkey, Norway, Greece, Italy, France, the Middle East and the United States on a broad spectrum of property transactions, ranging from residential apartments to office buildings of 9,000 square metres, logistics buildings of 90,000 square metres and hotels. Our clients range from individuals wishing to acquire property for their own use to investors and end users in the pension fund, logistics, energy, aviation, shipping, insurance, commodities, hotels and pharmaceutical sectors.

Ince & Co real estate partner Trevor Garrood comments: *“The market for good London property appears to be robust, and we do not currently see anything to suggest that this will not continue. Today’s buyers could be benefiting from improvements in the capital as London looks towards the Olympics in 2012 and maintains its position as a global financial and cultural hub.”*



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Reminder - Stamp Duty Land Tax (“SDLT”) Increase

From 6 April 2011, the rate of SDLT payable on residential property with a purchase price of more than £1 million increases from 4 percent to 5 percent. Legislation has not been published, but we expect that this increase will follow the same general rules as for lower thresholds. That is, if the purchase price for the property exceeds £1 million, the whole of the price is liable to SDLT at 5 percent, and not just the excess over £1 million.



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Other News

Ince & Co Singapore launches Ince Law Alliance with newly-formed local law firm Incisive Law LLC

We are pleased to announce the establishment of the Ince Law Alliance with newly-formed Singapore law practice, Incisive Law LLC. Ince & Co Singapore is the first of the English firms specialising in maritime law to do this.

Through the Ince Law Alliance, Ince & Co Singapore now offers an experienced team of dual-qualified lawyers in a true 'one-stop' shop for both Singapore and English law advice. The Incisive Law team, who are sharing office premises with their offshore alliance partner Ince & Co, will provide Singapore law advice and represent clients in both the Singapore Courts and in domestic and international arbitrations.

The Incisive Law team is led by Bill Ricquier and Mohan Subbaraman, both prominent local lawyers with a wide range of maritime, insurance and offshore oil and gas experience, along with Bernard Yee and Carolyn Chia. They are joined by Tricia Tong, a newly appointed Ince and Co partner in Singapore, who has transferred to Incisive Law as an executive director.

The Ince Law Alliance will also benefit the increasing number of global shipping and insurance clients looking to set up offices in Singapore. Incisive Law provides Singapore law advice on all aspects of licensing, setting up and operating new businesses in Singapore, together with guidance on any related immigration, employment, property, regulatory and local litigation issues that arise.

Ince & Co's nine new partners

Effective from 1 May 2011, Ince & Co will promote nine solicitors to the partnership. Our new partners are:



Gary Wong, Hong Kong

Gary advises on a diverse range of asset and project transactions including sale and purchase, ship finance, offshore and onshore corporate work, joint ventures, acquisitions and regulatory work, operating leases, finance lease securitisation, sale and lease back and subleasing transactions. He is qualified as a solicitor in both England and Wales and Hong Kong.

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Clare Kempkens, London

Clare specialises in energy & offshore in particular advising clients on drilling contracts, management and engineering contracts, charterparties, construction contracts, EPIC contracts, MOUs and associated insurance cover. She also advises on the resolution of large disputes particularly the design, engineering and construction of FPSOs and other offshore units.

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Jamila Khan, London

Jamila advises clients in the shipping and international trade industries in a range of matters, including charterparty claims, the sale, supply and carriage of goods, ship building contracts and sale of second hand tonnage.

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Matthew Moore, London

Matthew's practice is primarily related to maritime casualty work. He handles a broad range of admiralty matters including collision, stranding, fire, salvage and wreck removal cases. He deals with dry shipping issues arising under charterparties and bills of lading, including protecting clients' rights in relation to jurisdiction. Matthew also advises on casualty related marine insurance issues.

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Wai Yue Loh, Shanghai

Wai Yue's core practice areas are shipping, trade and insurance. He regularly advises ship owners, charterers, bunker and commodities traders and their insurers on ship arrests, charterparties, bills of lading, international trade disputes, shipbuilding disputes and marine insurance matters. He is admitted as a solicitor in England & Wales, Hong Kong (non-practising) and as an advocate & solicitor in Singapore (non-practising).

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Kijong Nam, London

Kijong specialises in maritime, shipbuilding and offshore energy matters, as well as general commercial dispute resolution. He advises on newbuilding, offshore projects, energy and charterparty contracts and disputes in these areas. Prior to his qualification as a solicitor, Kijong was an oil trader/chartering manager for one of the largest oil companies in Korea. He speaks native Korean.

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Vincent Xu, Shanghai

Vincent has extensive experience in both non-contentious and contentious matters and handles all aspects of general shipping, trade and commercial disputes. He has a strong focus on shipbuilding, ship and project finance and general corporate matters. He is qualified in Hong Kong and the PRC.

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Alexandre Besnard, Paris

Alexandre is dual qualified as an Avocat at the Paris Bar and an English solicitor. His practice is focused on international trade, shipping, energy, construction, engineering and insurance. He advises clients in litigation, arbitration and non contentious/ advisory matters.

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Tricia Tong, Singapore

Tricia is qualified as an advocate and solicitor in the Supreme Court of the Republic of Singapore and as a solicitor in England and Wales. In March 2011 she was appointed Executive Director of Incisive Law LLC in Singapore. Tricia advises clients in the shipping and energy and offshore sectors on a range of contentious and non-contentious matters including vessel collisions, salvage, charterparties, rig and shipbuilding, conversion and construction contracts, and other commercial disputes including those arising out of the operations of offshore installations, as well as sale & purchase and related transactions.

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In addition to the nine new partners promoted on 1 May, two partner appointments were made in Ince & Co's Hamburg office effective 1 January 2011. They were Georg Lehmann and Tim Schommer.

Ince & Co appoints new asset finance partner in London



We are delighted to announce the appointment of Stephen Marais to the asset finance practice in London. Stephen joins the firm as a partner from DLA Piper and advises on a range of asset finance transactions.

Stephen has over 15 years' experience and advises clients on a range of non-contentious matters from Islamic financings, big ticket domestic and cross-border structured transactions through to government guaranteed debt facilities, leasing structures and off-balance sheet structures. His clients include both shipowners and banks.

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Events

SeaAsia 2011 Conference & Exhibition

Date: Tuesday 12 - Thursday 14 April, 2011

Location: Marina Bay Sands, Singapore

Ince & Co Singapore partner Denys Hickey is speaking at this conference, which is held in conjunction with Singapore Maritime Week 2011. The SeaAsia conference provides delegates with the opportunity to listen to key industry professionals as well as providing a range of products, services and networking opportunities.

5th Maritime Risk Management

Date: Wednesday 27 - Thursday 28 April, 2011

Location: London

Ince & Co London Partner Kevin Cooper is speaking on "Conducting effective emergency response to maritime casualties" at the 5th Maritime Risk Management conference.

Quarterly Shipping Brief May 2011

Date: Thursday 05 May, 2011

Location: International House, London

Ince & Co's Quarterly Shipping Brief is a series of short presentations on current issues and a round-up of recent significant legal developments in the maritime industry.

Further details will be available on our website closer to the date. For further information please contact Chris Telford at chris.telford@incelaw.com

Shipbuilding & Ship Repair Contract Management

Date: Tuesday 17 - Wednesday 18 May, 2011

Location: Bonhill House, London

Ince & Co London partner Chris Kidd chairs and speaks on a number of subjects at this conference, which will address best practice contract management and cost control for shipbuilding and ship repair. David Steward will also be speaking.

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

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