Prettys

Prettys' Shipping Briefing

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The Shipping team provides a specialist legal service to shipping companies, transport companies and their insurers. Clients include liner operators, ship-owners, charterers, shipping agents, freight forwarders, NVOCCs, banks, insurers and brokers. We provide services such as legal advice and assistance in relation to both contentious and non-contentious matters.

Prettys also offers assistance with proceedings outside the UK by utilising an established network of experienced foreign legal correspondents. We offer a full range of dispute resolution from litigation (including ship arrest and injunctive relief) to arbitration and alternative dispute resolution.

Message from Paul Dickie, Head of Shipping, CEO

'I am very pleased to introduce the latest edition of our newsletter. Our team has compiled some interesting and topical cases, illustrating current judicial approaches towards the construction and interpretation of shipping contracts and towards the use of court procedures to manage cases, including Admiralty cases.

I hope you find it useful and informative.'

Paul Dickie

Contents

Bill of Lading

This is a brief note on a case that may be of particular interest to P&I Clubs and to others defending (or indeed bringing) cargo claims where so often the relevant contract consists of a bill of lading.

Caresse Navigation v Zurich et al (the Channel Ranger)

The *Channel Ranger* was not, as one might imagine, plying its trade up and down the Cinque Ports, or back and forth to Cherbourg. Rather, like Webster's Dictionary, it was Morocco-bound, carrying a cargo of coal from Rotterdam to Nador. Unfortunately, the coal started to overheat, and the shipowners, concerned about the safety of the vessel, took steps to douse the cargo. The consignees complained of damage to the coal that they alleged had resulted from the overheating and the dousing, and they and their insurers commenced proceedings against the master and port-operators in the commercial court in Casablanca, but not before the shipowners had instigated proceedings for non-liability against the cargo interests in London. The shipowner Claimant (in the London proceedings) then made an application for an anti-suit injunction to restrain the claim in Casablanca, Morocco, while the defendants contested the jurisdiction of the English court. At first instance, Males J rejected the jurisdictional challenge, and granted the anti-suit injunction. With permission, the cargo interests appealed to the Court of Appeal - a case, perhaps of Stay it Again, Sam.

Contractual set-up

The contractual set-up was that the coal was shipped pursuant to a bill of lading that purported to incorporate terms from a voyage charter, which was contained in an e-mail fixture recap referring to an amended version of the standard Americanised Welsh Coal Charter form. The charterparty contained an English choice of law clause, and, in the same clause, an agreement to submit to the exclusive jurisdiction of the High Court. The question for the court was whether the wording in the bill of lading was effective to incorporate the law and forum clause into the contract of carriage. The term in the bill of lading was:

'All terms, and conditions, liberties and exceptions of the charterparty, dated as overleaf, including the law and arbitration clause are herewith incorporated.'

The difficulty, of course, with that wording was that the charterparty did not contain an arbitration clause, only an exclusive jurisdiction clause. That difficulty was compounded by the traditional strict approach taken by English law to the incorporation of forum / arbitration clauses into bills of lading. Because bills of lading are negotiable and can (and do) easily end up in the hands of people who are not themselves parties to the charterparty referred to, clear words are needed to incorporate its terms. Particularly, terms as to arbitration or jurisdiction are considered to be ancillary to the main content of the charterparty, and so are required to be expressly mentioned in any term purporting to incorporate them, even if the general words incorporating the charterparty are very broad in scope.

This is in contrast to those terms considered 'germane' to the contract, i.e. those relating to the shipment, carriage, and delivery of goods. So, one might expect that the mismatch between the *jurisdiction* clause in the charterparty and the reference to *arbitration* in the term on the bill of lading might be considered fatal to the claimant's case that the English court had exclusive jurisdiction and that an anti-suit injunction should be issued in protection of the same.

***The Merak* considered**

Moreover, as well as the rule that express words are required to incorporate arbitration / jurisdiction clauses, there was also the case of *The Merak* standing in the way of the Claimant. There, a term in a bill of lading purporting to incorporate the terms of a charterparty referred to it in general terms, but also with a specific reference to clause 30. Unfortunately, the arbitration clause was number 32, clause 30 being something entirely different and unsuitable as part of a contract of carriage. The Court of Appeal upheld the arbitration clause on the basis that the reference to clause 30 was mere surplusage, and could safely be ignored. That left only the general words of incorporation which are, as we have seen, usually insufficient to incorporate an arbitration clause, but the Court of Appeal found that in that case, they were sufficient, not least because the parties to the dispute were also parties to the charter. But, crucially for *The Channel Ranger* case, two members of the Court of Appeal also found that it would be impossible to treat the reference to clause 30 as a reference to clause 32 (although that was, they admitted, obviously what was intended), because to do so would be against all the canons of construction.

A question of construction?

Thus, the Claimant, and the Court of Appeal, appeared to be caught in a pincer movement of the principle of insufficiency of general words to incorporate a forum clause on the one hand, and on the other hand *The Merak*, supposedly preventing any attempt simply to read the reference to arbitration as jurisdiction. Looked at in a broader context, the case represents something of a clash of cultures, a battle where purposive construction and commercial pragmatism try to storm the legal citadel while the canons of construction blast away at their advance and hurl Latin maxims into their serried ranks. The result was a total rout of the old rules, and victory for the shipowner Claimant. The Court, with Beatson LJ giving the only reasoned judgment even went so far as to say that it might sometimes lead to a perception of unfairness if decisions are made to turn on small departures from accepted wordings with settled constructions, where the difference between the magic words (with a judicially settled effect) and the form used did not involve any actual difference in ordinary meaning.

To be more precise, Beatson LJ found that the case of *The Channel Ranger* was not one where it could be said that there were only general words of incorporation held as a matter of precedent to be insufficient to give effect to an arbitration or jurisidiction clause. Plainly there had been an attempt to incorporate – by express words – just that sort of provision.

Caresse Navigation v Zurich et al (The Channel Ranger) cont...

With that hurdle overcome, the issue could be said to be one of construction. And the principles governing the correct approach to the construction of contracts are now to be found in a couple of speeches given by Lord Hoffmann, first in the *West Bromwich* case, and then latterly in *Chartbrook v Persimmon Homes*. The emphasis is now, in broad terms, more on the context in which the parties are contracting, and on finding a meaning that seems commercially sensible, and not so much on sticking to the strict meaning of the words chosen by the parties however little sense they might make in that context, or however uncommercial the effect. In particular, Lord Hoffmann has described the situation where 'something has gone wrong with the language', and said that usually it will be possible to determine and give effect to the underlying intention, even if the wording of the contract flat-out contradicts it.

Here, Beatson LJ agreed with the conclusion of the judge that it was more likely that the parties had intended to incorporate terms as to arbitration or other dispute-resolution terms, which would be apt to cover a jurisdiction clause, than that they had intended to incorporate the arbitration clause (if any). That latter interpretation was described by Beatson LJ as being 'uncommercial' because the original parties to the contract would have known that there was no arbitration clause in the charterparty.

Comment

So, the result was that the forum clause was effectively incorporated, the English court thus did have jurisdiction, and the anti-suit injunction to restrain the Casablancan proceedings was upheld. Alas, we are not told the outcome of the substantive dispute, or what became of the once-smouldering coal after it had been unloaded in Casablanca. The judgment may be bad news for those who might prefer a more limited approach to the interpretation of contracts by reference to old shipping cases. But for those who prefer a more modern approach to contractual construction that focuses on issues such as context and commercial sense, rather than the literal meaning of words, then this decision is good news. And, as a final thought, shipping lawyers, generally, may wish to dust off their old text-books to see whether some of the fundamental things still apply 'as time goes by'.

Case note by Dominic Mills

Checking an Agent's Authority: Navig8 Inc v South Vigour Shipping Inc

In *Navig8 Inc v South Vigour Shipping Inc* the absence of clear and express authority for an agent to act on behalf of owners in relation to a charterparty resulted in the owners not being bound by the charterparty.

Issues
The central issue in the case concerned the terms of charterparties, between Navig8 as Claimant Charterer and the defendant agent, Star Maritime Management Co PTE Ltd ('Agent'), which stated 'Disponent Owners Signatory in Contract'. According to the Charterer, the inclusion of the phrase 'disponent owners' was to be viewed in the sense that the Agent was agent of the registered owner (or 'owners'), and had very wide powers enabling them to conclude charterparties on behalf of the owners. Owners denied that they were party to the charterparties, and that the Agent had authority to act on their behalf. The owners contended that at the relevant time, the vessels were on bareboat charter, therefore either the Agent was contracting on behalf of the bareboat charterers or was contracting on their own behalf. They were not acting on behalf of the registered owners, and therefore were not the disponent owners, nor were they intended to be bound by the charterparties. Furthermore, no express authority had been given to the Agent.

Disponent Owners: Meaning
The judge concluded that in the present case the phrase 'disponent owners' was being used in a rare sense as meaning manager of the vessels.

The second issue to decide was whether the Agent had the authority to fix a charterparty on behalf of the registered owners. After hearing detailed witness evidence, it was held that on the balance of probabilities, the evidence demonstrated that the Agent had no such powers. The Agents had not been expressly authorised to conclude the charterparties on behalf of the group of registered owners. Therefore the charterer's claim against the registered owners for damages of around US$10.9 million for repudiatory breach for withdrawing the vessels from service was dismissed. The Agent was held liable in damages to the charterer for breach of implied warranty of authority.

The court also considered issues regarding unjust enrichment which are beyond the scope of this article.

Comment
This case identifies the pitfalls in concluding charterparties, and the need for parties to be absolutely certain, and indeed satisfied by way of documentary evidence, as to the extent of a party's respective powers when purporting to act on behalf of another. This is of particular importance where agents are concerned in order to avoid the prospect of liability for damages for agreeing a contract on behalf of its principal without the necessary authority. From a principal's point of view it is important to avoid becoming embroiled in costly litigation by setting out, at the outset, a clear set of parameters concerning an agent's authority to act. There are often third parties involved in negotiating charterparties, therefore the limits of their powers need to be known from the outset and should be clearly documented.

Case note by Naomi Eccles

Charterparty

Maestro Bulk v Cosco: late redelivery

Maestro Bulk v Cosco involved the late redelivery of a vessel where notice was premature by 12 days.

Facts
The vessel was chartered on an amended NYPE time charter for a minimum of 4 and a maximum of 5 months with 15 days in Charterers' option. The hire rate was $18,500 per day gross. The clause setting out the timing of the redelivery notice read as follows:

'On redelivery charterer has to tender 20/15/10/7 days approximate and 5/3/2/1 days definite notice'

This meant that the earliest redelivery date was 29 March 2010 and the latest date was 14 May 2010.

However, on 13 April 2010 the charterers realised that they would not be able to fix another voyage and that they would therefore have to redeliver the vessel. They served a purported 20 day notice on the same day. Then, on 14 April, they tendered 15/10/7 approximate notices and, on 16 April, they tendered 3/2/1 definite notices.

The vessel was redelivered on 19 April 2010. Two days later, on 21 April 2010, the owners fixed the vessel for a time charter at a rate of $22,000 per day.

The Claim
Accordingly, the owners claimed damages. However, they did not base their claim on the actual effect of the premature notice. Instead, they claimed damages on what they could have earned if the full notice of 20 days (approximate notice) had been provided (i.e. if notice had been given, as it should have been, on this view) from 31 March onwards.

The charterers contended that the owners should have claimed the difference between the charter rate and what owners could have earned if proper notice had been given. They contended that the correct time period for damages was the balance of the notice period after the ***actual*** redelivery on 19 April up to 1 May, a period of 12 days.

Judgment
The court found as follows:

- Damages could not include a period running beyond the end of the notice as that would be 'unquantifiable, uncontrollable or disproportionate.'
- Damages are best measured by the actual loss during the period of the missing notice and by reference to what would have been within the contemplation of the parties at the time.
- Therefore, damages should be provided in relation to the 12 days loss of net charterparty hire.

The court concluded that there was no injustice in taking 12 days' loss of net charterparty hire; as this was the sum which best represented the owners' loss as a result of short notice. Damages were awarded in the sum of $216,450, being 12 days x $18,037.50.

This case considered the decisions in *The Achilleas* and *The Sylvia.*

Case note by Josie Beal (Trainee)

GAFTA/Sale of Goods

Aston v Louis Dreyfus Commodities

In an appeal against a GAFTA appeal award made in favour of Louis Dreyfus Commodities, the court considered whether 'inspection final' provisions in a contract of sale would amount to an exclusive code for determining the quality and condition of the goods.

Facts
In line with the GTT (Tender terms of the Egyptian State wheat procurement body), the contract and the buyers' instructions, the contractual quality certificates had to be issued by the surveyors, Comibassal who were not GAFTA approved. However, the court considered that GAFTA 49 and GAFTA 124 were only incorporated into the contract to the extent that they did not conflict with the terms of the body of the contract or the GTT as incorporated into the contract. Therefore the court considered that the Board was wrong to conclude initially that the nomination of Comibassal was not contractually compliant as it was irrelevant that they were not GAFTA approved.

Issues
The case also raised two questions of law:

The first question was whether a Free on Board ('FOB') buyer could only reject goods in reliance on a certificate from the surveyor which complies with the documentary requirements set out in the payment terms of the contract.

The second question was whether the Board of Appeal was wrong in ignoring the totality of the evidence when considering whether the cargo was contractually compliant.

Judgment
The court agreed with Louis Dreyfus that, ***as a general position***, where a contract prescribes a mandatory inspection procedure and prescribes that the results of the inspection as per a certificate are "final" as to the quality of the goods then the buyer can only reject the goods by relying on a contractually compliant certificate demonstrating a relevant and sufficient disconformity in the goods (*Argo-Export v NV Goorden*, *W N Lindsay & Co Ltd v European Grain & Shipping Agency* and *Charles E Ford Ltd v AFEC*).

However, the court was not persuaded that the contract ***in this case*** had this effect as there was nothing that in the contract or the GTT which expressly or impliedly provided that issuing a contractually compliant certificate would preclude the buyers from otherwise rejecting the goods for disconformity.

The court further stated that the exclusion of ordinary rights at common law should not be lightly inferred but that there should be a clear and unambiguous expression. Clear words would be necessary to exclude the independent right to reject the cargo for non-conformity.

So, whilst the court accepted that, in principle, the independent right of a FOB buyer to reject the goods may be modified or even excluded by agreement (as Louis Dreyfus argued), it considered that the words in the contract in this case did not have this effect. Therefore, the court found in favour of Aston and set aside the award that had previously been made in favour of Louis Dreyfus.

Case note by Josie Beal (Trainee)

Contract

Avonwick Holdings Ltd v Webinvest Ltd and another

Background
This case involved draft heads of terms concerning a restructuring of the Defendant's obligations under a loan agreement after Webinvest had defaulted. The solicitors acting for Avonwick Holdings marked correspondence between the parties (including the draft heads of terms) as 'Without Prejudice & Subject to Contract'. The other parties followed with this approach.

Negotiations stalled and the parties were unable to reach an agreement to restructure the heads of terms. Avonwick threatened to submit a winding-up petition against Webinvest. The Court was asked to consider whether the correspondence between the parties was admissible or not.

Judgment
It was decided that the reference to 'without prejudice' was used incorrectly because there was no dispute at the start of communications.

The Court stated that there was no dispute about liability. Rather the aim of the negotiations was to decide how and when an admitted liability should be dealt with. The Court made it clear that this rule is not retrospective; there must be a dispute in existence at the time of marked correspondence.

The Court of Appeal saw that Avonwick's lawyers had used this in error and found that the correspondence was therefore admissible.

Comment
The use of 'without prejudice' needs to be considered thoroughly as placing it on all documents, if used incorrectly, may not give adequate protection.

Persons, qualified or unqualified acting in any form of litigation need to be aware that the Court will request an explanation for the use of 'without prejudice' correspondence if there is a disagreement regarding admissibility.

Case note by Craig Bird

Jas Financial Products LLP v ICAP Plc

Facts
The applicant (ICAP Plc) applied for summary judgment in respect of a claim for breach of contract brought by the respondent (Jas Financial Products LLP) ('JFP'). JFP sent an email to ICAP Plc headed 'agreed JV terms'. It purported to set out joint venture terms including the term that Jas Financial Products LLP would provide middle office support at a cost of £50,000 per month plus a one-off fee.

JFP alleged that it had entered into an oral agreement with ICAP Plc to provide middle office support which was partially recorded in the email. JFP stated ICAP Plc had breached that agreement by only paying the first two invoices. ICAP Plc denied that the agreement was enforceable, stating the provisions were only to take effect upon the agreement of a wider joint venture, which never materialised.

Judgment
Judge Mackie QC refused the application. If the email was part of a concluded agreement, the court would interpret the meaning of the e-mail. The term "middle office support" was clearly something the parties had discussed and was subject to a considerable monthly sum. The court held there was a narrow distinction between an oral agreement, partially recorded in writing, and a written agreement. JFP's claim was that the agreement was wider than the e-mail's terms. If the agreement was oral, there would be issues regarding interpretation where the factual matrix would have to be assessed to determine the matter. The summary judgment was refused.

The judgment may therefore have implications for the interpretation of oral agreements, partly recorded in writing and is a reminder that a party may become bound contractually in relation to certain terms even though there is no formally executed written agreement.

Case note by Danielle Hudson (Trainee)

Martrade Shipping & Transport GmbH v United Enterprises Corp

Background
The Late Payment of Commercial Debts (Interest) Act 1998 ('the Act') applies to 'qualifying debts' arising from commercial contracts for the supply of goods and services. The Act implies a term to allow for statutory interest which is currently 8% above base rate.

This case considered the Act's applicability to contracts where there is no 'significant connection' between the contract and England and had the parties not elected for that law to apply, the applicable law would be foreign law. The arbitrators made an award to the owner of the ship in respect of a claim for unpaid hire (on which interest was payable under the Act). The charterers appealed against the award for interest.

Judgment
Section 12 of the Act provides that even if parties to a contract with an international dimension have chosen English law, it is not to be assumed that English law will apply in terms of statutory interest. The Act provides that the contract must have a 'significant connection' to England or the contract would be governed by English law apart from the choice of law. The Court focused on the following factors:

a) the place of performance;
b) the nationality of the parties;
c) the extent of the parties carrying on business in England; and
d) consequences in the delay of payment in England.

The ship owner argued that the connection to England was strong as the contract language was English, the charterer's entitlement to logs was in English, the charterparty provided for general average adjustment in London and the P&I Club membership was in London. Despite this, the Court did not find a sufficient connection between the charterparty and England.

It was the Court's view that the interest rate imposed by the Act was there to prevent the late payment of commercial debts in a domestic context which might not apply to an international contract.

Comment
This case demonstrates the importance of including within the contract an express clause for interest, in the event of late payments, when English law is chosen but the parties are based/contract performance is to take place elsewhere.

The Court also held here that a trip time charter is a contract for the use of a vessel to transport goods rather than a contract for the carriage of goods by the owners, and is therefore not a 'contract of carriage' within the meaning of Article 4(4) of the Rome Convention.

Case note by Craig Bird

Jurisdiction

Recast Brussels Regulation 2015

Following an extensive period of review, the Recast Brussels Regulation came into force across the EU on 10 January 2015 and will apply to legal proceedings initiated on or after that date. The Regulation amends the original Brussels Regulation by clarifying certain rules on questions of jurisdiction and the enforcement of judgments in the EU.

Key Changes
Key changes include the following:

1.The Regulation has improved the position for litigants who want to rely on a contractually agreed exclusive jurisdiction clause. A court, in a Member State properly identified in such a clause, now has primary jurisdiction over any dispute that has arisen. Moreover, the question of whether a jurisdiction agreement is null and void will be determined under the law of that State. Article 25 of the Recast Regulation provides that 'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.' (Emphasis added).

2.The abuse of the *lis pendens* rules has provoked considerable criticism under the previous Brussels Regulation regime. In particular, the infamous pre-emptive tactic known as the Italian torpedo could result in major delay. In broad terms, the *lis pendens* rules mean that if proceedings involving the same cause of action are bought in two different Member State courts, Article 27 provides that the court second seised must stay its proceedings until the first court seised has determined the issue of jurisdiction. The Recast Brussels Regulation now includes a revised rule enabling a court stipulated in an exclusive jurisdiction clause to determine the issue of jurisdiction irrespective of whether it was, technically, first seised.

3.In relation to arbitration it is hoped that the Recast Brussels Regulation will help to overcome some of the problems arising from the Court of Justice of the European Union (CJEU) decision in *Allianz SpA v West Tankers Inc* . New Recital 12 stipulates that arbitration continues to be excluded from the Regulation but seeks to clarify this exception. In particular the provision makes clear that the Regulation does not prevent the courts of Member States, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from:

- referring parties to arbitration or from staying, or dismissing proceedings in favour of arbitration, or
- determining whether the arbitration agreement is null and void in accordance with their national law.

Also, the new provision states that the Regulation should not apply to important ancillary matters such as the establishment of the arbitration tribunal.

Comment
The Regulation may impact all businesses that operate within the EU. In particular, the Regulation should enable parties to choose a jurisdiction for disputes without being fixed with the court first seised. It is suggested that parties should give proper consideration to whether contracts should include an exclusive jurisdiction clause and which jurisdiction should be agreed upon.

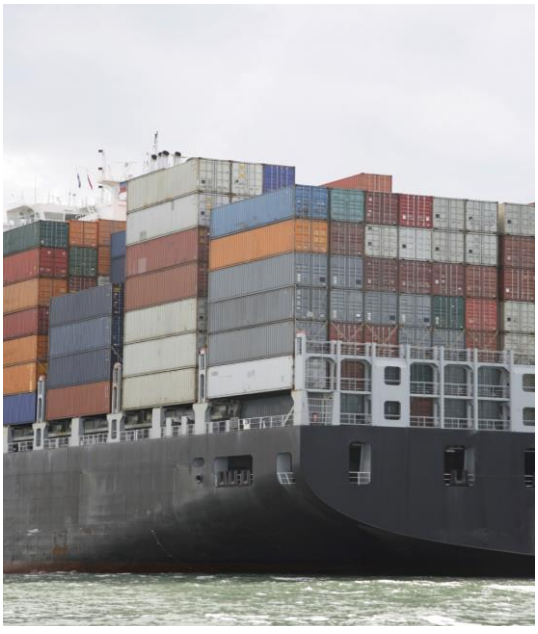
Case note by Danielle Hudson (Trainee)

Jurisdiction

Shipowners' Mutual P&I Association v Containerships Denizcilik Nakliyat

This important case involved issues arising from an application for an anti-suit injunction restraining the time charterers from commencing or continuing proceedings in Turkey against the P&I Club of the owners. In this case, the charterers had taken steps to attach the Club's assets in Turkey to obtain security for its claim for over US$13.5m notwithstanding the terms of the charterparty which provided for London arbitration. The terms of the owner's Club cover provided for London arbitration and the familiar 'pay to be paid' clause whereby the Club was only liable if the owner first paid the claims against it.

The Turkish Insurance Contract Law of 2012 gives a 'victim' a right of direct action to sue the liability insurer (in this case the Club) in Turkey. In particular, Teare J determined, on a balance of probabilities, that it was more likely than not that a pay-to-be-paid clause could not be relied upon by the Club, as a defence, when faced with this form of direct action in Turkey. A major issue in the case depended on the substance of the claim in Turkey. Was the claim in Turkey in substance a claim to enforce the contract between the Club and its member or was the claim in essence providing an independent right of recovery to the 'victim'? The answer to this question depended on the nature of the right according to Turkish law and a consideration of English conflicts of law principles. Teare J decided that the substance of the right of direct action in Turkey was the contract between the Club and its member, following the approach of Hamblen J in *The Prestige (No. 2)* on a similar right of direct action conferred by Spanish statute. Accordingly, Teare J concluded that the charterers were bound to refer the dispute to arbitration in accordance with the arbitration agreement in the Club cover. Teare J also concluded that the court had jurisdiction to serve proceedings out of the jurisdiction in Turkey.



In terms of the anti-suit injunction, a central issue was whether the proceedings in Turkey were vexatious or oppressive as, arguably, the charterers were simply proceeding according to Turkish law. Teare J decided that the Turkish proceedings were, in fact, vexatious and oppressive because they would infringe the contractual rights of the Club and that in the exercise of its discretion it was appropriate for the court to grant an anti-suit injunction. Nor did recent EU law developments provide a good reason not to grant an anti-suit injunction preventing the charterers from taking direct action against the Club in Turkey.

Comment

This case will be of considerable interest to English-based P&I Clubs faced with claimants bringing direct actions against them rather than first against their members in the contractually agreed forum, in this case England. Clearly, the obtaining of timely anti-suit injunction relief may be vital to P&I Clubs faced with overseas proceedings brought by claimants, directly, in jurisdictions that do not recognise the pay-to-be-paid rule.

It is understood that the judgment has been appealed.

Impala Warehousing and Logistics (Shanghai) Ltd v Wanxiang Resources (Singapore) Pte Ltd

This case arose in the context of an application for an injunction to restrain a party from continuing proceedings on the basis that it had commenced them in China contrary to an exclusive jurisdiction clause in favour of the English courts. In particular, the case considered, in a modern context, the issue of incorporation of terms from a website containing an exclusive jurisdiction clause in favour of the English courts.

Facts
Wanxiang claimed that it was the owner of aluminium that had been stored in a warehouse in China. Warehouse certificates were issued by Impala to a bank to whom the goods had been secured as part of the finance arrangement. The sums advanced by the bank were paid off, it was claimed, and warehouse certificates were consequently endorsed to Wanxiang. Impala, it was alleged, had not delivered the goods to Wanxiang. Wanxiang commenced proceedings in China against Impala for delivery of the goods.

Interim and Final anti-suit injunctions
The court granted Impala an interim anti-suit injunction restraining Wanxiang from continuing its proceedings in Shanghai. The basis for this injunction was that the warehouse certificates upon which Wanxiang were suing in Shanghai contained an exclusive jurisdiction clause in favour of the courts in England. In the early stage of the proceedings there was some uncertainty as to whether the claim was based upon the warehouse certificates or whether it was based on the collateral management agreement (the CMA) which did not contain an English jurisdiction clause.

The proceedings continued in China. Consequently, Impala made a further application to the court in England for a final anti-suit injunction and sought various other injunctive remedies. In a hearing for a final anti-suit injunction, a central issue in the case was whether the governing contract was CMA (which did not contain an exclusive jurisdiction clause in favour of the English courts) or whether the dispute was governed by the terms of the warehouse certificate (which arguably did contain an exclusive jurisdiction clause).

Incorporation of website terms issue
A central issue for Teare J to consider was the proper construction of the warehouse certificates. The warehouse certificates stated on their first page that 'warehouse certificate and all disputes arising from it shall be subject to the terms and conditions of Impala'. The judge carefully explained the following points:

- At the bottom of the page there was a note to the effect that additional conditions of the warehouse certificate were printed at the back of the page.
- On the reverse of the page there was a reference to the terms and conditions of Impala as posted on its official website.
- The website contained three sets of different standard terms. One set related to warehousing which Teare J decided was the appropriate set in the circumstances of this case. The website warehousing terms contained an English law and jurisdiction clause in favour of England.

There followed analysis from the court on the incorporation of standard terms from a party's website:

1.Where terms are incorporated it must be shown that the parties seeking to rely on the condition has done what is reasonably sufficient to give the party notice of the condition.

2.Teare J considered that the references were sufficiently clear and, in particular, he found that even the somewhat convoluted route to Impala's website terms and conditions was reasonably sufficient so that the holder of the warehouse certificate would know that the certificate was subject to Impala's terms and conditions. He added that 'in this day and age when standard terms are frequently found on websites' that reference to the website was sufficient incorporation of the warehousing terms.

3.The express reference to 'disputes' in the Warehouse Certificate was sufficient to ensure that terms which related to dispute resolution were incorporated from the Impala website:

> *the words of incorporation were that the 'warehouse certificate and all disputes arising from it' should be subject to the Terms and Conditions of Impala.*

However, ultimately the application for a final injunction failed. Teare J concluded that the court could not fairly or properly determine the principal issue between the parties without a clear understanding and further evidence regarding such issues, for example, as the making of the CMA contract and the knowledge and appreciation of Impala in relation to the CMA contract. It had been suggested by counsel for Wanxiang that CMA was the overarching contract and provided for Singapore law and jurisdiction.

Impala Warehousing and Logistics cont ...

Accordingly it was not necessary for Teare J, had he decided there was an applicable jurisdiction clause in favour of England, to consider whether Wanxiang, which had commenced proceedings in China, would have been able to establish a strong reason for not enforcing the clause.

Nevertheless, Teare J still considered whether Wanxiang would suffer prejudice if they had to litigate in England because any judgment would not be enforceable in China. He indicated that he did not consider that this was a strong reason for not enforcing an English jurisdiction clause because he 'expected the parties to respect' a decision of the Court in England. However, on further reflection and consideration of *The Eleftheria*, he stated that this might be a strong reason for not giving effect to the exclusive jurisdiction clause in the absence of any suggestion as to how this prejudice could be avoided.

Comment

The case highlights the importance of parties proceeding to enforce an exclusive jurisdiction clause in favour of the English courts to support their application with detailed evidence, which may include witness evidence.

The case also contains useful guidance on the incorporation of web-site terms containing an exclusive jurisdiction clause in favour of the English courts – an increasingly important issue in practice.

There were also interesting comments on the likely effect of the non-enforceability of judgments in China and whether this was a strong reason for not giving effect to an exclusive jurisdiction clause in favour of the English courts.

Insurance

Insurance Act 2015

The Insurance Act received Royal Assent on 12 February 2015 and is set to come into force in August 2016. The introduction of the Act follows 8 years of consultation by the English and Scottish Law Commissions. The Act aims to update the law to reflect modern business relationships and to rebalance rights and remedies.

The Act will update the law governing insurance contracts by reforming the following areas:

- Replacing the duty of disclosure and misrepresentation in business and other non-consumer insurance contracts with a new 'duty of fair presentation'. Insurers will be encouraged to take a more active role in ensuring that all material information needed to assess and price risks accurately is disclosed to them. This means that the policyholder will be under a duty to disclose all material circumstances that would influence the insurer's judgement in fixing the premium price and deciding whether to take the risk accordingly or, alternatively, the disclosure of sufficient information that highlights the need for the insurer to make further enquiries.

- With regard to warranties, abolishing 'basis of contract' clauses in business insurance and changing the circumstances where liability can be discharged or suspended. This means that clauses that seek to convert all representations into warranties have now been abolished. The existing remedy for a breach of warranty has been altered so that the contract will no longer be automatically discharged at the moment of the breach but it will instead be suspended until the breach is remedied. Additionally, if a loss occurs and the insured has failed to comply with a term of the contract, the insurer cannot rely on the breach in order to limit their liability if the breach had no causal link with the resulting loss.

- In relation to insurers' remedies for fraudulent acts/claims, preventing insurers from being liable to pay fraudulent claims and allowing them to recover any sums paid whilst also allowing them to treat the contract as terminated at the time of the fraudulent act.

- Amending the Third Parties (Rights against Insurers) Act 2010 with a view to the Act finally being brought into force.

The Insurance Bill originally sought to introduce an implied term in every insurance contract that the insurer would pay sums due within a reasonable time (with a breach giving rise to contractual remedies). However this change was not included in the final version of the Act. It was felt that it was too controversial at present. This is something that may therefore be added by way of future legislation.

These reforms would be a default scheme for business insurance, giving parties the option to agree alternative agreements in their contracts so long as they do so transparently.

Case note by Josie Beal (Trainee)

Suez Fortune Investments Ltd v Talbot Underwriting Ltd (Brillante Virtuoso)

Facts

The vessel sustained fire damage as a result of the actions of pirates. The main issues were whether the vessel was a constructive total loss so that the claimants were entitled to an indemnity under their War Risks policy. The ship had been on a passage to China with a cargo of fuel oil. Pirates boarded the vessel while she was waiting off Aden. They started a fire which caused extensive damage to the vessel. The vessel was salved and was redelivered to the owners. The owners' consultant surveyor inspected her in the usual way. He obtained repair quotations from various shipyards in the Middle East and China. This resulted in the surveyor concluding that the cost of repair would exceed the insured value of $55 million.

This resulted in the owners tendering a notice of abandonment to insurers declaring the ship a constructive total loss (CTL). One of the main issues in the case was whether the ship was a total loss or whether the claimants had lost their right to claim. The test for a CTL under the Marine Insurance Act 1906 s.60 was whether the cost of repairing the damage would exceed the vessel's value. However, this was qualified by the Institute Time Clauses – Hulls whereby the damaged value of the vessel is left out of account and no claim for CTL would be successful unless the cost of repair would exceed the insured value. The primary aspect of this test involved the court asking what a prudent uninsured ship owner would have done in the circumstances.

Judgment

While it would have been cheaper for repairs to be carried out in China, the judge considered that a prudent uninsured would have decided in favour of carrying out the repairs in the Middle East. It was not simply a matter of cost or expense. The quotation compared to China was much lower than the quotation in the Middle East. However, other factors needed to be taken into account including:

- Towing the ship to China would take many months and give rise to additional risks, particularly damage to the ship by pollution, grounding or collision with other vessels.

- There was also the commercial risk of project overrun at a Chinese shipyard as well as there being issues in relation to the quality of the workmanship in Chinese yards.

Flaux J decided that the overall cost of repairs whether carried out in the Middle East or China meant that the vessel was a CTL considering the various risks and uncertainties faced.

Suez Fortune Investments Ltd cont …

On another issue, the court decided that the owners had not lost their right to claim for a CTL because they had sold the ship. Insurers were aware that this was what the owners were proposing to do and had not objected to the sale. The owners were acting in the interests of both themselves and the insurers.

On the alternative case, Flaux J considered the issue of whether expenses such as the standby tugs and agents fees were not recoverable after the service of notice of abandonment or issue of the claim form. The court applied *Kuwait Airways Corporation v Kuwait Insurance) [1996] 1 Lloyd's Rep. 664* where the issue of a writ or claim form crystallised the rights and obligations of the parties and was a 'watershed' point in time. The Claimants were entitled to an indemnity in respect of standby tug costs and agents fees until the date of issue of the claim form February 2012.

Comment
This case highlights some of the difficult issues that can occur in determining whether a constructive total loss situation has arisen: it is not simply a matter of applying the cheapest quotation from a yard for repairs.

The case also highlights the importance of timing in terms of when a claim form is issued as this governs whether owners or insurers are responsible for various expenses.

It is understood that this matter is being appealed.

Venetico Marine SA v International General Insurance

Background
In this case the vessel had been seized by Somali pirates who had not kept her well maintained, one of the generators had exploded and a cylinder on the main engine had leaked. The vessel was released after five months on payment of a ransom. A new crew went aboard and the vessel departed for the discharge port in Dahej, India.

The Gulf was experiencing strong tidal flows and the vessel grounded just off the discharge port. The crew failed to notice the grounding at the time of the incident. On discovery, the crew attempted to refloat the vessel which was ultimately successful and she was able to discharge her cargo. Significant damage to the vessel was subsequently discovered.

The owner (Venetico) sold the vessel for scrap and sought damages on the basis that the vessel was an actual total loss (ATL) or, alternatively, a constructive total loss (CTL), on the basis that the damage had occurred due to a 'peril of the sea'.

The underwriters argued that the vessel was not an ATL or a CTL and that she could have been repaired for less than $ 12 million (her agreed value under the hull and machinery policy).

Judgment
The Court said the Claimants had to establish the following regarding the vessel's grounding:

i) That grounding of the vessel was fortuitous; and
ii) That the grounding was a proximate cause of the damage.

It was held that the grounding was not intentional nor an inevitability and was necessarily fortuitous, and that the proximate cause of the loss was the fact that she grounded.

The negligence of the crew for not noticing the drift was held not to be the proximate cause of the damage. The ATL was rejected as it was possible to have the towed vessel repaired, even if this would have been expensive. However, Smith J accepted that the cost of repairs would have exceeded $ 12 million and as such the vessel was held to be a CTL. The claimant was awarded $ 18 million subject to the proceeds from the scrap sale.

Comment
This case was decided on its particular facts, although it provides useful commentary on the meaning of the expression 'perils of the sea', from the Marine Insurance Act 1906.

Case note by Craig Bird

Owners and/or Bailees of the Cargo of the ship Panamax Star v Owners of the Auk

Background
The vessel *Auk* was anchored on the Amazon for two days before the *Panamax Star* collided with it. The *Panamax Star* cargo interests alleged that *Auk's* anchorage position was unsafe and the vessel was yawing excessively.

The *Panamax Star* issued proceedings in May 2000 and served the proceedings a year later. *Auk* issued a counterclaim, asserting that *Panamax* was at fault. The parties then agreed to a suspension of the procedural timetable up to May 2004.

A maritime inquiry into the incident took place in Brazil in 2003. Collision statements were filed at court in 2005. Sporadic without prejudice discussions then took place over the next few years. No action was taken in the proceedings between 2005 and Panamax's application in March 2013 to list a case management conference (CMC). The pilots of both vessels died before 2007.

Judgment
The court found that there had been extraordinary and inexcusable delay; *Panamax* should have fixed a CMC in 2005 rather than 2013. Although Auk had a duty to assist the court in accordance with the overriding objective, the responsibility of fixing a CMC had to fall with Panamax. Panamax should have fixed the CMC within 14 days of the defence under the Civil Procedure Rules 1998.

There were many issues in this case that would depend on oral evidence. The pilots both died before 2007, leaving the remaining witness evidence crucial and effective cross examination harder to complete. Auk was therefore found to have suffered serious prejudice due to the delay, which also created an unfair trial scenario. Due to this significant prejudice, the claim and counterclaim were struck out and deemed to have been an abuse of process.

Case note by Craig Bird

Coal Hunter v Yusho Regulas

Background
It was alleged in this case that the Defendant passed the Claimant's vessel in Brazil (mid loading with cargo) and caused $69 million damage by travelling too fast and too close and forced the vessel into a shore-based installation. The Defendant argued that the Claimant had been incorrectly moored. A third party claim was started against the Defendant.

Exchange of witness evidence took place in November 2013 and the hearing was listed. The Civil Procedure Rules 1998 provide as follows for the service of witness statements:

'If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission.'

At an application hearing the Defendant had argued that they were informed that all efforts were made to obtain evidence from the pilot. They were under the impression that this task had not been possible due to the pilot's links to the naval authority. However, the pilot had been present at another hearing in Brazil and it was now possible to obtain a statement. The Claimant claimed any statement should be excluded on prejudicial grounds as they could not check the correctness of the statement before the hearing started.

Judgment
On an application for relief from sanctions from a failure to serve a witness statement in time, the question was not whether the sanction was unjust, but whether it should not be applied in the particular case.

The Court considered the significance of the breach in relation to the value of the case and time available before trial. The Court decided that the delay was entirely the fault of the Defendant, who had been prepared to litigate without this new evidence. The Court stated that the Claimant would be prejudiced but also noted that they had been fully prepared to deal with some of the issues raised.

The Court did allow some of the witness statement to be admitted as evidence, but on the basis that the owners of the *Coal Hunter* could not adduce evidence that the navigation by the pilot was the standard procedure (of all the pilots in the port).

Comment
The Court again appears to have been trying to juggle the strict compliance orders with achieving a fair hearing.

The new test to determine the consequences for non-compliance stems from *Denton v White; Decedent Vapours v Bevan* and *Utilise TDS Ltd v Davis (2014)*. In a joint judgment, the court set out a three stage test to be applied to any relief applications:

1. The court should 'identify and assess the seriousness of the failure to comply with any rule, practice direction or court order which engages rule 3.9(1) (CPR 1998)';
2. The court should consider why the default occurred; and then
3. The court should 'evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including factors (a) and (b)'.

Driverless cars to be tested in the UK

The future of motoring in the UK will accelerate this year with driverless cars being tested in Bristol, Coventry, Milton Keynes and Greenwich.

Government funding of £19m will allow the trials to take place, lasting from 18 months to 36 months. The trials will take place away from public roads, though each is aimed at making automated vehicles on Britain's roads a reality.

Semi-autonomous cars and self-driving shuttles will be used in the trials. The trials will test different aspects of self-driving technology and will be linked by an external monitor who will coordinate all the data.

Business Secretary, Vince Cable, commented 'The UK is a world leader in the development of driverless technology. This not only puts us at the forefront of this transformational technology but also opens up new opportunities for our economy and society.' The UK has a head start on its continental rivals as it has not yet ratified the 1968 Vienna Convention on Road Traffic which stipulates that 'Every moving vehicle or combination of vehicles shall have a driver'.

Dr Gregory Offer from the department of mechanical engineering at Imperial College London warned that 'unless governments plan effectively, the potential positive impact of automated vehicles could turn into a negative.'

The government's review of the legislative and regulatory framework for driverless cars is still being analysed following the consultation that closed on 19th September 2014.

Case note by Danielle Hudson (Trainee)

Source: BBC News and The Guardian
http://www.bbc.co.uk/news/technology-30316458
http://www.theguardian.com/technology/2015/jan/01/driverless-cars-tested-uk-bristol-coventry-milton-keynes-greenwich

The CAA's consultation regarding passenger's complaint procedures (aviation)

The Civil Aviation Authority (CAA) created a draft policy on consumer complaints handling and alternative dispute resolution (ADR) for consultation until 22 February 2015.

The draft policy sets out the CAA's approach in order to ensure that consumers booking flights serving UK airports have access to high quality complaints handling arrangements to ensure the satisfactory resolution of any problems with an airline where contractual or legal rights arise.

The intended result is for airlines to have strong incentives to handle complaints properly in house and, if this process does not resolve the complaint, for the consumer to have access to independent, impartial and low-cost dispute resolution arrangements instead of resorting to court action.

The CAA will be reducing their direct involvement in consumer complaints handling accordingly if, by early September 2015, there is evidence of commitment from at least half of the market to an appropriate ADR scheme.

The CAA will then be designated as a competent authority in regulations that implement the ADR Directive in the UK. Their role will be to assess that ADR providers wishing to operate in the UK aviation sector are appropriately qualified.

This follows a growing trend of ADR being encouraged as a method of resolving disputes before court action is considered.

The consultation has now ended and a response is expected in due course.

Case note by Josie Beal (Trainee)

Air

Ryanair Holdings v Competition Commission

The Court of Appeal held that the Competition Commission had not erred in deciding that Ryanair's minority shareholding in a rival airline had resulted in a substantial lessening of competition or ordering the divestiture of most of the shareholding. The Commission had previously found that Ryanair's minority stake might affect the rival airline, in which it held shares, in terms of its ability to participate in combination with other airlines. The court also upheld the Commission's decision to refuse to disclose the names of other airlines which had provided evidence to the Commission.

(Source: *Westlaw*)

Allen v Jet2.com: Compensation for delay

A judge at Liverpool County Court has held that the airlines in the case were not entitled to keep passengers waiting for compensation for delayed flights. The airline Jet2 had applied to have Miss Allen's compensation claim delayed pending the outcome of a Dutch case referred to the Court of Justice of the European Union. The issue in both cases was whether the delays were caused by technical problems which amounted to 'extraordinary circumstances' for which the airlines should not be liable. This case follows the Supreme Court decision in *Jet2.com v. Huzar* in which the court refused an application to appeal and confirmed that unforeseeable technical problems should not be classed as 'extraordinary circumstances' under the EC flight compensation regulation (EC Reg No. 261/2004).

News *Source: Telegraph (Natalie Paris 26 February 2015)*

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For more information contact Rachel Fortnum-Adams at mailto:rfortnumadams@prettys.co.uk or visit www.netchaser4.co.uk

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