Standard Bulletin:
Defence Special Edition

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The Standard
for service and security

The Standard

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In this edition

Welcome to our Special Edition of the Standard Bulletin, devoted entirely to Defence Class issues.

Defence cover is insurance for the legal and other costs of pursuing and defending claims relating to entered ships, where the sum in dispute is not otherwise insured. Although not all of our members buy defence cover, defence and legal matters are still of great importance to all members.

Defence cover is entirely discretionary and the risks covered include disputes relating to: freight, hire, demurrage, detention, loss of use, breach of charterparty, contracts of affreightment and the supply of bunkers. The club also supports members in disputes with agents, stevedores and underwriters, and, by special agreement, cover can be extended to include new buildings.

Many of the claims we handle could be described as the more traditional types of disputes concerning, for example, demurrage and outstanding final hire. Often the amounts in dispute are relatively modest. However, given the difficult operating environment of low freight rates and high bunker prices, it is entirely understandable that members are keen to take steps to protect their position and our claims executives are here to support them wherever possible.

The club has significant in-house legal expertise in London, Piraeus, New York, Hong Kong and Singapore. Our qualified in-house lawyers work hard to ensure that members' legal problems are dealt with as quickly, efficiently and commercially as possible. Most of the legal advice provided by the club to members is given before any dispute has arisen and helps to head off commercial disagreement and defuse a potentially difficult situation. Where this isn't possible, our claims executives, exploiting our close working relationships with the leading maritime law firms, can help members through all forms of dispute resolution options available worldwide, including court litigation, arbitration and mediation.

Litigation (and arbitration for that matter) can be a very expensive process and, through the recent introduction of our Service Level Agreement ('SLA') (see our article on page 4) we continue to do our utmost to control the costs of handling and litigating claims. Through the SLA we will develop an even closer working relationship with the leading maritime law firms and our aim is to ensure there is greater transparency on the cost-effectiveness of all steps being taken in any dispute resolution process, to the benefit of not only the club but also the member.

The articles that follow give a flavour of the types of issues and disputes that we have been dealing with over recent months, as well as highlighting some of our success stories and local developments in the important maritime jurisdictions of Singapore and New York.

Our last article touches upon mediation and its advantages over a potentially costly and distracting litigation or arbitration. The club believes that commercial settlements that maintain the working relationship between parties are usually preferable to court judgments, which can often destroy a commercial relationship.

We hope this Special Edition is of interest. For any further advice or clarification, members should not hesitate to contact the authors, or their usual club contact. The Standard Club is always on hand to assist.

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The Jackson reforms – Budgeting for the future of litigation

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Litigation has often been an expensive and unpredictable exercise, with the costs of pursuing an action in the courts (or through arbitration for that matter) notoriously prone to escalation, sometimes to levels that are disproportionate to the amount in dispute.

Jackson reforms and litigation budgeting

In April 2013, a package of litigation reforms were introduced following the report and recommendations prepared by Lord Justice Jackson, intended to control costs and enable better access to justice generally in civil cases. While many of the reforms relate specifically to personal injury litigation, one key aspect of the Jackson reforms was the introduction of litigation budgeting as a required step in most multi-track civil cases (including commercial court cases under £2m), although admiralty cases are specifically excluded.

Under the new regime, parties are required to exchange and submit stage-based litigation budgets to the court for approval. There are strict timelines applicable to presentation of the initial budget, as well as any changes, and the case law to date has taken a very strict view on compliance with the procedural requirements. Failure to stay within the approved budget can have a significant impact on the recoverable costs of the successful party. One of the key elements that the court considers in granting its approval is whether the proposed budgets are proportionate to the amount in issue and the courts have wide discretionary powers to intervene when they are not.

There are a number of factors that tend to impact on the costs to be incurred in any given matter and some of these are more predictable than others:

- Is the case factually or technically complex, requiring a number of investigators or experts?
- Are the facts contested, or is the case more restricted to an interpretation or a point of law?
- Is the other party combative or co-operative?
- How much is at stake in the claim?

The interplay of these factors can all impact on the costs of a case. For instance, a relatively modest claim over physical damage to a crane can often incur disproportionately large costs, because it requires extensive factual and technical evidence. In contrast, a multimillion dollar claim in relation to the interpretation of a charterparty clause may incur only relatively modest costs as the facts are agreed and it is only the legal interpretation of the subject clause that is in dispute.

Introduction of budgeting on club matters

There has been a general increase in the legal costs paid by the club over the last decade and the club is conscious that in these difficult economic times for owners and operators, the club needs to look for all possible ways to minimise claim costs. In furtherance of this objective, the club and its managers have been looking at ways to more efficiently utilise external legal advisors on club matters.

As a result of extensive work within the club over the last six months, the club has now launched a Service Level Agreement (SLA) for use with major legal service providers in our primary markets. The club already has a significant number of law firms worldwide operating under the SLA, which covers a significant percentage of the club's overall legal spend.

The SLA outlines the club's expectations of law firms providing legal service to members and has been designed to capture a best practice approach. One significant new feature is the introduction of stage-based fee budgeting for all matters (including those going to arbitration), despite the fact that these are not yet court mandated for admiralty cases.

The introduction of stage-based budgeting is a useful tool for facilitating communication between the law firm, club and member, so that all parties have similar expectations on the anticipated costs of a matter, to avoid 'bill shock' when invoices are submitted.

The monitoring of the accuracy and ongoing performance of stage-based fee budgets versus costs will be facilitated by the implementation of the club's new electronic legal billing system, Serengeti©. The ability to electronically review and record legal billing will also assist the club to indentify macro level trends in our legal spend and will allow us to seek further improvements and efficiencies more generally in the future.

Conclusion

The Jackson reforms have now been in place for 18 months and we are yet to see whether the introduction of stage-based fee budgeting will result in any significant reduction of litigation costs. However, what we can already see is a shift away from retrospective consideration of costs at the conclusion of a litigated matter, towards cost budgeting as a prospective exercise, which should at least result in fewer surprises for all the parties involved.

Our success in Greece

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The club's office in Piraeus comprises a team of seven Claims Directors/Executives, four of whom are qualified English Solicitors or Greek qualified lawyers with considerable experience in handling defence cases for our Greek members. In recent years, the Piraeus office has handled various charterparty disputes, including off-hire, laytime and demurrage, speed and consumption claims, as well as damage to ship and shipbuilding disputes. The office has often achieved successful results either by way of an out-of-court settlement, mediation or issuance of a judicial award, thus providing an excellent service to our membership.

The following case is an illustration of the club's continuous support to a member throughout court proceedings in two jurisdictions, resulting in a successful recovery by the member of the full outstanding amount owed.

Successful enforcement of London Arbitration Award in Lithuania.

Our member chartered the m/v Alpha (the 'vessel') to a Lithuanian charterer (the 'charterer') under an amended Gencon voyage charterparty. The charterer's broker, also a Lithuanian company (the 'guarantor'), guaranteed the full and proper performance of the charterparty and any payments and amounts due under the charterparty (both entities referred to as the 'respondents'). The charterparty was governed by English law and arbitration.

The Vessel arrived at the discharge port on 14 August 2011 and Notice of Readiness was served the same day. However, discharge was delayed due to various reasons, none of which interrupted laytime or demurrage as per the terms of the charterparty. Upon completion of discharge, the member had a claim for demurrage and damages for detention of $335,069.44 and $5,950 respectively (the 'claim amount'), which the charterer refused to pay.

The member sought legal advice from English solicitors, Waterson Hicks, who advised that the case had strong merits, but that before seeking an arbitration award, it should be ascertained whether the respondents had sufficient assets that could be enforced against. Following research into the respondents' financial standing, assets were located in Lithuania. The club thereafter confirmed defence support and Waterson Hicks was instructed to commence arbitration in London for the recovery of the claim amount, plus interest and costs.

The respondents, via email and through the broking channel, were notified to appoint their own arbitrator, but failed to do so. The member's arbitrator therefore accepted appointment as a sole arbitrator. The respondents declined to take any substantive part in the arbitration proceedings. Consequently, within a few months, a default award was issued in favour of the member for full reimbursement of the claim amount, plus interest and costs.

Subsequently, the club appointed a law firm in Lithuania, LAWIN, to make an application for the enforcement and recognition of the London Arbitration Award under the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Pursuant to the 1958 New York Convention, there must be an agreement in writing under which the parties undertake to submit to arbitration. Furthermore, it is required that the applicant supply the original agreement or a duly certified copy thereof to the court where recognition and enforcement is being sought. Recognition and enforcement may be refused if the party against whom it is invoked provides proof that the party was not given proper notice of

This case demonstrates the club's willingness to provide continuous support to its members in defence cases where there are strong merits and good prospects of enforcement, and the costs of all steps taken are reasonable and proportionate to the sum in dispute.

appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case.

In support of its application, the member submitted a certified copy of the arbitration award as well as a copy of the charterparty and pre-fixture correspondence exchanged between the parties that proved the guarantor had authority to bind its principal.

The enforcement proceedings reached the Court of Appeal in Lithuania.

As neither of the respondents participated in the arbitration proceedings, the Court needed to be satisfied that the notification of arbitration proceedings to the respondents was properly made, before deciding whether to allow the award to be enforced.

The member obtained witness statements and copies of email exchanges from the brokers to prove that the respondents were duly notified by email and by post, and that such notification had been received.

Amongst other evidence, there was also a copy of a Skype telecommunication between the charterer and its broker confirming that the charterer was aware of the proceedings.

The judges determining the enforcement proceedings were very interested in the English Law position in respect of service of notices via email and via brokers/agents. It was therefore necessary for Waterson Hicks to draft detailed witness statements responding to the judges' questions.

On the basis of all the additional evidence provided, the Court of Appeal of Lithuania declared the arbitration award recognised and enforceable in full. Enforcement was made within one day, by freezing the charterer's bank account in Lithuania where sufficient funds were available.

The club and member also recovered their legal costs by way of a settlement with the charterer and the guarantor.

Fact or law? Anticipatory breach

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An anticipatory breach of contract occurs when a party makes it clear that it does not intend to perform an obligation under a contract – before the time for performance of that obligation is due. The innocent party may treat itself as discharged from future performance under the contract where the anticipatory breach amounts to a 'throwing up of the contract' by renunciation or a self-induced impossibility. To put it another way, the effect of the breach must be sufficiently serious and 'go to the root of the contract' for future performance to be discharged.

For a party to have renounced a contract, it must have 'evinced an intention not to perform' an obligation or obligations thereunder. In *The Bulk Uruguay*[1] the court reaffirmed the test for renunciation, clarifying that words or conduct giving rise to mere unlikelihood or uncertainty over future performance by one party were not sufficient on their own to evince an intention not to perform.

Background

The vessel had been time chartered by her disponent owner to the charterer for about 35-37 months. Delivery was to be one year from when the fixture was concluded. At the time of delivery of the vessel into the charter, the market price had fallen by around $6,000 per day.

Under the charter, the charterer could order the vessel through the Gulf of Aden freely (she was 'GOA OK'). This aspect of the deal had been described in fixture negotiations as a 'deal-breaker'. However, the disponent owner did not contract on back-to-back terms. Instead, it required the head owner's permission to transit the GOA and it had no control over whether and when this would be given.

1. Geden Operations Ltd v Dry Bulk Handy Holdings Inc ('The Bulk Uruguay') [2014] EWHC 855 (Comm)

The charterer indicated an intention to send the vessel through the GOA on her maiden voyage. The head owner initially refused the GOA transit, but eventually agreed on condition that this did not set a precedent and it was understood that permission had to be sought for any GOA transit on a case-by-case basis. The disponent owner was, of course, bound to follow what the head owner directed in that regard.

The charterer declared that the disponent owner had renounced the contract by virtue of its inability to perform the all-important GOA transits, and by virtue of having placed performance outside of its control. It said this anticipatory breach went to the root of the charter, allowing it to discharge itself of all future performance.

The disponent owner accepted the charterer's refusal to perform as a repudiation of the charter, claiming damages at the difference between the market and charter rate for the entire remaining charter period.

Arbitration

The Tribunal held that the disponent owner had not renounced the charter. As a matter of fact, the owner had not refused an order to transit the GOA, and nor had it evinced an intention not to perform future obligations under the charter. All it had said was that permission had to be sought to transit the GOA – which may or may not have been given, so it may or may not have been able to perform.

The Tribunal further held that the inability of the disponent owner to say with any certainty that the vessel would be able to transit the GOA in the future, if ordered to do so, did not go to the root of the charter.

Commercial court

The charterer argued that the Tribunal had erred in law by applying the following test: in order to consider whether the owner had evinced an intention not to be bound by the charter, it should be asked whether a reasonable man would have concluded that the head owner would have refused to comply, or comply promptly, with an order to transit the GOA in the future.

It argued that the very act of making performance dependent on a third party and, therefore, placing it outside of its control evinced that intention, without any regard to the 'reasonable man'. This could be regarded as a new category of anticipatory breach, with potentially wide-ranging consequences for an intermediate charterer.

The judge gave this argument short shrift, confirming that the relevant test is simply a factual one. He concluded that there was no renunciation, criticising the charterer's argument as *"an attempt to appeal a finding of fact by dressing it up as an issue of law"*.

He observed that where there was an uncertainty in performance, it would have to be seen what happened at the time performance fell due. So, if a future order to transit the GOA was refused, the question of breach could be analysed only then. The court confirmed that there was no special category of anticipatory breach by putting performance outside of one's control, or uncertain performance.

Whilst it was not necessary to consider whether the breach in question went to the root of the contract, the judge also commented that if you compared the term breached (here, the 'GOA OK' status), and the consequences of the breach, clearly substantially the whole benefit of the contract would not have been lost, especially given the worldwide trading limits contained within the charter.

Comment

In this case, the court reaffirmed the traditional understanding of renunciation. Anticipatory breach is a special category of breach and **only** if it gives rise to the most serious of consequences should it lead to the tearing up of a contract.

Benefiting from a breach – The New Flamenco

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In *The New Flamenco*[1], the issue before the Commercial Court (on appeal from a London arbitration) was principally one of mitigation: if a charterer's early redelivery causes the owner to sell the vessel, and the sale price obtained is in fact higher than what would have been the vessel's value at the minimum redelivery date, must the owner give credit for this in its damages claim against the charterer? More generally, when must a claimant give credit for any benefit it has obtained from a breach of contract?

The answer to this question had a significant bearing on the financial outcome of this case. The charterer insisted that it was entitled to redeliver the vessel (a small cruise ship) in October 2007, rather than November 2009. The owner treated the charterer as in anticipatory repudiatory breach and, in August 2007, accepted the breach as terminating the charter. The owner then sold the vessel in October 2007 and commenced arbitration in 2008. In its claim submissions served in 2011, the owner claimed damages of about €7.6m, being the owner's net loss of profits for the remaining two years of the charter period, taking into account the operating costs and expenses saved as a result of the sale. It was not disputed that there was no available market for a two-year substitute charter for the vessel at the time of the charterer's redelivery, or that the vessel was sold for a reasonable price. However, the sale price achieved by the owner was in fact some €11.3m (US$16.8m) more than the value of the vessel in November 2009. The charterer claimed it was entitled to a credit for the €11.3m benefit obtained by the owner – if correct, the owner would recover no damages at all.

A question of causality

The tribunal found that the sale was directly caused by the charterer's early redelivery and was in reasonable mitigation of damage. Seeing no reason why capital savings should not be taken into account in considering the owner's net losses, the tribunal declared that the charterer was entitled to the credit sought of €11.3m.

In the appeal proceedings, the charterer argued that the tribunal had correctly applied the principle under English Law that a claimant cannot recover for avoided loss. If a claimant takes steps to mitigate its loss, which are successful, then it must give credit for benefits obtained from such mitigation. However, in its judgment of May 2014, the Court disagreed. After reviewing relevant case law, the judge noted that there was no single general rule as to when a wrongdoer may receive credit for benefits obtained from a breach of contract. Of the principles emerging from the cases, however, there needed to be a direct causative connection between the breach of contract and the benefits obtained from the breach.

1 Fulton Shipping Inc v Globalia Business Travel SAU 2014 2 Lloyd's Reps 230

On these facts, the Court considered that such connection did not exist. While the redelivery may have 'triggered' the owner's sale and the sale may have been in reasonable mitigation of the owner's losses, the capital savings obtained by the owner arose from its own decision to sell, in the Court's view – a decision taken at the owner's own commercial risk – as well as the fall in the market caused by the global financial crisis, which occurred irrespective of the charterer's breach. The capital savings were not legally caused by the charterer's early redelivery.

Other considerations

The Court rejected the owner's argument that the benefits obtained from a breach of contract and the losses claimed needed to be of the same kind in order for the benefits to be taken into account in reducing the claim. Where they were different, however, as in this case (capital savings versus loss of income), this may indicate that the necessary causal connection between the breach of contract and the benefits did not exist.

The Court noted finally that, even if the necessary causal link could be established between a breach of contract and benefits obtained from that breach, the wrongdoer might nevertheless not be entitled to reduce its liability for reasons of justice, fairness and public policy. Just as a wrongdoer is not entitled under English law to benefit from an innocent party's receipt of proceeds of insurance, the charterer should not be permitted to benefit from the 'fruits of the owner's investment in the vessel', and the owner's timely decision to sell.

Conclusion

The charterer has been granted permission to appeal, which will be heard in early 2015, and the decision is awaited with interest. In other recent cases concerning damages for early redelivery where there is no available market at the time of breach, such as *The Kildare* and *The Wren*, the courts have considered an owner's actual losses in assessing damages so as to put the owner in the position it would have been in had the charter been performed. However, in *The Kildare* and *The Wren*, the relevant vessels were not sold on redelivery but chartered out (though not in similar employment) and the benefits obtained by the owner, and taken into account in assessing damages, arose under such charters. In principle, the Court in this case considered that a beneficial change in the vessel's capital value might be taken into account in assessing damages for early redelivery, but again, only if the necessary causal connection existed between an owner's lost contractual rights and the change in capital value.

For the moment, the case is a reminder that even where a party has benefited from steps it has taken to mitigate loss following a breach of contract, and even appears to have suffered no financial loss, this might not be something of which the original defaulting party can take advantage.

Update on Prejudgment Security and Enforcement of Judgments/Awards in the USA

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No matter how good the facts are, no matter how well the facts fit squarely into existing precedent, no matter how beautifully written the court's decision or the arbitrators' reasons are, it means nothing if the judgment remains uncollected. Indeed, whether any eventual judgment or award will be collected is a key factor for the club in deciding whether to support a member in a defence class case.

In the USA, there are two principal ways to obtain prejudgment security: maritime arrest and maritime attachment. For our charterer members with claims against shipowners, it is possible to arrest or attach a ship when the claim is against the owner or sister companies if certain conditions are met. However, for our owner members with disputes against charterers, it is always a challenge to find assets to arrest or attach prior to judgment. The USA has long allowed prejudgment attachment of 'property' if the underlying claim is maritime and the 'property' is located in a district where the defendant cannot otherwise be 'found'. Such an attachment is called a 'Rule B attachment', after the procedural rule that codifies it.

Contrary to the belief of many, Rule B attachments still exist in the USA. The remedy is not as useful as it used to be, however, as a result of a court decision in 2009 that dollar-denominated electronic fund transfers being cleared at a New York bank were not the 'property' of a defendant, subject to an attachment. The remedy remains, however, with respect to traditional forms of property, tangible or intangible, such as money in a bank account, debts, cargoes, bunkers, etc.

If the dispute is subject to arbitration in New York, a party may also apply to the tribunal for an award directing the other side to post security. In an appropriate case, arbitrators in New York will issue such an award and the courts will enforce it.

The dollar remains the global currency, New York remains the world's banking centre, many banks have spent fortunes branding themselves as global banks active in all major trading countries, and cash machines bearing the logo of such banks are ubiquitous. If I can go to a Citibank cash machine in Kenya and get cash, which is debited to my account in New York, why shouldn't a creditor in New York be allowed to serve an order on Citibank in New York that restrains the ability of a Citibank customer in Kenya to use the funds in an account there? The multinational banks tout that accounts can be accessed on a phone or computer from anywhere. They file consolidated financial statements for their worldwide operations. There is certainly no technical, practical reason why the banks cannot restrain funds from any account anywhere in the world pursuant to a court order issued in a place that has jurisdiction over the bank. For a while, there was precedent in New York that suggested the courts were headed in that direction, and lower courts struggled with the issue.

However, the recent decision of the New York Court of Appeals in *Motorola Credit Corp. v Standard Chartered Bank* has ended this possible remedy for creditors. Even though banks are global and integrated electronically, the court held that each branch office is a 'separate entity'. Under this 'separate entity rule', one bank branch office may not be compelled to interfere with assets held at another branch office. Accordingly, a creditor must obtain an order from a court that has jurisdiction over the branch where the account is held in order to attach or restrain funds held in an account there. So, to follow my earlier example, the 'creditor' here would need to get an order in Kenya to attach the funds held in the local Citibank account for that 'debtor' customer.

The traditional remedies of maritime arrest and attachment, as well as the power of arbitrators in New York to direct a party to provide security in appropriate cases, remain available in the USA. In considering whether prejudgment security is possible in a given case, do not hesitate to contact the New York office, who will be able to assist you in evaluating the remedies available in the USA.

Spotlight: Our New York Office

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The New York office of Charles Taylor has four primary missions:

- handle the claims of our US and Canadian members - anywhere in the world;
- assist our other members, when they have claims in the US with respect to security, as well as the appointment of surveyors and lawyers in the US and Canada;
- assist our other members, with respect to significant claims in the US; and
- be a resource generally on US and Canadian law issues and developments.

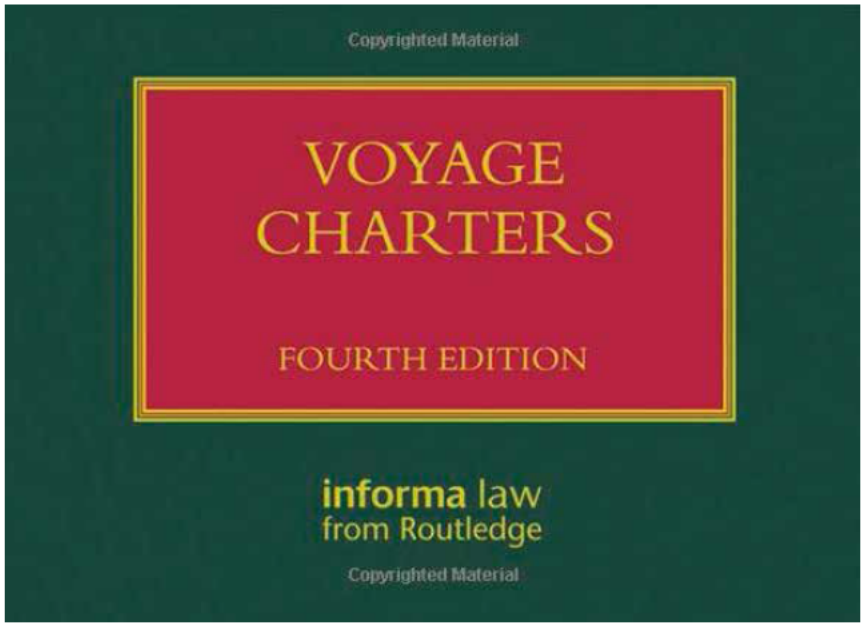
The office is headed by Regional Claims Director LeRoy Lambert, who joined the club in 2009 after 25 years as a maritime lawyer practising in New York. LeRoy's experience and contacts often enable him to deal directly with the US lawyers involved in difficult/complex matters and reach a resolution sooner, and at less cost, than would have been the case if the usual dispute resolution procedures had played out. He focuses on large, complex cases, and also mentors and is a resource for the rest of the team in New York. He also uses his experience to draft publications internally and externally, most recently as a co-author of *Voyage Charters*, see the next page of this Special Edition.

Admitted to the bar in the UK, Ireland and New York, Claims Director Leanne O'Loughlin joined the club in London in 2010 in the Mediterranean Syndicate, where much of the club's defence work arises. In 2012, she moved to the Offshore Syndicate and learned the 'ins and outs' of contract review. In 2013, she transferred to New York. In addition to using her expertise in contract review issues, she is responsible for our Canadian members and assists with the claims of our US members whose charterparty disputes call for London arbitration.

Claims Executive Rebecca Hamra joined the club in 2012 after graduating from Tulane University School of Law with a certificate of specialisation in Admiralty and Maritime Law. Between her undergraduate degree and commencing her studies at Tulane, Becky worked for a year at a coastal environmental education facility in Jekyll Island, Georgia. She is responsible for the majority of our US-Flag members and has a wealth of knowledge about US environmental and sanction issues.

The Standard Club's LeRoy Lambert Co-Authors leading treatise, Voyage Charters

On 4 November 2014, Lloyd's Shipping Law Library announced its publication of the fourth edition of Voyage Charters, the leading treatise for members, lawyers and claims handlers in this specialised area of maritime contracts. LeRoy Lambert, the head of Charles Taylor's office in New York, is a co-author. LeRoy has co-authored every edition, beginning in 1993. LeRoy stated: "The publishers and the co-authors are very pleased to see the fourth edition published. Numerous sections have been updated, and we are pleased to welcome two new co-authors: Michael Ashcroft, Q.C., for the UK team and Professor Michael Sturley for the US team".



Claims Executive Peter F. Black joined the club in 2014 after also graduating from Tulane University School of Law with a certificate of specialisation in Admiralty and Maritime Law. Prior to Tulane, Peter worked for three years as a freight forwarder in Baltimore, where he also gained experience doing routine surveys. An avid sailor, Peter served two seasons as harbour master at Annapolis, Maryland. Peter handles claims for our US and Canadian members and also handles US occupational disease claims.

The team is always ready to assist and can be reached as follows: pandi.newyork@ctplc.com (goes to all four members of the team – use for emergencies after hours).

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Does a charterer have to carry on paying hire during an arrest? The Global Santosh

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The dispute arose when time charterer Cargill stopped paying hire under its charterparty with the owner after the vessel had been arrested by cargo interests. At the time of the arrest, there had already been delays of nearly two months in the discharge of the cement cargo on board the *Global Santosh*[1] at Port Harcourt, and this was partly caused by the breakdown of IBG's (the cargo receiver's) unloader.

The vessel and her cargo were arrested by the sub-charterer and sellers of the cargo, Transclear, to secure its claim for demurrage against IBG under its separate sale contract.

Cargill withheld hire for the period during which discharge was prohibited by the arrest order, invoking an arrest off-hire clause in the charterparty (clause 49). This clause provided that payment of hire would be suspended during any arrest unless the arrest *'was occasioned by any personal act or omission or default of the Charterers or their agents'*.

There were two key issues to be decided:
- were Transclear or IBG Cargill's agents?; and
- if so, what actions of the agent fell within the arrest off-hire clause?

Decision and appeal

The owner claimed payment of the withheld hire from Cargill in arbitration, arguing that the arrest had been occasioned by the acts of IBG and Transclear, who the owner said were undoubtedly 'agents' of Cargill under clause 49. By a majority, the Tribunal rejected the owner's claim, deciding that:

- Transclear was not performing Cargill's obligation under the charter to discharge the cargo;
- even if it was, Transclear was at most an independent contractor of Cargill and not an agent; and
- in any event, Transclear was acting purely on its own behalf in arresting the vessel.

The Tribunal therefore concluded that Cargill could rely on clause 49 and that as a result the vessel was indeed off-hire for the period she was under arrest.

The award was appealed to the High Court, and then to the Court of Appeal, which held, contrary to the Tribunal's finding, that the term 'agent' should be widely interpreted, so as to include any party to whom Cargill had entrusted the performance of its obligations under the charterparty. The Court called such entities 'delegates'. 'Delegates' of Cargill could therefore include sub-charterers, sub-sub-charterers and receivers.

Unabashed, Cargill advanced a further argument, saying that even if Transclear and IBG did amount to 'agents', clause 49 could only apply when an agent was actually carrying out the obligation that had been delegated to it. Cargill said that Transclear had been acting solely in its own interest when arresting the vessel (so as to recover the demurrage owed to it under its separate sale contract with IBG).

1 NYK Bulkship (Atlantic) NV v Cargill International SA 2013 EWHC 30 (Comm); 2013 1 Lloyd's Rep. 455)

The Court of Appeal disagreed, holding that as soon as a party had become a delegate, it remained a delegate, regardless of the nature of the act that had caused the arrest. As a result, the actions of Transclear in obtaining the arrest and those of IBG in failing to discharge within the laydays and to pay the demurrage or furnish security to Transclear, fell within the proviso to clause 49. This was so even though these failures did not occur in the course of performing Cargill's delegated obligation (of physically discharging the cargo). It followed that Cargill had lost the protection of the arrest off-hire clause and was liable to pay hire during the period when the vessel was under arrest.

The Court also looked at the issue in a broader commercial context, commenting that when clause 49 was considered against the general expectation in the industry, risks would fall either on the owner's or charterer's 'side of the line'. This was clearly a case in which the failures leading to the arrest were committed by Cargill's delegates, and therefore fell on its side of the line.

Analysis

Charterers won't like this judgment. Some will say, noting that the finding of the Court of Appeal was effectively the opposite of what the commercial arbitral tribunal had decided on the two key issues, that this demonstrates those issues are not straightforward. Many charterers will baulk at the prospect of being responsible for loss of time stemming from the acts of parties further down the charterparty chain that are independent of, and indeed even contrary to, their own interests and will therefore wish to narrow the scope of the clause.

However, many will consider the Court's practical and commercial approach correct and point to the fact that under unamended NYPE 1946 terms, a charterer would ordinarily have to continue paying hire during the period of any arrest unrelated to an owner. Moreover, the ruling relates only to loss of time under the, albeit commonly used, arrest off-hire clause. Therefore, whilst a charterer will usually remain responsible for a receiver's failure to perform an obligation under a time charterparty that has been delegated to him by the charterer (e.g. to discharge the cargo), this judgment probably does not support any wider principle that a charterer should be regarded as generally responsible to his owner under the charterparty for any act or omission of a receiver.

Update on the Commercial Dispute Resolution landscape in Singapore

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The recent growth in trade and investment in Asia has been phenomenal. In 2012, Foreign Direct Investment (FDI) inflows into the region stood at about $400bn, up nearly 30% from 2009. In shipping, Asia was the main loading and unloading region for gas, oil and dry cargo in 2013. As a result, regional demand for dispute resolution services, especially for cross-border disputes, has increased.

Singapore: key factors

Singapore is a popular choice for dispute resolution in the region, for a number of reasons:

- The litigation and arbitration systems in place are well established.
- There exists a strong tradition as to the rule of law, which is supported by a world class judiciary. Judgments of the Singapore courts in commercial and shipping matters are well regarded and referred to in courts across the Commonwealth and in academic writings. Many international law firms as well as corporate counsel of multinational corporations (MNCs) have set up base here. It is estimated that the country hosts as many as 7,000 MNCs.
- The city state is strategically accessible.
- Virtually all the major P&I clubs are represented, including The Standard Club through Standard Asia, which provides a full complement of claims handling, underwriting and safety and loss services.
- State-of-the-art facilities exist for court litigation, arbitration and mediation.
- More importantly, the judicial and arbitration systems enjoy a high premium of trust and confidence.
- Consistently, the country ranks in the top 5 globally for neutrality in the Corruption Perceptions Index.
- The workforce is educated and cosmopolitan. Local and foreign talent are welcomed and there is a ready pool of expertise such as commercial men, technical experts, learned academics and experienced insurers to support lawyers and litigation.

The outcome

The hard work of the past two decades in laying the foundation for an international arbitration infrastructure of world-class proportions is paying dividends. Recent surveys place Singapore as the third most preferred seat of arbitration after Geneva and London.

More significantly, since earlier this year, Singapore stands alongside London and New York as one of the three designated choices of arbitral seats for disputes in all BIMCO contracts.

Standard Asia employs a team of 12 Claims Directors/ Executives, spread between Singapore and Hong Kong, all of whom are qualified lawyers or legally trained with considerable experience in handling both P&I and defence cases. In recent years, Standard Asia has handled numerous 'dry' and 'wet' disputes, achieving many successful results for its membership.

Both the Singapore International Arbitration Centre (SIAC), which supports administered arbitration of a shipping or non-shipping nature, and the Singapore Chamber of Maritime Arbitration (SCMA), which supports non-administered LMAA-styled shipping arbitration, record steady increases in terms of the number of references and the value of the disputes.

In 2013, SIAC received 259 cases, up by 10% from the previous year, with a combined value of S$6.06bn (about US$4.7bn), almost a 100% increase from the year before.

The SIAC and SCMA also accept cases where the governing law is not Singapore law. Parties are free to nominate arbitrators of their choice, whether from the SIAC or SCMA panel of arbitrators or not. As a signatory to the New York Convention, Singapore arbitration awards are widely enforceable.

In 2013, the SCMA launched the SCMA Expedited Arbitral Determination of Collision Claims (SEADOCC), which is an innovative attempt at providing a cost-effective procedure designed to apportion liability for ship collisions through arbitration. It is particularly useful where the sums involved are modest.

Ongoing development

Two further, potentially game-changing, dispute resolution options are currently being developed.

The first is the Singapore International Mediation Centre (SIMC), which was formally launched on 5 November 2014. It aims to provide world-class mediation services principally to parties in cross-border commercial disputes.

The SIMC offers, amongst other things, professional appointing authority and case management services pursuant to its Mediation Rules. The list of mediators features a number of international luminaries in the mediation business.

Settlement agreements concluded pursuant to mediation at the SIMC are enforceable as consent awards pursuant to the Arb-Med-Arb Protocol entered between the SIAC and SIMC.

Pursuant to this Protocol, a dispute is first referred to arbitration before mediation is attempted. Should the parties settle their dispute through mediation, their mediated settlement may be recorded as a consent award. If the parties are unable to settle their dispute through mediation, they may continue with the arbitration. Conceptually, the Arb-Med-Arb Protocol aims to combine the cost-effectiveness, flexibility and party autonomy of mediation with the finality and enforceability of arbitration in a seamless and convenient way for the parties.

Key features of the SICC

- The SICC will be established as a division of the High Court.
- Judges to be empanelled will include international legal luminaries.
- Provision will be made for the admission of international counsel.
- Disputes with no substantial connection to the jurisdiction or Singapore law may also be heard.
- The Chief Justice is expected to assign matters to the judges.
- The system is expected to include a right of appeal and provision for third parties to join.

Legislative changes are also under review to allow mediated settlements to be enforced as orders of court.

The second major initiative, first announced in December 2013 but yet to be launched, is the establishment of the Singapore International Commercial Court (SICC).

It is likely that to give the rulings of the SICC the force of law beyond the local jurisdiction, bilateral or multilateral governmental agreements may follow.

One hopes that the SICC will make it convenient for parties to avail themselves of the services of the brightest and best commercial judges and lawyers in complex international commercial disputes without boundaries.

Conclusion

The landscape of dispute resolution alternatives in Singapore is dynamic and exciting. It is imperative, however, that the various options dovetail. Encouragingly, arbitration and the commercial court are not viewed as competitors. In the *Titan Unity*[1], the courts reaffirmed support for arbitral proceedings and upheld an arbitral tribunal's function as first arbiter of its own jurisdiction in accordance with the principle of *Kompetenz-Kompetenz*. The synergy between arbitration and mediation espoused in the Arb-Med-Arb Protocol further exemplifies how the various mechanisms can complement each other.

How well Singapore takes on the next level of challenge to meet Asia's growing demands for cost-efficient, swift and satisfactory resolution of commercial disputes remains to be seen. Going by its track record, one should remain optimistic.

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Mediation – An overview

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Whilst strictly private and confidential, it is widely reported that mediations have between 70% to 80% success rate in the UK.

Mediation is always worth serious consideration in the face of legal proceedings. Not only does mediation offer an alternative to a potentially costly litigation (or arbitration), but parties may also be exposed to adverse cost consequences if they refuse to attempt mediation without good reason.

Introduction

Mediation is a form of alternative dispute resolution (ADR) that has become increasingly popular in many European countries, including the UK, as well as in other jurisdictions such as the USA and Canada. In mediation, the parties meet and constructively discuss the dispute in question. A neutral third party (the mediator) actively assists the parties in working towards a mutually acceptable negotiated settlement. The mediator does not act as a judge or arbitrator, adjudicating over the proceedings. As such, the mediator does not impose upon the parties a resolution or settlement. Instead, the mediator simply facilitates discussions and helps to identify common aims and objectives between the parties, in the hope that a mutually acceptable settlement can be reached.

Commercial parties increasingly recognise that disputes can be costly and distracting, capable of consuming significant management time. Whilst legal expenses may be recovered, there are always unrecoverable costs and, despite authoritative legal advice, litigation will always be a gamble – few, if any, legal advices come with guarantees of success. Litigation can prompt parties to become more entrenched, whereas mediation can be seen as a means of resolving disputes via compromise. Compromise is often necessary in a commercial environment, to facilitate negotiating contracts or preserving relationships. Compromise that allows the parties to retain or improve their commercial relationship can be attractive to both sides.

Advantages

- All discussions during a mediation are strictly private, confidential and 'without prejudice'. Nothing that is said by either party in mediation is admissible as evidence in current or future legal proceedings. The same principle applies for any documents that are disclosed in mediation. However, if a settlement agreement is reached and signed by the parties then the written settlement becomes legally binding and enforceable, as if it were the subject of a contract or court order.
- Mediation offers speedy resolution. For example, mediation can be arranged within a few weeks and, whilst the mediation itself may take a day or two, the whole mediation process is much quicker than, say, seeing arbitration through to a final award.
- For the same reasons, mediation is generally much cheaper than pursuing a claim through to arbitration.
- If the parties are able to reach a quick and amicable settlement of a dispute, they are also more likely to maintain a working, commercial relationship, than if matters are to proceed by way of formal legal proceedings.

– Whilst mediations are strictly private and confidential, as are their outcomes, it is widely reported that mediations have a high success rate (between 70% to 80% in the UK).

Court Approach

In the UK, the courts are actively encouraging parties to consider mediation. For example, the Civil Procedure Rules, the Admiralty and Commercial Court Guide and the Pre-Action Protocols all seek to encourage parties and prospective litigants to consider mediation. In addition to this encouragement, parties are also at risk of incurring costs if they unreasonably refuse to mediate their differences. For example, in *Halsey v Milton Keynes General NHS Trust (2004)*, the Court of Appeal stated:

"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. The Court of Appeal indicated that the courts would be robust in their encouragement, and parties will now face significant adverse cost consequences if they unreasonably refuse to consider mediation."

This approach has been followed in *PGF v OMFS Company 1 Ltd (2013)* in which the Court of Appeal held that where a party is silent upon receipt of an invitation to meditate, the onus lies on the recipient to show that its silence was not unreasonable, or was the result of some error, if the Court is to be persuaded that adverse cost consequences are not to be applied. On the facts of this case, the Court of Appeal found the defendant's refusal to mediate to be unreasonable and held that a costs order should be made to emphasise the importance of ADR.

Most recently, in *Garritt-Critchley v Andrew Ronnan and Solarpower PV Ltd (2014)*, the High Court awarded adverse costs against the defendants who refused to mediate but subsequently agreed, after trial but before the judgment was handed down, to accept the claimant's offer to settle made two months previously. In this case, the defendants claimed they were entitled to refuse mediation because the parties were too far apart for it to be appropriate. The judge considered the defendants to be misguided and stated: "*Parties don't know whether in truth they are too far apart unless they sit down and explore settlement.*"

Recommendations

Whilst mediation may not be a suitable option in every scenario, parties who litigate or arbitrate their differences need to seriously consider mediation during the legal process and may be exposed to cost consequences if they refuse to attempt mediation without good reason. We recommend that parties consider incorporating a 'mediate before arbitrate' provision in their contracts. This can save time in agreeing the location, timing and format of a mediation in the event of a dispute. However, even without such a prospective agreement, parties to a dispute should actively explore mediation as part of their dispute resolution process.

Early settlement discussions or mediation offer a means by which to finalise disputes without recourse to legal costs and expenses. In the event of a dispute, the club can provide advice and assistance in the interpretation of members' dispute resolution clauses. In addition to our London office, our claims offices in New York, Piraeus, Hong Kong and Singapore, coupled with our network of correspondents, mean the club is ideally placed to assist members in dispute resolution worldwide.

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