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1 ARBITRATION

1.1 BILATERAL INVESTMENT TREATY

In *Czech Republic v European Media Ventures SA – Lawtel 12.12.07* the Commercial Court interpreted the arbitration provisions of a bilateral investment treaty, in particular whether a provision providing for disputes ‘concerning compensation’ to be referred to arbitration was limited to the quantum of compensation or whether it included whether compensation was payable.

It held that the court was entitled to take into account that one of the objects of the treaty was to confer rights on an investor, including a valuable right to arbitrate. It emphasised that the court was to interpret the treaty itself rather than any contextual material which, in this case, was of little assistance in any event.

As regards the phrase "concerning compensation", the use of the word "concerning" was broad and, in light of the other provisions of the treaty, it included issues of entitlement as well as quantification.

1.2 CHOICE OF LONDON ARBITRATION – EFFECT

In *C v D – Lawtel 5.12.07* the dispute arose out of an insurance policy on the Bermuda form providing for London arbitration with New York law to apply.

The question for determination by the Court of Appeal was whether this meant that, once an award had been made, the parties’ remedies in relation to the award were limited to those available under English law.

It held that by choosing London as the seat of arbitration, the parties were to be taken to have agreed that proceedings on the award should be only those permitted by English law. The agreement incorporated the *Arbitration Act 1996* and the proper law of a contract to refer disputes to arbitration could not constitute an "agreement to the contrary" and thus import a method of challenge to the award not permitted by the seat of the arbitration – ie even if the arbitration clause was governed by the law of New York that could not qualify as an agreement ‘to the contrary’ under the *Arbitration Act 1996* to render the non-mandatory provisions redundant.

Accordingly the judge in this case had been right to grant an anti-suit injunction preventing the respondent from initiating proceedings in New York and also preventing the respondent from relying on New York law in any application to enforce the award.
2 CONTRACT

2.1 INDUCING BREACH OF CONTRACT

In *Meretz Investments NV and another v ACP Ltd and others - Butterworths Law Direct 11.12.07* the Court of Appeal considered the correct interpretation of the House of Lords’ decision in *OBG v Allan [2007] 4 All ER 545*, in which it was held that there was a distinction between the torts of inducing a breach of contract and preventing its performance.

The Court of Appeal emphasised that on a true construction of the House of Lords’ authority, in prevention cases, the defendant did not join with the contracting party in a wrong committed by the contracting party, with the result that tortious liability did not arise in prevention cases unless the preventative means used were independently unlawful. Where a party did something which he was entitled to do because of his contractual right conferred by A, the fact that it resulted in a breach of B’s contract with A could not constitute unlawful means of which A could complain in an action for damages for unlawful means conspiracy. The court had to look at the whole of the means used by the alleged tortfeasor and not simply its effect on the party rendered in breach.

This was a prevention case. It therefore had to be shown that the preventative means used by the second Defendant were ‘independently unlawful’. That could not be done because the second Defendant was contractually entitled as against the first and second Claimants to exercise its power of sale. The claim for conspiracy also failed on the ground of lack of unlawful means.
3 COSTS

3.1 CONDITIONAL FEE AGREEMENTS

In Jones v Wrexham BC – Butterworths Law Direct 19.12.07 the Court of Appeal ruled on the appropriate considerations when determining whether a conditional fee agreement fell within the Conditional Fee Agreements Regulations 2000 reg.3A as amended by the Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003. Under those regulations a CFA Lite is one pursuant to which ‘the client is liable to pay his legal representative’s fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by costs or otherwise.’

It held that the court had to construe the whole arrangement made between the solicitor and client. There was no reason why the court should not look at the whole package produced by the solicitor, the CFA agreement, the Rule 15 of the Law Society’s Solicitors’ Practice Rules letter explaining to the client the effect of the agreement (NB now replaced by the SRA) and the insurance policy recommended by the solicitor.

3.2 DETAILED COSTS ASSESSMENT

In Harris and another v Moat Housing Group South Ltd – Butterworths Law Direct 20.12.07 the court emphasised that CPR 47.6 clearly provides that detailed assessment proceedings are commenced by the receiving party serving both a notice of commencement and 'the' bill. Accordingly, if the receiving party is entitled to recover his costs of instructing more than one solicitor, then para 4.2 (2) of the Costs Practice Direction requires him to include the costs of each solicitor separately in the bill.

If the receiving party fails to include the costs of his previous solicitor in the bill of costs, and the costs judge completes his assessment of costs without regard to those costs of the previous solicitor and proceeds to a final certificate, or there is a settlement of the bill, the receiving party cannot claim a further assessment or recover more than the amount agreed.

3.3 NON-PARTY COSTS ORDER

In David Nelson v Greening & Sykes (Builders) Limited and Anor [2007] EWCA Civ 1358, the Court of Appeal held that, in appropriate cases, ie where there is sufficient identification between the non-party and a party to the proceedings, the courts have the power under section 51(3) of the Supreme Court Act 1981 to order a non-party to pay a sum of costs which have already been assessed.

3.4 SUCCESSFUL PARTY – EXAGGERATION

In Hall and others v Stone – Butterworths Law Direct 18.12.07 the court considered to what extent a defendant can be considered the victor for costs purposes where the claimant was unsuccessful in part of its claim.

It held that it is possible for an exaggeration by a claimant to be taken into account as conduct under CPR 44.3(4) (a), but for a defendant to regard himself as a winner or even
partial winner on an issue of exaggeration, the exaggeration had to be an important feature of
the claim with costs consequences – ie gross exaggeration on the part of the claimant.

What amounts to partial success under CPR 44.3(4) is a matter of fact and degree and will
vary in each case. The judge is also required to take into account relevant conduct of the
parties.
4 EU

4.1 COLLECTIVE AGREEMENT – ARTICLE 43 EC TREATY

In *International Transport Workers’ Federation and another v Viking Line ABP and another (Case C-438/05) – Butterworths Law Direct 11.12.07* the Court of Justice of the European Communities (Grand Chamber) has held, in a dispute concerning the right of a Finnish company to reflag one of its vessels under another European flag to reduce crewing costs, that (i) collective action (in this case strike action by trade unions) falls within the scope of article 43 EC; (ii) Article 43 EC is capable of conferring rights on a private undertaking which might be relied on against a trade union or an association of trade unions; and (iii) collective action constitutes a restriction which might be justified by an overriding reason of public interest provided that it is established that the restriction was suitable for ensuring the attainment of the legitimate objective pursued and did not go beyond what was necessary to achieve that objective.

In this case it could not be disputed that collective action such as that envisaged by the FSU (a union of Finnish seamen, affiliated to the ITF) had the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, in that such action prevented both Viking and its subsidiary from enjoying the same treatment in the host member state as other economic operators established in that state. Collective action therefore constituted a restriction on freedom of establishment within the meaning of art 43 EC.

4.2 WASTE


It amends *Directive 2000/59* on port reception facilities for ship-generated waste and cargo residues by including sewage as an additional type of waste to be notified before entry into the port.
5 JURISDICTION

5.1 INSURANCE

In *FBTO Schadeverzekeringen NV v Odenbreit Case C-463/06 – Butterworths Law Direct 13.12.07* the Court of Justice of the European Communities (Second Chamber) ruled on the interpretation of Article 11(2) of Council Regulation 44/2001, which refers to Article 9(1)(b).

Article 9(1)(b) provides:-

An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled, or

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,

Article 11(2) provides:-

2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

It held that the reference in art 11(2) to art 9(1)(b) was to be interpreted as meaning that the injured party might bring an action directly against the insurer before the courts for the place in a member state where that injured party was domiciled, provided that such a direct action was permitted and the insurer was domiciled in a member state.
6 PRACTICE

6.1 AMENDMENT – TIME BARRED

In *Dhillon and another v Siddiqui and others – Butterworths Law Direct 10.12.07* the court heard the Claimant’s application to reamend their particulars of claim to introduce four new claims. It found that two of the new claims were time barred, but allowed amendments in respect of the other two.

The court also allowed the Claimants’ appeal against a decision to award the Defendants summary judgment on the grounds that there was a real prospect that the Claimants might be able to establish at trial that they were entitled to the indemnity sought.

6.2 LEGAL ADVICE PRIVILEGE – REDACTION

In *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services Plc – Lawtel 11.12.07* the applicant applied for disclosure by the respondent of parts of documents which had been redacted on grounds of legal professional privilege.

The redacted parts of the document were various questions, the respondent submitting that some of the questions identified the narrow questions on which its legal department had advised whilst the answers to those questions revealed the substance of the legal advice given; that the narrative sections of the documents evidenced the substance of the legal advice given by its legal department to the claims teams; and that the substance of its advice could be inferred from a further question.

It was held that legal advice privilege applies to communications for the purpose of receiving legal advice with a lawyer in independent practice and also with an in-house lawyer employed by the client. It applies to communications by a client to his lawyer, made for the purpose of, or in the course of, obtaining advice, as well as to communications from the lawyer. It extends to any record of the advice within the client's organisation, whether by way of copy, summary or paraphrase and it does not matter whether the record was made for a communication within the organisation, for use within the organisation or purely as a record.

In this case the argument that two of the questions identified the narrow questions on which respondent’s legal department had advised justified the claim to privilege. The redactions from the narrative sections unequivocally stated the advice received from the legal department and privilege was correctly claimed for them.

As regards the paragraph from which it was suggested that legal advice could be inferred, it was held that none of the authorities dealt with the case of a document that, rather than stating the substance of the advice, was a document from which it was said that the advice could be inferred. Unless the inference was obvious and inevitable, in which case the document was in substance a statement of the advice, privilege did not attach to such documents. It was the communication between the client and lawyer which was privileged either in its original or summarised form. A document that did not contain the communication in any form contained nothing to which privilege attached.
However, in this case it made no sense to distinguish between the three different questions and so the respondent’s claim to privilege in respect of them all was upheld, although, obiter, the court said that in future it would encourage a plainer statement of the basis of the claim and an avoidance of more general assertions that a document "evidenced" or "revealed" the substance of advice.

6.3 **NEW SERVICE REGULATION**

*Council Reg 1393/2007/EC* of 13.11.07 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing *Council Reg 1348/2000/EC*. This Regulation applies in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the State for actions or omissions in the exercise of state authority. It will come into force on 13.11.08, although Article 23 relating to Member States’ communications to the Commission shall apply from 13.8.08.
7  SHIPPING

7.1  BUNKERS CONVENTION

On 21.11.07 Sierra Leone acceded to the 2001 Bunkers Convention. This means that the required number of countries have acceded to the convention for its entry into force requirements to be met. The treaty will come into force on 21.11.08.

7.2  COMMENCEMENT OF HIRE – ‘PASSING ….’

In London Arbitration 24/07 - 731 LMLN 3 the vessel was on her way from Manzanillo towards the Panama Canal when negotiations for the fixture took place. The fixture provided for the ship to be placed at the disposal of the charterers “on passing Balboa any time day or night, Sundays and holidays included” and for time to count from “the date the vessel has been placed at Charterers’ disposal”.

The dispute concerned the agreed delivery time. The tribunal found that there was nothing in the exchanges to indicate a binding agreement, from which the charterers could not resile, on the question of when time started and it was found that the charterers were entitled to re-open the position if it could be shown that the ship was “passing Balboa” at some later time than that originally used for the payment of hire.

The tribunal agreed with the charterers’ definition of “passing Balboa”, namely that it had to be on a bearing 90 degrees to that of the ship’s heading. At the time originally taken for the start of hire the ship was by no means off that port, let alone passing it. The evidence did not permit the precise time of the passing, on the charterers’ definition, to be ascertained. However, it was reasonable, in the light of the evidence that was adduced, to infer that the time taken by the charterers, namely 2000 on 27 April, was at the very least not overfavourable to them.

Accordingly, the charterers’ claim succeeded and the owners’ counterclaim would be dismissed.

7.3  DEMURRAGE

In London Arbitration 23/07 – 730 LMLN 2 the vessel was chartered on the Gencon form from one safe port /berth Zhenjiang, China to one safe port/berth Vitoria, Brazil. The disputes which arose included demurrage and despatch at the loading port, including whether there was a breach of charter in that the vessel’s gear could not lift the 20 mt specified in the charter but only 8 mt; whether the vessel was a berth or port charter, based on a claim that the insertion of WIBON must mean it was a berth charter as it would be unnecessary in a port charter. Looking at the charter provisions as a whole, this was rejected. There were also disputes as to whether various periods of time counted.

The owners’ claim for charterers’ dues at the discharge port where there were delays resulting in additional dues for wharfage and watchmen failed: as the charter provided for demurrage,
the owners would have to find a separate breach of a further obligation by the charterers to
entitle them to damages, which they failed to show.

There were further disputes at the discharge port concerning whether the charter was a berth
or port charter and the significance of the WIBON provision. There were also claims
relating to periods of time when the vessel was berthing and preparing for loading and other
delays such as awaiting trucks and stevedores: none were covered by exceptions in the charter
and none arose from fault on the part of the owners.

7.4 **NYPE – DISCHARGE – REASONABLE TIME**

In *London Arbitration 25/07 – 731 LMLN 3(2)* the vessel was chartered on the NYPE
form for “.. 1 time charter trip … within below mentioned trading limits.” It provided for the ship to
be delivered “on arrival first sea pilot station Kohsichang”, and for redelivery “on dropping outward
pilot 1 safe port Durban/Nouakchott range”.

The charterers ordered the vessel to discharge part of her cargo in Abidjan with the balance
being discharged in Lagos. Although the vessel arrived at Lagos anchorage on 18 July she did
not berth until 5 April the following year. The delays in discharging and the subsequent off-
berthing arose because of financial difficulties experienced by, and ultimately the demise of,
the intended receivers in Lagos.

Following an agreement between the parties, the remaining cargo was discharged at Cotonou,
where the ship arrived on 20 June, completing and redelivering only on 6 September.

Disputes arose under the charter, which were referred to arbitration. The tribunal ordered
that the principal dispute, namely whether the charterers were liable for the delay in
discharging the cargo and redelivering the vessel, be determined as a preliminary issue. The
main issue was whether, as owners alleged, there was a term implied into clause 8 of the
charter that the charterers would discharge the cargo within a time which was reasonable,
given the circumstances of the particular port in question.

It was held that, given the delivery location, the tribunal’s experience would suggest that the
parties anticipated loading there, at Kohsichang. However, the Durban/Nouakchott range
was a substantial range of over 5,000 miles of coastline that included nearly all the major
South African ports and numerous ports on the West Coast of Africa: there was no
indication of any intended discharging ports, just that it was probably to be expected that
they would be amongst the many covered by the very wide redelivery range.

The tribunal found that there was no authority as to what were the precise temporal
obligations on a time charter in relation, particularly, to discharging under a time charter trip,
but held that as a matter of principle there was no need, in order to give business efficacy to a
trip time charter in the present terms, to imply an obligation as argued for by the owners.
Such a charter could work perfectly well without it. If the parties wanted a temporal
obligation they could agree a period charter; or special provisions as to changes in hire rates if
the actual period exceeded a certain duration.
Further, given the fact that the parties probably had very different, albeit possibly reasonable, expectations, a tribunal could not safely form any view as to what, viewed objectively at the date of the charter, was a reasonable duration for the charter, or a reasonable time within which discharging was to take place.

In the absence of authority, the tribunal took comfort from the view expressed by Mance LJ in the Court of Appeal in an application for leave to appeal out of time in *Nagusina Naviera v Allied Maritime Inc [2002] EWCA Civ 1147* that charterers under a trip charter with no duration are under no obligation as to the time within which discharge of the cargo is to be effected.

The tribunal’s view was that even if they were wrong, and there was some implication as to reasonable time, it had to include any amount of time that was not frustrating.

7.5 RSA – ONE VESSEL ONLY PRESENTING.. AT BUYER’S OPTION

In *Cereal Investment Co v ED&F Man Sugar Ltd – Lawtel 14.12.07* the Commercial Court determined that the question on appeal would only arise in the instant case if it were held by the court that the contract identified a shipment period under which loading had to be completed by 31.10.06. The relevant contractual wording provided ‘One vessel only presenting October 2006 Shipment at Buyer’s Option, with 10 days pre-advice of vessel arrival.’

The Commercial Court held that when construing the relevant wording in the contract, it was logical to put in a full stop before the capital ‘S’ of ‘Shipment at Buyer's Option’. Accordingly, the sale contract did not require the letter of credit to contain a last date for shipment at all. It followed that the words ‘Shipment at Buyer's Option, with 10 days pre-advice of vessel arrival’ stood on their own.
8  US

8.1  U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

On 29.11.07 the U.S. Environmental Protection Agency issued plans for new emission standards, targeting emissions from "Category 3" marine engines, used primarily for propulsion power on ocean-going vessels, such as container ships, tankers, cruise ships and bulk carriers.

The plans are for performance-based standards for new and existing Category 3 engines, including:

- Tier 2 NOx limits for new Category 3 engines beginning in 2011 that would achieve a 15 to 25 percent NOx reduction.

- Tier 3 NOx limits for new Category 3 engines beginning in 2016 that would apply when ships are operating in U.S. ports and coastal areas and that would require the use of high efficiency catalytic after treatment emission control technology capable of reducing NOx emissions by 80 percent or more.

- NOx limits for existing engines (those built before Jan. 1, 2000) that would achieve a 20 percent NOx reduction; these standards would phase-in beginning 2010/2012

- PM and SOx performance standards beginning in 2011 that would apply to all vessels when they are operating in U.S. ports and coastal areas and that could be achieved through the use of low sulfur fuel or the use of exhaust gas cleaning technology.

EPA is providing 60 days for comments and has a proposed completion date of 17.12.09.

More information about the advance notice of proposed rulemaking, the timetable for rulemaking, and the government's proposal to the International Maritime Organization (which is presented as a series of amendments to Annex VI of the International Convention for the Prevention of Pollution from Ships) is available at:

http://www.epa.gov/otaq/oceanvessels.htm
This Briefing is a summary of developments in the last month and is produced for the benefit of clients. It does not purport to be comprehensive or to give specific legal advice. Before action is taken on matters covered by this Briefing, reference should be made to the appropriate adviser.

Should you have any queries on anything mentioned in this Briefing, please get in touch with Sally-Ann Underhill or your usual contact at Reed Smith Richards Butler LLP.

Reed Smith Richards Butler LLP
Beaufort House
15 St Botolph Street
London EC3A 7EE

tel 020 7247 6555
fax 020 7247 5091
email sunderhill@reedsmith.com

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