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TIME BARS AND THE INTER CLUB AGREEMENT

Bentleys acted for the successful sub-charterers in what appears to be the first reported English case on the 1996 version of the Inter Club Agreement. In the “*GENIUS STAR I*” [2011] EWHC 3083 (Comm) (Teare, J.), the Commercial Court examined the relationship between the one year time bar in an amended Centrocon arbitration clause and the two year time bar in the ICA and the judgment has provided some much-needed clarification.

The problem arose when a cargo claim in respect of the carriage of wind turbine parts was brought against sub-charterers (“Nordana”). The time charterparty was on the NYPE 1946 form and contained an additional London arbitration clause which provided that “any claim must be made in writing and the claimant’s arbitrator appointed within 12 months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred.” There was a clause paramount which had the effect of incorporating the Hague-Visby Rules into the charterparty and it also contained an amendment to the standard clause 26 which provided that “all cargo claims to be settled as per NYPE Inter Club Agreement 1996.” Nordana did not commence proceedings against the disponent owner (“Orient”) within the one year time limit set out in the arbitration clause in the time charter, but did notify them within the two year time limit set out in clause 6 of the ICA 1996. The position was back-to-back with the head charter between Orient and head owners (“Progress”).

The arbitrator held that the applicable time bar was two years, and this conclusion was upheld by the Judge on appeal. Clause 2 of the ICA 1996 expressly provided that the clause 6 ICA time bar was to

apply notwithstanding any provision of the charter or rule of law to the contrary. Even though the Centrocon clause was expressed to apply to “all claims”, reading the charter as a whole, it was clear that the Centrocon clause time bar was not intended to apply to claims covered by the ICA. Although Clause 6 of the ICA 1996 did not contain any stipulation as to when proceedings had to be commenced (the time bar applies to **notification** of claims only and therefore an arbitration could be commenced up to six years after the events as long as the claim was notified within two years) the construction was clear. The earlier unreported case of the “MARY ELLE” (1990, Evans, J.) which held that the Centrocon arbitration clause prevailed over the ICA 1984 time bar was distinguished on the basis that the 1984 ICA did not contain the wording set out in clause 2 of the 1996 ICA which expressly deals with inconsistency between clause 6 of the ICA and charter provisions.

This decision is in line with the “*STRATHNEWTON*” [1983] 1 Lloyd’s Rep. 219, where the Court of Appeal held that the Hague-Visby Rules time bar did not apply to claims covered by the ICA. It gives effect to the idea expressed in that case that the ICA cuts across other defences and liabilities set out in the charterparty.

However, this does not mean that there will not continue to be problems in considering conflicting charterparty time limits in this context – but those pitfalls are more likely to involve determining whether or not a claim falls within the 1996 ICA and is thereby subject to that particular time limit.



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The Supreme Court has made some very important general remarks about the interpretation of commercial contracts

REFUND GUARANTEES AND INSOLVENCY

We mentioned the Rainy Sky litigation briefly in our previous Bulletin. The Supreme Court has now overturned the Court of Appeal decision and in the process made some very important general remarks about the interpretation of commercial contracts such that it is now worth having a more detailed look at this case.

In *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, the Supreme Court determined the true construction of a number of refund guarantees. The six claimants (“the buyers”) had each entered into shipbuilding contracts with a yard (“the builder”) pursuant to which refund guarantees from a first class Korean bank were required before the first instalment was payable. The defendant (“the bank”) issued each buyer with identical advance payment bonds (“the bonds”). After all of the buyers had paid the first instalment (and after the first claimant had paid the second instalment) the builder entered a debt work-out procedure under Korean law. The buyers notified the builder that Article XII.3 of the contracts was triggered and demanded a refund of all instalments paid, together with interest. The builder disputed that Article XII.3 had been triggered and refused to refund the instalments paid. The dispute between the buyers and the builder was referred to arbitration, but the buyers additionally issued proceedings against the bank under the refund guarantees.

Paragraph 2 of the bonds provided that the buyers were entitled either upon their rejection of the vessel; their termination of the shipbuilding contracts; or upon total loss of the vessel to repayment of the pre-delivery instalments. Paragraph 3 provided that the bank would pay on demand “*all such sums due*” to the buyers under the shipbuilding contract.

The bank contended that it did not have to refund the instalments paid because refunds to which the buyers were entitled under Article XII.3 of the shipbuilding contracts were not payable under the refund guarantees. On a true construction of the bonds, reading paragraphs 2 and 3 together, the expression “*such sums*” in paragraph 3 referred back to the sums referred to in paragraph 2, such that the bank was only obliged to provide a refund if the buyers had terminated the contract or if the vessel was a total loss. The buyers contended that this construction was uncommercial because the purpose of the bonds was to guarantee the refund of all pre-delivery instalments. The expression “*such sums*” referred back to the phrase “*pre-delivery instalments*” used earlier in paragraph 3. The bank lost at first instance but won in the Court of Appeal, although it conceded that both sides’ constructions were arguable.

The bank’s construction was rejected by the Supreme Court, which held that, although the buyers had not put forward a very good explanation as to why paragraph 2 was included in the bonds, paragraph 3 was capable of two meanings and the buyers’ construction accorded with commercial common sense more than the bank’s construction did. The builder’s insolvency was the situation where the security provided under the advance payment bonds would be most needed and no credible commercial reason was advanced for the limited scope of the bonds being advanced by the bank.

The Supreme Court held that the ultimate aim of interpreting a provision in a contract was to determine what a reasonable person (with all the background knowledge reasonably available to the parties in the situation which they were in at the time of the contract) would have understood the parties to have meant. If there were two possible constructions the court was entitled to prefer the construction which was most consistent with business common sense and it was not necessary to conclude that a particular construction would produce an absurd or irrational result before having regard to the commercial purpose of the agreement.

The general approach to prefer contractual interpretations which make the most commercial sense is to be admired, although there may be some unease as to whether a judge is in the best position to determine that question. In the arbitration context, the choice of “commercial men” as arbitrators has always allowed for the application of commercial knowledge and expertise to a dispute. It may well be necessary in many cases to consider putting forward witness evidence on the commercial aspects of a particular interpretation, especially where the matter is not clear cut and each competing interpretation has some commercial merit. It should also not be forgotten that if the words used are clear the parties are bound by them, regardless of how uncommercial the result is. However, to the extent that we may see that contractual construction in the courts will fall more in line with business common sense, the decision is to be welcomed.

DECK CARGO AND THE HAGUE-VISBY RULES

In *Sideridraulic Systems v BBC Chartering & Logistic [2011] EWHC 3106 (Comm)*, the Commercial Court considered jurisdictional issues arising under a bill of lading for the carriage of sand filter tanks from Italy to the United States on the “BBC GREENLAND”. The claimant cargo interests contended that the defendant carriers were liable for loss and damage to cargo occurring during the voyage.

In December 2010 the defendants brought proceedings in Alabama, USA for a declaration that they were not liable to the claimants or that their liability was limited under US COGSA 1936. The claimants commenced arbitration in London, but the defendants denied that they were a party to any arbitration agreement and asserted that the Courts of Alabama had exclusive jurisdiction. The claimants applied to the High Court for an anti-suit injunction restraining the defendants from continuing the Alabama proceedings.

An important issue was whether the carriage was subject to the Hague-Visby Rules (“the Rules”). The bill of lading contained a paramount clause, but also provided that “otherwise” US COGSA 1936 applied, and if US COGSA 1936 applied the US courts had exclusive jurisdiction. There was a remark inserted by the master on the face of the bill as follows: “*all cargo carried on deck at shipper’s risk*”. The defendants argued that the tanks were deck cargo because they were carried on deck and the bill of lading stated as much. Accordingly, the Rules did not apply. The claimants contended that although the tanks had been carried on deck the bill of lading did **not** state that they were carried on deck.

The Court was therefore required to interpret the master’s remark on the bill of lading. The judge decided that this was a statement that the cargo was carried on deck, rather than being an exclusion of liability in the event that cargo was so carried (as contended by the claimants). As a result the Hague-Visby Rules did not apply compulsorily since the tanks were “deck cargo” within the meaning of the Rules.

The judge decided that he could determine the ordinary and natural meaning of the master’s remark without having to resort to the *contra proferentem* rule, applying commercial sense and looking at the words used in their documentary and factual context. The important fact appears to have been that it was an additional remark inserted into the bill of lading, and therefore presumably to be contrasted with the standard clause printed on the face of Congenbills, for instance. However, this case shows the potential difficulties in ascertaining whether or not the Hague-Visby Rules apply in cases where cargo is carried on deck. The issue is one of construction of the particular bill of lading. Given the implications for a shipowners’ P&I cover, not to mention the jurisdictional issues faced in this case, where possible it is always best to ensure that it is clearly stated that the goods are carried on deck.



This case shows the potential difficulties in ascertaining whether or not the Hague-Visby Rules apply in cases where cargo is carried on deck



TERMINATION FOR NON-PAYMENT OF HIRE

In *Parbulk v Heritage Maritime [2011] EWHC 2917(Comm) (Eder, J.)* the Commercial Court has once more considered the difficult issues facing an owner who wishes to terminate a long term charter for non-payment of hire. In December 2007 the parties entered into a five year bareboat charter (“the charter”). Under the charter terms hire was to be paid monthly in advance and time of payment was of the essence. Pursuant to clause 46 of the charter, it was an event of default if any instalment of hire was not paid on its due date, and if the failure to pay was not remedied within three banking days of notice of default being given owners could terminate the charter immediately.

Due to financial difficulties, in January 2009 the parties agreed that hire could be paid on the first and fifteenth day of each month, instead of monthly in advance. However, despite this concession, no hire was paid from 16th April 2009 until the charter was terminated on 22nd June 2009. After each instalment of hire became unpaid, owners sent charterers a notice of default asking for payment within three banking days. On 2nd June owners sent a further notice of default because hire for the period 1st-15th June 2009 had not been received. On 8th June 2009 owners demanded payment of hire for the period 16th-30th June 2009. No payment was made and on 22nd June owners served notice of termination.

Charterers contended that owners were not entitled to terminate the charter because: (a) the termination notice only referred to the default notices issued up to 2nd June, and any right owners may have had to terminate for those breaches had been waived by each successive demand for hire, including the demand made on 8th June 2009; and (b) owners were not entitled to terminate for the failure to pay hire for the period 16th-30th June because they had not referred to this failure in their termination notice.

The arbitrators held that the owners were entitled to terminate the charter on 22nd June 2009. The Court upheld the Award. There was no binding authority that an unambiguous demand (as opposed to acceptance) of hire operates as an automatic waiver of the right to terminate for non-payment. However, even if owners had waived their successive rights to terminate the charter prior to 2nd June, there was no waiver in respect of the hire due for the period 1st-15th June 2009. The 8th June demand for hire could not have been a waiver of the right to terminate the charter for non-payment of the hire due for 1st-15th June, because that right did not yet exist. The three clear banking days’ grace period in the default notice served on 2nd June had not yet expired. In addition, given the totality of charterers’ conduct, they had repudiated the contract at common law quite apart from any rights to terminate given in the charter. Owners’ termination notice was sufficient to communicate reliance upon a repudiation, as well as upon the contractual termination rights.

This case appears to offer owners cancelling long-term time charters confidence that sustained non-payment of hire will be sufficient grounds for termination. The recognition that further demands for hire (as opposed to acceptance of late-paid hire) are not in themselves a waiver of the right to terminate a charter is positive. However, a large number of the points in this case turned on the particular charter provisions in issue, as well as the actions of owners in response to non-payment. Owners should therefore continue to exercise caution when considering the withdrawal of a vessel.



The Commercial Court has once more considered the difficult issues facing an owner who wishes to terminate a long term charter for non-payment of hire.

REFUSING TO PROCEED THROUGH THE GULF OF ADEN - PIRACY IN COURT AGAIN

In *Pacific Basin IHX Limited v Bulkhandling Handymax AS (Teare, J.)* the Commercial Court considered the CONWARTIME 1993 clause incorporated into a time charter of the vessel "TRITON LARK". In November 2008 the charterers, Pacific, instructed the vessel to carry a cargo of potash from Hamburg to China via Suez and the Gulf of Aden. Owners, Bulkhandling, refused to proceed through the Gulf of Aden due to the risk of piracy and instead proceeded via the Cape of Good Hope.

Owners commenced arbitration and claimed unpaid hire. Charterers counterclaimed for additional expenses incurred by reason of the vessel proceeding via the Cape. It was common ground that the risk of a vessel being hijacked at the relevant time was about 1 in 300 transits. The arbitrators concluded that owners were entitled to refuse to obey the order to proceed via Gulf of Aden pursuant to the CONWARTIME 1993 clause and that proceeding via the Cape of Good Hope did not constitute a deviation. The dispute between the parties centred on the degree of risk that the vessel had to be exposed to before an owner could disobey orders as to route under sub-clause 2 of CONWARTIME 1993.

The Court held that the phrase "*may be, or are likely to be, exposed to War Risks*" in sub-clause 2 of CONWARTIME 1993 required that owners reasonably conclude that there was a "real likelihood" that the vessel would be exposed to acts of piracy. The likelihood could not be fanciful or speculative, but a "real likelihood" could include an event which had a less than even chance of happening. The arbitrators had erred in law because they construed the clause by looking at the seriousness of the risk rather than the probability of the risk materialising. Although the seriousness of the risk was relevant to the definition of "*War Risks*" set out in sub-clause 1(b) of the CONWARTIME 1993 clause, sub-clause 2

required an assessment as to whether there was a real likelihood of the vessel being exposed to the war risk identified. Owners' judgment had to be made in good faith and be objectively reasonable and this could often entail making all reasonable enquiries about the risk to the vessel.

The Court rejected charterers' alternative contention, that if the order to proceed through the Gulf of Aden was illegitimate the vessel was without orders and bound either to proceed to Port Said or to remain where she was, rather than proceed via the Cape. Relying upon sub-clause 8 of CONWARTIME 1993 there was no commercial purpose in proceeding to Suez and since there was an order to proceed to China (albeit that the order as to route was illegitimate) the decision to proceed via the Cape was in accordance with the owners' obligations to proceed with due despatch.

This case explores the potential conflict between a charterer's right to give orders and owners' right to ensure the safety of the vessel discussed in earlier cases, most notoriously in the "*HILL HARMONY*" [2001] 1 Lloyd's Rep. 144 (HL). Since the arbitrators had applied the wrong test, and the issue of whether owners believed there was a "real likelihood" of exposure to piracy was a matter of fact, the judge was minded to remit the matter to the arbitrators so that they could apply the judgment to

the evidence they had heard. Therefore, the matter was not finally determined but nonetheless there is some useful guidance in this case. Although the charterers' right to give directions as to the vessel's employment was important, the judge felt that the master's responsibility for the safety of the vessel meant that it was inappropriate to require owners to show that exposure to piracy was "more likely than not". The clause was designed to be used not by lawyers but by a master or owner responsible for the safety of vessel, crew and cargo and the judge shied away from what he saw as legalistic or complicated constructions of the clause. However, given the significant extra sums likely to be incurred in such situations if orders are disobeyed, it is always necessary to proceed with caution and in accordance with the particular wording of the charter in issue.



Piracy in Court again



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