Defence Bulletin

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The Standard
for service and security

The Standard

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In this edition

Introduction

Welcome to our third 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 because they all have legal disputes.

This Special Edition follows on from our bulletin in *October* 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 predominantly on legal developments taking place in England and Wales, and the United States.

As an international business, it is vital that we have in-house knowledge and expertise in key maritime jurisdictions so we can assist our members with any dispute that arises. Indeed, the article by Brett Hosking (on pages 22–23) illustrates how our claims offices around the world liaise and work closely together to find solutions to our members' problems.

What becomes apparent from the collection of articles in this Special Edition is the number of important legal issues that are still reaching the courts for determination, often through arbitration appeals. This challenges the critique often directed at arbitration, as a dispute resolution forum, that it has a limiting effect on the further development of judicial commercial case law on important and/or recurring legal issues.

What is also apparent from many of these articles is the often named 'litigation risk' of taking disputes through to litigation/arbitration. For example, if you read the article by John Reay on *The Global Santosh* (on pages 9–11), you will quickly notice that the issue in dispute was determined four separate times before the UK Supreme Court made a final ruling. Therefore, the advantages of an early compromise/settlement should not be underestimated.

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 recurring defence topics, all of which can be found on our *website*.

The Standard Club is always on hand to assist.

Timebars for maritime claims in the United States – the equitable doctrine of laches

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We are often asked by our colleagues in other offices: 'What is the statute of limitations for maritime claims in the United States?' Our colleagues are surprised when we tell them there is no one-line answer.[1] In this article, we attempt to provide some clarity as to why this is.

Laches is an equitable doctrine. A defendant who invokes this doctrine is essentially saying that the claimant has delayed in asserting its rights and, because of this delay, should no longer be entitled to bring its claim. However, delay alone is not enough to prevent a claimant obtaining relief. The consequence of the delay must also have had some detrimental effect on the defendant – say, because the defendant has changed its position due to the delay. The party asserting a laches defence has the burden of proving it.

Introduction

The time you have to commence a maritime claim often depends on the state you are in. For example, under New York state law, a supplier's lien on a ship (on the rare occasion it is not governed by federal maritime law) expires within 12 months after the subject supply, unless, at the expiration of the 12 months, the ship is not in New York. In that case, an action under the lien expires 30 days after the ship returns to New York.

Each of the 50 states has its own laws and courts to administer those laws. By ratifying the United States Constitution, those states, otherwise sovereign, ceded certain areas of their sovereignty to the United States Government. The United States Constitution provides that maritime law is federal because it should be uniform throughout the states. However, apart from personal injury and death claims (where there is a three-year time limit) and COGSA cargo claims (where a one-year time limit applies), United States Congress never actually enacted a statute of limitations for maritime claims, leaving the courts to instead apply the common law, judge-made, equitable doctrine of laches to determine the timeliness of all other maritime claims.

Essentially, to find a claim is barred by laches, a court must find that the claimant unreasonably delayed in bringing its claim and that the defendant was prejudiced by the delay.

Laches in practice

In *Larios v Victory Carriers, Inc.*, 316 F.2d 63, 66-67 (2d Cir. 1963), the judge considered the relevance of an otherwise applicable state statute of limitations and concluded:

'When the suit has been brought after the expiration of the state limitation period, a court applying maritime law asks why the case should be allowed to proceed; when the suit, although perhaps long delayed, has nevertheless been brought within the state limitation period, the court asks why it should not be.

...

When a plaintiff who asserts a maritime claim after the state statute has run, presents evidence tending to excuse his delay, the court must weigh the legitimacy of his excuse, the inference to be drawn from the expiration of the state statute, and the length of the delay, along with evidence as to prejudice if the defendant comes forward with any.'

1 This article does not concern maritime torts that result in personal injury or death. In those cases, there is a statute of limitations, 46 United StatesC 30106, which requires such claims to be brought within three years.

A more recent decision reviewed and applied these principles, *Leopard Marine & Trading, Ltd. v Easy Street Ltd.*, 2016 U.S. Dist LEXIS 51568 (S.D.N.Y. 2016), and found that the claims of a bunker supplier against a ship should not be enforced on the grounds of laches.

Easy Street supplied bunkers to the subject ship in August 2011 upon the order of the ship's time charterer, Allied Maritime (Allied). Under United States law, Easy Street gained a maritime lien against the ship in rem. Allied subsequently went bankrupt and did not pay Easy Street for the bunkers so supplied. In April 2015, Easy Street arrested the ship in Panama. The ship's owner filed an action against Easy Street in New York asking the court to declare that laches barred enforcement of Easy Street's lien.

The judge acknowledged that Easy Street's claim was not barred by New York statute, but that did not end the enquiry because, as the judge stated in *Larios*, the formulation was a 'rule of thumb'. A court still has to look at the facts of the particular case and analyse whether the delay was unreasonable and the defendant had been so prejudiced. Here, the judge found that Easy Street inexcusably delayed enforcing its lien because:

- It made no attempt to arrest the ship prior to 6 November 2012, when Allied was declared bankrupt, which was more than a year after Allied's bill had become due.
- Rather than promptly enforcing its *in rem* claim against the ship, Easy Street accepted assurances from Allied that it would pay the many outstanding bunker invoices, eventually.
- There were several jurisdictions that the ship visited where Easy Street could have arrested the ship, prior to Panama in August 2015, which would have enforced the United States law lien. Indeed, Easy Street arrested other ships in these jurisdictions.

The judge also found that the ship's owner had been prejudiced by the delay:

- If it had known Easy Street had not been paid and intended to arrest the ship to enforce its lien, the owner could have exercised the contractual rights it had against Allied at the time of delivery.
- Asserting a claim in Allied's bankruptcy proceedings now was futile.

Concluding on the issue of harm and prejudice, the judge stated:

'The question is whether Leopard was harmed, at any time, in ways that could have been prevented by Easy Street taking action. If harm had occurred but Easy Street still timely brought its claim, then Leopard would bear the costs of the harm. But if a lienholder waits for too long with no excuse, it must bear the prejudicial costs.'

Accordingly, the judge here found that there was 'inexcusable delay by Easy Street and prejudice to Leopard' and held 'that enforcement of Easy Street's lien is barred by laches'.

Comments

The lack of a statute of limitations in United States maritime claims can be frustrating – and costly. However, this case (which is on appeal) shows that United States courts will consider the facts of each case and, when appropriate, find that a claim is untimely made and, therefore, timebarred.

The compensatory principle maintained – *The Glory Wealth*

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With freight rates continuing to drop, the decision in *The Glory Wealth*[1] is a reminder as to the importance afforded to the compensatory damages principle established in *The Golden Victory*[2]. The decisions of the English High Court in this matter have shown its common sense approach to resolving disputes regarding the quantum of damages arising out of a breach of contract, as well as the challenges it faces in ensuring that cash-strapped parties do not extend the compensatory principle beyond reasonable limits.

Background facts

Glory Wealth Shipping and Flame S.A. were parties to a contract of affreightment (COA) which provided for the carriage of six cargoes of coal, in bulk, in each of the years 2009, 2010 and 2011. Glory Wealth was the owner for the purposes of the COA but did not actually own the ships concerned, instead engaging in the business of chartering in and subchartering out. Disputes arose when Flame, the charterer, breached the COA by failing to nominate cargoes.

Glory Wealth commenced London arbitration proceedings on the basis of breach of contract by the charterer and sought damages. Glory Wealth claimed that the correct measure of loss was the difference between the COA freight rate it had been due and the (lower) market rate. This amounted to a sum in excess of $5m.

First arbitration appeal

The arbitration tribunal found in favour of Glory Wealth, stating that Flame was in repudiatory breach of the COA and Glory Wealth was entitled to damages.

During the arbitration, Flame argued that, as a result of the market collapse and its deteriorating financial situation, Glory Wealth would not have been capable of performing the COA so as to earn the freight it was now claiming. As a result, Flame contended that Glory Wealth should be forced to prove that it would have been able to perform the voyages had the repudiation not taken place before it was rightfully entitled to any damages.

The tribunal stated that it was not correct for the charterer, as the party in the wrong here, to require the owner, as the innocent party, to assume the burden of proving its loss after it had accepted the charterer's breach. Flame appealed to the High Court.

Glory Wealth argued that in assessing its loss as the innocent party, it had to be assumed that it would have performed its obligations if there had been no repudiatory breach and that having accepted the repudiation, it was released from any future performance of that contract. Flame submitted that this was illogical and that to be able to properly determine the actual loss suffered, the hypothetical situation had to be considered as to what would have happened 'but for' the breach.

The High Court considered that it should follow the compensatory principle as to the assessment of damages, as endorsed by the House of Lords in *The Golden Victory*[3]. This principle provides that damages are awarded to put the innocent party in the same position, but in no better position, than it would have been in had the contract been performed.

1 [2016] EWHC 293
2 [2007] 2 Lloyd's Rep 164; [2007] 2 AC 353
3 *The Golden Victory* [2007] 2 Lloyd's Rep 164; [2007] 2 AC 353

This meant that an assessment had to be made as to what would have happened had there been no repudiation, in order to establish the true value of rights that had been lost as a result of the breach. In other words, the innocent party has to prove its loss.

The court therefore held that the arbitration tribunal had erred and Glory Wealth was obliged to prove that, had there been no repudiation, it would have been able to perform its obligations under the COA. However, as the tribunal had found as a matter of fact that Glory Wealth would have been able to perform the COA, this requirement was fulfilled. There was no need to reconsider the assessment of $5m in damages as claimed.

Second arbitration appeal

After losing in the High Court in 2013, Flame went back to the tribunal and Glory Wealth found itself in litigation once again. This time, the charterer argued that the freight due to Glory Wealth from Flame was being diverted to other companies and, therefore, the freights on future shipments would never have been received by Glory Wealth. The charterer further contended that this meant that the owner would never have suffered a loss as a result of the contract breach, as the funds would never have been received by it.

The tribunal's decision

Flame managed to persuade the arbitrators to find in its favour. The tribunal refused to award damages of $5m to the owner on the basis that the freight payable under the COA would not have been paid to the owner anyway, but instead would have been directed to two other companies in a (separate) arrangement prescribed by the owner. As the owner would not have received those funds, the tribunal held that the owner had not suffered any true loss. In actual fact, Glory Wealth had become insolvent and was forced to redeliver early a number of long-term time chartered ships, which led to substantial claims against it from other parties. In an attempt to protect its assets against Rule B attachments in New York, Glory Wealth had decided to divert these freight funds to two separate companies.

In coming to its decision, the tribunal applied the same compensatory principle as the court in the previous appeal, namely that an award of damages must place the innocent party in the same position it would have been in had the contract been performed. As the tribunal found that the two companies where the freight was being diverted were not agents of Glory Wealth, the freight could not have been held on the owner's behalf. Therefore, in this situation, although Flame's breach of the COA deprived Glory Wealth of the right to receive freight, it would not have received the freight in any event.

Glory Wealth appealed to the High Court.

The High Court

The High Court disagreed with the conclusion of the tribunal and stated that it had erred in law. The court held that the owner had a contractual right to receive freight due under the COA. The fact that the owner had decided that the freight would be subsequently paid on to other companies was only one limb to consider. The court held that there were two limbs to take into account:

1. the right of a party to receive freight into its bank account; and
2. the right to thereafter give it away.

It was immaterial that Glory Wealth had decided to give the freight away to other companies, or that this had been done in order to avoid attachments of those funds by other creditors. The repudiatory breach of the COA by Flame had deprived Glory Wealth of the right to earn freight.

The compensatory principle maintained: *The Glory Wealth* continued

The court also considered that it could not be correct that the charterer could escape having to pay damages where it openly breached a contract which caused a loss. The owner was therefore entitled to damages, this time of just over $3m, based on the difference between the incoming freight that would have been earned under the COA and the freight that would have been payable down the charterparty line so as to perform the COA.

Summary

In holding that the owner had not suffered any loss, the tribunal had not taken into account the owner's right of ownership to the funds as well as the right to dispose of the funds due to it. There was no question that the funds were due to the owner under the COA; how the owner chose to dispose of the funds was a matter for the owner and did not, and should not, affect the conclusion that the owner had actually suffered a loss. Had the court agreed with the tribunal, this would have allowed the charterer to obtain a windfall for its own repudiatory breach of contract which would have been inequitable. In addition, the two companies to whom the freight was to be redirected were not parties to the COA so they would not have been able to step into the shoes of the claimant in this arbitration to try to recover damages.

This decision highlights the complications that can often arise in determining the correct contractual level of damages, as well as the importance of the compensatory damages principle. No doubt the common sense approach of the courts will be called upon again in future to resolve what may be an increasing number of disputes regarding the quantum of damages recoverable after a breach of contract. This is especially significant where both parties to the contract may be struggling financially given the poor market conditions presently faced by the shipping community at large.

The Royal Courts of Justice

Update: benefitting from a breach – *The New Flamenco*

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The English Court of Appeal has issued its judgment in *The New Flamenco* regarding whether benefits obtained from a breach of contract should be taken into account when assessing damages. This article explores the case and what can be learned from it.

Introduction

In our January 2015 Defence *Special Edition*, we reported on the decision of the English Commercial Court in *The New Flamenco*[1], regarding mitigation of damages and the circumstances in which benefits obtained from a breach of contract are to be taken into account when assessing damages payable to the innocent party.

An appeal was filed by the charterer and, on 21 December 2015, the English Court of Appeal issued its judgment. The appeal was allowed, with the Court of Appeal finding – contrary to the Commercial Court – that benefits obtained by the owner in selling its ship by way of mitigation, following the time charterer's early redelivery of the ship, should be taken into account when assessing damages[2].

Background facts

- The charterer redelivered the ship early, in October 2007, rather than in November 2009. The owner considered the charterer to be in repudiatory breach as a result. Shortly before redelivery occurred, the owner entered into a memorandum of agreement for the sale of the ship.
- The tribunal (a sole arbitrator) found that the sale was directly caused by the charterer's early redelivery and was in reasonable mitigation of the owner's loss.
- Arbitration was commenced by the owner in 2008 but claim submissions were not served until 2011. The owner claimed damages of about €7.6m, being its loss of profits for the balance of the charter period, less operating costs and expenses saved as a result of the sale.
- It was not disputed that there was no available market for a substitute charter for the ship at the time of the breach, or that the ship was sold for a reasonable price. However, by the time of the arbitration, it was apparent that the sale price achieved by the owner was in fact some €11.3m ($16.8m) more than if she had been sold at the end of the charterparty, in November 2009.
- The charterer claimed that it was entitled to a credit reflecting the €11.3m 'benefit' obtained by the owner. The effect of this argument, if accepted, was that no damages would be payable by the charterer to the owner for the early (wrongful) redelivery.

The correct causation test

It was the Court of Appeal's view that one principle, deriving from the classic *British Westinghouse* case on mitigation[3], was 'sufficient to guide the decision of the fact-finder in any particular case', namely that:

'...if a claimant adopts by way of mitigation a measure which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit is normally to be

1 [2014] 2 Lloyd's Rep 230
2 [2016] 1 Lloyd's Rep 383
3 [1912] AC 673.

Update: benefitting from a breach – *The New Flamenco* continued

brought into account in assessing the claimant's loss unless the measure is wholly independent of the relationship of the claimant and the defendant.'

No available market

The Court of Appeal also considered the cases concerning early redelivery under a time charter where there was no available market at the time of breach: cases such as *The Kildare*[4] and *The Wren*[5] which had been considered and relied upon by the tribunal, but not the Commercial Court.

Deciding to charter a ship in the spot market, where there was an available market for a replacement time charter on the day of the breach, would be an independent decision having no connection to the breach, pursuant to *The Elena D'Amico*[6]. However, where there was no available market, chartering the ship in the spot market could be the only form of mitigation available to the owner. Cases such as *The Kildare* made clear that, in these circumstances, additional losses or profits incurred by an owner in mitigating its losses following early redelivery, such as any earnings in the spot market, should be taken into account.

Equally, though more unusual, an owner may decide, where there is no available market, to mitigate its losses by selling the ship. The Court of Appeal saw no reason why the benefits secured by an owner on any such sale should not be taken into account, so long as the sale arose from the consequences of the early redelivery and was undertaken in mitigation of the owner's losses.

Conclusions

The tribunal had made a factual finding (not open to appeal) that the sale had been caused by the early redelivery of the ship and was in mitigation of the owner's losses. In effect, the tribunal had thus found that the sale had arisen 'out of the consequences of the breach and in the ordinary course of business'.

As such, the Court of Appeal considered that the charterer's appeal must be allowed and the tribunal's decision restored.

Comments

This case illustrates the challenges and questions that arise when assessing damages for early redelivery under a time charter, especially where there is no available market at the time of the breach.

If, for example, the minimum redelivery date under the charter has not yet passed by the time that damages are assessed by the tribunal/court, the full extent of the owner's mitigation efforts, and thus what losses the owner has actually suffered, will also likely not yet be clear. This can make the quantification of damages even more difficult.

Here, if the arbitration had not been commenced and progressed belatedly by the owner, the benefits obtained by the owner from selling the ship two years early might not have been apparent.

Where a ship has been sold by an owner following early redelivery, the timing of the sale could be relevant. The fundamental questions would, however, remain the same: whether the sale can be said to 'arise out of the consequences of the breach' and be 'in the ordinary course of business'.

It is understood that an appeal to the English Supreme Court has been lodged. In the meantime, the Court of Appeal judgment provides some helpful guidance on the law relating to mitigation – an area of law that can often be complex to navigate.

4 [2011] 2 Lloyd's Reps 360.
5 [2011] 2 Lloyd's Reps 370.
6 [1980] 1 Lloyd's Reps 75.

The Global Santosh – what is a charterer's agent? UK Supreme Court hands down the final say

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The Global Santosh[1] concerns the interpretation of a commonly used off-hire provision in time charters. The case provides clarification on the concept of vicarious liability under English law, setting out which third parties are likely to be considered to be a charterer's agent and providing insight on the extent of such agency.

The facts

The facts of this case may already be known to some. Indeed, we touched upon the Court of Appeal decision in our January 2015 Defence *Special Edition*. Briefly, the *Global Santosh* was chartered by NYK to Cargill on an amended Asbatime charterparty (the charterparty). The ship was then voyage chartered by Cargill to Sigma Shipping Ltd (Sigma) and ordered to carry a cargo of bulk cement from Sweden to Port Harcourt, Nigeria. The cargo in question was sold by Transclear SA (Trasclear) to IBG Investments Ltd (IBG). Transclear is believed to have been the end subcharterer of the ship, although the exact contractual chain is not known.

The ship was prevented from reaching the berth at Port Harcourt due to congestion. After a delay of around two months, the ship was ordered to berth. However, before being able to dock, she was arrested on 17 December 2008. The arrest of the ship was in fact an error; it was the cargo that should have been arrested as a result of a demurrage dispute between Transclear and IBG.

The arrest dispute was settled on 15 January 2009 and cargo operations were completed on 26 January. During the period of arrest, Cargill withheld payment of hire. NYK argued that the ship was not off-hire because of the proviso at clause 49 of the charterparty (our emphasis in **bold**):

'Should the vessel be captured or seizured [sic] *or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release,* ***unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents****.'*

Although Cargill was responsible under the charterparty for the proper performance of the discharge operations (as is commonly the case under time charters), there was no personal default on Cargill's part. So to succeed, it was necessary for NYK to rely on the act or omission of either Transclear or IBG – arguing that they were Cargill's agents.

1 *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20

The Global Santosh – what is a charterer's agent? UK Supreme Court hands down the final say continued

The Arbitrators' decision
The arbitration tribunal held at first instance that neither Transclear nor IBG was acting as Cargill's agent for the purpose of clause 49 of the charterparty and, therefore, this proviso did not apply. The ship was found to be off-hire for the period of arrest.

The Commercial Court
On appeal, the Commercial Court reversed the arbitrators' decision, holding that the proviso did apply and hire was payable throughout the period of arrest.

The judge stated that Cargill was responsible for any act or omission of its agent(s) in the course of discharging the cargo. While Transclear's arrest of the ship was not done strictly as part of the performance of discharge operations, the judge considered that the failure to discharge the cargo within the specified laydays and the failure to pay the resulting demurrage on time were omissions in the performance of 'overall' cargo operations.

The Court of Appeal
The Court of Appeal affirmed the order made by the Commercial Court and the ship was again held to be on hire throughout the period of arrest, but on different grounds. The judges here held that the delay was within the charterer's 'sphere of responsibility' and not the owner's, because NYK was not in any way involved in the dispute between Transclear and IBG. It was found that the dispute arose from Cargill's 'trading arrangements concerning the ship' and it was therefore liable. In other words, by subchartering to Sigma, Cargill made it possible for there to be trading arrangements between parties further down the contractual chain under which this type of dispute might arise.

The UK Supreme Court
Reversing the Court of Appeal's decision, the UK Supreme Court has now found that the arbitrators at first instance had arrived at the correct conclusion, ie the proviso at clause 49 of the charterparty did not apply and that the ship was in fact off-hire for the arrest period.

The Supreme Court found as follows:

- References to agents of the charterer in a time charterparty are not limited to parties doing those acts on the charterer's behalf, in the strict legal sense, or those standing in a direct legal relationship with the charterer.
- However, it rejected the Court of Appeal's attempt to apportion liability for the arrest by assessing whether the arrest arose due to matters falling within the owner's or charterer's 'sphere of responsibility', which it considered too wide.
- Under the time charter, Cargill was responsible for cargo handling operations or, alternatively, for arranging the performance of cargo handling operations if it was not to carry them out personally. Cargill was also responsible for ensuring that such operations were carried out properly, as well as paying for them. The issue here however was not defective cargo operations, but a delay to cargo operations due to an arrest.
- Any responsibility Cargill may have had under the charterparty for IBG's acts or omissions extended only to acts or omissions in the actual performance of those cargo operations whilst in progress and no further.
- Here, the arrest was caused by a dispute between Transclear and IBG relating to unpaid demurrage. Enforcing a liability for demurrage under a subcontract cannot be seen as the vicarious exercise of any contractual right or responsibility by Cargill under the charterparty.
- Indeed, the Supreme Court concluded that the concept of 'agency' under a time charter does not extend to an act of a subcharterer or receiver that is 'wholly extraneous or unrelated to sub-letting under the [subcharter] or inconsistent with its scheme'.

Comment

The Supreme Court's decision restricts the concept of agency under a time charter. The broad approach adopted by the Court of Appeal has been rejected. Instead, what is being promoted by the English courts is a focus on:

1. identifying the contractual responsibilities of the charterer under the said time charter; and
2. then considering whether the acts or omissions in question arise out of the actual performance of these responsibilities.

The English courts continue to uphold arbitration agreements

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A recent decision of the English High Court reinforces the court's desire to uphold arbitration agreements wherever possible, even where the very existence of the arbitration agreement is disputed.

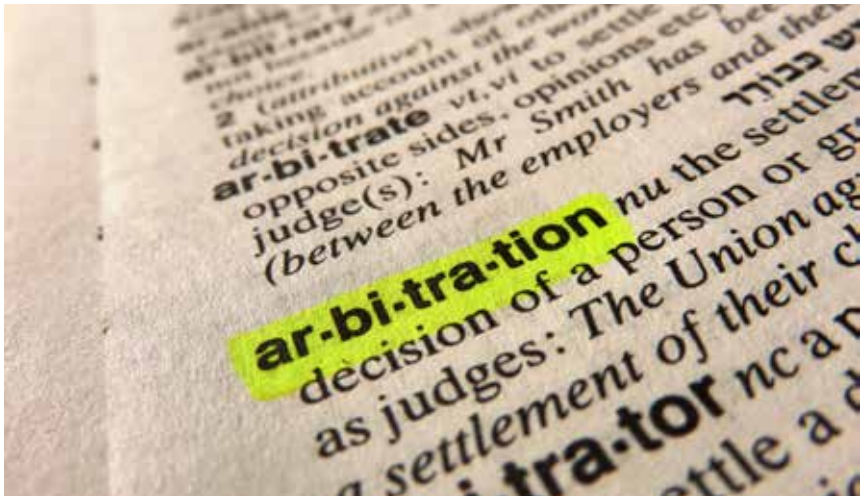
The facts

In *HC Trading Malta Ltd v Tradeland Commodities*[1], the claimant alleged that the parties had entered into a binding commodities sale and purchase contract which contained a London arbitration clause. No shipments in fact ever took place under the contract.

The claimant wanted to claim under the contract against the defendant in London arbitration for its loss of earnings/profit. However, the defendant declined to accept service of its arbitration notice. The defendant indeed denied that there was any valid contract at all and took the position that if, or when, the claimant commenced London arbitration, it would contest the arbitrator's jurisdiction to hear the dispute. For its part, the defendant did not have any claim against the claimant.

The claimant therefore issued proceedings in the English High Court, seeking a declaration from the court that there was a binding arbitration agreement between the parties. The defendant, however, claimed that the court had no jurisdiction to entertain the claim for relief in circumstances where the claimant was about to commence arbitration, since a tribunal has express power to determine its own jurisdiction under section 30 of the *Arbitration Act 1996* (the Act).

The defendant therefore applied to set aside the claim for relief before the court.



1 [2016] EWHC 1279 (Comm)

Decision

The judge agreed with the defendant that the court had no jurisdiction on the facts of this case and set aside the claim for relief for the following reasons:

- A party's ability to apply to the court for relief (as to jurisdiction or otherwise) once arbitration had been commenced was prescribed by the Act. Firstly, the arbitrator rules on his own jurisdiction and recourse to the court thereafter is subject to the conditions in section 32 of the Act.
- Where the Act lays down an extensive code for the governance of arbitrations, it would be wrong for the court to intervene.
- The Act's intention was that the court would not usually intervene outside the specific circumstances specified therein. It cannot have been intended that a party to a disputed arbitration agreement could, by merely not appointing an arbitrator, obtain a court decision on its existence without being subject to the restrictions contained in section 32 of the Act.
- There was no impediment to the claimant commencing arbitration, such that there was no need for the court to exercise its discretion here and grant the relief being sought.

Comment

This case addresses a previously untested point: whether a party seeking to rely on a disputed London arbitration agreement can seek relief of the English courts before appointing an arbitrator. The answer given here was a firm 'no'.

Despite the defendant's assertion that there was no valid contract, and accordingly no valid arbitration agreement, it was clear that in order to have that issue determined, the claimant should still have commenced arbitration in accordance with the terms set out in the disputed contract. Questions of efficiency and costs cannot be used to deviate from the procedure set out in the Act.

The judge's decision serves as a timely reminder to parties considering the commencement of arbitration to ensure that reliance on the court's powers is not misplaced. On facts such as these, the provisions of the arbitration agreement (whether its existence may be disputed or not) must be followed before the English courts will be prepared to intervene.

The English courts will only consider interfering on rare occasions, where there is, say, a legislative gap that warrants the court exercising its discretion to make good any such lacuna. This was clearly not such a case and the court chose to give primacy to the contractually agreed (albeit disputed in this case) dispute resolution forum of London arbitration.

What is the timebar for outstanding hire claims?

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When does a claim made by an owner for outstanding hire become timebarred? A recent London arbitration decision has handed down some useful guidance in this area.

Introduction

Hire, unlike freight, is not sacrosanct. In certain limited situations, a charterer is entitled to make legitimate deductions from hire; for example, when it can bring itself within the relevant off-hire clause in the charterparty, or when the charterer has a claim for damages for which it is permitted to make a set-off against the hire otherwise due and payable.

As soon as a charterer has a right to make a deduction from hire, it can apply this to the next hire payment so long as the charterer deducts a *bona fide* sum that has been assessed on a reasonable basis.

However, where the owner does not agree with the deduction, when will its responding claim for the return of the outstanding hire become timebarred? This question was looked at recently in *London Arbitration 10/16*[1].

The facts

A dispute arose under a NYPE 1946 amended form time charter, which specified that hire had to be paid 15 days in advance of it falling due. The charter was subject to English law and London arbitration. The charterer paid hire until 7 January 2006, after which it withheld hire for various alleged off-hire periods and multiple other claims, including a claim for underperformance. Five more hire payments were missed before the ship was finally redelivered on 22 March 2006.

The owner commenced arbitration proceedings for the outstanding sums on 21 March 2012 (ie only one day short of the six-year anniversary of the ship's redelivery). The charterer, in reply, sought a declaration from the London tribunal appointed that the claims were already time barred. The charterer essentially argued that, under the Limitation Act 1980, there was a breach of contract on each and every occasion that hire was not paid, with a separate cause of action arising (with time starting to count) each time, so that the claims for outstanding hire were already time barred by the time proceedings were commenced on 21 March 2012. The London tribunal found in favour of the charterer on this preliminary issue.

1 [2016] 950 LMLN 3

The award

In coming to its decision, the tribunal rejected the owner's two key arguments:

- The owner alleged that its claim was one for the final balance of hire, which was arrived at either on the date of redelivery, 22 March 2006, or just a few days later, but not before. The tribunal rejected this argument and said that an owner cannot unilaterally extend its time for commencing proceedings by, in effect, saying that its claim is one for the balance due, based on a final hire statement, rather than for the hire itself. The true claim was one for hire, which fell due on the date it was originally due to be paid under the charterparty.
- The owner argued that because the charterer withheld hire here legitimately, relying on the basis of off-hire provisions and the principle of equitable set-off, time did not start to run until the claims themselves had been determined. The owner relied upon *The Nanfri*[2] to support its proposition that if a charterer deducted hire in good faith that element of hire was not then immediately due for payment. To put it another way, as the charterer here was not in breach when it made such (legitimate) deduction from hire, time should not start to run straightaway.

Again, the tribunal rejected this argument. Making legitimate deductions from hire in good faith does not affect the commencement of time for the purposes of limitation. A charterer can only make legitimate deductions from hire if the hire has first fallen due for payment and this is when the owner's cause of action accrues for limitation purposes.

Appeal

The award was subsequently appealed to the English High Court, which confirmed the above decision. The court held that the fact that an arbitration tribunal may subsequently determine that a period of off-hire or set-off was not justified does not mean that the accrual of the cause of action is suspended until that determination by the tribunal is made.

Conclusion

Members should therefore always bear in mind that, in the absence of any express term in the subject charterparty, under English law at least, the timebar for unpaid hire will be six years from the date that the same hire originally fell due for payment.

2 [1978] 2 Lloyd's Rep 132

The Wehr Trave

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The English High Court has recently provided guidance as to the meaning and nature of a 'time charter trip'.

The facts

The *Wehr Trave*[1] was chartered by SBT Star Bulk Tankers (the owner) to Cosmotrade SA (the charterer) on an amended NYPE 1946 form, dated 16 October 2013, for:

'One time charter trip via good and safe ports and/or berths via East Mediterranean/Black Sea to Red Sea/Persian Gulf/India/Far East always via Gulf of Aden...'.

The ship was to be delivered at Algeciras (Spain) and redelivered at one safe port in the charterer's option within the Colombo/ Busan Range, including China, but not north of Qingdao.

Upon delivery, the ship was ordered to load cargoes at three separate ports, namely Sevastopol/Avitla, Novorossiysk and Constantza/ Agigea. She proceeded on her route and discharged at one port in the Red Sea (Jeddah), one port in the Gulf of Oman (Sohar) and three ports in the Persian Gulf (Hamriyah, Jebel Ali and Dammam).

The day after berthing at Dammam, the charterer ordered the ship to go back to Sohar, once the ship was empty of cargo, and to load a project cargo for delivery at New Mangalore or Cochin (west coast of India).

It is this subsequent order that led to the dispute and the question as to whether the charterer's order to load another cargo was legitimate (ie permissible under the charter).

Issue to be decided

The arbitration tribunal concluded that this was an order the charterer was contractually entitled to give. On appeal to the High Court, the question for decision by the judge was as follows:

'On the true construction of the Charter, was the respondent charterer under a "one time charter trip" after the vessel had discharged the entirety of all previous loaded cargo, entitled to order the empty vessel to another load port (Sohar) and discharge port to perform a further trip/voyage; or only to order the vessel to proceed to the agreed Charter redelivery place having completed the agreed one time charter trip?'

The central issue was whether the charter terms permitted the charterer to order the ship to load the further cargo after the initial cargo had been discharged. The owner submitted that the 'one time charter trip' had been completed following discharge at Dammam and, therefore, the subsequent order was illegitimate.

1 [2016] EWHC 583 (Comm)

The Court's decision

The High Court judge refused the owner's appeal and agreed with the tribunal. He emphasised the importance of the charter being a time charter where the defining characteristic is that the ship is under the orders of the charterer as regards the employment of the ship for the agreed charter period. The scope of any 'trip time charter' will depend upon the particular terms agreed between the parties and can be restricted by reference to period, trading limits and/or geographical route. It was common ground that proceeding to Sohar was not inconsistent with the contractual route.

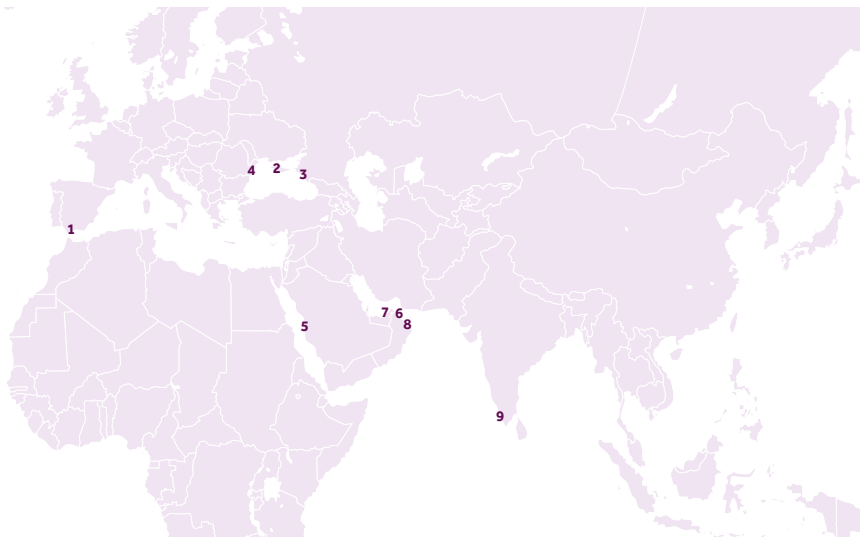
The judge did not consider that, even in the context of this charter being for 'one' charter trip, this restricted the charterer's general entitlement to give orders with regard to loading and discharging, provided the calls were within the agreed trading limits and the route was not inconsistent with the contractual route.

The judge further recognised that the concept of a 'trip time charter' can embrace a number of possible permutations, including loading and discharging at a number of different ports along the permitted route, and held that there was no single definition as to what constitutes a 'trip' or 'one trip'.

The judge also rejected the owner's argument that the words 'via' and 'to' restricted the range of ports at which the ship may load and discharge cargo.

Comment

It is clear from this decision that, if an owner wishes to limit the scope of the orders a charterer may give, whether it be in relation to trading limits, geographical route or number and designation of loading and discharge ports, clear and specific language to that effect will be required in the charter. Clear and express language is strongly recommended in all contracts to avoid disputes.



The *Wehr Trave*
1. Algeciras
2. Sevastopol/Avitla
3. Novorossiysk
4. Constantza/Agigea
5. Jeddah
6. Sohar and Hamriyah
7. Jebel Ali and Dammam
8. Sohar
9. Cochin

OW Bunker – last stand in the United States for owners and charterers?

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The OW Bunker bankruptcy has had ramifications worldwide. This article looks at the United States and how interpleader actions there have, for the time being at least, been protecting debtors from paying twice.

In these cases, an owner or time charterer contracted with an OW Bunker entity to supply bunkers to the subject ship. Before the owner or time charterer paid for the bunkers supplied, however, OW Bunker collapsed. OW Bunker – typically, but not always – contracted with other parties to make the physical supply to the ship in the agreed port. At the time that OW Bunker in Denmark and affiliates elsewhere filed for bankruptcy, neither OW Bunker nor the physical supplier at the bottom of the chain had been paid in a large number of cases. The relevant OW Bunker entity, as well as the physical supplier, have since contended that they each are entitled to enforce a lien on the same ship for the value of the bunkers so supplied.

1 [2016] EWHC 583 (Comm)

Introduction

In our October 2015 Defence *Special Edition* we provided an update on the cases in the United States (as well as in Singapore and the United Kingdom) arising out of the spectacular demise of OW Bunker and its affiliates around the world at the end of 2014.

Owners and time charterers have always been prepared to pay for the bunkers consumed by their ships. However, they are only prepared to pay once for those bunkers. Unfortunately, legal decisions in England and in other jurisdictions have resulted in the real possibility that owners and time charterers may have to pay twice for the same bunker supply. In the United States, however, owners and time charterers have had more success in lessening that risk, although it is still too early to say whether they will ultimately succeed.

Interpleader actions

As we reported in October 2015, Judge Caproni in New York has held that the procedural device of 'interpleader' actions can be used to protect owners and time charterers from the risk of double payment. An interpleader action allows a person faced with more than one person demanding payment for the same debt to pay the disputed amount due into 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 stop the persons before it from attempting to collect the debt by filing actions elsewhere.

The cases as they stand

More than 25 such interpleader actions have been filed in New York and consolidated before Judge Caproni. Judge Caproni has held that these actions are proper and the United States Court of Appeals for the Second Circuit has affirmed her decision. Further proceedings will now be required to determine precisely which entity is entitled to be paid from the funds paid into court by the owners and time charterers.

An obvious solution?

From an operational perspective, and all other things being equal, a solution is obvious – the owner or time charterer pays the OW Bunker entity with whom it contracted, the OW Bunker entity pays the entity with whom it contracted and, ultimately, the physical supplier is paid in full, with each person in the contractual chain retaining its contemplated profit.

Here, however, all other things are not equal. ING Bank contends that OW Bunker assigned its receivables to ING Bank as security for loans made by ING Bank to OW Bunker. If then, in fact, the owners and time charterers only have to pay once, either the end physical suppliers or ING Bank bears

the credit risk of the default and demise of OW Bunker. ING Bank contends it perfected a security interest in the receivables and 'takes first', while the physical suppliers contend they have a maritime lien against the ship in rem and that they must 'take first'.

However, the owners and time charterers concerned want to pay only once and do not want to be concerned about future arrests or disruptions to their business.

Recent developments

Recently, the physical suppliers have suffered setbacks in district court cases in Washington, Louisiana and New York (in a case before a different judge). These cases are not part of the interpleader actions before Judge Caproni. In these cases, the courts have held that the physical suppliers have no lien under United States law because there was no agency relationship connecting the ship to the physical supplier. Instead, the courts have held that the physical supplier is akin to a subcontractor, who does not generally have a lien against a ship to which it supplies services on the order of a general contractor.

The Louisiana case is already on appeal and the others will doubtless be appealed as well. The physical suppliers contend inter alia that the district courts have misconstrued the United States lien statute which, they argue, only requires proof that the bunker order originated 'on the order of' ship interests – a fact that has been admitted in all of the decided cases – and that there is no requirement under United States statute that the physical supplier must also prove that OW Bunker, as intermediary, was acting as an agent of the ship in ordering the bunkers.

Meanwhile, all eyes are on New York and the showdown in front of Judge Caproni as she decides who gets the funds paid into court, and whether the owners and time charterers before her will in fact be relieved from the risk of paying twice for the same bunker supply.

She has selected four test cases for summary judgment, both on the maritime lien issues discussed above and also on whether ship interests can be discharged from these cases with no further liability. These test cases have been submitted to Judge Caproni, and her decisions are expected later this year.

Bunkering

OW Bunker – *The Res Cogitans* decision

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A recent decision by the English Supreme Court has surprised many in the maritime industry. This article looks at this test case in the OW Bunker saga and discusses how this may affect other owners and time charterers facing competing claims for bunker supply payment.

Introduction
On 11 May 2016, the English Supreme Court handed down its judgment[1] confirming that, in this test case, OW Bunker was entitled to recover the price of bunkers delivered to a subject ship, regardless of the fact that property in the bunkers had not been transferred (due to non-payment of the bunkers down the contractual supply chain by OW Bunker). This is a surprising and rather disappointing decision for owners and time charterers.

Background
In November 2014, the OW Bunker group filed for bankruptcy. As a result, OW Bunker has been unable to pay many of its physical bunker suppliers for supplies made to ships prior to the insolvency. ING Bank has also asserted a right to recover, as assignees, any debt owed to OW Bunker in respect of the supply of bunkers to ships. Since then, many owners and time charterers have faced competing claims from ING Bank and from the unpaid physical supplier for the price of the same bunkers supplied to the ship prior to the insolvency.

The Res Cogitans was selected as a test case to determine whether ING Bank's claims would fail because they are subject to Section 49(1) of the Sale of Goods Act 1979 (SoGA). This requires under English law that property (title) in the goods (the subject of a sale contract) must pass to the buyer if the seller is to maintain a claim for the contract price so agreed.

Facts of *The Res Cogitans* case
On 4 November 2014, OW Bunker supplied bunkers to the *Res Cogitans* on terms that included a retention of title clause, under which property in the bunkers could not pass to the owner until it had made payment to OW Bunker in full. However, the owner did have the right to use the bunkers from the moment of their delivery.

OW Bunker arranged the bunker stem under a contract with its parent company, OW Bunker AS. OW Bunker AS had entered into a back-to-back contract with Rosneft Marine (UK) Limited (Rosneft) for the supply. Rosneft, in turn, contracted with its Russian affiliate, RN-Bunker Limited, for the physical supply of the bunkers.

On 17 November 2014, after the collapse of the OW Bunker group, Rosneft sought payment directly from the shipowner for the bunkers so supplied, on the grounds that

1 [2016] UKSC 23

Rosneft remained the owner of those bunkers according to its own retention of title clause. At that time, part of the bunker supplied to the ship had already been consumed. In addition, OW Bunker also claimed the price of the bunkers from the shipowner, even though Rosneft retained title in the bunkers supplied. The shipowner rejected both claims as it had no contract with Rosneft and as OW Bunker was incapable of passing title to the shipowner which, the shipowner argued, is a pre-requisite for a claim for the price of goods under SoGA.

Previous decisions

The arbitration tribunal, the English Commercial Court and the English Court of Appeal have all held that this bunker supply contract is not a contract of sale to which SoGA applies. ING Bank's claim for the contract price was not, therefore, defeated under Section 49(1) of SoGA, even though OW Bunker could not pass legal title in the bunkers to the owner. It was instead held that ING Bank had a simple claim in debt which was not contingent on property in the bunkers passing to the owner.

The decision of the Supreme Court

The English Supreme Court has agreed that the bunker supply contract here did not come within SoGA. It has held that the bunker supply contract is *similar* to a sale contract, so would be subject to similar implied terms as to description, quality and fitness for purpose, but its essential nature is such that it could not be regarded as an agreement to transfer property (title) in goods to the purchaser for a price. Instead, the contract in question is an agreement with two different aspects.

First, it permits consumption of the bunkers prior to payment, but without property passing to the shipowner. Second, in respect of the bunkers that remain unconsumed, there is an agreement to transfer property in those unconsumed bunkers to the shipowner in return for payment of the contract price. So far as the shipowner is concerned, according to the Supreme Court, what matters is having the right to consume the bunkers prior to payment and that, once it has paid, the owner then acquires property to the bunkers remaining on board.

This leaves open the question of whether, in any particular case, there might be a breach of this implied undertaking. Perhaps crucially, the Supreme Court did not address the issue of a potential double payment having to be made to the physical bunker supplier due to a separate in rem action being brought against the ship, as no claim had yet been advanced by the physical supplier (RN-Bunker Limited) in this matter.

Conclusion

The decision of the Supreme Court in *The Res Cogitans* represents a significant departure from the industry's traditional understanding of contracts for the provision of bunkers. It may also have ramifications under time charter arrangements more generally, particularly at the time of delivery and redelivery when property in bunkers is commonly intended to pass from one party to another. Those purchasing bunkers may now wish to review the terms of their bunker supply contracts to minimise the risk they may face of being forced to pay the same debt twice.

The problems currently faced by owners and time charterers following the collapse of the OW Bunker group involve a variety of scenarios. Each case should be reviewed on its own individual facts to determine the impact this Supreme Court decision may have, assuming of course that these supply contracts are subject to English law and jurisdiction.

How well do you know the origin of the cargo you carry?

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The club has more than 50 qualified lawyers and barristers working in house on defence class claims, spread across London, Piraeus, New York, Singapore, Rio de Janeiro and Hong Kong.

For more information on our New York office and the president of that office, LeRoy Lambert, see the club *website* .

This article covers the successful defence of a potential United States cabotage violation.

The Jones Act

The United States Jones Act prohibits any foreign built or foreign flagged ship from engaging in coastwise trade within the United States. The federal courts have given a very wide interpretation to the term 'coastwise trade', whereby it applies to a voyage beginning at any point within the United States and which discharges commercial cargo to any other point in the United States. Any breach of the Jones Act, in respect of these cabotage rules, can attract significant penalties, including large fines, as well as possible confiscation of the ship.

Background

A member of the club chartered a ship, as owner, on a voyage basis, adopting the GENCON 1994 form (the charterparty), which was subject to English law and arbitration. The cargo to be carried from a port on Mexico's Pacific coast to a United States port in the Gulf of Mexico consisted of motor and sailing yachts, including a tug.

The tug was loaded on board the member's ship at the Mexican port during October 2015. The ship then proceeded to an interim United States port to discharge part of her cargo of yachts. The tug was discharged and reloaded during this operation, which was controlled by the charterer. At or about this time, it transpired that before arrival at the Mexican port of origin, the tug had recently been towed from another port in the United States , unbeknown to the member. The United States Customs and Border Protection (CBP) regarded the movement of the tug as a whole as a 'coastwise' movement and therefore a breach under the Jones Act by a non-United States flagged ship.

The problem

The CBP advised the member that the tug could not be discharged at the intended port of discharge, nor at any other United States port, as this would be regarded as a breach of the Jones Act.

The Standard Club acted swiftly and engaged the assistance of the club's New York office to work with the member's local office in that region. United States lawyers were also appointed. However, the United States lawyers were unable to advise categorically that discharge of the tug at another United States port would not be a breach of the Jones Act. The member was in a difficult position, as there was a real risk that discharge of the tug at any United States port would lead to a Jones Act violation and financial sanctions. Consideration was even given to alternative discharge outside of the United States . This, however, was not a very satisfactory option either since it could not be confirmed that discharging the tug outside the United States would protect the member if the tug re-entered the United States at a later stage.

The involvement of the CBP and the potential Jones Act violation, which led to significant delays in discharge, stemmed from the charterer not declaring the true port of loading of the tug. As a result, the member made a claim for detention against the charterer for the consequent delay in discharging the tug.

Legal analysis

The club sought legal advice from English lawyers, given that the charterparty was subject to English law. The issues for consideration were:

1. the member's options for alternative discharge; and
2. the charterer's liability for consequential loss and delay.

Practically speaking, the tug could not be delivered without violating local (United States) law. English law does not and will not compel the violation of foreign law (unless it violates public policy). Accordingly, the cargo had to go elsewhere.

So far as the position against the charterer was concerned:

- The charterer was considered to be in breach of warranty that carriage of the cargo would not expose the member to an undisclosed legal danger. The pre-carriage of the tug rendered the discharge at a United States port unlawful. The charterer was under a duty to disclose this fact. In these circumstances, the member had the right to take steps to mitigate the loss brought about by the charterer's breach, by proceeding to a port where the cargo may lawfully be discharged.
- The charterparty provided that the member was to carry the cargo to and discharge it at the agreed port 'or so near thereto as she may safely get'. Where the ship was not permitted to carry the cargo to and discharge it, the member was at liberty under this provision to select an alternative and lawful port of discharge.

Solution

The charterer refused to engage in finding a solution for discharge of the tug and also declined to put up security to cover the detention/delay claim.

In exploring possible discharge solutions with United States and English lawyers, the member managed to negotiate with the cargo consignee, who urgently wanted to receive delivery of the tug, a sufficient indemnity for any potential Jones Act fine levied against the ship by the CBP if the member discharged at a United States port.

Once the cargo had been discharged, following receipt of the indemnity from the consignee, the member still had an unsecured claim for detention against the charterer for delay.

Working closely with United States lawyers, the member then successfully applied for a Rule B attachment where the charterer's bank was located. The Rule B attachment was a sufficient pressure point to force the charterer to promptly settle the member's claim for detention in full.

Conclusion

This case demonstrates the need for all members to carry out sufficient due diligence checks on their commercial counterparts and understand, so far as possible, the true origin of any cargo to be carried.

The case is also an illustration of the club's support of a member in a challenging situation, spanning two jurisdictions. It demonstrates the club's willingness for provide continuous support for its members in defence class claims where there are good merits and the costs of all steps taken are reasonable and proportionate to the sum in dispute.

For more information on defence cover provided by the club, see the *special article* available on the club's website.

The club would like to thank Siiri Duddington, Russell Harling and Tom Burdass of Campbell Johnston Clark for their assistance in this matter and contribution to this publication.

Clause paramounts revisited

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As club managers, we often receive queries from our members as to whether a clause paramount should be included in the subject voyage or time charter. Our general answer is 'yes'. This article aims to explain why.

What is a clause paramount?
A clause paramount is essentially a clause that incorporates a cargo liability regime, usually the Hague or Hague-Visby Rules (the Rules), into the subject charter. Such clauses are necessary as, under English law at least, the Rules are not compulsorily applicable to charterparties. So, where the Rules do not apply compulsorily, sufficiently clear words of incorporation are needed. See, for example, Clause 24 of the NYPE 1946 form, which reads as follows:

'It is further subject to the following clauses... the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein...'

What is the effect of a clause paramount?
Defence of claims outside of cargo loss or damage
Where the Rules are successfully incorporated and apply to a charterparty, their application will not be limited to cargo claims alone. An owner may also benefit from the defences provided for by the Rules in respect of other claims.

For example, the leading treatise '*Time Charters*'[1] suggests that the effect of the incorporation of United States COGSA, in Clause 24 of the NYPE form, is that the 'absolute' obligation of seaworthiness at the beginning of the charter period is reduced to an obligation to exercise due diligence to make the ship seaworthy before and at the beginning of each voyage under the subject time charter.

This was demonstrated in *The Saxon Star*[2] where there was a consecutive voyage charter which included a clause paramount. Delays occurred on the voyages, including ballast, due to breakdowns of machinery caused by the incompetence of the engine room staff, making the ship unseaworthy. They were incompetent despite the fact that the owner had exercised due diligence in their selection. It was held by the House of Lords that the Rules applied to all voyages, whether these were in ballast or with cargo, and the immunity given in respect of 'loss or damage' extended beyond physical loss or damage to cargo and also covered the financial loss to the charterer from the reduction in the number of voyages performed.

Time limit
The incorporation of the Rules will also give an owner the benefit of the one-year time limit in respect of claims in relation to goods loaded or to be loaded under the charter. This covers proceedings by a charterer against an owner. It does not, however, cover proceedings by the owner against the charterer.

1 *Time Charters*, Authors: Terence Coghlin, Andrew Baker, Julian Kenny, John Kimball and Thomas H. Belknap Jr; Edition: 7th Edition, 2014.
2 *Adamastos Shipping v Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep. 73 (H.L.)

The words 'loss or damage' in the Rules are not necessarily restricted to physical loss of or damage to goods, but can be extended to loss or damage related to goods – such as extra tank cleaning costs, pumping costs, standby lifting equipment and/or substitute cargo costs. The question of whether there is a sufficiently close relationship between 'loss or damage' claimed and the 'goods' in question to enable the owner to invoke the one-year time limit is one of fact in each case and upon construction of the particular clause paramount in the subject charter.

For example, there is a difference between the NYPE form compared with the Shelltime standard form. The English courts have typically held that the former contains wider and more expansive incorporation of clauses than the latter. This should be of no real surprise given that the Shelltime forms are generally more 'charterer friendly'.

Some of the differences between the Hague and the Hague-Visby Rules, such as the applicable time limit for bringing indemnity actions and package limitation, can often make it important to distinguish whether precisely the Hague or the Hague-Visby Rules will apply to the relevant contract of carriage.

Words of incorporation

Charterparties may contain a clause paramount, but it does not necessarily mean that the Rules are incorporated. For instance, wordings such as 'The following clause shall be included in all bills of lading issued pursuant to this Charter' (Cl. 37, ShellVoy 6 Form) or 'Charterers shall procure that all bills of lading issued under this charter shall contain the following' (Cl. 38, Shelltime 4 Form) are not sufficient to incorporate the clause paramount into the subject charter.

However, the following wording is sufficient to incorporate the clause paramount into the subject charter: 'This Charter Party is subject to the following clauses all of which are also to be included in all bills of lading or waybills issued hereunder' (Cl.31, NYPE 1993 Form).

Once incorporated, the clause paramount may conflict with other clauses in the contract and, in these circumstances, it is especially important that attention be paid to the precise wording of the clauses at issue. As a general principle of construction, the preamble of the clause will usually identify which clause overrides another. For instance, if the incorporation commences with the words 'Notwithstanding anything which may otherwise be stated in the charter...', the clause paramount is likely to prevail over the other clause. The converse is true if it is the other clause that has such a preamble wording[3].

The effect of incorporation

If the clause paramount is successfully incorporated into the subject charter, it will often override any other conflicting clause by virtue of Article III Rule 8 of the Rules. For example, clause 2 of the standard GENCON charterparty holds the owner liable for loss, damage or delay caused only by the personal want of due diligence and excludes the owner's liability for (mere) negligence of the master or crew. Such a clause would be null and void if a paramount clause were incorporated into this charter.

However, Article III Rule 8 doesn't prevent the parties to a charterparty from transferring obligations and liabilities for, say, loading, stowage and/or discharge of cargo from an owner to a charterer[4].

3 *The Tasman Discoverer* [2004] 2 Lloyd's Rep. 647
4 *The EEMS SOLAR QBD*, Admiralty Court, Admiralty Register, 5 June 2013

Clause paramounts revisited continued

Which rules are incorporated?
It has historically been held by the English courts that a general reference to a clause paramount will give effect to the Hague Rules (not the Hague-Visby Rules). However, in *The Superior Pescadores*[5], the bill of lading provided for 'The Hague Rules contained in the International Convention of the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924 as enacted in the country of shipment' and the Court of Appeal held that this wording in the clause paramount contractually incorporated the Hague-Visby Rules.

The Court of Appeal dismissed the argument that if the parties wanted the Hague-Visby Rules to apply they would have made an express reference to it, going against earlier decisions on the point given that the relevant bill of lading did not make specific reference to the Hague-Visby Rules (only the Hague Rules).

The main differences between the Hague and the Hague-Visby Rules
There are two significant differences between the Hague and the Hague-Visby Rules that an owner and charterer should consider when deciding which clause paramount to agree to:

1. **Indemnity claims**
   Where the Hague Rules apply and a party has settled a cargo claim under the bill of lading, the time limit to bring an indemnity claim remains 12 months from the cargo delivery. Therefore, by the time the indemnity action arises, it may well already be timebarred.

   However, where the Hague-Visby Rules apply, the time limit is three months after the claim has been settled or the person has been served with process in the action, provided that English law applies. This is particularly important where there is a charterparty chain and claims are to be passed up or down the line.

2. **Package limitation**
   Another difference is package limitation. The Hague Rules contain a limitation of '£100 per package or unit', regardless of whether the bulk cargo is dry or wet.

   Conversely, the Hague-Visby Rules provide for 'the equivalent of 666.67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher'.

Conclusion
Whether or not a clause paramount is included in a charterparty is a matter of commercial risk and negotiation. Furthermore, whilst it is not a prerequisite for P&I cover that all charterparties are to contain a clause paramount (and thus incorporate the Rules), there could be P&I cover implications if, as a result, an owner member is held liable for a cargo claim liability over and above that which would have been incurred had the contract of carriage been subject to the Rules.

It is nearly always beneficial for an owner to have a clause paramount incorporated into a charterparty. If such a clause is not to be included then the owner should consider the implications carefully and weigh up the 'pros and cons'. Parties should then know exactly the nature of the bargain they are entering into.

5 *The Superior Pescadores* [2016] 1 Lloyd's Rep. 27

Bulk carrier

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