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In our October 2012 Shipping E-brief, we reported on the Commercial Court decision in *The Bulk Chile*, in which it was held that a ship-owner is entitled to redirect the payment of freight due under bills of lading and separately rely on a charterparty lien on sub-freights. The Court of Appeal has now upheld that decision. The prevailing view remains that a lien on sub-freights is a form of security in the form of a charge which, in certain jurisdictions, may need to be registered to be effective where the time charterer becomes insolvent. It should be noted that such charges are registrable in the UK and that our rules governing the registration of charges changed on 6 April 2013.

**The background facts**

The vessel, owned by DBHH, was time chartered to KLC and sub-time-chartered to Fayette. Both time charters were on NYPE terms, clause 18 of which provided that “Owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter...” Fayette voyage chartered the vessel to Metinvest. KLC failed to pay hire so DBHH sent a notice to Fayette and to Metinvest requiring them to pay direct to DBHH freight or hire due under “charters, bills of lading, or other contracts of carriage”.

Subsequently, bills of lading were issued for the cargo which stated “Freight payable as per [the voyage charter]” and “freight prepaid”, although freight had not in fact been paid. The bills were owners’ bills and the shippers were Metinvest. Metinvest paid freight to Fayette. DBHH accordingly brought both bill of lading claims and charterparty lien claims.

**The Commercial Court decision**

Mr Justice Andrew Smith held that DBHH were entitled to instruct Metinvest to pay the freight due under the bills of lading to DBHH. This right arose independently of DBHH’s rights under clause 18 of the time charter and could be exercised at any time before the freight had been paid.

Clause 18 gave DBHH security over “all sub-freights” due to KLC. This security took the form of an assignment by way of a charge. The KLC-Fayette charter contained the same clause and therefore gave KLC security over Fayette’s right to receive freight under the voyage charter. Consequently, Fayette had given security over the voyage charter freight to KLC who had assigned that security to DBHH.

As the notices were sent by DBHH before freight was paid, they constituted a valid demand for payment of the freight under the bills of lading. As KLC were in default, the notices were also a valid exercise of the time charter lien over “all sub-freights” due to KLC. Metinvest were therefore obliged to pay freight to DBHH. Metinvest did not discharge this obligation by paying Fayette.

**The Court of Appeal decision**

The Court of Appeal agreed with the Judge’s finding that DBHH were entitled to redirect the payment of freight due under the bills of lading. As the bills were owners’ bills, they evidenced contracts between DBHH and Metinvest. It did not matter that the bills were issued pursuant to the Fayette-Metinvest voyage charter. DBHH and Metinvest were the only parties to the bill of lading contracts and DBHH were entitled to receive the freight due under them.

The fact that the bills stated “Freight payable as per [the voyage charter]” identified that Fayette were nominated as agent to collect the freight on DBHH’s behalf. DBHH were entitled as the carrier under the bills to notify Metinvest that this nomination was revoked and demand that Metinvest instead pay the freight to DBHH.

Since Metinvest were themselves the shippers, it did not matter that the bills were marked “freight prepaid”. This was not sufficient to show that Metinvest were not liable for freight which they knew had in fact not been paid.

The Court held that a ship-owner who intercepted bill of lading freight would be required to account for any surplus which exceeds the hire due under the head charter. The Court also observed that insolvency can give rise to complications. However, the Court was quite clear in confirming that none of these complications should interfere with the ship-owner’s right to intercept the freight, not least since that right would most likely be needed in cases of insolvency.

Unlike the charterparty lien on sub-freights, DBHH’s right to intercept the bill of lading freight did not depend on whether KLC were in default. The possibility that ship-owners might routinely intercept bill of lading freight did not concern the Court, as this was regarded as unlikely in practice. The Court also considered that a time charterer who was not in default may arguably be entitled to restrain a ship-owner from demanding direct payment of the bill of lading freight, on the grounds that the ship-owner had agreed to delegate collection of freight to the charterer.

The notices issued by DBHH to Metinvest were sufficient to intercept the freight due under the bills. They were sent when the freight had not been paid and were explicit in warning Metinvest of the risk of being required to pay twice. It did not matter that the notices were sent before the bills were issued.

**Registration of charterparty liens on sub-freights**

The Court of Appeal did not comment on Mr Justice Andrew Smith’s finding that a charterparty lien on sub-freights is a form of security taking effect as an assignment by way of a charge. That finding appears to represent the settled view and is also consistent with the recent decision in *The Western Moscow* [2012] EWHC 1224.

The cases further indicate that where the time charterer is a company incorporated in the UK, a lien on sub-hire or sub-freight may need to be registered as a charge to be effective against the time charterer’s liquidator, administrator and/or creditors. Where other claimants hold other forms of security over the charterer’s assets, there may be questions as to the rights of the competing claimants to the monies representing the freight. A failure to register the lien may mean that it is void and the ship-owner will be treated as an unsecured creditor of the time charterer.
New registration rules

The time-limit for registering charges against a UK company is 21 days from the day after the charge is created. The prevailing view is that the time charter is the instrument which creates the charge and therefore the security created by the lien must be registered within 21 days after the charter date.

English law changed on 6 April 2013, when new rules were introduced dealing with the registration of charges. The new rules apply to all applications for registration, even where the charge was created before 6 April 2013. The time-limit for registration is still 21 days. However, the company creating the charge (i.e. the time charterer) is no longer obliged to register the charge. Instead, registration is voluntary and the onus is on the charge-holder (i.e. the ship-owner) to ensure that the charge is registered.

Registration under the new rules is performed by sending to the registrar of companies a statement of particulars of the charge, together with a certified copy of the instrument creating the charge (i.e. the time charter) and the registration fee. A correctly registered lien on sub-freights will be valid against the time charterer’s liquidator, administrator and creditors and may assist in establishing the priority of the ship-owner over monies representing the sub-freight.

The new rules apply whenever the time charterer is a corporation registered in the UK, irrespective of where their assets are located. Overseas companies are not required to register charges over their assets under English law, even when the assets are located in the UK. However, ship-owners wishing to register charges over their assets under English law, even when the assets are located in the UK. However, ship-owners wishing to ensure that a lien on sub-hire or sub-freight is effective should verify whether similar requirements apply in other relevant jurisdictions.

Comment

It is clear from the decision of the Court of Appeal in The Bulk Chile that a ship-owner may redirect the payment of freight due under bills of lading where the bills are owners’ bills and the sub-charterer is the shipper. Therefore, where the time charterer is in default and this remedy is available to the ship-owner, it may have the advantage of simplicity over the more complicated requirements of exercising a valid lien on sub-freights.

What is less clear, however, is whether a ship-owner may retain priority over freight which has been redirected under the bills in the face of claims from a liquidator, administrator, trustee in bankruptcy (in a Chapter 11-type situation) and/or competing creditor of the time charterer. As such, ship-owners wishing to establish security over sub-freight and sub-hire should endeavour to ensure that a lien on sub-freights is incorporated throughout the charter chain and that the security granted by the lien is properly registered wherever this may be necessary.

The Griffon: the deposit or compensation? What can a seller claim when the buyer fails to pay the deposit?

Griffon Shipping LLC v. Firodi Shipping Ltd (Griffon) [2013] EWHC 593 (Comm)

The recent decision of Mr Justice Teare in this case heralds a departure from the previously held view that, under clause 13 of the standard form Norwegian Sale Form 1993, where a buyer fails to pay the deposit under a memorandum of agreement, an innocent seller’s claim is limited to compensation for its losses. In this case, the Court concluded that a seller is in fact entitled to claim the deposit in such circumstances.

The background facts

Griffon Shipping LLC, as Sellers, entered into a memorandum of agreement (“MOA”) with Firodi Shipping Ltd, as Buyers, for the purchase of the Griffon. The MOA was on a standard Norwegian Sale Form 1993 (“NSF 93”). Pursuant to clause 2 of the MOA, a deposit of 10% (US$2,156,000) was due to be paid within three banking days of signature of the MOA. The MOA was signed but the deposit was not paid within the three banking days. On the following day, the Sellers accepted the Buyers’ conduct as a repudiation of the MOA and/or cancelled the MOA.

Clause 13 of the NSF 1993 provides as follows:

“13. Buyers Default

Should the deposit not be paid in accordance with Clause 2, the Sellers shall have the right to cancel this Agreement, and they shall be entitled to claim compensation for their losses and for all expenses incurred together with interest.

Should the Purchase Price not be paid in accordance with Clause 3, the Sellers have the right to cancel the Agreement, in which case the deposit, together with interest earned shall be released to the Sellers. If the deposit does not cover their loss, the Sellers shall be entitled to claim further compensation for their losses and for all expenses incurred together with interest.”

The damages recoverable by the Sellers, being the difference between the contract and market price of the vessel, were said to be US$275,000, substantially less than the deposit of over US$2 million which had not been paid.

Arbitration proceedings were commenced and the Tribunal was asked to consider, as a preliminary issue, whether the Sellers could recover the deposit or whether they could only claim damages in the lesser sum. The Sellers argued that the right to payment of a deposit had accrued before the MOA was terminated and, accordingly, the Sellers were entitled to claim the deposit either as a debt or as damages for breach of contract. The Buyers argued that, in the event of non-payment of the deposit, on the true construction of the MOA it was clear from clause 13 that the Sellers were only entitled to claim “compensation for their losses” and not the deposit.

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The Tribunal preferred the Buyers’ position and confirmed that the Sellers were not entitled to recover the deposit and were restricted to their claim in damages. The decision was appealed by the Sellers to the Commercial Court.

**The Commercial Court decision**

Mr Justice Teare considered the previous case law. In *The Blankenstein* (1985), the MOA was on the NSF 1966 form. The MOA was never signed, so the deposit was not paid. The Sellers claimed the amount of the deposit but the Court of Appeal held that there was a binding contract and, by a majority, that the Sellers were entitled to damages for the Buyers’ repudiation of it, the measure of the damages being the amount of the deposit. Robert Goff LJ dissented and considered that the Sellers were only entitled to damages for their loss of bargain, namely the difference between the contract and market price of the ship.

Clause 13 in the NSF 1987 (in a form different to the NSF 1966) was considered by the Court of Appeal of Singapore in *Zalko Marine Services v. Humboldt Shipping* (1988). Again, the contract came to an end before the deposit fell due and the Sellers claimed the deposit as damages. The Court of Appeal held that the Sellers’ only remedy was for “compensation” under the first limb of clause 13. The decision in *The Blankenstein* was distinguished. The practitioners’ texts on ship sale and purchase support the approach in *Zalko Marine Services*, confirming that a seller’s claim should be limited to compensation for its loss.

In an arbitration decision in 2011, the Tribunal considered a claim for a deposit under the NSF 1993 in circumstances where the deposit had fallen due for payment but had not been paid - circumstances akin to the case in question. In that case, the Tribunal held that the Sellers were entitled to the deposit, either because it had fallen due for payment, or as damages for the obligation to pay the deposit.

The differing conclusions of the Tribunals in the current case and the 2011 case meant that there were contradictory decisions by maritime arbitrators as to the true construction of clause 2 and clause 13 of the NSF 1993 that should be considered by the Commercial Court. The court placed much reliance on the fact that clause 2 of the MOA made provision for the payment of a deposit as “security for the correct fulfilment” of the MOA. The court considered a deposit to be different from a part payment of the price. If a deposit is paid, it is to be forfeited if the contract comes to an end, because it is paid as “an earnest of performance”. On the other hand, a part payment of the price may be recoverable after termination, because the price is no longer payable. It was the court’s view that the recoverability of the payment depended upon the purpose for which the payment was made and whether payment was made conditionally or unconditionally upon performance of the contract.

In this case, the deposit had not been paid, but the right to payment of it accrued before the contract was terminated. Accrued rights are not lost by reason of the subsequent termination of the contract. It was the court’s view that a deposit which has fallen due for payment remains payable, notwithstanding that the contract is terminated after the deposit falls due. The court concluded that the language of the MOA and, in particular, clause 2 provided that the Sellers might recover the deposit in these circumstances. Clause 2 expressly described the payment as a deposit for the purpose of providing security for the correct fulfilment of the MOA. This indicated that, when the deposit accrued due before the MOA was terminated, it accrued due unconditionally. The rights provided by clause 13 for compensation were therefore additional to the right to claim the deposit.

**Comment**

In practical terms, this decision enables a seller to claim a deposit which is in excess of the actual loss it suffers as a result of a buyer’s non-payment of the deposit. This is perhaps a surprising result and not one which the market had expected. It is understood that leave to appeal has been granted and that, in due course, the decision will be reviewed by the Court of Appeal.

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**Global Santosh: Does a vessel arrested for a claim under a sale contract remain on-hire?**

**NYK Bulkship (Atlantic) N.V. v. Cargill International S.A. (Global Santosh) [2013] EWHC 30 (Comm)**

### The background facts

Time charterers, Cargill, withheld hire from disponent owners, NYK, pursuant to a period off-hire clause in a time trip charter on amended NYPE terms. The vessel was delayed for a prolonged period at Port Harcourt, Nigeria, where she was to discharge cement: first, because the unloader at the discharge port owned by the Buyers of the cargo was broken and the vessel was held at anchor and, subsequently, because the Sellers of the cargo arrested the cargo, and inadvertently the vessel was held at anchor and, subsequently, because the port owned by the Buyers of the cargo was broken and the discharge cement: first, because the unloader at the discharge port prolonged period at port Harcourt, Nigeria, where she was to on amended NYPE terms. The vessel was delayed for a period of delay at the discharge port. Transclear were the Sellers and iBG the Buyers. Under the sale contract arising from the period of delay at the discharge port, Transclear were the Sellers and iBG the Buyers. Under the sale contract, IBG were responsible for discharging the cargo. Transclear were also a sub-charterer of the vessel pursuant to a voyage charter.

NYK brought a claim for payment of the hire which was withheld by Cargill for the period when the vessel was subject to the Arrest Order. Their claim was rejected by the majority of a panel of three arbitrators. NYK successfully appealed to the Commercial Court.

### The off-hire clause

The relevant off-hire clause in the time charter between NYK and Cargill was provided as follows:

*“Should the vessel be captured or seized (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. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners’ account.”*

### The Tribunal's decision

The majority of the Tribunal held that the arrest of the vessel did not fall within the off-hire provision in clause 49. They rejected NYK's claim for hire and held that this was not the case falling within the proviso “*unless such... arrest is occasioned by any personal act or omission or default of the Charterers or their agents*”. They quoted the classic definition of agency under English law, requiring that one party expressly or impliedly consents that the other should act on his behalf. They concluded that Cargill did not expressly or impliedly consent to Transclear detaining or arresting the vessel or her cargo. They further found that Transclear were not performing Cargill's obligation to discharge and, even if they were, they were not doing so as Cargill's agent but as their sub-contractor or sub-sub-contractor. Further and in any event, in arresting the vessel or cargo, Transclear were not acting as Cargill's agent but on their own behalf. Transclear had a claim for demurrage against IBG, but Cargill did not.

In the alternative, NYK argued that IBG, as receivers of the cargo, were Cargill's agents in respect of unloading the cargo, and the arrest of the vessel had been occasioned by IBG's: (i) failure to unload within the stipulated time (in part because their unloader broke down) giving rise to a claim for demurrage against them by the Sellers, Transclear; and (ii) failure to pay and/or secure the resulting demurrage claim. The Tribunal noted this argument, but did not refer to it when giving their reasons for finding against NYK.

### The Commercial Court decision

The Court allowed NYK's appeal. The Judge observed that he had to determine the meaning of the words “*occasioned by any personal act or omission or default of the Charterers or their agents*”. He held that, in the context of a charter which provided for many acts to be operated through the parties’ “agents”, the proviso in clause 49 was not limited to cases where parties who are specifically instructed by the charters to carry out functions which are charterers' responsibility “occasion” an arrest or detention. He accepted NYK's submission that sub-charterers or sub-sub-charterers or receivers to whom Cargill, by subletting the vessel, had delegated or sub-delegated the performance of its responsibilities under the charter could be Cargill's agents, irrespective of the precise relationship between the delegate and the party above him in the contractual chain. The Judge did, however, also accept Cargill's submission that the act, omission or default of such a delegate must have occurred in the performance by the delegate of the delegated task. It was not enough that there was an act which was causally linked to the seizure or arrest.

Applying these findings to the particular facts of this case, the Judge found that the arrest of the cargo and (by mistake) the ship by Transclear was not an act done by Transclear in carrying out any responsibility delegated to them by Cargill. He found, therefore, that although the arbitrators were wrong to reject NYK's claim on the grounds that Transclear were a subcontractor rather than an agent, they were correct in rejecting the claim on the grounds that there was no evidence Transclear were performing Cargill's obligation to discharge.

The Judge then turned to the part of the case that the arbitrators failed to consider, relating to IBG. He considered whether the acts, omissions and defaults of IBG occurred whilst IBG were under an obligation as a delegate of Cargill to unload the vessel so that they occurred in the course of IBG's performance of their obligation. The Judge found that they did. IBG became Cargill's delegate of the obligation to unload cargo under clause 8 of the NYK/Cargill charter by reason of the relevant sale contract, including its demurrage regime, and, therefore, the failure to unload within the lay days was an act, omission or default that occurred in the course of performing the obligation to discharge as delegated to IBG by Cargill. The same applied to IBG's failure to pay or secure Transclear's demurrage claim.

The Judge then turned to consider causation: did the act, omission or default “*occasion*” the arrest of the vessel at the material time? He held that the test for causation was that the relationship between the act and the arrest has to be such that it can be said, as a matter of commercial common sense, that...
the latter was caused or brought about by the former. The Judge rejected Cargill’s submission that, since the arrest of the vessel (as opposed to the cargo) by the third party Transclear was a mistake, plainly the arrest was not “occasioned” by iBG’s acts, on the grounds that it was the failure to unload in time and the failure to pay or secure the demurrage claim which led to the application resulting in the arrest of the vessel. At Cargill’s request, the Judge decided, with some hesitation, to remit the causation issue back to the arbitrators, because he found it to be a matter of commercial common sense and the Tribunal being “three commercial men conversant with shipping matters”, as required by the charterparty, were very well placed to decide it.

Comment
The decision is perhaps surprising in that the obligation to unload within the lay days under a sale contract between third parties was held to be a relevant delegated act under clause 8 of the time charter. It appears that the decision will be reviewed by the Court of Appeal. We will report on the appeal decision in due course.

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Pacific Champ: Lack of consensus prevents both charterparty and arbitration agreement coming into existence


The Commercial Court has set aside a maritime arbitration award on the basis that there was no consensus between the parties regarding the fixture of the Pacific Champ and, as a result, no binding charterparty or arbitration agreement ever came into existence. The court found that the questions of whether there was a binding main contract and/or a binding arbitration agreement (as incorporated into the main contract) stood or fell together. A complete lack of consensus not only prevented the main contract (i.e. the charterparty) from coming into existence, but also the arbitration agreement.

The background facts
The dispute related to an alleged fixture of the Pacific Champ in February 2008 between the bareboat charterers of the vessel, Hyundai Merchant Marine (“HMM”), as Disponent Owners, and Americas Bulk Transport Limited (“ABT”), as Charterers. The negotiations for the alleged fixture were conducted through a series of telephone and email exchanges. The trading limits in the bareboat charter excluded the Orinoco river. ABT wished to transport a cargo of hot moulded iron briquettes (HBI) via the Orinoco River.

A first recap was sent by ABT to HMM on 11 February. It was common ground that there was no agreement at that stage, as the parties had not agreed on a place for redelivery. On 12 February, HMM sent to ABT a proforma charter which excluded the carriage of HBI. A number of phone calls ensued. A second recap was sent by email by ABT on 12 February. The second recap contained two “subjects” or conditions precedent, namely: (a) the review of owner’s head charterparty back to back; and (b) the charterers’ reconfirmation.

HMM contended that, following receipt of the second recap, it informed ABT by phone that, although the bareboat charter contained no restriction on the carriage of HBI, it did not permit trading via the Orinoco River. This was disputed by ABT. Subsequently, HMM sent ABT an email containing comments and proposing amendments permitting the carriage of the cargo, but excluding the Orinoco River.

The following day, ABT purported to lift the subjects of the second recap and confirmed that the vessel was fully fixed and that a binding fixture had been entered into. HMM argued, among other things, that one of the subjects or conditions precedent (review of the owner’s head charter, to ensure that the charter being negotiated was back to back with the bareboat charter) had not been complied with. As a result, HMM contended that there was no binding contract between the parties. ABT referred the dispute to arbitration, alleging a repudiatory breach of the charter by HMM.
The arbitration award

The Tribunal held in favour of ABT, declaring that a valid and binding contract had been concluded between ABT and HMM on the basis that the subjects had been lifted and that, on their true construction, the meaning of the words “subject to review of the owner's head charter back to back” was that it was for the charterers to review the owners' proforma charter, rather than the owners' bareboat charter. The Tribunal found that ABT had accepted the terms of the proforma charter in full, satisfying the back to back requirement, and that they lifted the subject within the agreed time limit. The Tribunal also held that the wording referring to the exclusion of HBi in the proforma charter would have been deleted as being a logical amendment to reflect the main terms agreed by the parties. HMM appealed to the Commercial Court on various grounds, including that the Tribunal had no jurisdiction because there was no valid arbitration agreement between the parties.

The Commercial Court decision

The court was faced with considerable evidential difficulties, due to a number of factors, including factual disputes between the parties about what was said in their telephone calls, as well as the passage of time and the lack of contemporaneous documents. Ultimately, the Court preferred HMM's account of events and found that HMM had not confirmed to ABT that the cargo could be carried before the second recap was sent. On that basis, the Court found that there was no consensus and therefore no binding charterparty before or at the time of the second recap and no binding arbitration agreement.

In summary, the Court's reasoning was as follows:

1. The questions of whether there was a binding fixture and/or a binding arbitration agreement stood or fell together and were to be determined on the basis of a full rehearing.
2. The arbitration agreement in the charter was, like all of the other terms of the second recap, conditional on the two subjects contained in that recap. Accordingly, if one of those subjects was not satisfied (as HMM contended), there could be no operative arbitration agreement.
3. If there was no consensus at all between the parties, the lack of consensus not only prevented any charterparty, but also any arbitration agreement, from coming into existence.
4. There was no evidence in the particular circumstances of the case that the parties intended that any alleged arbitration agreement was intended to have effect independently of the existence of the proposed charter.

The court also expressed the view, that, if it was wrong and, contrary to its conclusion a binding agreement had been reached between the parties, then the acronym BTB (back to back) in the subjects of the second recap had the effect of incorporating the proforma rather than the bareboat charter into the contract.

Comment

First, this case helps to clarify the role of the doctrine of severability of an arbitration agreement from the main contract. The doctrine of severability is enshrined in section 7 of the Arbitration Act 1996 and provides that arbitration clauses are to be treated as “distinct agreements” separate from the main contract which has been found to be invalid, ineffective or non-existent. Whilst the English Courts have traditionally held that arbitration agreements can only be invalidated for reasons relating to the arbitration agreement itself (Fiona Trust v. Privalov [2008] 1 Lloyd's Rep 254), this case highlights that a complete lack of consensus will prevent the arbitration agreement from coming into existence, just as it will prevent the main agreement (in this case, the charter) from coming into existence. This case does not make new law, but illustrates the limits of the doctrine of severability of an arbitration agreement.

Second, this case serves as a good reminder of what has to be agreed for a charter to be final and binding. Under English law, the parties must have reached a firm agreement on all essential terms. Such essential terms may fall into two categories: (a) terms which, if not settled, render the entire agreement unworkable or too vague and uncertain to be enforceable, for example, provisions of objectively fundamental importance such as loading and discharging ports, quantity of cargo and size of the ship; and (b) terms on which agreement is regarded by the parties themselves as an essential prerequisite of the making of the contract. These are terms which parties expressly agree to settle before any agreement becomes legally binding and which, in practice, are usually shortened to SUBS (subjects).
Prior course of dealing between parties to Fleet Agreement did not mean they had agreed to arbitrate

Lisnave Estaleiros Navais SA v. Chemikalien Seetransport GmbH [2013] EWHC 338 (Comm)

The Commercial Court here considered the circumstances in which a term may be implied into a contract as a result of a course of dealing between the parties. The particular term which the fleet agent was seeking to imply into a Fleet Agreement with a shipyard was an agreement to arbitrate. After considering the relevant case law, the Court held that it was impossible to conclude that the parties intended that this term should form a part of their contract.

The background facts

The Claimant shipyard (“Lisnave”) entered into a Fleet Agreement with the Defendant fleet agent (“CST”) in relation to repairs for vessels managed by CST. Lisnave subsequently entered into separate ship repair contracts with each of the ship-owners whose vessels were managed by CST. The purpose of the Fleet Agreement was to set out the terms which would apply to each individual repair contract. The repair contracts expressly incorporated Lisnave’s General Conditions. In particular, Article 15.2 of the General Conditions provided for disputes to be resolved by arbitration in London.

A dispute later arose between Lisnave and CST in connection with the Fleet Agreement. CST referred the matter to arbitration on the basis that Article 15.2 of the General Conditions was implied into the Fleet Agreement by virtue of the parties’ prior course of dealing under the individual ship repair agreements. The parties agreed that the Tribunal would first determine the question of whether there was an agreement to arbitrate. By a majority, the Tribunal agreed that it did have substantive jurisdiction and the Fleet Agreement did incorporate the General Conditions and therefore did provide for arbitration. Lisnave appealed against the award.

The relevant case law

There is a long line of authorities dealing with the implication of a term into a contract. The course of dealing principle was set out in McCutcheon v. David Macbrayne Ltd [1964] 1 WLR 125, in which the House of Lords provided that a term could be incorporated into the last of a series of similar contracts, where such a term was used in the previous contracts and, for some reason, appears to have been omitted from the particular contract under consideration. The incorporation of terms by a prior course of dealing, however, is a question of fact and degree, which depends, amongst other things, upon the number of previous contracts, how recent they are, and the similarities between the contracts (in terms of subject matter and the manner in which they were concluded - see Capes (Hatherden) Ltd v. Western Arable Services Ltd [2010] LLR 477). It is also established law that it is not necessary for the parties to the prior course of dealing to be exactly identical to the parties to the contract under consideration (SIAT v. Tradax [1978] 2 LLR 470). More recently, in Attorney General of Belize v. Belize Telecom [2009] 1 WLR 1988, Lord Hoffman held that a term can be implied into a contract only where the Court finds that the parties must have intended that term to form a part of their contract. The question, therefore, is not whether it would have been reasonable for such a term to be incorporated into the contract, but rather whether the parties intended to include such a clause into their contract. A consideration in this respect is whether the term which one party is seeking to imply into the contract is necessary and obvious.

In the context of arbitration agreements, there is also a presumption that parties are likely to have intended any disputes arising out of the relationship into which they have entered to be decided by the same Tribunal (Fiona Trust & Holding Corporation v. Privalov [2008] 1 LLR 254). In addition, there is a presumption that, in the case of related matters, even where arising under separate but related contracts, the parties to the contracts would prefer to have all the proceedings considered in one forum.

The Commercial Court decision

Considering the various authorities above, Mr Edelman QC overturned the majority award and held that the Tribunal did not have jurisdiction, as Art 15.2 could not be implied into the Fleet Agreement. The Judge gave several reasons for his decision, which were as follows:

1. The Judge found that it was impossible to conclude that it was obvious that the parties intended that Art 15.2 should apply to the Fleet Agreement. In reaching this conclusion, the Judge took into consideration the fact that, whilst there was a strong inter-relationship between the Fleet Agreement and the repair contracts, the relationship concerned the effect of the terms of the Fleet Agreement on the terms of the repair contracts. As such, the terms of the repair contracts did not have any impact on the Fleet Agreement. Moreover, the dispute which had arisen in connection with the Fleet Agreement had, in the Judge’s opinion, no direct relevance to the repair contracts.

2. The Judge also considered it possible that the parties may simply not have addressed their minds to the issue of a potential dispute under the Fleet Agreement.

3. Finally, the Judge considered that the language of the Fleet Agreement was inconsistent with an intention to incorporate any part of the General Conditions. Whilst Clause B of the Fleet Agreement did refer to “Conditions”, there was nothing to indicate that this was a reference to the General Conditions. In particular:

a. The General Conditions apply to all contracts “for” dry-docking etc. The Fleet Agreement was not a contract “for” such work. As such, the General Conditions were unsuitable for application to the Fleet Agreement.

b. The Judge also noted that CST only alleged that Art 15.2, and no other term of the General Conditions, was incorporated in the Fleet Agreement. This may have been because the General Conditions would not be relevant or suitable to be incorporated in the Fleet Agreement as the General Conditions dealt with actual repairs to vessels. The selection of Art 15.2 for incorporation on its own was considered all the more difficult a proposition, as it was part of a set of other dispute resolution provisions in Art 15, which formed an integral part of the overall scheme of Art 15. The Judge did not therefore see that there was any reason why the parties should be regarded as having intended to incorporate Art 15.2 in the Fleet Agreement.
Comment
Traditionally, the English courts have been reluctant to imply terms into contracts which are not expressly provided for within the contract. In this case, the Court balanced this traditional reluctance to interfere with a contract in writing against the presumption that where there are related contracts, the parties intend for related disputes to be considered in one forum. The Judge here preferred to look at the intentions of the parties, rather than rely on the presumption that the same forum would apply for all disputes. It is therefore always recommended that an express dispute resolution provision be incorporated into every contract, in order to avoid a dispute of this nature before the real matter in hand can be considered.

Chada Naree: Passing costs liability down a charterparty chain

Occidental Chartering Inc v. Progress Bulk Carriers Ltd (Chada Naree) [2012] EWHC 3515 (Comm)

The judgment in this case deals with the recoverability of the costs of an arbitration as damages in a series of arbitration references, notwithstanding the absence of an arbitration reference for one of the links in the charterparty chain. The Commercial Court, on appeal from an arbitration award, held that where there was a claim being passed down through a chain of charterparties and there was a break in the arbitration references, this would not necessarily prevent the liability from being passed on through the chain. The decision is significant because of the frequency with which charterparty chain disputes arise in maritime arbitration.

The background facts
The vessel, Chada Naree, was the subject of a chain of charterparties. Precious Garnets Ltd (“PG”) were the registered owners and they time-chartered her to Occidental Services Corporation (“OSC”). OSC re-let her to a company within its corporate group, Occidental Chartering Inc (“OCI”) and OCI time-chartered her on to Progress Bulk Carriers (“PBC”). Finally, PBC voyage chartered the vessel to CNAN. All of the charters were on materially identical terms.

PG commenced arbitration against OSC claiming damages for breach of the safe port warranty. This claim was passed down the charterparty chain and this gave rise to the following three arbitrations, in each of which the same Tribunal was appointed:

1. Under the head charter between PG and OSC;
2. Under the time charter between OCI and PBC; and
3. Under the voyage charter between PBC and CNAN.

There was no arbitration reference in relation to the internal re-let between OSC and OCI, the two being related companies. However, there was an agreement for an extension of time, so as to preserve rights between the two.

The arbitration awards
In June 2010, the Tribunal issued their first award in all three references, finding that there was a breach of the safe port warranty in all of the charters in the chain and that damages were recoverable from the respondent in each of the references. In this award, they referred to “Disponent Owners” and no distinction was drawn between the two Occidental companies.

The Disponent Owners also claimed as damages their own liability for costs in the arbitration with the Registered Owners, PG. When making their award, the Tribunal reserved jurisdiction to deal with the Disponent Owners’ claim for their costs.

Subsequently, an amending award was handed down to address a number of errors in the first award. At that stage, and for the first time since the dispute arose, PBC submitted that OCI was not a party to an arbitration with the Registered Owners and it had not therefore incurred any liability for costs that could be passed on as a claim for damages due to PBC.
As a result of these further submissions, the Tribunal published a second award and held that OCI were not entitled to recover, as damages, the costs incurred in the head arbitration between OSC and PG, as it was impossible to show that OCI had sustained a loss. Their reason for reaching this conclusion was that “this gap in the chain of references seemed to us to be fatal to OCI’s claim for costs as damages. If the loss had not been suffered by the party claiming it in the arbitration over which we had jurisdiction, then that seemed to us to be the end to the matter.”

The Commercial Court decision
OCI were granted permission to appeal this second award to the Commercial Court under s.69 of the Arbitration Act 1996 and the matter was then considered by Mr Justice Teare. The key issue before the Court was the ability of a party to recover, as damages, sums which it had not been liable to pay to a third party.

The Judge found that, in reaching its decision, the Tribunal had overlooked the background to the award and, in particular, that any sensible reading of the first award showed that the two Occidental companies were treated as one and the same for the purpose of passing liability down through the charter chain.

The Judge also considered that there was an inconsistency in the Tribunal's reasoning. The claim made by PG against OSC was a claim for damages based upon the breach of the safe port warranty and the arbitrators found that this claim could be passed down through the charterparty chain to CNAN, the ultimate Voyage Charterer, despite the break in the arbitration references. If the arbitrators had not found that liability flowed down the chain from OSC to OCI, OCI would have been unable to recover from PBC in respect of the substantive losses. The same breach of the safe port warranty also gave rise to a claim for the costs to be recovered as damages and, according to Mr Justice Teare, there was no difference in the nature of those two heads of damages (i.e. substantive losses and costs).

The Judge therefore allowed the appeal and concluded that OCI could recover the costs incurred by OSC in the head arbitration from PBC.

Comment
One of the key points that was taken into consideration by the Judge was the background and the fact that the parties had treated the two Occidental companies as being one and the same and that no point had been made in relation to the break in the chain of arbitrations until after publication of the first award.

Contract chain disputes, which arise frequently in the maritime sector, can be problematic because a Tribunal cannot make costs orders against third parties and the costs must therefore be claimed down the chain as an indemnity or damages. However, this judgment suggests that technical arguments will not be allowed to prevent liability for costs from flowing up and down a chain of contracts, so long as a breach is established.
The Target: “Confusing the absence of specification with the specification of zero”: Court of Appeal construes charterparty overage freight provisions

BP Oil International Ltd v. Target Shipping Ltd (Target) [2013] EWCA Civ 196

In the October 2012 edition of our Shipping E-Brief, we reported on the Commercial Court decision in this case ([2012] EWHC 1590 (Comm)). That decision has now been overruled by the Court of Appeal.

The Court of Appeal confined its decision to a narrow point of construction of the voyage charterparty in question. The Commercial Court Judge had held that the parties did not make any relevant agreement as to the rate of overage freight that was payable for discharge in the US Gulf and that, therefore, the owners were entitled to reasonable overage freight, on the basis of Section 15 of the Supply of Goods and Services Act 1982.

The Court of Appeal has allowed the Owners’ appeal, holding that the Owners’ construction of the charterparty was correct. The Owners were therefore entitled to 100% of the freight rate (i.e. Worldscale 135) for the overage. In paragraph 19 of the judgment, Lord Justice Longmore explained the Court of Appeal’s reasoning, which is also of general interest concerning the construction of contracts:

“When [the parties] have taken elaborate trouble and set out their agreement over many pages, the idea that there is a lacuna which the court has to fill is inherently unlikely. If filling the lacuna leads to an inquiry which is likely to be the subject of evidence and potential dispute, I would accept that one or other of the constructions put forward by the parties is likely to be right. In this case it is the owners’ construction which is correct.”

The Court of Appeal did not, therefore, need to address the more complex issues of mistake which had arisen in the Commercial Court.

Lucky Lady: Disponent Owners granted declaratory relief that they were not a party to certain bill of lading contracts

Navig8 Pte Ltd v. Al-Riyadh Co for Vegetable Oil Industry (Lucky Lady) [2013] EWHC 328 (Comm)

The Buyers of a cargo brought claims in Jordan against the Sellers of the cargo and the Disponent Owners of the vessel carrying the cargo. The Disponent Owners sought an injunction and declaratory relief from the Commercial Court, in particular that they were not liable to the Buyers and were not a party to the relevant bills of lading. The Commercial Court refused the injunction but granted declaratory relief, on the basis that the parties had, by implication, chosen English law and that the declaratory relief would be useful to the Disponent Owners in fighting any subsequent attempt at enforcement of a Jordanian judgment in Singapore, where the Disponent Owners were incorporated.

The background facts
The dispute concerned a shipment of palm oil and palm olein from Malaysia to Jordan. Upon delivery, the cargo was rejected by the Buyers on the grounds that it was apparently in poor condition. The Sellers of the cargo were sub-charterers under a Shelltime 4 charterparty, under which Navig8 Pte Ltd were the Disponent Owners.

The sub-charterparty was governed by English law and provided for disputes to be resolved by arbitration in London. The bills of lading issued in respect of the shipment of the cargo incorporated the terms of the sub-charterparty and provided as follows:

“This shipment is carried under and pursuant to the terms of the charter dated 7 March 2008 at Kuala Lumpur between... owners and... charterers, and all conditions liberties and exceptions whatsoever of the said Charter apply to and govern the rights of the party concerned in this shipment...”

The bills of lading further provided that, if a person other than the owner or the demise charterer was judged to be carrier or bailee of the shipment, that person would be entitled to rely upon “all limitations or exonerations from liability and/or defences provided by law or by the terms of the contract of carriage”.

The Buyers brought claims in Jordan against the Sellers of the cargo and the Disponent Owners, as the carriers under the bills of lading, for damages arising from the alleged poor condition of the cargo upon delivery. It was not in dispute that the Buyers’ claim had a real prospect of success under Jordanian law, including the Buyers’ argument that the Disponent Owners were the carrier under the bills of lading issued in respect of the shipment.

The Disponent Owners commenced a claim before the English Commercial Court, seeking: (i) an anti-suit injunction in respect of the Jordanian proceedings and damages; and (ii) declarations that the Disponent Owners were not a party to the bills of lading in respect of the shipment, that they were not bailees of the cargo and that they had no liability to the Sellers in respect of the cargo.
The Commercial Court decision

The Commercial Court rejected the Disponent Owners’ application for an anti-suit injunction. The Commercial Court held that the Disponent Owners’ argument that the Jordanian proceedings were vexatious and oppressive did not fall within the jurisdictional “gateway” provisions in the Civil Procedural Rules, Rule 6B paragraph 3.1(6)(c) of the Practice Direction. This paragraph covers claims made “in respect of a contract where the contract... is governed by English law”. The Commercial Court held that the claim for an injunction was not a claim made “in respect of” a contract governed by English law. In this regard, the Commercial Court cited *Alliance Bank JSC v. Aquanta* [2012] EWCA Civ 1588, in which Lord Justice Tomlinson said that “unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of non performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract”. Applying this test, the Commercial Court held that the application for injunctive relief fell outside the provisions of paragraph 3.1(6)(c), since no contractual right was being asserted by the Disponent Owners, nor were they seeking to assert any right resulting from any actual or threatened non-performance of a contract.

In respect of the Disponent Owners’ application for declarations that they were not a party to the bills of lading, were not bailees of the cargo and had no liability to the Buyers, the Commercial Court held that the Disponent Owners had established that England was the proper place in which to bring the declaration claims (which was denied by the Buyers). The Commercial Court further held that the presumed parties to the bill of lading contracts between the Buyers and the Disponent Owners had chosen English law, not expressly, but by way of implication, through the incorporation into the bills of lading of the arbitration clause from the sub-charterparty.

The Buyers submitted that the Disponent Owners should not be permitted to serve out of the jurisdiction the claims for declarations, on the basis that these declarations would serve no useful purpose. The Commercial Court rejected that argument. In particular, the Commercial Court accepted the Disponent Owners’ argument that declaratory relief might help the Disponent Owners to resist enforcement of a judgment of the Jordanian court in Singapore, where the Disponent Owners were incorporated. The fact that the Disponent Owners were incorporated in another common law jurisdiction was an important factor in the Court’s decision, since the courts in that jurisdiction were more likely than those in other, non-common law, countries to take into account any orders of the Commercial Court.

Comment

This case highlights the importance of inserting express law and jurisdiction clauses into bills of lading, rather than relying upon wording in a bill of lading that purports to incorporate an arbitration clause from a charterparty. The Commercial Court’s decision shows that an English court may be more willing to grant declaratory relief where it would help the applicant to defend any subsequent enforcement of the foreign judgment in its country of incorporation, particularly where the applicant is based in a common law country that would more readily recognise orders of an English court.
**Supreme Court confirms legal advice privilege extends only to legal profession**

*R (on the application of Prudential Plc) v. Special Commission of Income Tax [2013] UKSC 1*

The Supreme Court has recently delivered an important decision on the question of whether legal advice privilege covers communications between a client and a non-lawyer. By a 5:2 majority, their Lordships held that the privilege extends only to advice given by members of the legal profession. Consequently, documents relating to tax law advice given, in this case, by chartered accountants had to be disclosed to the UK tax authorities.

**Privilege**

Where it applies, privilege protects a party from having to disclose its communications. There are two types of privilege: legal advice privilege and litigation privilege. The *Prudential* judgment is concerned with legal advice privilege alone.

Legal advice privilege protects all communications passing between a client and its lawyers in connection with the provision of legal advice, except in very limited circumstances.

**Did tax law advice from chartered accountants attract legal advice privilege?**

The Applicant, Prudential Plc, had received advice from an international firm of chartered accountants, PriceWaterhouseCooper (PwC), in relation to a tax avoidance scheme. The UK tax authorities had issued an order requiring Prudential to disclose certain documents received from PwC in relation to that advice. Prudential sought to overturn the order on the basis that the advice was covered by legal advice privilege. The application failed in the High Court and in the Court of Appeal and the matter proceeded on appeal to the Supreme Court for a final decision.

Even though the tax advice had not been given by a member of the legal profession, Prudential argued that legal advice privilege should extend to advice given by a non-lawyer (such as an accountant) if the same advice would be given to the same client by a member of the legal profession. It was common ground that the majority of tax advice in modern times is given by qualified accountants, rather than by lawyers.

**The Supreme Court’s decision**

The starting point taken by the majority of the Supreme Court was that it was universally believed that legal advice privilege applies only in respect of advice given by the legal profession (which, in England and Wales, Lord Neuberger clarified, meant barristers, solicitors, members of the Chartered Institute of Legal Executives and, by extension, foreign lawyers).

Numerous previous judicial decisions had refused to extend the ambit of legal advice privilege to advice given by people such as consultants or trade mark agents. In addition, the UK government had, in the past, rejected proposals to enact legislation to the effect that advice from accountants was covered by legal advice privilege. Various pieces of legislation suggested that legal advice privilege was confined to advice being given by members of the legal profession.

The approach taken by the minority members of the Court in favour of extending legal advice privilege was that the privilege should cover advice given by any professional “whose profession ordinarily includes the giving of legal advice”.

The majority of the members of the Supreme Court accepted that there was no principled reason to justify the exclusion of advice given by non-lawyers from the protection of legal advice privilege. However, they took the view that to allow Prudential’s appeal would extend the clear and well-understood ambit of legal advice privilege. It was for the legislature, and not for the courts, to decide whether to extend legal advice privilege and to define the scope of such privilege and what restrictions should apply to the protection afforded. The majority considered it likely that, if Parliament was prepared to allow legal advice privilege to be recognised in respect of tax advice given by accountants, then it would only be on a significantly qualified basis.

Lord Reed explained that the rules on what constitutes legal advice privilege must be clear, certain and readily understood. In their present formulation, the existing rules met those requirements. By contrast, the test put forward by the dissenting members of the Supreme Court would mean it might be necessary for a court to enquire into the qualifications and standing of the advisers and assess whether the group to which those persons belonged constituted a “profession”. There was also a greater possibility that advice given by non-lawyers would contain both legal advice and non-legal advice and that might make it difficult to decide how and whether legal advice privilege attached.

**Comment**

The essential difference of approach between the members of the Supreme Court on this issue was that the dissenting minority took the view that the status of the adviser was immaterial so long as the other requirements for legal advice privilege were met. That view was rejected by the majority. Therefore, unless there is a change in the law enacted by Parliament, only communications with solicitors, barristers, qualified legal executives and foreign lawyers in relation to the provision of legal advice will be protected from disclosure by reason of legal advice privilege.

It has been widely reported that interested professional bodies intend to lobby the government to enact legislation on this issue. It remains to be seen whether Parliament has any appetite to change the law and, if so, what form any statutory intervention might take.
SHIPPING LEGISLATION AND REGULATION

MARPOL ANNEX V: new amendments relating to disposal of cargo residues

In July 2011, by resolution MEPC.201(62), the Marine Environment Protection Committee (“MEPC”) adopted certain amendments to MARPOL Annex V. Those amendments entered into force on 1 January 2013, causing a certain amount of concern within the shipping and international trade community as to their practical implications. This article is intended to address certain of those concerns and to clarify certain aspects of the amendments in relation to the disposal of cargo residues.

Background to and scope of the amendments
Annex V is primarily directed at prohibiting the disposal of garbage at sea and, when it first came into force in 1988, its main focus was to reduce the disposal of garbage at sea of plastics, such as drinking water bottles and synthetic nets, by cruise ships and fishing vessels.

Under previous versions of Annex V, disposal of garbage at sea was generally permitted (with certain exceptions), provided it was disposed of far enough from the nearest land. The new regime sets out a blanket prohibition such that disposal of all garbage at sea is now prohibited, except as otherwise provided in Annex V.

The definition of “Garbage” includes “Cargo Residues”, which are defined as “the remnants of any cargo which are not covered by other Annexes to the present convention...” Accordingly, Annex V applies to the disposal of any cargo residue of any dry bulk cargo/commodity that is not an oil, a noxious liquid or carried in packaged form (as covered by Annexes I, II and III and defined therein).

To which parties does Annex V apply and what are their obligations?

Regulation 2 (Application) of Annex V provides that “the provisions of this Annex shall apply to all ships” and the primary focus of Annex V is, therefore, on the vessel's compliance.

Accordingly, every vessel's owners, operators and crew should ensure that the vessel complies with Annex V and takes every precaution to avoid discharging any garbage at sea other than in accordance with the exceptions set out in Annex V.

In this regard, in addition to the general prohibition on disposal of garbage at sea, Annex V also sets out three positive obligations which apply depending upon the size/tonnage of the vessel in question. These are as follows:

- Regulation 10.1.1: every ship of 12m or more in length and fixed/floating platforms must display placards to notify the crew and passengers of the discharge requirements of regulations 3-6 of Annex V;
- Regulation 10.2: every ship of 100 gross tonnage or above must carry a garbage management plan, which the crew follow and which meets the specified criteria; and
- Regulation 10.3: every ship of 400 gross tonnage or above must carry a Garbage Record Book, in the form specified in the appendix to Annex V, and ensure that it records the information stipulated in Regulation 10.3.1-4.

Annex V contains no specific terms applicable either to shippers or time/voyage charterers, but this does not necessarily mean that a charterer or shipper could never have any liability in respect of a breach of Annex V.

In addition, paragraph 3.4 of the Guidelines does provide that “solid bulk cargoes should be classified and declared by the shipper as to whether or not they are harmful to the marine environment” (“HME”). However, because the Guidelines are non-mandatory, it seems as though a breach of the Guidelines would not amount to a violation of either the Convention or Annex V, so as to render a shipper liable if it did not provide such a declaration.

Nevertheless, it seems to us that, if a master were to discharge cargo residue at sea in good faith, in reliance on a shipper’s declaration that it was not HME, and it then transpired that the cargo residue was HME and that the declaration had been fraudulently or negligently given by the shipper, then the possibility that the relevant authorities might seek to prosecute the shipper cannot be ruled out.

Permitted disposal of cargo residues
Regulation 4.1.3 of Annex V states that discharge at sea of “cargo residues that cannot be recovered using commonly available methods for unloading” can take place at sea provided that:

1. this happens at least 12 nautical miles from the nearest land (and not within a special area); and
2. the discharge contains no substances that are harmful to the marine environment.

It should be noted, however, that this only applies to cargo residues “that cannot be recovered using commonly available methods for unloading” (our emphasis), such that the amount of any cargo residue to be disposed of at sea should be minimised. In this regard, the 2012 IMO Guidelines for the implementation of Annex V (the “Guidelines”) state that ports, terminals and ship operators should consider cargo loading, unloading and on board handling practices in order to minimise production of cargo residues.

Every effort should be made, therefore, to ensure that as much of the cargo as possible is unloaded in port.

What substances will be considered harmful to the marine environment (“HME”) for the purposes of Annex V?

The term “harmful to the marine environment” is not defined in Annex V itself, but guidance as to what constitutes an HME substance is set out in the Guidelines.

Paragraph 3.2 of the Guidelines states that cargo residues will be considered HME if they are solid bulk substances that meet the seven parameters that are set out in paragraphs 3.2.1-3.2.7.
of the Guidelines. These parameters are based on the fourth revised edition of the UN Globally Harmonised System (“GHS”) 2011.

The difficulty for those in the industry is that there is no list of solid bulk cargoes or assessment of individual cargoes that are HME, in relation to compliance with Annex V for the discharge of solid bulk cargo residues. As a result, there is no easily accessible reference source to which owners/charterers/shippers/masters/operators or any other party can refer in order to assess whether or not a given cargo residue is HME.

The IMO has recognised that there are certain “challenges” in classifying solid bulk cargoes and with the discharge of the associated residues. It has issued a circular (MEPC.1/Circ.791) stating that, for the first year that revised Annex V is in force (from 1 January 2013 to 31 December 2014), competent governmental authorities should accept provisional classifications.

However, such provisional classification is only permitted where reliable data as to four of the listed criteria is not available and where such provisional classification is based on the other three criteria (namely acute aquatic toxicity, chronic aquatic toxicity and the plastic/polymer/rubber content of that cargo). There is no exception in relation to aquatic toxicity (whether acute or chronic) or the plastic/polymer/rubber content, for which it appears all cargoes must be tested.

It is also unclear whether, if one laboratory tests a particular type of bulk cargo and determines that it is not harmful to the marine environment, other parties will be entitled to rely upon that determination in dealing with other cargoes of the same commodity.

Much may depend upon the nature of the cargo in question. If the cargo is of a standard nature, such that there is little/no variation in chemical make-up between cargoes, then we anticipate that, once it has been tested in accordance with the criteria specified in paragraph 3.2 of the Guidelines, that determination as to whether or not that cargo is HME ought to hold good for all cargoes of the same type.

The position will be more complex, however, where the chemical composition of a type of cargo varies widely from consignment to consignment, or where cargoes are blended so as to produce a new substance, or where a cargo that would generally be considered as non-harmful contains a tiny proportion of a substance that might be considered harmful. In those circumstances, we anticipate that it may be necessary to sample and test individual cargoes and, where a product is to be blended, test both the blended product and any by-product (including the waste resulting from any tank washings) in accordance with the specified criteria. In doing so, it should be borne in mind that a cargo may react with seawater such that it becomes harmful on contact with the sea, although we anticipate that this possibility is likely to be covered by the tests for chronic and acute aquatic toxicity.

Practical guidance

As will be apparent from the above, it is far from clear that all the practical implications of the new rules have yet been fully considered by the IMO or any of its member states. A number of practical questions arise: for example: as to who carries out any testing to determine whether a particular substance is considered harmful or not; whether the test result is centrally registered in some way and accessible to other parties; whether it is accepted as applicable to other similar cargoes; and whether it carries any particular status, if, for example, it supports the view that a substance is harmless, but a different view is taken by authorities in another part of the world.

There is currently no indication as to whether the UN will seek to publish a comprehensive list of substances for the purposes of establishing whether or not a particular cargo is HME for the purposes of Annex V. It is possible that an official list will be developed by the IMO in the period ahead, as the practical implications of the new Annex V become more widely appreciated.

Until these practical issues have been worked out in clearer detail, it is not easy to give practical legal guidance with as much clarity or certainty as is desirable, but, in the meantime, we consider it better to err on the side of caution regarding the classification and disposal of any cargo residue and, if in doubt, to discharge at appropriate discharge facilities ashore, rather than at sea.

We appreciate that disposal ashore costs money and is not always an available option. In those circumstances, we hope that the following ‘pointers’ may be of assistance:

1. GESAMP (the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection) publishes a list of certain products/minerals that are carried by ships, with a profile for each one that indicates whether or not it is considered “hazardous” to the marine environment. These profiles are not comprehensive for the purposes of establishing whether the listed products are HME pursuant to Annex V: the parameters for which GESAMP tests are conducted do not correspond precisely with the criteria set out in Paragraph 3.2 of the Guidelines and, in addition, the list of substances covered by GESAMP is not comprehensive and certain products (such as petcoke) are missing from the list. However, they do cover some of the UN GHS criteria specified in paragraph 3.2 of the Guidelines and, we suggest that the GESAMP list would be a good starting point when assessing whether or not a particular type of cargo is HME.

2. Any analysis relied upon ought to have been undertaken by a laboratory of international standing/repute, with the experience and equipment to properly analyse samples of the cargo in question in accordance with the specified UN GHS criteria. In this regard, we are aware that the issue of accurate testing has previously arisen in relation to cargoes of substances such as nickel ore, where mining companies/shippers have produced certificates as to a cargo’s transportable moisture limit in circumstances where the local laboratories in question have not had the correct equipment accurately to test for such characteristics.
3. The amount of any cargo residue to be disposed of at sea should be minimised and every effort made to ensure that as much as possible of the cargo is unloaded at port. Otherwise, we can only recommend that those concerned use their best efforts to establish whether any cargo residue is or would be considered harmful by reference to the UN GHS criteria specified in the Guidelines and that, in case of doubt, advice be sought from ITOPF or other appropriate sources of technical expertise.

How the *Erika* continues to shape French oil pollution legislation

On 12 December 1999, the oil tanker *Erika* sank off the coast of Brittany, leading to the contamination of more than 400km of coastline: one of the most extensive oil pollution incidents in maritime history.

The resulting damage to the coastline and the local economy and the adverse impact this had on public opinion highlighted the fact that the compensation limits under existing international pollution legislation were insufficient to provide for oil spills of this magnitude. As a result, in dealing with the *Erika* litigation, the French courts examined the interaction between national environmental pollution law and international oil pollution legislation. In doing so, they reaffirmed their jurisdiction over oil pollution incidents taking place within France’s Economic Exclusive Zone and implemented reforms to French maritime criminal law.

International Oil Pollution Legislation

In most parts of the world outside the USA, laws governing compensation for oil spills from oil tankers is covered by a tiered international regime of compensation. The first tier of this international regime is provided by the Civil Liability Conventions ("CLC"). France initially signed up to this regime by way of the CLC 69 which came into force in France on 19 June 1975. France subsequently signed up to CLC 92 which increased the compensation limits, simplified the mechanism for calculating the limitation amount and introduced a substantially lower risk to the owner that his right of limitation would be lost. The key feature of the CLC is that liability is channelled squarely onto the ship-owner (and their insurers) up to a limited amount after which the iOpC Fund takes over, thereby limiting recourse against other parties and individual liability for any single event. In 1999, however, the compensation limits were much lower than the potential financial liability for major oil spills as was clearly demonstrated by the *Erika* catastrophe: the ship-owner’s liability was limited to 13 million Euros, as compared with the 400 million Euros claimed for direct and indirect losses caused by the incident.
Waiving the limitations of the CLC

The *Erika* litigation in France went right up to the French Supreme Court, where final judgment was given on 25 October 2012. Through all the lower courts, as well as in the Appeal and Supreme Courts, the French judges held that France had jurisdiction in respect of all civil and criminal proceedings to decide liability in oil pollution cases involving damage to its coastal line, even where the casualty occurred outside French territorial waters.

Under French environmental pollution law, enacted in 1983, harmful environmental damage caused willingly, or by acts of omission or negligence, is a criminal offence. This results in strict liability for all parties exercising control or direction over a ship for damages resulting from oil spills. Subsequent French pollution legislation introduced on 3 May 2001, 9 March 2004 and 1 August 2008 established a list of all damages to the environment that qualify for compensation before the French courts (Article 161-1 of the Code of the Environment) and eventually raised the maximum amount of criminal fines from 375,000 Euros to 1 million Euros.

In the *Erika* litigation, the French courts held that national law on environmental pollution was not incompatible with the MARPOL 73/78 Conventions that provides for the liability only of ship-owners and managers for pollution resulting from deliberate illicit discharges of oil. Having found that the *Erika* had not been properly maintained, the French courts concluded that Total SA, although acting as the agent of the charterer, their subsidiary Total Transport Corporation, and not the owner of the ship, were not entitled to rely on the exemption for charterers and charterers’ agents and were nonetheless guilty of criminal conduct in carrying out their voluntary vetting operations and could be held individually liable for criminal damages and jointly liable for civil damages, together with the ship-owner, classification society and the ship management company.

In addition, the French Judges stated that, in accordance with established principles of French transport law, a finding of intentional negligence (or “*faute inexcusable*”) meant that there was no right to rely on the CLC’s channelling provisions or limitations of liability.

A finding of intentional negligence was made against the *Erika*’s owner and manager for failing to properly maintain the ship, despite its apparent bad condition, and against the ship classification company for failure to withdraw the ship’s classification. Furthermore, Total SA, the parent company of the voyage charterer, and the entity which vetted the ship was also held to be intentionally negligent, because it had acquired a role in the technical maintenance and control of the ship through its voluntary vetting procedure.

The new French legislation

In the *Erika*, the French Supreme Court had to consider a number of issues on which the law was far from obvious. These issues included the scope of the French courts’ jurisdiction over oil pollution incidents, the enforcement of the CLC channelling provisions and the parties that can be held liable for oil spills where the actual ship-owner cannot be clearly identified.

As a result, and in order to clarify the applicable legislation and enable the prosecution of all parties involved in oil spill incidents, regardless of the legal, financial and corporate structures in place, a new Regulation has been issued (Ordinance n°2012-1218 of 2 November 2012) providing in particular that:

1. Specific criminal maritime courts are to be created (Tribunaux maritimes) and the transfer of information is to be facilitated between State representatives and the authorities in charge of preserving navigational safety at sea;
2. All ships entering French waters should possess adequate insurance and present a financial guarantee or an insurance certificate from a first rate institution;
3. Deterrent penalties will be imposed where the ship fails to obey navigational instructions issued by a maritime authority;
4. Owners, charterers or their legal representatives, or any other person exercising any right allowing them to manage or control the ship, can individually be found criminally liable for any damage resulting from oil pollution;
5. Any criminal fine imposed on the Captain of the ship may be transferred by right to the ship-owner, if he has been validly summoned before the French courts as part of the proceedings;
6. Additional penalties can be issued by the criminal courts against the Captain or crew working on board, including a temporary or permanent prohibition on navigation in French territorial waters; and
7. Provisions of the French Labour Code regarding formalities and compulsory references included in employment contracts are to be extended to sailors and crew employed on-board ships.

Comment

The new Regulation has been submitted to the French Parliament for ratification and is expected to be promulgated by the end of 2013. However, many uncertainties remain relating to the practical implementation of the new obligations under the Regulation. For example, clarification is still needed as to the scope, extent and practical consequences of the new obligation to take out insurance cover before entering French territorial waters. There are also issues arising as to the constitutional validity of the wording of the Regulation regarding the criminal transfer of fines and the obligations imposed by those fines.

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COMMERCIAL

VTB v. Nutritek: Supreme Court confirms corporate veil cannot be pierced to make a puppeteer party to his puppet's contract


The Supreme Court has unanimously rejected VTB Capital Plc's (“VTB”) case that the corporate veil of their contractual counterparty could be pierced so as to render those controlling the counterparty jointly and severally liable under their contract. In doing so, the Supreme Court rejected the approach adopted by Mr Justice Burton in the Commercial Court in Antonio Gramsci Shipping Corporation and Others v. Stepanovs [2011] EWHC 333 (Comm), who held that, in certain circumstances, the corporate veil could be pierced so as to impose contractual liability on those controlling the corporate entity that had ostensibly entered into the contract concerned.

The background facts

VTB lent US$225,050,000 to a Russian company, Russagroprom llC (“RAP”), under a Facility Agreement. The advance was primarily to enable RAP to buy six Russian dairy companies and three associated companies from Nutritek International Corp (“Nutritek”). RAP subsequently defaulted on the loan. It was VTB's case that it was induced to enter into the Facility Agreement in relation to the loan, and an accompanying interest rates swap agreement, by misrepresentations made by Nutritek for which other Respondents were jointly and severally liable. The misrepresentations alleged were first, that RAP and Nutritek were not under common control and, second, that the value of the dairy companies was much greater than was in fact the case. VTB's case was that the misrepresentations were fraudulent. VTB sought to pursue their claims against Nutritek and others, including the individual allegedly pulling the strings behind the corporate veil, Mr Malofeev, both in tort and in contract. In order to pursue a claim in contract, and, in particular, to seek to rely upon the English jurisdiction clause in the Facility Agreement, VTB argued that the Court should pierce RAP's corporate veil on the basis of the alleged fraudulent conduct, so as to render Nutritek and others jointly and severally liable under the Facility Agreement.

The piercing of the corporate veil issue was not the only issue that the Court had to deal with. The other main issue, which logically had to be dealt with first, was in relation to jurisdiction. VTB had obtained ex parte permission to serve the respondents out of the jurisdiction. At that stage, their claim was limited to one in tort. The Respondents applied to set aside the permission to serve out and, at the same time, VTB sought to amend their case so as to introduce a contractual claim against the Respondents, based upon the argument that RAP's corporate veil could be pierced in the manner described above.

At first instance, Mr Justice Arnold set aside the leave to serve out and refused to grant VTB permission to amend. VTB's appeal to the Court of Appeal in relation to both issues was rejected. They were then given permission to appeal on both issues to the Supreme Court.

The Supreme Court Judgment

Jurisdiction issue

On the question of jurisdiction, whilst the Supreme Court took a different view to both Mr Justice Arnold and the Court of Appeal in relation to the law applicable to VTB's tortious claims, concluding that they were governed by English law rather than Russian law, they upheld the lower Courts' decision in relation to jurisdiction by a majority of 3:2, with Lords Clarke and Reed dissenting from the judgments of Lords Mance, Neuberger and Wilson.

Corporate veil issue

With regard to VTB's attempt to pierce the corporate veil in respect of RAP, the Supreme Court unanimously rejected their appeal and, in so doing, it read the last rites over the decision of Mr Justice Burton in Antonio Gramsci and Others v. Stepanovs.

Lord Neuberger gave the leading judgment in respect of the corporate veil issue. He considered the Respondents' argument that there were in fact no circumstances in which the Court could pierce the corporate veil. In essence, the Respondents' case was that previous cases that appeared to involve piercing the corporate veil were not what they seemed and were decided on a different basis. In summary, they said that piercing the corporate veil was contrary to high authority, inconsistent with principle and unnecessary to achieve justice.

Lord Neuberger obviously found the arguments in this respect finely balanced and concluded:

“In my view, it is unnecessary and inappropriate to resolve the issue of whether we should decide that, unless any statute relied on in the particular case expressly or impliedly provided otherwise, the Court cannot pierce the veil of incorporation. It is unnecessary, because the second argument raised on behalf of Mr Malofeev, to which I shall shortly turn, persuades me that VTB cannot succeed on this issue. It is inappropriate because this is an interlocutory appeal, and it would therefore be wrong (absent special circumstances) to decide an issue of such general importance if it is unnecessary to do so.”

Lord Neuberger went on to consider (and obviously reject) VTB's efforts to pierce the corporate veil in this case. In doing so, he observed that the notion that the principle of piercing the corporate veil, if the principle exists at all, can be extended as contended for by VTB, receives no support from any case save, of course, from Mr Justice Burton's decision in Antonio Gramsci. That, he said, did not necessarily mean VTB's case in this respect must fail but concluded:

“However, given the principle is subject to the criticisms discussed above, it seems to me that strong justification would be required before the court would be prepared to extend it. Once one subjects the proposed extension to analysis, I consider that it is plain that it cannot be sustained: far from there being a strong case for the proposed extension, there is an overwhelming case against it.”
Observing that the notion of joint and several contractual liability of the puppet and the puppeteer is inconsistent with the reasoning and decision in Salomon v. Salomon, Lord Neuberger said:

“In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context...”

So, in conclusion, Lord Neuberger said that, even assuming that there is jurisdiction to pierce the corporate veil on appropriate facts, VTB’s proposed pleaded case did not give rise to arguable grounds for contending that that jurisdiction could be invoked in the present case.

Comment
Whilst there were two issues before the Supreme Court in this case, namely jurisdiction and the circumstances in which the corporate veil might be pierced, if at all, it is only in relation to the latter issue that the Supreme Court’s decision is of significance. Whilst it certainly settled the debate as to whether a puppeteer can be liable under his puppet company’s contract, it still leaves open for future determination whether there is, in fact, any jurisdiction, in any circumstances, to pierce the corporate veil in a true sense of the term and, if so, what those circumstances are.

NEWS AND EVENTS

New regulations for commercial buildings in the UK: who pays for the cost of compliance?

New regulations
New regulations relating to the use of the refrigerant gas known as “R22” in air-conditioning systems are due to come into force in the UK in January 2015. The regulations will prohibit the use of R22, making it unlawful to operate, or even repair, equipment that uses R22. If a property is over 10 years old and still utilises the original air-conditioning system, then it is likely that R22 will be present. If so, the system will need to be upgraded or replaced with a system that does not use R22. Any such work is likely to be expensive. In properties which are let to one or more occupational tenants, will the responsibility for covering the cost of this fall to the landlord or the tenant(s)?

Responsibility under the lease
It is likely that tenants occupying such properties will, under the terms of the lease, be responsible for either (a) maintaining and repairing the property directly, or (b) reimbursing the landlord for such expenditure under the service charge. Whether or not the tenant’s lease obligations will cover the cost of upgrading or replacing the air-conditioning system will depend on the precise wording used.

Lease renewals
If a lease is to due be renewed before the regulations take effect, a well-advised tenant should clarify with their landlord at the time of renewal who will be responsible for the air-conditioning system and suitable wording can be inserted into the new lease. It may also be prudent to negotiate a service charge cap or obtain some other concession from the landlord at the time of renewal.

Rent review
Care should also be taken in the event of any forthcoming rent review. If significant work to a property has been, or will be, carried out (such as replacing the air-conditioning system) then this may have an effect on the market rent. Again, this will depend on the precise wording of the rent review provisions in the lease.

Contact us
Any tenants requiring clarification or assistance are advised to contact us using the details given below.
Super Lawyers UK names eight Ince lawyers as Super Lawyers and four Ince lawyers as Rising Stars.

**Super Lawyers**
- Aviation Law: Gillie Belsham
- Energy and Natural Resources: Stuart Shepherd
- Insurance Law: Tony George and Jan Heuvels
- Mediation – Civil And Commercial: James Wilson
- Shipping Law: Paul Herring, Dean Norton and Faz Peermohamed

**Rising Stars**
- Shipping Law: Jeremy Biggs, Kevin Cooper, Olivia Murray and Kijong Nam.

The Thomson Reuters US publication Super Lawyers was launched in the UK this year. The publication’s proprietary rating system is designed to pinpoint the top solicitors in the Greater London area. The publication comprises a rating service of outstanding lawyers representing each of the Law Society practice areas who have attained a high-degree of peer recognition and professional achievement. The selection process involves independent research, peer nominations and peer evaluations.

**Top Indian shipping stakeholders speak at Ince & Co’s Shipping & Offshore seminar**

A top panel of expert speakers lined up to discuss key issues in Indian shipping at Ince & Co’s seminar in Mumbai on Tuesday 16 April. The seminar provided delegates with practical and legal updates on key shipping topics.

Guest speakers included Capt. Sunil Thapar and Mr BK Mandal of the Shipping Corporation of India, the largest Indian shipping company, whilst Atul Agarwal, Managing Director of Mercator Limited, provided an insight on the tanker market.

James Leake of shipbroker ICAP also provided delegates with predictions for the tanker, dry bulk, container, LNG and offshore sectors with a special focus on India’s growing influence. He said:

> “ICAP was delighted to be part of this prestigious event, particularly as India’s place in the global shipping sector continues to grow in importance.”

Faz Peermohamed of Ince & Co also commented:

> “We were thrilled to have such eminent figures from the Indian shipping sector join us and offer our Indian clients and contacts such a detailed and wide ranging agenda.”

Ince also received recognition in 15 other categories and 28 individual lawyers were also recognised by the publication in their respective fields.

**Ince & Co promotes three new partners**

The firm has announced the promotion of three lawyers to the partnership. The new partners are:

**Piraeus**
- Evangelos Catsambas
  - Evangelos, bi-lingual in English and Greek, is a shipping specialist whose practice embraces both contentious and non-contentious matters. He specialises in charterparty and contract of carriage work, as well as advising on newbuilding and marine insurance issues. His clients include shipowners, charterers, cargo shippers and traders, P&I Clubs and hull underwriters.

**Hamburg**
- Sami Chowdhury
  - A German Rechtsanwalt, Sami advises on all aspects of German law in connection with national and cross-border financings, acting for domestic and international lenders and owners in the shipping and energy & offshore markets. His work includes new financings and security and on-going financings and finance leases. In current market conditions he also advises on complex workouts and restructurings, and foreclosures and enforcements in and outside of insolvency.

**Dubai**
- Rania Tadros
  - Rania has extensive experience in commercial arbitration and litigation within the shipping and energy & offshore markets. She has had experience handling a range of matters for clients in the offshore support and oilfield services sector. Rania has also advised on a number of shipping disputes concerning the Middle East and has a particular focus on construction disputes and claims relating to refund guarantees.

Rania is a fluent Arabic speaker and will be relocating from London to Dubai this summer.
Ince & Co senior partner, James Wilson, commented:

“I am delighted to welcome these talented lawyers to the partnership. These promotions demonstrate the strength and expertise of our rising stars in the firm. Our new partners will be based in the hub cities of Dubai, Hamburg and Piraeus. Each demonstrates exceptional commitment and focus on their areas of expertise and their markets. The promotions reflect both our clients’ demand for first-class legal advisers and our continuing investment in our people.”

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Ince & Co is a network of affiliated commercial law firms with offices in Beijing, Dubai, Hamburg, Hong Kong, Le Havre, London, Monaco, Paris, Piraeus, Shanghai and Singapore.

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