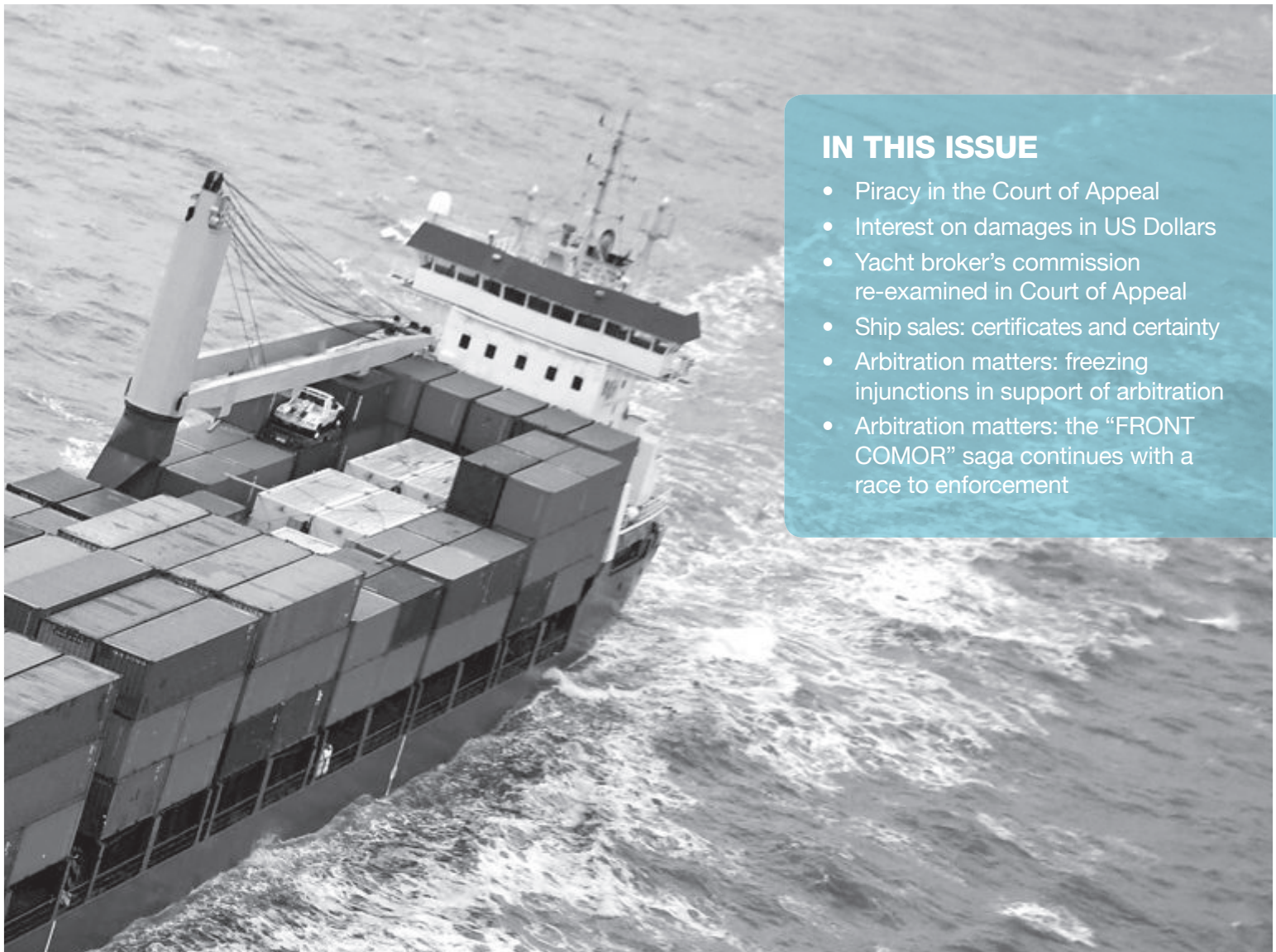


## BENTLEYS' BULLETIN

July 2011

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## BENTLEYS' BULLETIN: JULY 2011

Welcome to our first issue of Bentley's Bulletin, which will be, we hope, an informative quarterly round up of English law judgments and reported arbitration awards affecting the shipping and marine insurance business. The cases which go to court or arbitration are of course a tiny fraction of the disputes we and our professional colleagues in London are asked to advise on and they represent an even smaller proportion of the problems dealt with daily by our clients and readers. We will try to focus on cases which are representative of key issues faced by our clients or which help to illuminate aspects of London arbitration or the English courts.

Paul Griffiths

### PIRACY IN THE COURT OF APPEAL

Somali piracy has been dominating the headlines for some time now and the legal issues which arise are making their way to the courts. Last year, the High Court handed down a judgment in *The SALDANHA* [2011] 1 Lloyd's Rep. 187, which looked at a time charterer's obligation to pay hire when a ship is captured by pirates. Then in January of this year the Court of Appeal judgment in *The BUNGA MELATI DUA* [2011] EWCA Civ 24 was released.

This latest case contains interesting material for cargo owners, insurers and others on a number of issues, firstly whether or not cargo becomes a total loss on seizure by pirates and, secondly, whether there is any public policy against the payment of ransoms.

The vessel was carrying the claimant's cargo when she was captured by Somali pirates. The vessel owners, MISC, commenced ransom negotiations almost immediately. The cargo was insured with the defendant under an all risks policy which did not exclude piracy or theft. About a month after the seizure, the claimant served notice of abandonment on the defendant, which was rejected. The vessel and cargo were later released, although by the time the voyage was completed the cargo had missed its market (the cargo was biofuel, which is a seasonal market). The cargo was later sold for less than its insured value, and the claimant sought the shortfall under the all risks policy.

#### The Court of Appeal held:

1. There was no total loss because the claimant was not irretrievably deprived of the cargo. The test for actual total loss in a marine context was strict and seizure by pirates was not an automatic actual total loss. On the facts there was a strong likelihood that payment of a ransom of a comparatively small sum compared to the value of the vessel and cargo would secure the recovery of both. This was a "wait and see" situation, and the facts would not even have amounted to constructive total loss.
2. Public policy did not preclude the payment of a ransom. The court noted the differing interests of the pirates, commerce and government and concluded "there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition".



**Public policy did not preclude the payment of a ransom.**

## INTEREST ON DAMAGES IN US DOLLARS

**Even with interest rates at historic lows, the rate and basis on which interest is recovered by successful parties in court or arbitration can make a significant financial difference.**

In a recent judgment ([2011] EWHC 664 (Comm)) relating to the interest aspects of the long running *Fiona Trust* litigation, Andrew Smith J refused to award interest at the US Prime Rate. The successful claimants sought interest on their claim at the US Prime Rate, alternatively at the US\$ three-month LIBOR plus 2.5% (slightly lower than Prime). The defendants contended that the correct rate should be the US\$ three-month LIBOR plus 0.85%, with annual rests rather than the three month rests sought by the claimants.

Although the judge acknowledged that it was now conventional for the High Court to award US Prime Rate on damages awarded in US dollars, LIBOR was used widely for settling interest rates on loans to shipping companies. US Prime Rate was generally not used for loans to shipping companies based outside the USA. The defendants' evidence did not establish that the claimants could have borrowed the funds for as little as LIBOR plus 0.85% and an uplift of 2.5% was more appropriate because that reflected what would be charged for a short-term unsecured loan. It would only be in an exceptional case that the court would look at the claimants' actual borrowing rates over the relevant period.

This decision is likely to apply to a wide range of shipping disputes, where many if not most contracts use US dollars but the parties are not US-based. It should bring the court's practice closer to that in LMAA arbitration where a rate of LIBOR plus 2.5% is often applied.

This case is unusual in another respect in that the judge was dealing with an award of compound rather than simple interest. Both parties had agreed compound interest was appropriate in this case as it involved a claim for equitable compensation. Normally, the court's jurisdiction to award interest on claims for debt or damages is derived from the Senior Courts Act 1981 which only permits simple interest.

By contrast, the Arbitration Act 1996 provides arbitrators with a discretion to add either simple or compound interest to the amounts they award and the general practice of LMAA arbitrators is to award compound interest. It now seems likely that if a party wishes to contend for a different rate of interest, (or, where compound interest is applicable, different rest periods), it will have to bring good evidence as to why this decision, which purports to represent ship finance and arbitration practice, should be departed from.





## YACHT BROKER'S COMMISSION RE-EXAMINED IN COURT OF APPEAL

**Shipbroker's commission cases are quite rare - Bentleys acted for the successful claimants in *Seascope Capital Services v Anglo-Atlantic SCo Ltd* [2002] 2 Lloyd's Rep. 611 when the question of "effective cause" was last examined.**

In *Berezovsky v Edmiston* [2011] EWCA Civ 431, the Court of Appeal re-examined the amount of commission awarded to a yacht broker by the High Court [2010] EWHC 1883 (*Comm*). This case is also an illustration of the difficulties courts face when required to determine such matters as a "reasonable" rate of commission when market practice is mixed or unclear.

The dispute arose out of the sale of a super-yacht called the "DARIUS". B approached E on a non-exclusive basis to find a purchaser for the yacht, and through discussions with contacts E told B that a Mr Al Futtaim ("F"), amongst others, was a potential purchaser. F visited the yacht but told the yard building her that he insisted on dealing directly with B and refused to deal with brokers. Negotiations continued and the sale was eventually agreed, but E were kept in ignorance of the discussions and played no part in concluding the sale. When E found out about the sale, it claimed commission.

At first instance it was argued that E were entitled to no commission at all, since for a number of reasons they were not the "effective cause" of the sale. The judge disagreed, stating that because E had made sure that the yacht came to the attention of the final purchaser, it was entitled to commission. In the world of super-yachts, where there is a limited pool of potential buyers, a broker's skill consisted largely in

establishing contacts with access to high net worth individuals. It was wrong for B to say that E were not involved in the sale negotiations because it was B who had deliberately excluded E from them. As to the rate of commission, Field J awarded 3% of the purchase price of €240m based on his review of the evidence, including expert evidence, and despite evidence that the parties had agreed a rate of 2.5% if the sale was for €300m or more.

B appealed on the rate of commission awarded. The court held that, because the yacht sold for less than €300m, the agreement as to the rate of commission did not apply, but that a "reasonable rate" should be awarded. However, the starting point had to be the rate discussed by the parties i.e. 2.5%, and the court considered that the judge had not given any good reason for increasing the rate when the yacht sold for a lower figure. The commission was thereby reduced to 2.5%, meaning that the brokers received €6m.



**Shipbroker's  
commission cases  
are quite rare**

## SHIP SALES: CERTIFICATES AND CERTAINTY

### In *Polestar Maritime Ltd v YHM Shipping Co & Anor* [2011] UKHC 894 (Comm), Field J considered a question arising out of a sale on the Norwegian Saleform 1993.

Polestar agreed to sell a bulk carrier to YHM on the 1993 form. The parties also agreed an addendum of necessary documentation and a bill of sale which contained a covenant that the vessel was not subject to detention.

At the date of the MOA, the vessel did not have, and was not required to have, an International Sewage Pollution Prevention (ISPP) certificate. However, before the vessel was delivered, 2008 MARPOL Annex IV came into force, requiring the vessel to have an ISPP certificate. YHM refused on this basis to accept delivery of the vessel. The same day the vessel was detained by the port authorities because, inter alia, of the lack of ISPP certification. YHM purported to cancel the memorandum the following day.

The arbitrator agreed that YHM was entitled to cancel the MOA on the basis of lack of certification and of detention on the delivery date. The arbitrator's decision was reversed on appeal by Field J. Lines 220-224 of the 1993 form only required the seller to provide all the certificates that it had when the vessel was inspected. A requirement for new certificates to be provided would produce uncertainty. In addition, since Polestar had 3 banking days under the MOA to arrange the necessary documentation, (which included obtaining the vessel's release from detention), YHM were not entitled to cancel one day after the delivery date on the grounds of detention.

This decision provides some comfort to sellers confronted with ever-changing regulatory requirements, and should be compared and contrasted with the decision in *The ELLI and The FRIXOS* [2008] 2 Lloyd's Rep. 119 (CA), where owners were held in breach of warranty under a Shelltime 4 charterparty when the vessel was affected by changes in MARPOL requirements mid-charter.



## ARBITRATION MATTERS: FREEZING INJUNCTIONS IN SUPPORT OF ARBITRATION

**One of the first questions we consider with clients who are potential claimants is their prospects in relation to security or enforcement – will they be able to turn any eventual award or judgment into money? The freezing order is an important source of security for a party to litigation or arbitration in circumstances where there is a risk that any award or judgment will go unsatisfied.**

The court has held that a *Scott v Avery*-type arbitration clause (which excludes other proceedings unless and until an award is issued) prevented an application to the court for a freezing order. A worldwide freezing order previously granted was set aside. This decision will affect a number of commodities contracts, since *Scott v Avery* clauses are common in that context.

In *B v S* [2011] EWHC 691 (Comm), the sellers in a sale contract on FOSFA 54 terms (who were on the receiving end of the freezing order) argued that the *Scott v Avery* clause should be interpreted as having the effect of excluding the court's jurisdiction under s44 Arbitration Act 1996 to grant injunctions in support of arbitration proceedings. The buyers argued that the

construction of the clause was settled law, with previous authorities deciding that ancillary proceedings within the jurisdiction were not a breach of the clause.

Flaux J started from the position that, if untrammelled by authority, he would conclude that the wording of the clause was wide enough to restrict all proceedings. He then went on to consider the line of authorities relied upon by the buyers (starting with *Mantovani v Carapelli* [1980] 1 Lloyd's Rep. 375), but distinguished these on the basis that they were decided under the 1950 Act rather than the 1996 Act. Flaux J rejected the buyers' contentions and discharged the freezing order.

Despite the buyers' assertions that it would be commercially undesirable to restrict the

court's jurisdiction to grant such orders, Flaux J put the emphasis on party autonomy, stating that if the industry thought that the restriction was undesirable the FOSFA terms could be amended. Permission to appeal to the Court of Appeal has been granted, meaning that it is likely that the issue will be revisited in the near future.



**A worldwide freezing order previously granted was set aside**

## ARBITRATION MATTERS: THE FRONT COMOR SAGA CONTINUES WITH A RACE TO ENFORCEMENT

**The dispute between West Tankers Inc and Allianz resulting out of a collision between the vessel “FRONT COMOR” and a pier at a refinery in Italy is now famous. It caused a reference to the European court of Justice which held that the English court could not grant an anti-suit injunction to protect English arbitration proceedings against Italian proceedings.**

In *The FRONT COMOR (No 2)* ([2011] EWHC 829 (Comm)) the claimants applied to have an English arbitration award - which declared that they were not liable for the collision - converted into a judgment under s66 of the Arbitration Act 1996. They wanted the award made into a judgment so that any subsequent Italian judgment would not be enforced by the English courts, because Article 34(3) of the EC Judgments Regulation (44/2001) provides that a judgment will not be recognised if it is “irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought”.

Simon J made an order entering the award as a judgment. The defendants applied to Field J to set aside the order on the ground that a declaration of non-liability could not be entered as a judgment because it was not capable of being “enforced” as a judgment in any relevant sense. Field J upheld the original order, because in

circumstances where a contrary Italian judgment was expected at a later date, the making of the award into a judgment contributed to the claimant securing the material benefit of the award.

This decision provides a measure of protection for a party to arbitration where its opponent has commenced proceedings in another EU jurisdiction. However, although this method may prevent enforcement of EU proceedings in England, and is therefore of particular relevance where P&I Club or London based bank or insurance security has been provided by a party, parties with assets based elsewhere may derive little practical benefit from this solution.



the making of the award into a judgment contributed to the claimant securing the material benefit of the award

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**ADMIRALTY**

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