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 second 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 our members.

This Special Edition follows on from our bulletin in *January* and the articles that follow give a flavour of the types of issues and disputes that we have been dealing with over recent months.

In this bulletin, we focus on important legal developments in England and Wales, where many international owners and charterers still choose to litigate/arbitrate their matters, as well as Singapore and New York, which are increasingly significant jurisdictions for dispute resolution. As an international business, it is vital that we have in-house knowledge and expertise in key jurisdictions so that we can assist with any dispute which arises. Indeed, the litigation following the collapse of the OW Bunker group (which we comprehensively cover within this Bulletin, on pages 11 through to 16) is an excellent illustration of the international nature of our business.

We hope this Special Edition is of interest. For any further advice or clarification, members should feel free to contact the authors, or their usual club contact. The club also issues regular advices, web alerts and information sheets on important and/or reoccurring defence topics, all of which can be found *here*.

The Standard Club is always on hand to assist.

The Great Creation – the importance of redelivery notices

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The case *Maestro Bulk Ltd v. Cosco Bulk Carrier Co Ltd (The Great Creation)*[1] deals with the measure of damages to be awarded, under English law, where a ship is redelivered with insufficient notice under a time charter.

Facts

In *The Great Creation*, the ship was time chartered on an amended NYPE form for four to five months, plus 15 days at the charterer's option.

The charterparty contained the following redelivery notice clause:

'On redelivery charterers to tender 20/15/10/7 days approximate and 5/3/2/1 days definite notice.'[2]

Before redelivery, the charterer intended to employ the ship on a final voyage. However, because of delays, the charterer subsequently realised that such a final voyage would not be possible.

As a result, on 13 April, a 20-day approximate notice of redelivery was served. On 14 April, the 15/10/7-day approximate notices were all tendered. On 16 April, the 3/2/1-day definite notices were served by the charterer.

On April 19, only six days after serving the first 20-day approximate notice and in breach of the charter, the ship was redelivered. While the owner was able to fix the ship for a new voyage, it was only able to do so at a rate well below the market rate at the time.

Discussion

The parties agreed that the correct measure of damages, where a charterer fails to give redelivery notice(s) in line with the relevant charterparty, is that which puts the owner in the same financial position it would have been in had no breach taken place. However, in *The Great Creation*, the owner and charterer were unable to agree on the correct 'no breach' position.

The owner categorised the charterer's breach as redelivering without providing contractual prior notice. As a result of this breach, the owner argued that the correct measure of damages was the hire which would have been earned from a notional voyage that the owner would have fixed for the ship had the charterer redelivered in accordance with the agreed notice provisions, minus the hire actually received under the new charter.

In contrast, the charterer stated that the breach was akin to premature redelivery, i.e. by redelivering six days, rather than 20 days, after the first notice was served. The charterer argued that the owner was entitled to hire payable, at the existing charter rate, for approximately 20 days after the date that the first notice was actually served, i.e. 20 days after 13 April, less any hire earned in mitigation.

Arbitrators' award

The London arbitrators agreed with the owner, categorising the charterer's breach as redelivery with insufficient warning, which resulted in redelivery taking place earlier than the owner was entitled to expect. The owner was

1 [2014] EWHC 3978.
2 It was found that 'approximate' notice amounted to a two-day 'either-way' allowance. So a 20-day notice could in fact be treated as 18 days' notice.

therefore awarded damages on the basis of a notional further fixture for the ship, had the charterer redelivered in accordance with the terms of the charter.

The High Court's decision

The English High Court disagreed with the arbitrator's decision and found in the charterer's favour, stating that the charterer's breach lay in failing to redeliver in accordance with the contractual notice given on 13 April.

The High Court held that the effect of the charterer's failure to provide accurate redelivery notices was to deprive the owner of the hire payable under the relevant charter for the balance of the notice period after actual redelivery took place, i.e. the 12-day period between redelivery on 19 April and the time when redelivery should have taken place in line with the 20-day [18 days in reality] approximate notice (on 1 May).

Any earnings received from employment obtained in mitigation would be offset against the subject charter hire. However, in this case, because the charter was below the market rate, no such allowance was made.

The High Court agreed with the charterer that the owner's argument that damages should be assessed on the basis of a hypothetical follow-on fixture leads to *'...unquantifiability, unpredictability, uncontrollability and disproportionality at the date of the charter...'*.

Comment

While this case is fact-specific, it provides arguable authority that an owner's claim for damages following breach of the redelivery clause by a charterer is limited to the charter hire payable in the missing notice period. This judgment may preclude an owner from arguing for an alternative method of assessing damages in some circumstances.

Practical suggestions

Owner members should be cautious about relying upon approximate redelivery notices. It is suggested that shipowners do not act on approximate notices of redelivery, but instead only take active steps to fix future employment when definite notices of redelivery have been received.

Owners may wish to renegotiate the terms of their charterparties to ensure that definite notices are provided as early as practicable.

The following table sets out the timeline as found by the judge:

Date	*Event*
13 April	**20-day approximate notice served** [It was found that 'approximate' amounted to a two-day 'either way' allowance. So a 20-day notice could in fact be treated as 18 days' notice.]
14 April	15/10/7 – approximate notices tendered.
16 April	3/2/1 – definite notices served.
19 April	**Ship redelivered**
1 May	Date ship should have been redelivered under the 20-day approximate redelivery notice.

Payment of hire – is it a condition?
Spar Shipping v. Grand China Logistics[1]

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Nearly two years after the controversial decision in *The Astra*,[2] which found the punctual payment of hire under a time charter to be a condition of the contract, this obligation has been restored back to its original status – that of an innominate term.

A **condition** in a contract is defined as a promise or undertaking that is fundamental to the contract, *any* breach of which entitles the innocent party to terminate the contract; in addition to its right to claim damages.

Conversely, a breach of an **innominate term** gives the innocent party the right to terminate *only if* the breach is so serious that it deprives the innocent party of substantially the whole benefit of the contract; in addition to its right to claim damages.

Background facts

In the *Spar Shipping* case, the claimant owner had let, in 2010, three supramax bulk carriers to the defendant charterer using long-term time charters on amended NYPE 1993 forms. In April 2011, the charterer fell behind on hire payments and, despite its continuous apologies, the situation did not improve for the next six months. The owner sent regular anti-technicality notices until September 2011, when it gave notice of withdrawal with immediate effect.

Under guarantees obtained from both the parent company of the defendant and the defendant itself, the owner made two claims:

- The balance due under the three charters prior to termination. This is a standard contractual claim and was not controversial.
- 'Loss of bargain' damages for the remainder of the charter term(s). The recovery of future losses emerges either upon the breach of a condition or the repudiatory breach of an innominate term.

The question, therefore, was whether the punctual payment of hire amounted to a condition and, if not, whether regularly delayed payments of hire amounted to a repudiatory breach.

Is the payment of hire a condition?

Contrary to *The Astra*, the judge in *Spar Shipping* countered against the charterer's obligation to pay hire being a condition of the contract on two key grounds:

- First, one has to view any time charter in its entirety and, when it comes to any breach, decide whether the default in question deprives the innocent party substantially of the whole benefit of the contract. Here it was found that there was no evidence to suggest a single non-punctual payment of hire amounted to a repudiation.
- Secondly, commercial certainty could be, and is, achieved without the general classification of all payment clauses as being conditions. An owner's commercial risk in a hire relationship is to cover the ship's running costs, but its right to withdraw the ship upon default of a hire payment adequately protects this. The owner is thenceforth able to find another charterer and extract full hire charges elsewhere.

The club has covered *The Astra* decision in detail in its earlier publication, which can be found *here*.

Or, is it an innominate term?

Whilst accepting that the sole aim of the NYPE right to withdraw is to protect future performance of the contract, the judge in *Spar Shipping* commented that the language was neutral as to the common law rights of the parties. In fact, it was found that both the language and its interpretation suggested punctual payment of hire to be an innominate term for the following reasons:

- If payment of hire really was a condition of the contract, then there would automatically be the right to terminate and withdraw the ship upon non/late payment. However, in all time charters, there is the express provision as to withdrawal – indicating there wouldn't be such an entitlement absent such express wording.

- Most importantly, and the reason for anxiety post-*Astra*, payment of hire breaches can vary from the trivial (a few hours' delay) to the serious (outright refusal – namely, repudiation). Therefore, the classification of punctual payment as an innominate term is natural and logical. Indeed, situations where parties automatically terminate long-term charters after just a few moments' delay in payment should be avoided.

- Finally, commercial certainty is enhanced by the recognition that trivial delays should not trigger a rash and dramatic legal response. This is further achieved by the presence of anti-technicality clauses in charters, which act to define the seriousness of the breach. Recognising the vast array of possible situations, an anti-technicality notice helps to ascertain whether the breach should be considered repudiatory.

Conclusion

The *Spar Shipping* judgment restores the previously accepted view that punctual payment of hire is not a condition. Therefore, in order to recover future losses following a withdrawal, an owner must be able to demonstrate a default of sufficient seriousness amounting to repudiation by the charterer. 'Sufficiently serious' is defined as substantially the whole benefit of the contract. In this case, the owner was successful in its claim for future losses.

More generally, however, a failure to pay is not the same as a refusal to pay and can be effectively remedied by an owner's prompt withdrawal and the ship's rehire to a new charterer. It is not disputed that an owner is authorised to recover outstanding (earned) hire up to and until withdrawal. Following *The Astra*, it marks a welcome return to a much debated, but historically consistent, position.

1 [2015] EWHC 718 (Comm).
2 [2013] EWHC 865 (Comm).

The Cottonex Case[1]

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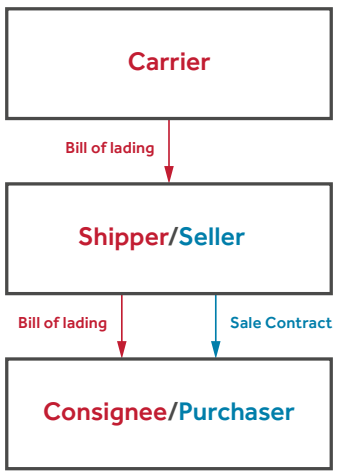
On its facts, this case simply concerned a shipper's liability for container demurrage, when a consignee failed to take delivery of containerised cargo. However, the case has wider implications, by extending the common law requirement to exercise good faith to the carrier's (in)ability to continuously claim demurrage with no end date.

Background

The carrier in this case agreed to ship 35 containers of cotton to Chittagong. The carrier supplied the containers and the contract of carriage provided that the containers should be unpacked and returned to the carrier within 14 days of the containers being delivered at the port/place of discharge, demurrage being payable thereafter.

The containers were discharged to a container yard at Chittagong around May 2011. Shortly prior to this, the shipper sold the goods to the consignee. The consignee never collected the goods, nor did anyone else.



The carrier's position was that the shipper or consignee was responsible for unpacking and returning the containers. In September 2011, the shipper wrote to the carrier explaining that, as the shipper had been paid for the goods, title had passed to the consignee and the shipper was not entitled to unpack the containers.

Two years later, the carrier commenced court proceedings against the shipper in England, claiming demurrage. When the dispute came to trial, the containers remained at Chittagong and the demurrage exceeded $1m, almost 10 times the value of the containers.

The shipper argued that demurrage stopped running in 2011, because its inability or failure to collect the containers amounted to a repudiation of the contract of carriage, which brought the obligation to pay demurrage to an end.

The judgment

The English High Court judge accepted that demurrage ceased to accrue on termination of the contract. He also accepted that the shipper was in repudiatory breach of contract in 2011, when the shipper gave notice to the carrier that it was unable to perform its obligations under the contract. The question was whether this repudiation terminated the contract.

The judge recognised the general position that a repudiatory breach does not automatically terminate a contract. Rather, the innocent party (here the carrier) has a choice whether to accept the repudiation as terminating the contract or to keep the contract in force. In this case, the carrier had not accepted the repudiation, instead choosing for the demurrage to continuously accrue.

Does an innocent party always have a choice?

The judge then considered whether there was any limitation on an innocent party's choice to accept, or perhaps not, a repudiatory breach of contract. He referred to the well-known case of *White & Carter v. McGregor*[2] in which the House of Lords identified that unless an innocent party has a *'legitimate interest, financial or otherwise'*, it should not be permitted to insist on the continuance (i.e. the affirmation) of a repudiated contract.

The 'legitimate interest' principle has been recognised in a number of cases. For example, in *The Aquafaith,*[3] the court concluded that an innocent party can only be said to have a legitimate interest in maintaining a contract if: (a) damages are not an adequate remedy; and (b) maintaining the contract would be reasonable.

In the *Cottonex* case, the judge highlighted the developing principle of good faith in contractual dealings and specifically that, in the absence of very clear language to the contrary, any contractual discretion must be exercised in good faith and must not be exercised *'arbitrarily, capriciously or unreasonably (in the sense of irrationally)'*.

Did the carrier have a legitimate interest?

The judge found in this case that the carrier's only interest in affirming the contract was to keep claiming demurrage. He asked: can the carrier keep the contract in force after the repudiation solely to claim demurrage? He concluded that the carrier had no legitimate interest in doing so.

The carrier had not been keeping the contract alive in order to invoke the demurrage clause for a *'proper purpose but in order to seek to generate an unending stream of free income'*.

The judge emphasised that the carrier was not suffering financial loss as a result of the shipper's breach of contract. He said that in order to keep the contract in force to claim demurrage after the repudiation, there would need to be at least some basis for supposing that the carrier's inability to use the containers was causing it to suffer financial loss. The carrier would need to show in good faith *'that the demurrage clause was being used to provide compensation for loss'*.

Comment

Although this was a case dealing with the discrete issue of container demurrage, it is important because it clarifies that a party's discretion to affirm a repudiated contract is limited by the good faith requirement.

1 [2015] 1 Lloyd's Rep 359.
2 [1962] AC 827.
3 [2012] 2 Lloyd's Rep 61.

Anti-suit injunctions – are they still a useful remedy in the UK?

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The answer, in a nutshell, is yes – very much so.

Introduction

Under English law, if a party to a contract commences court proceedings in a foreign jurisdiction, in breach of an English exclusive jurisdiction agreement (including an arbitration agreement), the innocent party has two choices if it wishes to object.

The first is to lodge an objection before the foreign court where the proceedings have been commenced. Of course, to do so, the innocent party has to appoint local lawyers and incur time and legal costs in making the application. There is, of course, the risk that the foreign court will reject any such application to dismiss the claim. Alternatively, the foreign court may decide not to determine its jurisdiction in advance of its determination of the merits, which has much the same practical effect – the innocent party finds itself having to defend a claim before a foreign court, applying foreign law, in breach of the contractual agreement reached between the parties.

The second option is to make an application to the English court for an anti-suit injunction, restraining the party in breach of the exclusive jurisdiction agreement (or arbitration agreement) from continuing with the foreign proceedings. We look in more detail at this option and how it works in different locations.

The situation within the European Union (EU)

For over 10 years, it has been accepted that the English courts have restricted powers when it comes to issuing anti-suit injunctions within the EU, seeking to restrain *court* proceedings before another EU state.[1] However, what about an anti-suit injunction seeking to restrain the breach of an *arbitration* agreement?

One of the most reported cases in recent years has been the European Court of Justice (ECJ) decision in *The Front Comor*.[2] In this case, the ECJ, in practical terms, abolished anti-suit injunctions issued in support of arbitration agreements within the EU.

Facts and English proceedings

The Front Comor hit a jetty at a Syracuse oil terminal. The ship was chartered to Erg, which was also the jetty owner. The charter was subject to English law and contained a London arbitration agreement. The jetty owner claimed against its Italian insurers. That policy was limited and Erg started London arbitration proceedings against the owner for the balance of its losses. Erg's insurers then started proceedings in Italy against the owner in order to recover the payments they had made to Erg. The owner's lawyers successfully obtained an anti-suit injunction against the insurers in the English High Court, restraining these Italian proceedings.

They argued that the dispute arose from the charter, which contained an arbitration agreement. Therefore, they said, the insurers were bound by that agreement. The English courts, including the House of Lords, agreed.

The ECJ's 'old' approach

However, the ECJ found that the Italian proceedings were a claim for damages governed by the Brussels Convention and, as such, the applicability of the charter's arbitration agreement came within the scope of the Brussels Convention. Thus, the Italian court alone had the ability to rule upon any jurisdictional objections made to it in relation to the arbitration agreement (including its applicability and validity). The ECJ ruled that such anti-suit injunctions were counter to the mutual trust that the courts in various EU member states enjoyed and were in breach of EU Regulation 44/2001 (the Regulation), which provides a set of uniform rules governing civil and commercial disputes within the EU.

Practical implications and new developments

A common complaint following the decision in *The Front Comor* was that it would have the practical effect, in the future, of there being conflicting decisions in parallel proceedings in the EU. It was feared that the decision in *The Front Comor* would also render London arbitrations vulnerable to 'torpedo' actions and, in effect, render London arbitration agreements worthless. The European Parliament and the European Commission acknowledged this, and in December 2010 the Commission published proposals for reform of the Regulation. These proposals were aimed at improving judicial co-operation within the EU and enhancing the autonomy of arbitration.

Changes have at last been made to the Regulation and a 'recast' Brussels Regulation (1215/2012/EU) came into effect on 10 January 2015. In this new Regulation, the arbitration exception in Article 1(2)(d) of the Regulation has been clarified in Recital 12, which now confirms as follows (our emphasis):

> *'This Regulation should* **not** *apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*
>
> *A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should* **not** *be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.'*

The 'recast' Brussels Regulation does not expressly deal with anti-suit injunctions however, so it remains somewhat unclear whether they would, in the future, be permitted within the EU in relation to breaches of *arbitration* agreements. It was hoped that through the most recent decision of *Gazprom OAO*,[3] the ECJ would give clarification and confirm that anti-suit injunctions would be permitted within the EU, in support of arbitration agreements.

Unfortunately, the ECJ in this case didn't have to decide the point in arriving at its decision. In *Gazprom*, it was an arbitration tribunal which had handed down an anti-suit injunction against the claimants, who had commenced an action before the Lithuanian courts. The ECJ, therefore, was able to hold that recognition of an arbitral anti-suit injunction fell outside the 'recast' Regulation, without the need to clarify whether or not the same would have been said had the anti-suit been issued by a court in a member state.

Therefore, the question as to whether or not the 'recast' Brussels Regulation has changed matters and now permits anti-suit actions by member state courts, so as to protect arbitration agreements, remains unanswered.

The situation outside the European Union (EU)

The position outside the EU is more straightforward. For example, in 2013,[4] the English Supreme Court held that the English courts have the power to order anti-suit injunctions in relation to proceedings outside the EU in breach of an arbitration agreement.

In *The Yusuf Cepnioglu*,[5] following a grounding and total loss of the ship, the subject charterer commenced Turkish court proceedings directly against the owner's P&I club, pursuant to a recently enacted Turkish statute which gives third parties a right of direct action against insurers. The P&I club in this case successfully obtained an anti-suit injunction from the English court, on the basis that the contract of P&I insurance (between the insured and the insurer, on which the charterer was seeking to rely) provided for London arbitration.

However, for the English courts to grant such an anti-suit injunction the contractual agreement in question must be **exclusive**. By comparison, if the contract is silent on the issue of the applicable jurisdiction, or the clause in question is non-exclusive, then an anti-suit injunction is unlikely to be handed down by the English courts.

1 *See: Turner v. Grovit*, Case C-159/02 [2004] ECR I-3565.
2 *West Tankers v. Allianz SpA and another*, 2009, Case C-185/07.
3 *Gazprom OAO* – C-536/13.
4 *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.
5 *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v. Containerships Denizcilik Nakliyat Ve Ticaret AS* [2015] EWHC 258 (Comm).

OW Bunker bankruptcy – update from England and Wales

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OW Bunker bankruptcy
For background information, please refer to the previous article in the ***Standard Bulletin, December 2014***, published shortly after the bankruptcy was announced.

An important test case[1] has recently been handed down by the High Court in London concerning the bankruptcy of the OW Bunker group (OWB) and, most importantly, who an owner or time charterer should pay for bunkers previously supplied to the ship. The club has previously issued a web alert concerning the recent *Res Cogitans* decision, but it is worth remembering the broad facts and findings of the case.

Overview

The owner in this case was essentially trying to avoid the danger of a double payment for bunkers supplied to the ship, by seeking to knock OWB and the assignee bank (ING) out of the equation and instead pay the physical bunker supplier directly. It did so by arguing that the supply contract previously entered into with OWB was a contract to which the Sale of Goods Act 1979 (SOGA) applied. The owner's argument in this case was that, given the bunkers were consumed before payment became due under any of the contracts in the bunker supply chain, no property in the fuel supplied ever passed to OWB. If correct, and if SOGA applied, then this would have meant that OWB/ING never became entitled to the contractual purchase price and hence had no claim against the owner, the reason being that because the bunkers had been consumed before the price became payable, there was no property in the bunkers to pass – it had been extinguished.

Court decision

On appeal to the English High Court, the judge considered first the statutory definition of a contract of sale as found in SOGA. For the purpose of this case, the crucial wording was found in section 2(1), which states that it is *'...a contract by which the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price'*. The judge then identified two requirements of fundamental importance to this case:

- One party has to have agreed to transfer property in the goods to the other.
- There has to be a link between the transfer of property and the price. It has to be shown that the buyer is paying money for title in the goods and not some other benefit.

In the judge's view, there was a combination of four factors in this case which rendered it likely that the parties here accepted that title would never, in fact, be transferred. These were: (i) the retention of title clause(s) in the bunker supply chain; (ii) the fairly generous credit period(s) granted before payment was due; (iii) the fact that the owner here was granted permission to consume the bunkers; and (iv) the fact that the fuel would very likely be consumed prior to expiry of the credit period(s) such that the property would cease to exist.

That inevitably leaves the question of what, if it was not a sale, was the owner actually paying for here? The judge found it amounted to a contract whereby OWB would supply bunkers which the owner would immediately be entitled to burn, in return for which the owner would pay OWB in accordance with the agreed payment regime. As such, it was found that OWB and ING were entitled to recover the sums under their supply

contracts as a debt due under a contract not subject to SOGA. This was the case notwithstanding that OWB never paid for the same bunkers up the line, under its own respective contract with the end physical bunker supplier.

As a consequence of the *Res Cogitans* decision, the owner in this case was left with the unpalatable prospect of having to pay both OWB and ING (who have *'a straightforward case in debt'*) and the physical suppliers, who may have *in rem* claims and be able to arrest in other jurisdictions. The judge recognised this, but said that these factors did not affect the English law position and, in his own words:

'...the risk of an adverse decision in a foreign court which views matters differently from English law is typical of the risks which a shipowner undertakes as it trades its vessel around the world'.

Considerations

The decision in *Res Cogitans* is not only disappointing for the owner, but surprising as well, not least as the English Court accepted that the contract was drafted as a contract of sale and there were numerous indications that the parties themselves understood it to be a sale contract. In addition, it is not easy to reconcile the decision regarding title to bunkers with the wider practice under time charters where, on delivery and redelivery of a ship, owners and charterers purchase and sell the bunkers remaining on board (ROB). If the bunker purchaser (typically a time charterer, just before redelivery of the ship) does not obtain title from the supplier, then how can ownership of the bunkers be transferred to the owner?

Pending the decision of the Court of Appeal, it is important to realise that the *Res Cogitans* decision will not necessarily affect all OWB/ING claims. It should not be forgotten that the decision was based on a number of assumed facts, which may not apply to other claims. For example, it may not be the case (or be possible to show) that all parties accepted that bunkers or lubes were supplied for consumption before the expiry of the credit period(s). Linked to this, or alternatively, the intermediate supply contracts may be on materially different terms regarding say, payment, risk and/or title. They may also be subject to a foreign law. It is therefore good practice to obtain all intermediate sale contracts wherever possible, in case there are points of difference between the claim(s) in hand and the (assumed) facts in the *Res Cogitans* decision.

Next steps

The *Res Cogitans* decision has been appealed by the owner (ING/OWB's application to cross-appeal was rejected) and it is understood that the case will be heard by the Court of Appeal in mid-September. Given there are hundreds, if not thousands, of other claims involving similar facts, it is hoped that the Court of Appeal's judgment will be handed down as swiftly as possible thereafter.

In the meantime, the High Court is expected to determine shortly various interpleader claims. This may deliver further bad news for shipowners, albeit not unexpected, if such decisions go the same way as the judgment handed down by the Singapore High Court in *Precious Shipping v. OW Bunker Far East & Others [2015] SGHC 187.* See pages 13–14 for further details of this decision.

1 PST Energy 7 Shipping LLC & Anor v. OW Bunker Malta Ltd & Anor (Res Cogitans) [2015] EWHC 2022 (Comm)

OW Bunker bankruptcy – update from Singapore

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In most common law jurisdictions, a person who is sued, or expects to be sued, by rival claimants may seek relief from their local court by applying for a summons compelling the rival claimants to appear before the court to stake their claims. The court may then order that the issues between the rival claimants be tried together and direct who shall be the plaintiff and defendant. In legal terms, this procedure is known as an interpleader summons.

Interpleader actions

Against the background of the ongoing OW Bunker group (OWB) saga, Steven Chong J. presiding in the High Court of Singapore recently ruled upon 13 interpleader actions filed by various purchasers (the 'Purchaser') of bunkers and heard them on a consolidated basis.

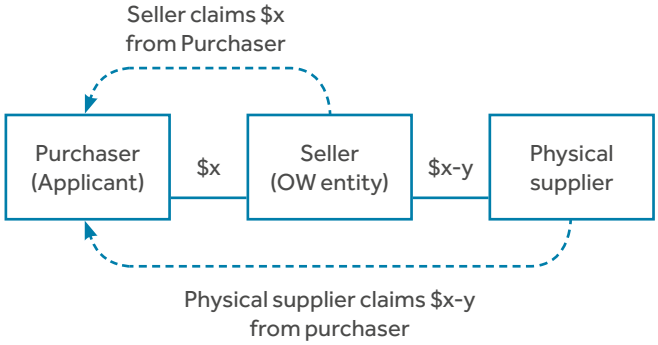
In *Precious Shipping Public Company Ltd and others v. O.W. Bunker Far East (Singapore) Pte Ltd and others*,[1] the various purchasers sought directions from the court, by interpleader summons, as to whether they should pay OWB (the 'Seller') with whom they had contracted, or instead pay the physical suppliers of the bunkers (the 'Physical Supplier').

The relationship between the parties is shown diagrammatically in para 7 of the judgment:

Court decision

The Singapore court decided, rather on a technicality, that the threshold for seeking the relief of an interpleader was not satisfied in these cases and dismissed the applications. According to the judgment, to succeed in obtaining the relief of an interpleader, the Purchaser must satisfy the following conditions:

(i) that it was under a contractual obligation to make payment for the bunkers under the Purchaser-Seller contract(s);
(ii) that there was an expectation that the Purchaser would be sued by at least two persons, in the sense that the Purchaser must be able to show that both the Physical Supplier and the Seller have a *prima facie* case or good cause of action against the Purchaser; and
(iii) that these claims were adverse claims for debt, monies, goods or chattels.



Whilst condition (i) seemed to have been satisfied, the Singapore court held that conditions (ii) and (iii) were not.

Counsel for the Physical Supplier advanced a 'potpourri' of possible claims against the Purchaser, including alleging claims by way of a collateral contract, bailment, fiduciary agency, retention of title, tort of conversion, unjust enrichment and by way of a maritime lien, all of which were roundly rejected by the Singapore court as failing to meet the *prima facie* or good cause of action test.

In respect of condition (iii), the court held that even if it accepted that the Physical Supplier had a *prima facie* claim against the Purchaser, which the court did not, the claims by the Seller (OWB) were not *adverse* or *competing* with the claims of the Physical Supplier.

In order for the claims to be *adverse* or *competing* with each other, the court distilled three requirements after an extensive review of precedent, as follows:

(i) There must be symmetry: the competing claims must be made in respect of the same subject matter.
(ii) Mutual exclusivity: the resolution of the interpleader must result in the extinction of the unsuccessful competing claim.
(iii) Actual disagreement: the applicant must face an actual dilemma as to how he should act.

The court found requirements (i) and (ii) to be absent and explained as follows:

'...None of the competing claims of the [Physical Supplier]*...assert that the physical supplier has a contractual right to be paid the price of the bunkers under the Purchaser-Seller contract. Therefore the requirement of symmetry has clearly not been satisfied...the extinction of these competing claims* [of the Physical Supplier] *will not have any impact on the sellers' claim* [OWB] *for the purchase price of the bunkers or vice versa so the requirement of mutual exclusivity is also not satisfied...the claims of the physical suppliers are not adverse to one another and are therefore not suitable for interpleader relief...'*

Incidentally, unlike the English High Court decision in *Res Cogitans*,[2] the Singapore High Court did not have to decide whether the Singaporean *Sale of Goods Act* applied to preclude the claim by the Seller (OWB). In this case, it was sufficient to find that the competing claims by both the Seller and the Physical Supplier were non-competing and non-adverse.

The Singapore court, having dismissed the application for an interpleader, held that it had no power to determine summarily the claim by the Seller (OWB) on its merits. That will have to be for another day.

Conclusion

This decision suggests, at least under Singapore law, that the Physical Supplier does not have a direct claim against the Purchaser. The recourse for the Physical Supplier would instead seem to lie in proving its claim, together with the pool of creditors, against the wound-up OWB group. However, the court also appreciated that in jurisdictions other than Singapore the Physical Supplier may yet commence a claim based on a maritime lien against the Purchaser or its ship. That may be cold comfort to an owner.

For now, it would seem that, in Singapore, the relief of an interpleader summons does not afford a way out of the OW Bunker impasse. We understand that, as at the time of writing, no appeal is pending against the decision in *Precious Shipping*.

1 [2015] SGHC 187.
2 See The Standard Club web alert, dated 15 July 2015, *'OW Bunker 'test' case – A disappointing UK judgment handed down yesterday'*.

OW Bunker bankruptcy – update from the USA

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Shortly after OW Bunkers (OWB) in Denmark filed for bankruptcy in November 2014, OWB affiliates in the USA filed as well. As in England and Singapore, owners and time charterers in the USA who contracted with OWB and, in particular, OWB's US affiliates, faced the possibility of having to pay the value of the bunkers twice, once to OWB (or its bank, ING Bank) and once to the physical supplier. In the USA, however, owners and time charterers in New York have successfully used an interpleader action to avoid paying twice, for now: *UPT Pool Ltd v. Dynamic Oil Trading*.[1]

Interpleader actions

Typically, an OWB entity contracts with an owner or time charterer to supply a given ship and then contracts with others 'down the chain' to make the actual supply in a given port to the given ship. In an attempt to avoid the risk of double payment, some owners and time charterers filed 'interpleader' actions in the federal court in New York. An interpleader action allows a person faced with more than one person demanding payment for the same debt to pay the amount due into the registry of the court and leave it to the court to decide which of the competing claimants should be paid. If the court finds that the interpleader action is proper, it may also enjoin the persons before it from attempting to collect the debt by filing actions elsewhere.

From December 2014 through to the spring of 2015, some 25 such interpleader actions were filed in New York and consolidated before Judge Valerie Caproni. The owners and time charterers posted security or funds representing the value of the bunkers, and also sought and obtained orders preventing the potential claimants (e.g. the physical suppliers, ING Bank and the OW entities) from arresting the subject ships anywhere else and, in some cases, from pursuing claims against the owners/charterers other than in the interpleader action.

Maritime lien

Under US law,[2] *'a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien against the vessel'*. The term 'necessaries' is broadly construed and bunkers are such 'necessaries'. The lien is a true maritime lien and survives the sale of a ship to a third party. The lien can also be enforced against the ship even when the lien holder does not have a contract with the owner. The Lien Act lists persons who are presumed to be authorised to procure bunkers on behalf of the ship and bind the ship to the lien, including the owner, the master, a person entrusted with the management of the ship at the port of supply, or an officer or agent appointed by the owner or a charterer.

Court decision

The physical suppliers raised various procedural and substantive objections, but primarily contended that the court lacked 'subject matter jurisdiction' to hear the dispute or to forbid them from arresting the ships, because the ships themselves were not physically in the district of New York. On 1 July 2015, Judge Caproni issued her decision, cited

above, holding that she did have 'subject matter jurisdiction' over the claims before her and that interpleader relief was appropriate at this stage. She thus upheld the injunctive orders that she had issued in the cases, maintaining the status quo.

It remains to be seen what relief will ultimately be granted in New York on a substantive basis, but at least for now, the owners and time charterers in the New York interpleader actions have obtained relief from the threats of arrest with respect to the bunker supply transactions at issue.[3]

Conclusion

While the New York court has indicated its willingness to bring all necessary parties before the court in a single action and to decide the substantive issues, the ruling does not necessarily open the door for all other owners and time charterers affected by the OWB fallout to obtain relief in New York. The physical suppliers before Judge Caproni are subject to the court's personal jurisdiction and the bunker supplies in question occurred in the USA. The situation may be different in cases involving a foreign physical supplier which is not subject to, or has not consented to, US court jurisdiction.

Members who still face the threat of an OWB-related arrest should contact their usual claims executive to consider whether joining the New York action is advisable.

The author gratefully acknowledges the assistance of Gina Venezia, Partner, Freehill Hogan & Mahar, New York, in the preparation of this update.

1 2015 U.S. Dist. LEXIS 85950 (S.D.N.Y. July 1, 2015).
2 Commercial Instruments and Maritime Liens Act, 46 U.S.C. 31342 (the Lien Act).
3 In addition to the 25 cases that were commenced as interpleader actions in New York, there are other cases in US jurisdictions, including Texas. Applications have been filed to transfer those cases to New York to be heard with the existing ones before Judge Caproni, but no rulings have yet been issued.

Early intervention – the new alternative dispute resolution process

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Can we use the key ingredients that make mediation such an effective process and introduce them into the dispute much earlier?

Mediation

In the *Defence Special Edition of the Standard Bulletin* in January, the club explained the process of mediation and why it works.

It is well publicised that mediation is a highly effective process, with around 80% of cases settling. The Civil Mediation Council recently estimated that, in the last 25 years, cases to the value of £65bn have been mediated, with savings in wasted management time, damaged relationships, lost productivity and legal fees of £17.5bn.

But can we use the key ingredients that make mediation such an effective process, and introduce them into the dispute earlier and in a more dynamic or fluid way, in order to achieve an informed solution much sooner, and perhaps in an even more time-efficient way?

The leading mediation provider in the UK – *CEDR* – believes we can and has worked with shipping mediator Stephen Mills to develop its new early intervention concept.

Early intervention

Early intervention is a simple concept. It seeks to introduce a truly impartial, confidential and independent 'Neutral' into a dispute at an early stage, on an entirely ***without prejudice and confidential*** basis, in the hope that it will encourage a new dialogue between the parties. Talking to and through a Neutral can make things happen which otherwise would not.

What is the process?

Through early intervention, **CEDR** will nominate one of its experienced shipping mediators to act as a Neutral and explore with the other party its willingness to engage in the process.

The other side may say no, which is always a possibility, but experience shows that if people can talk on the right terms – those of trust and confidentiality – they will usually do so, and progress will be made.

The **Neutral** will work with each party, and its lawyers, to explore all resolution options, including:

- identifying key issues and concerns for each party;
- working out what each party needs to do to inform the other of its position;
- working out a mutually agreed shopping list, or an improved road map, to take the dispute forward;
- identifying options for resolving, or agreeing, how to contest the issues.

Such options may include:

- chaired settlement meetings;
- exploring a possible settlement by phone or email;
- solution planning if no settlement is reached;
- agreeing a timetable to mediation, which will also serve the litigation process, should facilitated negotiation fail.

All of this is on a strictly confidential basis and without prejudice to the parties' rights in the litigation.

What are the benefits?

The Neutral may help to identify any vital information that each party needs to discuss and resolve this claim, or help plan a way forward to a more measured process, or simply facilitate an earlier exchange of 'positions' and an enhanced understanding of why the dispute has got to where it is. The early intervention process and its terms provide a safe and confidential wrapper for these discussions.

As CEDR points out, no litigation process provides confidential access to a true Neutral. Parties will not and cannot confide in a judge or arbitrator, nor will they expose their true positions to each other. They will do both with a Neutral, often enabling a mutually advantageous outcome to be identified.

The parties effectively control the outcome. They can decide to settle or not to settle, but will do so on an informed basis.

Finally, the parties can walk away at any point in the process if they feel it is not serving their needs.

Why does it work?

When a dispute starts, the parties:

- distrust each other;
- adopt postures which signal complete confidence – though not always with strong foundations;
- protect, rather than share, their information – but ultimately they will probably be compelled to share this information eventually, through the litigation process.

With the assistance of a Neutral:

- distrust can be neutralised;
- posturing can be neutralised;
- information can be exchanged more readily and on a 'safer' platform.

The significance of these three ingredients should not be underestimated. Their presence – and that of the Neutral – will always make settlement more likely, happen sooner and cost less. When a case settles in mediation in one day, after many months and possibly years of litigation, these ingredients are at work. Early intervention uses and seeks to inject these ingredients at a much earlier stage in the process, thus reaping the rewards for clients and their legal representatives much sooner too.

When to use it?
CEDR says that early intervention:

- can be used with equal effect on low-value, or on difficult or high-value or simply intractable cases;
- is particularly suitable where there are multiple parties or multiple proceedings, or several jurisdictional options;
- can be invoked unilaterally. The selected Neutral will, if needed, make the first approach to the other parties, or CEDR will make that approach and appoint the Neutral and explain their involvement.

Where do my lawyers fit in to this?
Early intervention depends on the parties seeking and receiving independent advice. Lawyers are vital to the process and are likely to see early intervention as another tool to use to achieve their client's needs and serve their best interests.

For more information:
Please email
Emma Lucas at CEDR
elucas@cedr.com and/or

Steve Mills
steve.mills@seamediation.com
for further information.

Alternatively, visit the *CEDR website* where the full early intervention procedures and terms can be found.

CENTRE for EFFECTIVE DISPUTE RESOLUTION

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