

Shipping E-Brief



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Shipping

Piracy - an overview of the legal issues

At the time of writing, some 300 crew members on 16-odd ships remain hijacked off the coast of Somalia. Most appear to be near to the now booming town of Eyl with others, including *The Faina*, further south off Harardhere. *The Faina*, loaded as it seems to be with tanks and munitions (bound for Kenya or Sudan depending on who you believe), has brought things to a head.

The EU has set up a naval cell and committed warships to provide protection to commercial shipping off Somalia. The Russians and even the Indian Navy are scrabbling to get involved and there are mutterings about military options that can hardly be of any comfort to the crews and their families.

Significantly perhaps, the UN have issued Resolution 1838 giving authority for military assets to be operated in Somalian territorial seas and to use “the means necessary” to repress any act of piracy. The shipowning community can be forgiven a certain sense of frustration on the basis that a similar response six months ago might have nipped this in the bud before it reached the serious proportions of today. 22,000 ships travel through the Gulf of Aden each year and keeping that water way free of pirates is vital. The cost of the additional 15 days for an Asia–Europe voyage, even at today’s lower freight rates, will add to the cost of all products at a time when the world can least afford it.

The purpose of this article is to look at and identify some of the legal issues raised by the hijackings and the questions we are being asked to look at. Most are very much live, which means that it would not be appropriate to give definitive answers in some of the more contentious areas.

Are armed guards legal?

Admiral Gortney, the US commander of the Combined Maritime Forces, recently suggested that “shipping companies must take measures to defend their vessels and their crews”. He did not go on to say how. There is undoubtedly a debate to be had on the pros and cons of armed guards, with the more rational in the security world concluding firmly that the answer to that should be “no”. Much better to have unarmed teams giving training and support to the crew so they have the ability and confidence to avoid or thwart an attack by

non lethal means. There have been many examples of crew doing just that. Further, the pirates have gone some way to show that they do not want to harm the crew. That resolve would be sorely tested if members of their gang were killed during a hijack.

Ultimately it is the law of the flag state that governs the use of force, which for most boils down to the use of reasonable force, but in circumstances where the rules of engagement would be extremely difficult to formulate and of course, police. The EU’s laws are dominated by Human Rights considerations, but in general terms for a self defence type argument to succeed, the Courts are looking for evidence of an imminent attack and a proportional response.

Is the payment of a ransom legal?

As a matter of English Law there are two potential pitfalls. One is the anti-terrorist legislation and the other is the Proceeds of Crime Act (POCA). You are not allowed to pay money to an organisation if i) you have a reasonable belief that that organisation is a terrorist one (ie it is carrying out its objectives for political, religious or ideological reasons) or ii) you think there is a reasonable chance that money may end up in the hands of a terrorist organisation.

In recent announcements by someone purporting to be the pirates’ spokesman, they have conveniently tried to make it clear that they have no affiliation with religious or political groups and that this is all about money. Given the proximity of US naval warships that view may not be entirely objective.

However, it is at least arguable that this is about extortion and not terrorism. In terms of POCA the ransom in the hands of the pirates can be regarded as a “proceed of a crime”. However the money laundering legislation is not there to punish the payers of a ransom demand in these circumstances and paying does not constitute a breach of the law.

Who is liable to pay the ransom?

A discussion seems to have started in the insurance industry as the total cost of the ransoms and the ancillary costs rise dramatically. Clearly, there is ransom inflation and the amounts being paid are unfortunately reported and speculated on widely. The cost of negotiating and actually paying the ransom in some cases exceeds the ransom itself.

The Gulf of Aden attracts an Additional Premium under war risk insurance, and yet the burden of

payments for the most part is apparently being absorbed by the hull market. Much will depend on the terms of the policies, but payment of a ransom may have to be borne by the owner in the first instance. Whether this is recoverable will depend on the cover provided.

There is concern that one of these incidents will expose underwriters to much bigger losses through the loss of a cargo or indeed the vessel itself and it may be the market will react accordingly. More specialised policies covering kidnap and ransom are available, with the advantage that they come with named responders, a willingness to meet costs up front and, perhaps importantly, provide loss in transit cover for the ransom itself.

Are these costs recoverable in GA?

As an extraordinary cost incurred to ensure that the common venture can continue then a ransom payment and other costs should be recoverable in GA, assuming that there is a successful release of the ship and cargo. GA security would have to be collected in the usual way prior to the discharge of the cargo at its destination. There is a sense that cargo interests should play a much more active role on helping resolve the various hijackings, although for obvious reasons the emphasis remains on freeing the crew and the feeling that this is an Owners' problem.

What about hire?

The average hijacking is taking about 45 days to resolve. The negotiations appear to be fairly formulaic in the sense that it is a case of persuading the hijackers to accept the bare minimum. Although the period of the hijacking is causing other practical problems, with food, water and diesel supplies being exhausted before the release of the vessel. There are examples of food and other supplies being brought from the shore, but a lack of diesel is more problematic and the mechanics of organising a tow in these circumstances is sure to be exercising some Owners who are still trying to get their ships and crews out. However, even with a loss of hire policy a large part of the delay will be uninsured.

Whether hire remains payable during the hijacking will depend on the construction of the

underlying charterparty. It does not follow that just because an Owner is following Charterer's orders as to route or service that hire will be payable. Issues will arise over the wording of any deviation clause and whether the drafting has been wide enough to exclude payments of hire in all cases where the vessel departs from the normal route for whatever reason. Close attention should be paid to these during fixing so that both parties can be sure where the risk and responsibility lies in a hijacking situation. It is fair to say that not many charterparties anticipate the possibility of a hijacking and therefore arguments will arise on both sides.

Can an owner refuse to transit the Gulf of Aden?

The odds of being hijacked have shortened and Owners are dusting off their war risk clauses and focusing on whether they have a right to refuse what would otherwise would be legitimate orders. The CONWARTIME and its fellow VOYWAR clause are good examples although clearly there are many standard clauses in the various charterparties in common use.

The two clauses referred to above were brought into being after the 1990/91 Gulf War and reflect contemporary times, referring as they do to acts of terrorism and acts of piracy. They provide that without the written permission of the Owners, a vessel should not be ordered to or through an area where it appears, in the reasonable judgment of the master or the Owners, that the vessel will be exposed to war risks including the risk of capture.

It is hoped that with the intervention of the various naval forces the risk of capture will fall, particularly if a convoy system is introduced in the Gulf of Aden itself. There is no doubt that slower ships and those with smaller freeboards are more vulnerable and the judgment of the masters of those vessels may be different to the masters of, for example, the bigger and faster container ships. Although *The Faina* and indeed the attack on *The Seabourn Spirit* in 2005 show that the pirates are prepared to attack anything.

An issue may arise over the safe port warranty, which previous decisions have made clear covers the approach to the port as well as the port itself. The law is well established in that an unsafe port claim will fail if it can be shown that the feature rendering the port unsafe could

have been avoided by good seamanship. The prospective unsafety of a port or its approaches has always been more problematic and in a commercial setting much more difficult to define, particularly where you are looking at political risks or as in this case a general threat of piracy which may have existed at the time the fixture was completed. In those cases it is argued that the test is not so much one of good seamanship but something more akin to common sense. In other words, an Owner must, at the very least, be able to prove that the vessel was following the recommendations of the relevant authorities, carrying out sensible risk assessments and ensuring that the crew is trained and vigilant.

Conclusion

The point was recently made that if aircraft were being hijacked with this kind of regularity the situation would not be tolerated. This is right, but at last we have seen signs of government action. Sadly there is a feeling that this is only because of the realisation of the damage that could be done to the smooth passage of the world's trade. Whilst governments struggle to open long-since-closed stable doors, we in the industry should not forget the human side to this issue and spare a thought for the crews and their families whose safe release is very much the priority.

Our experience of some of the high-profile piracy cases in Somalia, the Niger Delta and the Malacca Straits means are well-placed to give advice to all interests. For further information or advice on piracy issues, please contact Stephen Askins or your usual Ince contact.

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The Erika - potential unlimited liability for producers of waste

The breakdown of *The Erika* off the coast of Brittany, on 12 December 1999, and the oil spill which followed exposed her Owners, her Managers, her Charterers (the oil major Total) and her Classification Society (Rina) to large compensation claims from local authorities and businesses affected by the spill and from environmentalists/volunteers who took part in the clean-up.

On 16 January 2008, the Paris Tribunal de Grande Instance upheld the majority of these claims and found Total (jointly with Owners, Managers, and

Class) liable to pay €192m in compensation. This judgment has been extensively commented on worldwide.

On 24 June 2008, in an offshoot of the *Erika* main proceedings which had gone relatively unnoticed so far, the European Court of Justice ("ECJ") rendered a judgment (C-188/07) which results in Total SA, which was not the named Charterer of *The Erika*, being potentially exposed to unlimited liability for the "waste" disposal costs, as "producer" of "waste".

Facts and Procedure

The City Council of Mesquer ("Mesquer"), a small village in southern Brittany had its coast affected by *The Erika* oil spill.

In addition to joining in the main claim before the Tribunal de Grande Instance of Paris, Mesquer commenced a distinct claim based on "waste" disposal and the "polluter pays" principle under French statute 75-633 (article L 541-2 of the Code de l'Environnement) which implements Directive (EC) 75/442. (Directive 75/442 has since been replaced by Directive 2006/12/EC, but the relevant provisions in this context are the same.)

Mesquer argued that Total, as the owner and producer of "waste" within the meaning of EC Directive 75/442, should pay all the costs arising out of the disposal of that "waste" which had washed ashore, notwithstanding any relevant international or domestic legislation limiting/excluding Total's liability.

After being defeated in first instance (Tribunal de Commerce de Saint-Nazaire) and on appeal (Cour d'Appel de Rennes), Mesquer's claim reached the Cour de Cassation (French Supreme Court) which referred the case to the ECJ for a preliminary ruling on (EC) Directive 75/442.

Questions referred to the ECJ and judgment

The questions referred to the ECJ were :

- (1) Does heavy fuel oil sold as a combustible fuel fall within the definition of "waste" under article 1(a) of (EC) Directive 75/442;
- (2) Does heavy fuel oil that is accidentally spilled into the sea following a shipwreck fall to be classified as "waste" within (EC) Directive 75/442;
- (3) Does the Producer/Seller of the heavy fuel oil carried on board a chartered

ship which breaks down and releases her cargo have to bear the cost of disposing of the “waste” thus generated?

Relevant provisions of (EC) Directive 75/442

Article 1 of the Directive provides :

- (a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.
- (b) “producer” shall mean anyone whose activities produce “waste” (“original producer”) [...]
- (c) “holder” shall mean the producer...or the... person who is in possession of it.

Article 15 of the Directive states:

In accordance with the ‘polluter pays’ principle, the cost of disposing of waste must be borne by:

- the holder [...], and/or
- the previous holders or the producer of the product from which the waste came.

Directive 75/442 has since been replaced by Directive 2006/12/EC, but the relevant provisions in this context are the same.

ECJ judgment

The ECJ, in its judgment dated 24 June 2008, answered “no” to question (1) and, in essence, “yes” to questions (2) and (3). It held:

- (1) Heavy fuel oil sold as a combustible fuel does not constitute “waste” under the Directive where it is exploited or marketed on economically advantageous terms and is capable of actually being used as fuel without requiring prior processing;
- (2) Hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a member state until being washed up on that coast, constitute “waste” where they are no longer capable of being exploited or marketed without prior processing;

- (3) The Courts of member states may regard the Seller of the hydrocarbons and Charterer of the ship as producer of that “waste” and, thereby, as a “previous holder” if he contributed to the risk that the pollution would occur.

The ECJ did not say when fuel oil which had leaked from *The Erika* had become “waste” but gave the test to be applied i.e. the lack of commercial exploitability/marketability without prior processing.

The Court recognized that Member States are parties to the Civil Liability and Fund Conventions 1992, and that these require their national legislation to give effect to exemptions and limitations of liability which they contain. The Court observed that the EU is not a party to the Conventions and that they did not, therefore, preclude the Community from legislating in different terms if it saw fit to do so. Nonetheless, although its remarks on the relationship between the Conventions and the Directive may be open to more than one interpretation, it expressed the view that they were compatible in as much as the Directive did not prevent national laws based on the Conventions from providing for limitations or exceptions of liability of the Owner and Charterer.

Accordingly the Court expressed the view that the Directive provided a remedy in cases where full compensation could not be obtained under the international compensation regime, or from the Charterer of the ship due to his liability being excluded by CLC 92. In such cases Member States’ national laws must provide for the “producer” of the product from which the “waste” came to pay for the costs of disposal if he has contributed by his conduct to the risk that the pollution will occur, for example by lack of diligence in the choice of carrier.

Conclusion

This ECJ judgment is binding upon Member States’ Courts. How the ECJ judgment is implemented in the domestic laws of Member States, and applied by their Courts, remains to be seen; but it is clear now that the “producer” of a product which is carried by sea and which, having become “waste”, accidentally washes ashore is exposed to a risk of unlimited liability if by his conduct he has contributed to the risk.

Whatever the precise legal relationship may be between the Directive and international conventions, in practice claimants seeking compensation have no incentive to bring a claim under the Directive, and to assume the burden of proving that the defendant's conduct contributed to the risk of pollution, if an adequate remedy is available under international strict liability regimes.

Consequently, where the damage results from a spill of persistent oil from a tanker, claimants have no such incentive unless - as in *The Erika* - the established claims exceed (or may exceed) the maximum amount of available compensation. This amount has been increased considerably by the entry into force in 2005 of the Supplementary Fund Protocol, which applies in most EU member states. Under the Protocol the ceiling is now SDR 750 million, over five times the amount available to the Erika claimants under the 1992 Fund Convention.

In rare cases where the compensation limit is exceeded, the Directive may provide a further remedy against other defendants. Whilst the ECJ judgment is not totally clear on this issue, the Court apparently accepted that liability under the Directive of the Charterer could be excluded in such a case by the "channelling" provisions in CLC 92, but that it could be imposed on other parties who are not similarly protected, e.g. the shipper of the goods.

The prospect of liability being incurred under the Directive in such a case is greater if Courts take a restrictive approach to the interpretation of the "channelling" provisions in CLC 92, following the judgment in *The Erika* case given in January 2008 by the Paris Criminal Court. The Court refused to allow Total to benefit from the exemption of liability of the Charterer, on the grounds that the entity within the Total Group which vetted the ship was neither the Charterer, nor (apparently) considered to fall within the exemption available for the servant or agent of the Charterer.

A spill of non-persistent oil falls outside the international compensation regime. Though incidents of this kind are less damaging to the environment and have not led to claims on a par with spills of persistent oil, in theory the Directive could provide a remedy against the Shipowner as well as the Charterer and shipper, in the absence of domestic laws to the contrary.

The Directive could also be relevant in cases involving bunker spills, especially as the Bunkers Convention 2001, which comes into force in

November 2008, does not contain any "channelling" provisions excluding the liability of a Charterer. Generally the cargo Owner will not be the Owner of the bunkers, but liability could be incurred by the Charterer in addition to the Owner if he is considered to have acted negligently in approving the vessel for charter. If he is permitted to limit his liability in accordance with the 1976 Limitation Convention then for these purposes his liability should be aggregated with that of the Owner: in that case only a single limit applies and it is doubtful whether the liability of the Charterer adds to the recovery ultimately made by the claimants.

In summary, it is probably only in rare cases that the Directive and ECJ decision will materially affect existing compensation arrangements, but the judgment is not completely clear on all points and there is every prospect of reliance being placed upon it in any litigation following an oil spill in Europe.

At present it seems likely that those most at risk of incurring liability under the Directive are those in the same position as Total in *The Erika*, namely oil companies which owned the spilt cargo and are held to have contributed to the risk of pollution by their participation in the decision to charter the vessel.

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London Arbitration and the EU: The Advocate General's opinion in *The Front Comor*

This much reported case is currently before the European Court of Justice. It concerns the availability of an anti-suit injunction, where there is an agreement to arbitrate in London, to restrain a party from proceeding with a claim before Courts in the EU. The opinion of the Advocate General in the ECJ was issued on 4 September 2008, while the ECJ's judgment is expected later this year.

As many readers will be aware, at the heart of this case is an anti-suit injunction (i.e. a restraining order) obtained from the Commercial Court in London by the Owners of *The Front Comor* - represented by this firm - to restrain the claimant Italian insurers from continuing with their claim against Owners before the Tribunale di Siracusa, in Sicily. The Insurers had insured an Erg Petroli oil

refinery in Syracuse. Erg Petroli had chartered the vessel and the charterparty contained a London arbitration clause, by which all disputes arising out of the charter were to be put to arbitration. On berthing, the vessel struck an oil jetty at the refinery.

Losses were claimed by Erg Petroli for repair costs and for disruption to the refinery's operations. Erg Petroli pursued losses caused by the incident against the Shipowners in London arbitration, in accordance with the arbitration clause. However, Erg's Insurers later and separately filed subrogated claims against the Shipowners in the Syracuse Court for the amounts which the insurers had paid to Erg Petroli in respect of the same incident. The insurers claimed not to be bound by the London arbitration clause agreed by their insured.

The Shipowners were granted an anti-suit injunction against the insurers by Gross J at first instance, in September 2004. That injunction was upheld by Colman J in March 2005 and was then subject to a "leapfrog" appeal from the Commercial Court straight to the House of Lords (i.e. missing out the Court of Appeal).

The jurisdiction of the Courts in EU Member States is governed by the EC Regulation 44/2001 (formerly the Brussels Convention). However, Article 1(2)(d) of the Regulation provides that it shall not apply to arbitration. A key issue before the House of Lords was whether an injunction was compatible with the Regulation, following the judgments of the ECJ in *Gasser* [2003] EUR 1-14693 and *Turner v Grovit* [2004] 2 Lloyd's Rep 169, both being decisions issued in the context of exclusive jurisdiction clauses (rather than an agreement to arbitrate). The House of Lords issued judgment supporting the anti-suit injunction in *The Front Comor* in February 2007, but referred the following question to the European Court of Justice:

"Is it consistent with EC Regulation 44/2001 for a Court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?"

Advocate General Kokott, in her opinion of 4 September 2008, has now answered that question in the negative.

The AG takes the view that the decisive issue is not whether the anti-suit injunction proceedings in England are within the arbitration exception in Article 1(2)(d) and therefore outside the scope of the Regulation; but rather whether the proceedings in Syracuse are within the Regulation.

The opinion accepts that the use of the term "arbitration" in the Article 1(2)(d) means that not only actual arbitration proceedings, but also related proceedings before national Courts, are to be excluded from the scope of the Regulation. However, the AG goes on to say that, when assessing whether proceedings are "arbitration" or not, regard must be had to the subject matter of the dispute and not to the existence of a preliminary issue. If the subject matter of the dispute is one over which the Court seised of the action has jurisdiction under the Regulation, then she considers the existence of an arbitration clause does not affect that Court's right to examine its own jurisdiction.

The AG concludes that the subject matter of the dispute put before the Syracuse Court by the insurers was a claim in tort and not arbitration, and therefore that the action in Syracuse falls within the scope of the Regulation. "Mutual trust" underpins the Regulation system and, in her view, even if the English Court proceedings are outside the Regulation, it is inappropriate for national rules to be allowed to undermine the Regulation's purpose. The anti-suit injunction granted by the English Court would have the effect of preventing the Syracuse Court from exercising the competence conferred upon it by the Regulation. The injunction infringes that "mutual trust" and hence, in her view, is incompatible with the Regulation.

The opinion recognises that, because arbitration is outside the scope of the Regulation, Articles 27 and 28 do not apply, with the result that there is scope for conflicting decisions to be issued on jurisdiction and the merits. The AG's view is that this potential for conflict needs to be remedied by an amendment to the Regulation to bring arbitration within it.

In summary, this case has already attracted considerable comment and controversy. Following *Gasser* and *Turner v Grovit*, injunctions to restrain breaches in the EU of exclusive jurisdiction agreements are no longer permissible. Should the ECJ follow the AG's

opinion in *The Front Comor*, the useful remedy of an anti-suit injunction from the English Court will no longer be available to restrain a party who, in breach of an arbitration agreement, pursues a claim in the Courts of another EU country. In those circumstances, the party wishing to arbitrate would need to demonstrate the existence and validity of the arbitration agreement, to the satisfaction of the Court to which its opposing party has referred the claim. It would be up to that Court to decide whether or not it will stay its own proceedings, in favour of arbitration. (Contrary to many reports, the Syracuse Court in *The Front Comor* has not in fact yet made its decision in that regard).

The practical implications of all this for both lawyers and clients in London arbitration are clearly quite wide-ranging. Interesting issues arise – for example, how else to compel adherence to agreements to arbitrate and whether anti-suit injunctions might be sought by litigants from and granted by other Courts (for example, in New York) operating outside the scheme of the Regulation. A further update will be provided when the decision of the ECJ is issued, expected to be later this year.

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***The Silver Constellation* - Owners' obligations in respect of RightShip approval**

The recent judgment of Steel J in *The Silver Constellation* [2008] EWHC 1904 (Comm) is an important decision for Owners and Operators of older bulk carriers that do not currently have RightShip approval. The practical effect of the judgment is that in the absence of express provision in the charter, a term will not be implied that the vessel must be RightShip approved. However, the Court also held that under clause 8 of the NYPE form an Owner is obliged to permit a RightShip inspection of the vessel and other RightShip vetting procedures, as and when required by their Charterer.

The case concerned concurrent hearings involving back-to-back claims arising under back-to-back charterparties. The appellant Shipowner purchased this 1986 built Capesize bulker of 146,351 dwt from Swissmarine in June 2003 and chartered her back to Swissmarine for 24 months. In November 2003 the Owners chartered the vessel ahead to

Glencore for 24 months upon redelivery from the Swissmarine charter. In May 2006 Glencore sub-chartered the vessel to Swissmarine for a period of 18 – 24 months. After the vessel incurred substantial damage in a grounding incident, she was delivered into the Glencore charter, and the Swissmarine sub-charter, only in August 2006.

Through 2002-3 the vessel had been rated 3* by RightShip, but was downgraded to 2* in 2004 when she became 18 years old. Nonetheless she performed a number of voyages at that rating until February 2007 by which time she was 21 years old. In February 2007, the Charterers sought approval for the vessel to be inspected by RightShip which the Owners refused. The dispute was referred to arbitration and the Arbitrators held that the Owners were obliged by line 38 and clause 31 of the charterparty to obtain and maintain RightShip approval.

Line 38 of the charter obliged the Owners to keep the vessel "*in a thoroughly efficient state ... with all certificates necessary to comply with current requirements of all ports of call*". In addition, Clause 31 provided as follows:

Certificates, Laws and Regulations

It is a condition of this Charter that the vessel is and will remain in all respects eligible for trading to the ports, places or countries specified or not excluded in this Charter and that at all necessary times vessel and/or Owners shall have all valid certificates, records and other documents required for such trade. Furthermore, it is a condition of this Charter that the vessel complies and will continue to comply with all applicable laws and regulations of the ports, places and countries specified or not excluded in this Charter.

The Tribunal applied a commercial approach and decided that it was reasonable for the Owners to understand when entering into the charter in November 2003 that they should obtain and maintain RightShip approval, having regard to the importance of RightShip approval for Capesize bulkers in iron ore and coal trades, and industry knowledge of the importance of obtaining RightShip approval from soon after the system's inception in December 2001.

The first principal issue in the appeal was whether the charterparty terms obliged Owners to provide a vessel with RightShip approval and to maintain such approval for the currency of the charterparty.

It was contended by the Owners that they were under no obligation to provide a vessel with such approval since there was no express reference to RightShip approval in the charterparty. The Owners argued that the word "eligible" in clause 31 meant either "legally qualified", in which case RightShip approval was irrelevant, or "fit to be chosen", which was solely directed to the physical state of the vessel and thus not concerned with compliance with the broad range of more than 50 factors taken into account in RightShip's "algorithm software" analysis upon which RightShip approval is based. It was noted that only 10 of those factors are disclosed on RightShip's website and that the basis of approval is obscure. Thus it was argued that the effect of the Arbitrators' decision was to imply an obligation into the charter that required the Owners to comply with a private vetting scheme and exposed the Owners to the unpublished requirements of a third party without any period of grace.

Allowing that part of the appeal, Steel J held that the charter terms did not require Owners to provide a vessel with RightShip approval. It was his view that "eligible" meant that the relevant person or object was fit for selection as satisfying the relevant conditions for selection. As to whether the vessel was fit for selection, the requirements of lines 22 and 38 focused upon requirements legally imposed either by the law of the flag, the law of the country to which the vessel had been ordered, or by the laws of the port of call (see *The Derby*). RightShip approval was not lawfully required by the ports at which cargo might be loaded. It was only a commercial requirement that had become progressively more widespread since its inception.

Furthermore, read as a whole, the relevant terms of the charters focused on certification and documentation, which in turn established fitness and eligibility. The RightShip system does not give rise to the provision of any documentary form of certification and the Court accepted that the basis of approval remains obscure. In particular, the Court noted that it is not an answer that approval, or lack of it, is recorded in the computer hard drive of RightShip. Thus RightShip approval did not form part of the certification envisage in line 38 and clause 31, and the Arbitrators had erred in finding that it did.

On the second central issue of the appeal, the Court held that the Owners were obliged to permit a RightShip inspection of the vessel and other RightShip vetting procedures. The Owners argued

that RightShip approval was a stand-alone obligation like Class, and that a Charterer was not entitled to insist upon an inspection by a Class surveyor merely because they might be concerned about the state of the vessel's classification. That argument was rejected by Steel J who noted that RightShip approval was to be obtained voyage by voyage, dependent on the requirements of the relevant shipper or loading terminal, and is very different from classification, which is a continuous survey system by the selected class society, paid for by the Shipowners, and conducted in accordance with the rules of the selected society.

The Court concluded that the Arbitrators had correctly held that under clause 8 of the NYPE form the Charterers had the power to order the Owners to allow RightShip inspectors aboard the vessel to carry out a vetting inspection, consistent with observations made by the House of Lords in *The Hill Harmony* about a Charterers' right to exploit the earning capacity of the vessel. If RightShip vetting was excluded, the Charterers would be "stymied" as to nominating any loading port or any cargo: in short although hire would remain payable, the vessel would be unemployable by the Charterers.

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SAFE approval and registration of PRC Bank refund guarantees

On 1 August 2008, the State Council approved a draft Amendment to the Regulation of the People's Republic of China on Foreign Exchange Administration (the "2008 Amendment"). The 2008 Amendment came into effect on 5 August 2008. The 2008 Amendment has created widespread misunderstanding that, as of 5 August 2008, in addition to the existing requirement of registration with the State Administration of Foreign Exchange ("SAFE") in respect of foreign currency refund guarantees (RGs), there has also been a new requirement to obtain SAFE approval prior to the issuance of RGs.

We are of the view that the 2008 Amendment to the *Regulation of the People's Republic of China on Foreign Exchange Administration* does not create a new SAFE approval requirement for refund guarantees, in that both SAFE approval and SAFE registration had been required prior to the 2008 Amendment.

The position prior to the 2008 Amendment

The 1997 Amendment to the *Regulation of the People's Republic of China on Foreign Exchange Administration* (the "1997 Amendment") provides that:

"foreign currency guarantees can be issued only by financial institutions and enterprises meeting conditions stipulated by State regulations and with approval from SAFE."

Other than the 1997 Amendment, there are rules which provide further guidelines for the issuance of RGs, including the Procedures for Administration of Guarantees overseas by institutions within the Chinese Territory, together with its Detailed Rules for Implementation. In accordance with those rules, Chinese banks can only issue RGs following approval of SAFE.

The general position is that Chinese banks hold a "blanket" approval (which may entail certain conditions) from SAFE to issue RGs. In other words, Chinese banks are not required to seek additional SAFE approval on a case by case basis prior to the issuance of each individual RG. However, in respect of foreign currency, Chinese bank guarantees for financing, finance leases, deferred payments that exceed one year and cash performance guarantees for accounts under compensation trade, it is necessary to seek prior SAFE approval on a case by case basis and the blanket approval referred to above does not apply.

We believe that the misunderstanding in relation to the requirements for SAFE approval may have originated from *"the Reply of SAFE regarding the interpretation of the Procedures for the Administration of Guarantees overseas by institutions within the Chinese Territory"* (the "Reply"), which was issued by SAFE on 29 August 1999. There is a provision in the Reply which states that:

"Chinese banks may issue non-financing guarantees overseas without the prior approval of SAFE but such guarantees must be registered with SAFE..."

The above extract of the Reply indicates that Chinese banks can issue RGs "without the prior approval of SAFE". However, when the Reply is considered in its entirety, the correct interpretation of the above extract is that Chinese banks may merely issue non-financing guarantees (such as RGs) without SAFE approval being required on a case by case basis.

The current position

From 5 August 2008, the relevant provision in the 1997 Amendment was amended to:

"an institution shall apply to a foreign exchange administrative authority before providing foreign guarantee. The foreign exchange administrative authority shall make a decision of approval or disapproval according to the asset-liability situation of the institution. The institution shall, after concluding a foreign guarantee contract, apply to SAFE for foreign guarantee registration."

Whilst the 2008 Amendment supersedes the 1997 Amendment and other relevant rules, the Detailed Rules for Implementation remain unchanged. This means that the detailed rules governing SAFE approval and SAFE registration of RGs remain unchanged. The 2008 Amendment is no more than a brief summary of the requirements under the 1997 Amendment and the relevant rules aforesaid. Equally, the 2008 Amendment has not altered the requirement that all Chinese bank RGs must be registered with the relevant SAFE authority follow issuance.

Conclusion

It is incorrect to adopt the view that SAFE approval to issue RGs was not required prior to the 2008 Amendment coming into effect. The former requirements that both SAFE approval and SAFE registration are required, remain unaltered. There also remains no regulation to the effect that each and every RG will now be subject to SAFE approval on a case by case basis prior to issuance.

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Ship sales - the NSF 1993 - place of payment and the relationship between a recap and a subsequent MOA

PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor) [2008] 2 Lloyd's Rep 246)

Clients of our Piraeus office have recently succeeded, first in arbitration and then in the Commercial Court, in an interesting sale and purchase dispute. It is one of the relatively few cases on the Norwegian Saleform to reach the English Courts.

Our clients were the Sellers of *The Aktor*. She was contracted for sale on the Norwegian Saleform 1993. The dispute centred on where the Buyers

were obliged to pay all or at least part of the purchase price.

Clause 2 obliged the Buyers to pay the deposit to “Sellers’ nominated bank in Singapore”. Clause 3 obliged them to pay the purchase price in full to “Sellers’ nominated bank”. The Sellers nominated Piraeus for payment of the purchase price.

The Sellers insisted that they were entitled to receive payment of the full price in Piraeus. The Buyers claimed that (a) the MOA limited the Sellers to nominating the bank in the location of the deposit-holding bank (Singapore) or (b) that the Sellers had to nominate a bank in the place of closing – again Singapore or (c) that if the Sellers were entitled to nominate Piraeus for payment of the price, the Buyers were nevertheless entitled to pay 90% there and to pay the balance by release of the deposit to the Sellers in Singapore.

There was no agreement on this, and ultimately the Sellers terminated the MOA, both sides holding each other in repudiation.

Represented by Ince & Co, the Sellers won this issue in the arbitration. The Buyers appealed to the Commercial Court on three grounds.

The Buyers’ first ground was that they were not required to pay any part of the purchase price to Greece as the MOA did not entitle the Sellers to nominate a bank for payment of the purchase price in any place other than Singapore.

Clause 3 of the NSF 1993 deals with payment “in full” of the purchase price. It permits the parties to identify where payment of the purchase price is to be made. In the MOA, the parties had inserted the words “Sellers’ nominated bank”. Shortly after the MOA was concluded, the Sellers nominated their bank in Piraeus. The Buyers objected.

Before the Court, the Buyers relied on clauses 2 and 8 of the MOA. Clause 2 of the NSF 1993 deals with the provision and holding of a deposit. It allows the parties to nominate a bank or location in which the deposit is to be held. In this case, the parties had inserted the words, “Sellers nominated bank in Singapore”, into clause 2 and the Sellers subsequently nominated a bank in Singapore. Clause 8 of the NSF 1993 deals with closing and permits the parties to nominate a “place for closing”. The parties again inserted Singapore in the MOA. The Buyers argued that these clauses restricted the Sellers’ right of nomination of the place for payment under clause 3 to Singapore.

Clarke J rejected the Buyers’ contentions. He held that clauses 2, 3 and 8 all deal with different aspects of a ship sale: clause 2 deals with the holding of a deposit, which, in law (he referred to *The Selene G* [1981] 2 Lloyd’s Rep 180), is different to and need not make up any part of the price; clause 3 deals with payment of the price in full; and clause 8 deals with the place of the closing meeting, at which some but by no means all of the steps needed to complete the sale are to take place. He concluded that none of these clauses could limit the Sellers’ right of nomination of a bank for payment of the full purchase price under clause 3.

The Buyers’ second ground of challenge to the award was that the MOA should be rectified – rewritten – to bring its terms into line with the terms of an earlier recap agreed by the parties which, the Buyers claimed, stipulated for payment as to 10% of the purchase price by way of release of the deposit (it being implicit this would be in Singapore) and as to the balance of 90% at the Sellers’ nominated bank. The Arbitrators (who had come to a different conclusion as to the construction of the recap) held that the Buyers were not entitled to rectification because (a) the rectification proposed by the Buyers did not accord with either parties’ subjective common intention – the Buyers thought they had agreed that payment of the full purchase price was to be made in Singapore whereas the Sellers thought they had agreed that payment of the full price was to be made in Greece – and (b) because in any event the Buyers could not overcome the practical and legal presumption that the parties intended the terms of the later written agreement (the MOA) to record their final agreement and to supersede the terms of any earlier inconsistent agreement (the recap).

Clarke J rejected the first of the Arbitrators’ reasons on the basis that it was wrong to inquire into the parties’ subjective intentions. Rectification, like contractual construction, required an assessment of the parties’ ascertainable objective intentions. But he accepted that the Arbitrators’ second reason constituted a factual finding that, objectively viewed, the parties intended the final contract to be a complete replacement for the earlier recap, to the exclusion of what had gone before. As such it was not open to challenge on appeal.

The Buyers’ third ground of appeal was that, even if they were obliged to pay the full purchase price to the Sellers’ nominated bank in Piraeus, their failure to do so was not a breach of condition entitling the

Sellers to terminate the MOA. They argued that the obligation to pay the full purchase price covered a number of matters – the amount to be paid, the method of payment, the time of payment, and the place of payment – some of which could be regarded as conditions, but some of which could not. The place of payment, and therefore the place of payment of 10% of the purchase price, was, they argued, at most an intermediate term, breach of which allowed the Sellers to claim damages but not to terminate the MOA.

Clarke J again rejected the Buyers' argument. He held that the obligation to make payment in full of the purchase price was a condition of the MOA and that payment otherwise than in accordance with its terms could not amount to satisfaction of that condition. Having drawn an analogy with the certainty required in business transactions where performance by one party is a condition precedent to the ability of the other party to perform another term (as emphasised by Lord Roskill in *Bunge Corp v Tradax* [1981] 1 WLR 711), he concluded that, in the case of a ship sale and purchase where the principal obligations of payment of the purchase price and delivery of the vessel are concurrent conditions and where the Seller is, in practice, likely to require immediate and certain receipt of payment in order to redeem the mortgage on the ship, payment strictly in accordance with the terms of the contract is clearly a condition. Accordingly, he held that the Sellers were entitled to have treated the Buyers' refusal to confirm that they would make payment in accordance with the MOA (i.e. by paying 100% of the price to Greece) as repudiatory and that they were entitled to have terminated the MOA.

The Buyers have been granted permission to appeal and the appeal is listed to be heard in February 2009.

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Time Charterers' obligation to nominate delivery port and right to cancel for non-delivery

Mansel Oil Ltd & Another v Troon Storage Tankers SA (The Ailsa Craig) [2008] EWHC 1269 (Comm)

Charterers cancelled a two year time charter when, on the cancelling date, the vessel was still in drydock in Greece – not the place of delivery, namely a port in the Nigeria-Ghana range. Owners argued that the cancellation was unlawful because until Charterers nominated the delivery port the Owners were not under a duty to deliver. If Owners were not obliged to deliver, Charterers could not cancel. This argument failed because when the charter was cancelled, the time for nominating the delivery port had not yet arisen; the contract did not require the Charterers to make a meaningless token nomination just to have the right to cancel.

The Facts

In November 2006 Charterers entered into negotiations with Owners for a two year charter to provide storage of clean and dirty petroleum products off West Africa. By May 2007 the deal was finalised and the vessel sailed from West Africa to Piraeus for extensive conversion work. The charter, on the Shelltime 4 form, provided as follows:

4. *The vessel shall be delivered by Owners at a port in WAF-Ghana/Nigeria range in Charterers' option....*
5. *The vessel shall not be delivered to Charterers before 25 September 2007 and Charterers shall have the option of cancelling this charter if the vessel is not ready and at their disposal on or before 31st October [later changed to 15 November] 2007. Notices: delivery/redelivery 30-25-15 days estimated then 10-7-5-3-2-1 definite days notice...*

On 16 November 2007 the vessel was still in drydock in Piraeus and Charterers cancelled the charter. Owners argued that Charterers were not entitled to do this for two reasons:

1. Owners alleged that the Charterers had ordered extra work on 18 October and this meant it was impossible for Owners to meet the cancelling date.

2. Charterers were obliged to exercise their option to select a delivery port; this had to be done before Owners became obliged to give 30 days notice of delivery because the range of ports was about 4 days wide; until Charterers nominated the port the Owners were not obliged to deliver the vessel. If Owners were not obliged to deliver, Charterers were not entitled to cancel.

The second argument was dealt with by the Court as a preliminary issue. The Charterers' position was as follows:

1. The charterparty did not oblige Charterers to nominate a delivery port at all. It was an option, entirely for their benefit, to specify a port within the range. If Charterers failed to exercise the option, as happened here, it was open to Owners to deliver the vessel at any port within the contractual range;
2. If Charterers were bound to nominate a delivery port, the time for fulfilment of that obligation never arose; and
3. Charterers were not bound to nominate a delivery port if the nomination would be futile. In this case a nomination would have been futile because whatever delivery port was nominated, the vessel would never have been able to get there before the cancelling date.

The Decision

The Judge's starting point was to remind everybody that his job was to decide how the charter would be understood by reasonable businessmen in the position of the parties and in the context in which the charter was made. He decided that:

1. The Charterers were obliged to nominate the port of delivery at some stage.
2. In the absence of an express term in the contract, a nomination of a loading or discharging port must be made within a reasonable time. A reasonable time *"would be such time as (a) was not so late as it would mean that, because of the lateness of the nomination, the vessel could not make her cancelling date; and (b) early enough to ensure that the vessel suffered no delay resulting from the absence of nomination."* On the assumed facts, the time by which the Charterers were bound to make a nomination never arrived.

3. If, contrary to 2 above, the time for nominating had arisen, Charterers were not obliged to do so.

"Reasonable commercial men would not, in my judgment, contemplate the Charterers had, on pain of losing their right to cancel, to go through the idle ceremony of nominating a delivery port when the vessel was nowhere near any possible delivery port (being in drydock in Piraeus) and could not possibly reach one by the cancelling date."

Accordingly, the Charterers were entitled to cancel the charterparty despite the fact that they had not nominated a delivery port. The Judge also remarked that Owners' obligation to give 30 days notice of delivery was probably not a condition precedent to Charterers' obligation to nominate.

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Charterers' nomination of a laycan is irrevocable

P v A and another [2008] EWHC 1361 (Comm)

The Voyage Charterers' nomination of laycan dates was irrevocable. Owners were entitled to rely on Charterers' nomination immediately and the nomination could only be amended by agreement, irrespective of whether Owners had nominated a vessel already. Charterers' insistence on their "entitlement" to change the laycan amounted to a repudiatory breach of the charter because it demonstrated a clear intention not to be bound by its terms, namely the original laycan nomination.

Claimant Charterers and Defendant Owners had entered into a contract of affreightment (on the Americanized Welsh Coal Charter Form) for six voyages from either Quebec (where Charterers would load iron ore) or Baltimore (where Charterers would load coal) to Constanza. The COA did not state when the voyages would take place, or from which of the two loadports, however clause 23 of the COA provided:

"Charterers to give 30 days' notice with 10 days notice laycan spread and Owners to nominate vessel latest 10 days prior first day..."

In giving notice of the laycan spread, Charterers would nominate the loadport for the particular voyage, and thereby determine the cargo to be

loaded, as well as fixing the earliest date on which the vessel could tender a NOR.

The dispute arose out of Charterers' arrangements for the fifth voyage:

- on 6 September 2007, Charterers notified Owners that the fifth voyage under the COA would be from Baltimore to Constanza and the laycan would be 5/14 October 2007;
- a week later Charterers told Owners that they wanted to move the laycan to 21/30 October 2007 because the shippers could not supply cargo to the loadport within the 5/14 October laycan;
- Owners refused to agree to this change, no doubt influenced by the fact that the freight market had risen since the COA had been concluded, but suggested that the fifth voyage should be treated as cancelled and that the sixth voyage should be carried out with the 21/30 October laycan;
- Charterers resisted this suggestion and instead proposed to substitute for the fifth voyage under the COA an alternative voyage from Newport News to Nikolaev, at the COA freight rate, with a laycan of 5/14 October;
- Owners once again rejected Charterers' proposal and on 24 September 2007, Owners informed Charterers that they were in repudiatory breach due to their refusal to perform the fifth shipment in accordance with the 5/14 October laycan.

The case was referred to arbitration and the arbitrators found, by majority, that:

- the effect of the Charterers' notice, dated 6 September, was to define the parties' obligations under the COA;
- once the laycan notice was given it was deemed to be written into the COA and could only be changed by agreement;
- the Charterers' insistence that they had the right to move the laycan dates because the shippers could not provide the cargo by 5/14 October amounted to a proposal for a substitute voyage and demonstrated a clear intention not to be bound by the original nomination;

- Owners were entitled to accept Charterers' repudiatory breach as releasing them from their obligation to perform the fifth voyage.

Steel J was asked by Charterers, on appeal from the Tribunal's decision, whether (1) the nomination by the Charterers of the laycan spread was irrevocable and (2) the Arbitrators erred in law in holding that the Charterers were in repudiation by purporting to revoke the original nomination.

Charterers' argued inter alia that the laycan nomination would only have become irrevocable if Owners had nominated a vessel and Charterers had confirmed the vessel (pursuant to the requirements of clause 23 of the COA) on the basis that at that point Charterers would have been estopped from changing the laycan. They further submitted that they were under no obligation to provide cargo within the laycan and that all Charterers had been doing by seeking to put back the laycan was, implicitly, to make clear that they would not exercise their option to cancel pending delivery of the cargo.

Steel J dismissed the appeal and held as follows:

(1) Charterers had no right to change the laycan. Charterers' nomination of laycan dates, in fulfilment of their obligation under the COA to do so and thereby complete the definition of the parties' obligations for the particular charter, was irrevocable.

This was in line with *The Jasmine B* [1992] 1 Lloyd's Rep. 39, wherein the Court held that in the absence of any special provision to the contrary, once a loadport had been nominated, the charter must thereafter be read as though the nominated port had originally been written into the charterparty, and neither party had the right (or the obligation) unilaterally to change the nomination.

The fact that the nomination is irrevocable is also in keeping with the basic requirement in contract law that for a contract to be valid the parties must have made provision for terms of fundamental importance to the contract, or at least included a mechanism for determining such fundamental terms. In this case, the Charterers' nomination of the laycan was essential to complete the definition of the parties' obligations, including the loadport, the cargo to be carried and the earliest date on which the vessel could tender a NOR. Steel J held that without a provision in the COA for these provisions to be written in, the COA would be unworkable. He reasoned moreover that it would be commercially unworkable if the nomination

only became irrevocable once a vessel had been nominated (and confirmed, if relevant) because Charterers would be able to alter the laycan repeatedly until that time.

(2) The Tribunal was entitled to conclude that the Charterers' insistence on their right to change the laycan constituted a repudiatory breach because it evinced a clear intention not to be bound by their original nomination.

(3) Charterers' submissions before the Court that the effect of their notices addressed to Owners was merely to inform Owners that they would not exercise their option to cancel until 30 October (if at all) were completely inconsistent with the Tribunal's findings of fact that Charterers had informed Owners that they wanted to change the laycan and believed that they were entitled to do so, or that they wanted to substitute another voyage for the fifth voyage under the COA.

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The Reborn – is there an implied safe berth warranty in a named port voyage charter?

Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn) [2008] EWHC 1875 (Comm)

This case addresses the issue of whether a "safe berth" warranty is to be implied into a charterparty in circumstances where a specific load port is named in a voyage charterparty. Given the previous lack of authority on this point, the case is of significant interest to both Owners and Charterers alike.

Facts

The Owners chartered the vessel to the Charterers for carriage of a cargo of cement from Chekka, Lebanon to Algiers. Whilst at the loading berth at Chekka, the vessel's hull was damaged as a result of contact with an underwater projection.

There were several possible berths at Chekka and the Owners argued that the Charterers were under an absolute obligation to nominate a safe berth at the load port, despite the absence of an express warranty in the charterparty to this effect. The arbitrators ruled that there was no such obligation on the Charterers and the Owners appealed this decision.

On appeal Aikens J formulated the issue as follows:

"if a specific load port is named in a voyage charterparty and there are several possible berths within that port to which a vessel could be directed to load by the Charterers and there is no express warranty in the charterparty of the "safety" of either the port or the berth to which the vessel is to be directed by the Charterers, is the charterparty subject to an implied term that the Charterers must nominate a "safe" berth at that load port?"

The Charterparty Terms

The charterparty was on the 1994 revised Gencon form as amended by the parties and provided as follows:

Box 10:

"Loading port of place (Cl.1) 1 BERTH CHEKKA – 27 FT SW PERMISSIBLE DRAFT"

Clause 1:

"The said vessel shall... proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may safely get and lie always afloat..."

Clause 20:

"Owners guarantee and warrant that upon arrival of the vessel to and/or prior its depart from, loading or discharging ports...the vessel including, inter alia the vessel's draft, shall fully comply with all restrictions whatsoever of the said ports... including their anchorages, berths and approaches and that they have satisfied themselves to their full satisfaction with and about the ports specifications and restrictions prior to entering into this Charter Party."

The Appeal

The Judge held that, in the absence of an express warranty as to the safety of either the port of Chekka as a whole or any berth nominated by the Charterers within Chekka, the burden lay on Owners to demonstrate that such a term should be implied because it was "necessary" to give the charterparty "business efficacy".

The Judge found that there was no need to imply such a warranty into the charterparty for the following reasons:

1. The Owners agreed to load the Vessel at the identified port of Chekka. The terms of the charterparty were such that they knew

that the vessel would have to go to one of the berths at Chekka that was capable of accommodating a vessel with a maximum salt water draft of 27 feet. Pursuant to clause 20 of the charterparty, the Owners guaranteed and warranted that they would satisfy themselves to their *“full satisfaction with and about the ports specifications and restrictions prior to entering into this Charter Party”*.

Those two express provisions indicated that the Owners agreed that they would either investigate the port or take the risk of any dangers getting to it, using it and departing from it.

2. When a Charterer nominates a specific berth, that nomination is an election, rather than a selection, and the berth is to be treated as if it had originally been written into the charterparty. Therefore, once nominated, a Charterer cannot change the chosen berth without the Owner’s agreement.

Under the charterparty in question, the Charterers’ only choice was to elect a specific load berth within the identified load port of Chekka. The only limitation on this right to elect was that it had to be possible for a vessel of 27 feet salt water draft to berth there.

3. The combination of the first part of clause 20, in which the Owners guaranteed and warranted the vessel’s compliance with the restrictions of the loading/discharging ports, and the deletion of the word *“safely”* from clause 1 of the Gencon form was of considerable significance.

Together, these two provisions were taken to mean that the Owners had undertaken that the vessel would proceed to the nominated berth in Chekka or so near thereto as she may get and lie afloat and load the cargo, but that the Owners’ obligation was not contingent upon the vessel’s safety.

4. Given the express words of the charterparty, in particular: the lack of express warranty; the changes made to clause 1 and clear wording of additional clause 20, an implied warranty of safety would plainly be inconsistent with the express terms.

Accordingly, the Judge held that the only obligation upon the Charterers was that they were not to nominate an *“impossible berth”*, for example one at which the vessel could not lie afloat on a 27 foot salt water draft. The Owners’ appeal was dismissed and the Court upheld the original arbitration award in Charterers’ favour.

Conclusion

The judgment is of significant interest as there was previously no direct authority as to whether a *“safe berth”* warranty is to be implied in circumstances where a specific load port is named in a berth (voyage) charterparty. Therefore, the issue on appeal had to be approached from *“first principles”* and, as a result, the case contains a useful discussion of existing case law on the issue of *“safe berths”* and *“safe port”* warranties.

The decision provides a guide to the circumstances in which a warranty of safety will not be implied. However, it is important to bear in mind that the specific wording of this charterparty was *“crucial”* to the question of whether there was an implied warranty of safety of the berths at Chekka, in particular:

- the deletion of the word *“safely”* from clause 1;
- Owners guarantee of satisfaction with the port specifications; and
- the lack of an express warranty as to the safety of the port.

We understand that an application for permission to appeal has been lodged with the Civil Appeals office but that it is yet to be reviewed.

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Reciprocal enforcement of judgments between Hong Kong and Mainland China

Under the *“one country, two systems”* formula, Hong Kong and China have distinct and separate legal systems. Until recently, no legal mechanism existed which would enable a judgment obtained in the Hong Kong Courts to be directly enforced in Mainland China, and vice versa.

The Supreme People’s Court of the PRC and the Secretary of Justice of Hong Kong have previously signed an agreement to put in place an

arrangement for the reciprocal recognition and enforcement of judgments by Courts of the Mainland and Hong Kong in civil and commercial matters (“the Arrangement”). The Arrangement is ground-breaking because it establishes a new and convenient mechanism for cross-border enforcement of debts.

In Hong Kong, the Arrangement was given effect by the passing of the Mainland Judgments (Reciprocal Enforcement) Bill, which came into operation as the Mainland Judgments (Reciprocal Enforcement) Ordinance (“the Ordinance”) on 1 August 2008.

The Supreme People’s Court has promulgated a judicial interpretation under which the Arrangement also came into force in the Mainland on 1 August 2008.

The New Position

Under this new Arrangement, reciprocal enforcement is possible only in respect of ‘money judgments’ (judgments under which a sum of money is payable) on commercial contractual disputes. This excludes equitable judgments for injunctions or specific performance, and other types of legal disputes such as personal injury claims, matrimonial law, insolvency or employment matters.

A key requirement for the enforcement of a cross-border judgment is that the parties to the commercial contract must have previously agreed in writing (after commencement of the Ordinance) to submit to the exclusive jurisdiction of either the Hong Kong or Mainland Courts for resolution of the dispute. If, for instance, a party is seeking to enforce a Hong Kong judgment in the Mainland, the parties to the underlying commercial contract must have opted for the exclusive jurisdiction of the Hong Kong Courts.

A further requirement is that the judgment must necessarily be final and conclusive as between the parties to the judgment.

The Arrangement is a positive and useful development. Mainland judgment-creditors seeking to enforce judgments against assets in Hong Kong were previously unable to avail themselves of the simple registration procedure for the enforcement of foreign judgments in Hong Kong under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (China not being a designated jurisdiction under this ordinance). The only recourse for Mainland creditors was to start a

fresh action in debt in Hong Kong at common law. Inevitably, these proceedings were time-consuming and protracted.

What does this mean for Mainland judgment creditors?

After 1 August, Mainland judgment creditors will be able to apply to the Court of First Instance to have their judgments registered for the purpose of enforcement in Hong Kong. The time limit within which such application has to be made is two years from either the last day for performance, if specified in the judgment, or in any other case, from the date from which the judgment takes effect.

Only judgments from a ‘designated Court’ in the Mainland can be registered. Designated Courts include the Supreme People’s Court, a Higher People’s Court, an Intermediate People’s Court and a Basic People’s Court which has been authorised to exercise jurisdiction in civil and commercial cases involving foreign parties.

The judgment must also be enforceable in the Mainland. The Ordinance deems it enforceable if there is a certificate issued by the original Mainland Court, accompanying the application, certifying the judgment is final and enforceable in the Mainland.

What does this mean for Hong Kong judgment creditors?

For judgment creditors seeking to enforce Hong Kong judgments in the Mainland, a certified copy of the judgment and a certificate certifying the judgment is enforceable by way of execution in Hong Kong is required.

Setting Aside Registered Judgments

The registration of a Mainland judgment in Hong Kong does not guarantee an absolute right to enforcement. The Hong Kong Courts, upon application, may set aside a registered judgment on certain grounds, for example, that the judgment has been wholly satisfied; the clause specifying Mainland as the exclusive jurisdiction to determine the dispute is invalid; or the Courts in Hong Kong have exclusive jurisdiction over the matter.

The time period within which an application to set aside registration must be made is one fixed by the Hong Kong Court at the time of making an order to register a Mainland judgment.

Conclusion

At a practical level, a party contracting with Mainland Chinese entities (which frequently maintain a presence and assets in Hong Kong) should consider whether to include in their contracts a clause providing for the exclusive jurisdiction of the Hong Kong Courts.

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Importance of ensuring shipbuilding refund guarantees are signed by bank employees with full authority

The danger of going on holiday in August is that this is the time that Judges quietly catch up on writing and handing down judgments which risk slipping by unnoticed. This year is no exception and the recent decision in *Sea Emerald S.A. v Prominvestbank* [2008] EWHC 1979 highlights the importance of ensuring that refund guarantees issued in connection with shipbuilding contracts are signed by employees with full and proper authority.

Unfortunately for the Laskaridis Group it was unable to claim under a refund guarantee signed by an employee of the Ukrainian bank, Prominvestbank, and issued in connection with a newbuilding contract entered into with the Nakolaev Shipyard. The bank had not given the head of the department assigned to the region in which the yard was located actual or apparent authority to issue the refund guarantee, and had not ratified it.

Neither the English or the Russian version of the guarantee was dated, and neither was on headed paper. No expiry date for the guarantee was specified, and the English version had a number of typing errors. Although it did not form part of the reasoning that led Smith J to his conclusion, he was apparently comforted in his decision because of the nature of the guarantee. It was not usual for departments of the bank to issue guarantees of any kind at the relevant time, and the Judge found it difficult to believe that the bank's Articles should be interpreted as authorising the head of the department to commit the bank to a refund guarantee to pay a large amount of scarce foreign currency, and one governed by a foreign law about which advice was not taken.

In the circumstances, the Court concluded that the expression in the bank's Articles empowering it "to effect settlements connected with clients' export and import operations in foreign currencies in the form of a documentary letter of credit, collection of payments or bank transfer, and in other formats used in international banking practice" was not broad enough to expressly or impliedly empower the head of department to issue a refund guarantee. Smith J interpreted the provision as being restricted to letters of credit, collection of payments or bank transfers. A refund guarantee was not a method of making payment but a collateral contractual commitment. It was not therefore within the terms of the expression. Further, it was not within the scope of the usual authority for a head of department to enter into a contingent commitment as large as that given by the refund guarantee, and the bank had not held out their head of department as having authority to do so. Furthermore, the Buyer failed to establish that the bank had ratified the guarantee by showing that it was adopted by the Chairman of the bank, or by its management board – there was insufficient evidence to show that either had knowledge of the terms of the guarantee or that they were content to adopt it.

The decision highlights the importance of ensuring that refund guarantees are signed by employees with proper authority. It may well be unsafe to assume that it is necessarily usual for senior officials of regional offices of banks to have authority to issue refund guarantees for shipbuilding contracts as opposed to more general commercial guarantees.

This is particularly so where guarantees are issued by banks in parts of the world where written procedures might be non-existent or at best opaque, and where employees might be unfamiliar with guarantees of this kind. The result may be that, understandably, those involved in issuing the guarantee may do so in circumstances where they are, in all good faith, wishing to support the shipyard customer who is earning important foreign currency at a time when the banks are developing new services required by their customers. The bank may be therefore be reluctant to turn the customer away and goes too far in accommodating the request, without necessarily consulting head office as to how it might do so.

It is therefore necessary to undertake a careful review of the bank's Memorandum and Articles of Association and consider obtaining an opinion from a corporate lawyer in the relevant country before accepting a refund guarantee.

Although not essential to the decision the judgment also highlights some further traps for the unwary in holding that the wording of the guarantee was such that it only covered the instalments due under the contract in respect of the vessel made by reference to the progress in its construction. It did not extend to advance payments of such instalments when they were not contractually due, payments for equipment, or payments the parties agreed to bring into account although not made under the contract. If a Buyer makes such payments they risk being unsecured in the event of termination unless the Buyer negotiates for the refund guarantee to be amended to cover such payments.

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Maritime claims: the Winter Storm continues for frozen US Dollar wire transfers

Consub Delaware LLC v Schahin Engenharia Limitada (2d Cir., Docket No. 07-0833-cv) (Sept. 23, 2008)

A Claimant in English proceedings froze the Defendant's US-Dollar electronic funds transfer (EFT) in New York after obtaining a US Court order made pursuant to Rule B of the US maritime procedural rules. The Defendant challenged attachment of the funds arguing that under New York state law (rather than US federal law) the funds being transferred not be considered the Defendant's property whilst in the hands of the intermediary clearing bank, relying on a footnote in the 2006 appellate decision *Aqua Stoli*. The appellate Court held that New York state law did not apply to attachments under Rule B for maritime claims, which federal law governed as it was maritime in nature.

The Facts

On 8 November 2001, Consub (a US company) entered into a contract with Schahin (a Brazilian company) to provide and operate vessels to carry out maintenance and reporting on submarine fiberoptic cables on the high seas. The contract provided for English law and High-Court jurisdiction. On 26 November 2003, Consub claimed against Schahin in London for its fees. Schahin challenged formal service of the English proceedings in Brazil.

On 13 November 2006, Consub filed proceedings in the US District Court for the Southern District of New York, requesting an order to attach any of Schahin's property found there, on the basis of Rule B of the Supplementary Rules for Certain Admiralty and Maritime Claims of the US Federal Rules of Civil Procedure ("Rule B"). The next day, the Court issued an order allowing attachment up to US\$5,986,117.65. On 4 December 2006, a payment by electronic funds transfer (EFT) of US\$4,281,767.96 from Schahin to a bank in Zurich was being cleared through intermediary banks in New York, and was attached.

As many readers may be aware, Rule B allows claimants or creditors to attach assets in order to later satisfy Courts' judgments or arbitrators' awards for maritime claims. US Dollar payments are cleared through US clearing banks in New York. By filing legal proceedings in the Southern District of New York (comprising Manhattan), claimants worldwide are able to freeze US-Dollar payments coming from defendants as they are being cleared.

On 15 December 2006, Schahin applied to the Court to vacate the attachment, arguing that an EFT was not property of the sender or the receiver under New York law (as opposed to US federal law). On 13 February 2007, Judge Scheindlin of the US District Court issued an order denying the application to release the funds, following the 2002 decision of the US Second Circuit Court of Appeals (the "Second Circuit") in *Winter Storm*. *Winter Storm* established the rule that Rule B permitted funds remitted by EFT and originating from a defendant to be frozen.

Schahin appealed the order to the Second Circuit, arguing that EFTs are not subject to Rule B attachments. Schahin relied on a footnote in the Second Circuit's 2006 decision in *Aqua Stoli*, where it set out a four-part test for attachments under Rule B to be permitted. Schahin's argument was as follows:

1. Under *Aqua Stoli*, a requirement for attaching assets under Rule B is that the defendant has property within the jurisdiction of the US District Court; and
2. A footnote in *Aqua Stoli* stated that, in the absence of federal law, New York state law (specifically, Article 4 of New York's Uniform Commercial Code) would consider an EFT to be neither property of the sender nor the receiver.

Primary issue - EFTs are subject to attachment

The Second Circuit held that attachments under Rule B are not affected by New York state law regarding banking transactions. In the US, maritime law is designated by the Constitution as being the subject of federal (US) law. Federal law pre-empts state law in the fields which it governs. Attachment of assets for maritime claims under Rule B was held to be part of admiralty law which had important policy reasons for being in place – i.e. providing a remedy against inherently international parties. Therefore, it was ruled irrelevant which party under New York state law would be considered the owner of EFT funds whilst the intermediary bank transferred them.

The Second Circuit held that interpretation of federal law in the Second Circuit (comprising the states of New York, Connecticut and Vermont) on this point is governed by Winter Storm. Winter Storm clearly established that EFTs from a defendant were subject to attachment under Rule B. It was confirmed that this rule would remain in place unless (a) overruled by an en banc decision (a decision made by all the Circuit Judges of the Second Circuit) or (b) a decision of the US Supreme Court cast doubt on it.

This decision upheld the Winter Storm rule - that EFTs originating from a defendant may be attached to secure maritime claims. We note that the order upheld by the Second Circuit was made by Judge Scheindlin, who very recently made a potentially groundbreaking order in *Kalafrana* extending maritime jurisdiction to contracts for the sale of existing vessels.

One point that was left undecided (in footnote 1) was whether funds being wired to (rather than from) a defendant would be subject to attachment under Rule B. It could be that, with the recent popularity of Rule B as a remedy, the Second Circuit will address the point.

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Does this taste salty to you? US Rule B attachments in New York

Kalafrana Shipping Ltd v Sea Gull Shipping Co Ltd (S.D.N.Y., 08 Civ. 5299 (SAS) (Oct. 4, 2008)

Buyers sought to enforce a London arbitration award for the costs of repair obligations under a contract for sale of an existing vessel. Buyers froze US Dollar assets in New York using Rule B of the US maritime procedure rules. Sellers applied to lift the attachment arguing that the claim under the sale contract was not a maritime contract under US law (as required for attachment). The Court ruled that the test for whether the claim was a maritime claim changed in 2005 and was now whether the nature and character of the contract was maritime commerce. As a result, the claims arising from a contract for the sale of an existing ship were to be subject to Rule B attachments.

The Facts

On 4 May 2006, Sea Gull agreed to sell *The Assil* to Kalafrana under a Memorandum of Agreement (“MOA”). Sea Gull also agreed in the MOU to make repairs to the vessel prior to delivery. Kalafrana claimed against Sea Gull in London arbitration for costs arising from repairs and for wrongful arrest. The London arbitrator awarded Kalafrana US\$611,373.62 plus interest and costs of the arbitration.

On 10 July 2008, Kalafrana filed proceedings in the US District Court for the Southern District of New York (comprising Manhattan), seeking an order to attach Sea Gull’s assets in New York City under Rule B of the Supplemental Admiralty Rules for Certain Admiralty and Maritime Claims of the US Federal Rules of Civil Procedure (“Rule B”). As of August 2007, Kalafrana had attached US\$123,195.28 of payments made by Sea Gull being cleared by intermediary banks in New York.

Sea Gull applied to set aside the order allowing the attachment on the basis that the underlying claim arose from a contract for the sale of a vessel, which under prior US cases was not traditionally considered a maritime claim.

The Aqua Stoli rule

In 2006, the US Second Circuit Court of Appeals (with appellate jurisdiction over the Southern District of New York) established the requirements for attaching property under Rule B in the *Aqua Stoli* case:

1. “a valid prima facie admiralty claim against the defendant”;
2. “the defendant cannot be found within the district”;
3. “the defendant’s property may be found within the district”; and
4. “there is no statutory or maritime law bar to the attachment”.

Sea Gull disputed whether Kalafrana’s claim under the MOA was considered to be an admiralty claim under US law. The US Constitution designates admiralty and maritime law as subject to federal (and not state) law. The scope of maritime jurisdiction over contracts is defined only by case law (as opposed to statute) and is occasionally clarified by the Courts.

Sea Gull argued that the London Arbitrator’s award in Kalafrana’s favour was based on a contract for the sale of a vessel and as a result failed to satisfy the first part of the *Aqua Stoli* test. Sea Gull relied on a 1918 case (the *Ada*) stating that a contract for the sale of a vessel is not considered a maritime contract, on the basis that it was a well-established principle and upheld by the Second Circuit as recently as 1989.

The Decision

The Court in *Kalafrana* concluded that the MOU was a maritime contract, subject to attachments under Rule B. Contracts which fall within US maritime jurisdiction were defined by two requirements:

1. “[T]he nature and character of the contract” is maritime commerce. This rule was derived from two recent decisions by superior Courts:
 - a. The recent decision of the US Supreme Court in *Norfolk Southern Railway Co v James N. Kirby, Pty Ltd* (2004) (*Kirby*) was considered. The Court stated that whether a contract is maritime depends on whether it was “reference to maritime service or maritime transactions”.
 - b. Following *Kirby*, the Second Circuit Court of Appeals in *Folksamerica Reinsurance Co v Clean Water of New York Inc* (2005) (*Folksamerica*) called for reconsideration of cases on the subject. *Kirby* was interpreted as establishing a requirement that “the principal objective

of the contract is maritime commerce”.

As vessels are central to maritime commerce, claims arising from contracts for their sale are maritime claims. In support of the first requirement, the Judge cited criticism of the rule in the *Ada* on the basis that ship sale contracts are properly the subject of admiralty law and procedure, including attachments under Rule B.

2. The contracts be related to seaborne activities. In describing contracts within maritime jurisdiction, the *Kalafrana* Court stated that they have a “genuinely salty flavor” (a phrase borrowed by O’Connor J in *Kirby* and coined by Harlan J in *Kossick v United Fruit Co* (1961)). It should be noted that an express limitation was recognised in relation to newbuilding and financing contracts. These contracts were identified as being “made on land, to be performed on land”, in contrast to the sale of an existing launched ship.

Judge Scheindlin, whose judgment is not binding on other judges of the federal (US) courts in New York, concluded that *Kirby* and *Folksamerica* changed the previous rule (from *The Ada*) that vessel sale contracts were not maritime contracts. As it interprets very recent binding decisions from superior Courts, it is likely that Judge Scheindlin’s order will be appealed by Sea Gull to the Second Circuit Court of Appeal. This potentially groundbreaking order may warrant rethinking by maritime claimants everywhere as to whether their claims have the “genuinely salty flavour” enabling attachment of US Dollar assets under Rule B.

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Collision actions: cargo claims, limitation actions and the correct choice of Court

Shijiazhuang Iron & Steel & Ors v Hui Rong Nav. Corp. S.A. (The Hui Rong) [2008] HKCU 1326

This decision of the Hong Kong High Court involved an application by shipowners to stay cargo claims commenced against them in Hong Kong on the grounds of forum non conveniens. It is significant in that it is the first decision since the seminal decisions in 1998 of the Hong Kong Court of Appeal in *The Kapitan Shvetsov* and the English Court of Appeal in *The Herceg Novi* (CA, England), involving “jurisdictional fights” following a collision, motivated by the differences in the limitation regimes available in the foreign court (in this case, mainland China) on the one hand, and that available in the domestic court (in this case Hong Kong) on the other.

The Hui Rong had been involved in a collision with *The Peng Yan* in Chinese territorial waters off Zhoushan on 17 March 2007, after which *The Hui Rong* sank with all of her cargo and the loss of 17 of her crew members. In two separate actions, persons interested in the cargoes lately laden onboard the vessel *Hui Rong* (“Cargo Interests”), commenced liability actions in Hong Kong against the Owners of *The Peng Yan* (“the Owners”).

Following the collision, and before the Owners had commenced any limitation proceedings, the Cargo Interests issued writs in Hong Kong against *The Peng Yan* and her sister vessels, basing their claims in negligence.

In March 2008 and thereafter, various cargo interests and other claimants also commenced liability proceedings against the Owners in the Ningbo Maritime Court in respect of losses arising from the collision and, on 30 April 2008, the Owners applied to set up a limitation fund in the Ningbo Court. That application was initially approved by the Ningbo Court on 12 May 2008, the approved limitation amount being 50% of the amount that would have been necessary to constitute a limitation fund in Hong Kong under the 1976 Convention on Limitation of Liability for Maritime Claims.

Subsequently, the Ningbo court ruled that the limitation fund should be for a higher amount, being equivalent to 100% of the amount needed to constitute a limitation fund in Hong Kong. The Owners appealed against the Ningbo Court’s decision to increase the amount of the limit.

On 11 July 2008, the Owners applied to stay the Hong Kong proceedings in favour of the Ningbo Court on the ground of forum non conveniens. At the time of the hearing on 25 August 2008, no limitation fund had been constituted at Ningbo. However, the Owners indicated in their application in the Hong Kong proceedings that the reason for their appeal against the limitation amount in Ningbo was simply to buy time to put up the necessary security and that, in principle, they were agreeable to setting up an increased fund.

As the admiralty actions were brought in Hong Kong as of right, the Owners had the burden of showing that the Ningbo Court was both an available forum having competent jurisdiction and was the more appropriate forum for the trial of the action, where the case could be more suitably tried for the interests of all the parties and the ends of justice.

The Owners relied on a host of factors to show that the Ningbo Court was clearly or distinctly the more appropriate forum. These are set out below, with the court’s findings:

1. The collision took place in PRC waters, making the PRC the natural forum for the trial.

- On this issue the court accepted the location of the collision would prima facie make the PRC the natural forum, but stated that this was simply the starting point and other factors had to be considered.

2. The *Peng Yan* was registered in the PRC and owned by a PRC Company.

- Given that Hong Kong was a leading international port and it was expected defendant ships would be registered in foreign jurisdiction and be under the ownership of foreign companies, the court concluded that this factor would have little (if any) impact on the trial.

The crew of both vessels were PRC nationals.

- The PRC is an enormous country and there was no evidence that the key crew witness, a resident of Shandong, would find it more convenient to go to Ningbo to give evidence, rather than Hong Kong.
- The crew members were usually at sea and it was unclear whether, at any given moment, it would be more convenient for the crew to attend trial at Ningbo as opposed to Hong Kong.
- It was doubtful that any evidence could usefully

be obtained from the crew many months after the event and the main body of evidence from the flag state investigation and Zhejiang Maritime Safety Administration would be more useful to a trial Judge.

4. There were other actions, including the limitation action, proceeding in Ningbo and it was more convenient for all claims to be adjudicated in the same jurisdiction.

- The Court was unable to attach much weight to this factor. It was far from clear that the Ningbo Court would consolidate all liability claims before it. In fact, some of the actions (e.g. the Zhejiang MSA's action for pollution damage) seemed impossible to consolidate. The Court was therefore unable to see how liability claims to the Ningbo court would have the effect of substantially saving time and costs.

5. Existence of the limitation action in the PRC

- The Owners sought to argue that there was a danger that the very same issues that would be tried by the Hong Kong courts (viz apportionment of liability between the 2 vessels for the collision) could be tried in the Limitation Action in Ningbo as well. It could therefore be argued that all parties contesting the issue of apportionment could apply to be joined in as parties to the Limitation Action. However, the Court, citing Rix J in *Caspian Basin Specialised Emergency Salvage Administration v Bouygues Offshore S.A.*[1997] 2 Lloyd's Rep 507 held that there was nothing unusual about a limitation action taking place in a different forum from that in which liability is being litigated and it was the Owners choice to constitute the limitation fund in Ningbo, after the Hong Kong litigation was commenced.

6. Equivalent Limits of Liability in PRC and in HK

- The Owners sought to argue that since limitation amounts in Ningbo and Hong Kong would effectively be the same, the Cargo Interests would not lose any juridical advantage if they were compelled to litigate in Ningbo. The Court commented that, at best, the existence of a 100% 1976 Convention limitation fund would be a neutral factor. However, the Court concluded that, despite Owners assertions, there remained a chance that something less than 100% of the 1976 Limitation Convention fund would be established in Ningbo, and this factor marginally favoured Hong Kong.

The Judge therefore concluded that the Owners had not discharged the burden of showing that Ningbo was the most appropriate forum. Consequently it was unnecessary to deal with the Cargo Interests arguments that they would be deprived of a juridical advantage if the Hong Kong proceedings were stayed. However, the Judge indicated that the juridical advantages relied upon were not compelling.

Cargo Interests had argued that 1) PRC proceedings were more cumbersome; 2) they would be unable to recover their legal costs, and 3) there was no general discovery in the PRC. The Court indicated that it would be slow in today's global age to refuse a stay on the basis of these features, stating:

"Considerations of comity should make a court hesitate to claim superiority for a system simply because one has general discovery and can recover party-and-party costs."

Cargo Interests also argued that interest on the limitation fund would be lower than in Hong Kong and that PRC foreign exchange control would make it difficult for them to remit damages awarded outside the PRC. On the first issue, the Court accepted evidence that the claimant could apply to the Ningbo Court for a higher interest rate and, on the second, that the claimants could seek permission for remittance of foreign currency outside the PRC. Therefore, neither factor could be regarded as a substantial disadvantage.

Comment

The decision demonstrates the present day application of *The Spiliada* principles for a stay on the ground of forum non conveniens. It also sheds light on the weight likely to be attributed by a Hong Kong Court to the existence of a limitation action in mainland China, in respect of a collision occurring in mainland China. While it is tempting to conclude that these factors weigh heavily in favour of the situs of the tort as the natural forum, it is now clear from the point of Hong Kong law that the question of whether the foreign forum is in fact the "*most appropriate forum*" for the trial of the dispute is not assessed in a vacuum. Instead, consideration must be circumscribed by the facts in dispute and evidence required for the purpose of adjudicating that dispute. Here, the issue in dispute was the apportionment of liability between the 2 vessels for the collision; all of the evidence necessary for that determination was

equally available in Hong Kong and in Ningbo.

The Owners appeal against the decision was heard by the Court of Appeal of Hong Kong last week. By then, the Owners had already established a limitation fund corresponding to 100% of the 1976 Limitation Convention fund in Ningbo. Nonetheless, the Shipowners' appeal was dismissed with costs. We will report further when the grounds of the Court of Appeal's judgment become available.

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Business & Finance

Major changes to UK immigration rules

The UK immigration system is currently undergoing major changes which impact considerably on those employing nationals of non-EU countries. The new system is a points-based system (where points are awarded on the basis of, for example, ability/qualifications, experience, age, previous earnings, English language ability) and will mean that applications for the right to work in the UK will eventually be under one of five tiers.

Applications under tier 2 (skilled workers with a job offer, including those currently employed abroad who wish to transfer intra-company to work in the UK), are to be assessed under the new points-based regime from the end of November 2008 (along with applications under tier 5 (temporary workers)). From that time, all applications for permits to work in the UK under either of those tiers will require the support of a sponsor (who must be the applicant's employer). Employers will therefore need to apply for a sponsorship licence in order to be able to employ workers who fall within either of these categories.

Once an employer has obtained a sponsorship licence, it may issue sponsorship certificates (at a cost of £170 each time) to those non-EEA nationals whom it wishes to employ in the UK. A certificate of sponsorship does not guarantee that the prospective employee will be granted a permit to work in the UK, but a sponsorship certificate from a licensed sponsor will be required for all tier 2 and 5 applications from November 2008 before the application will even be considered.

As a condition of keeping their sponsorship licence, sponsors will need to comply with certain ongoing duties or will risk losing its licence. A sponsor who loses its licence can no longer

continue to employ those employees whose work permits have been approved under the points-based system. Non-compliance therefore has potentially extremely serious consequences for both employer and employee.

From November 2008, employers who "inherit" employees whose work permits are granted under the points-based regime and therefore require a sponsor will need to obtain a sponsorship licence, if they do not already have one in place, within 28 days of acquiring the employees, or the work permits will be withdrawn.

It should be noted that applications for the right to work in the UK for highly skilled workers (tier 1) have been subject to the new points-based system since 29 February 2008 and do not require a sponsor. Also since that date, an employer who knowingly employs an employee whom he or she knows is not entitled to work in the UK may face criminal sanctions of an unlimited fine and/or a prison sentence of up to two years, and a civil penalty of up to £10,000 per employee. To avoid such sanctions, the employer must show that they have carried out the appropriate checks (repeated as necessary) and were not aware that the employee was not legally entitled to work in the UK. This also applies to employees who are "inherited", for example when an existing business or branch is taken over.

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Other News

Ince & Co wins shipping award

Ince & Co has been named the inaugural global Shipping & Maritime Law Firm of the Year 2008 in the Who's Who Legal Awards.



With the benefit of over ten years of independent research, Who's Who Legal used the thousands of nominations it has received from clients and private practice professionals to identify the leading firms in 50 countries and five US states. The winners were formally announced in The

International Who's Who of Business Lawyers 2008, a compendium edition of all the individual Who's Who Legal publications, which was released in May, covering 29 practice areas and nearly 100 countries.

Editor in chief Callum Campbell said, *"In a highly competitive field, receiving the Who's Who Legal Shipping & Maritime Law Firm of the Year Award is an outstanding achievement. This is the first time we have recognised a firm in this field, and the consistently positive feedback Ince & Co received reflects its exceptional individual and collective talent. We have no hesitation in declaring Ince & Co the leading firm for Shipping & Maritime expertise."*

Partners from the firm received sufficient nominations from their clients and peers to be listed nine times across seven countries in the Shipping & Maritime chapter of the publication. The firm had more practitioners in this section than any other firm, and senior partner James Wilson features among the most highly regarded individuals in the research overall.

Who's Who Legal lists only the leading practitioners in each field, based exclusively on the findings of an independent six-month research process. The awards are based on a number of factors, including the feedback received in the ongoing research process, past performance in the research and the overall aggregate number of weighted votes cast in their favour.

This year, Who's Who Legal was named the Strategic Research Partner of the ABA Section of International Law in addition to its position as Official Research Partner of the International Bar Association.

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