

CARRIAGE OF GOODS BY ROAD

Were RHA 1998 Conditions of Carriage applicable and reasonable?

Two points of significance arose in the recent case *Men Shun Fireworks v Goldstar Transport* in which we acted for the successful defendant hauliers.

In August 2003, M entered into an oral contract with road hauliers G for the carriage of M's two containers of fireworks from Felixstowe to Yorkshire. The containers were collected by G in September 2003 but were stolen before they could be delivered to M.

M claimed against G for the full value of the lost containers. G declined liability and maintained that the oral contract was subject to the RHA 1998 Conditions of Carriage which were incorporated as a result of a prior course of dealing. The RHA Conditions, by clause 13(2), include a one year time bar for bringing suit, time to run from the commencement of the carriage. As M's suit was not brought until over 13 months after commencement of the carriage, G contended that the claim was time barred. In the alternative, G argued that if it was liable, then it was entitled to limit its liability to £1,300 per tonne in accordance with clause 11(1) of the Conditions.

At the High Court hearing, M advanced two main challenges to the position adopted by G. First, it denied that the RHA Conditions were incorporated into the contract. However, the undisputed facts were that for some four months prior to the contract, G had provided a large number of services to M for which it had issued over 50 invoices. Each invoice prominently identified the Conditions as being applicable. Each invoice had been received, processed and paid by M, prior to haulage being performed. In addition, for each consignment a delivery note was given to and completed by M which indicated that G contracted subject to the Conditions which were available on request.

On those facts, the court had no doubt that the RHA Conditions were incorporated into the oral contract and therefore that G was entitled to rely upon them.

In its second challenge, M attempted to prevent G from relying upon the time bar provision referred to above. M relied upon the Unfair Contract Terms Act 1977. By sec 3(2), if the standard terms of business of a contract exclude or restrict liability then they must satisfy the test of reasonableness. Sec 11(1) provides that for a term to be reasonable it must be a "fair and reasonable one... having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made."

M argued that the one year time limit (for bringing a claim) in the RHA Conditions was onerous and unusual because it curtailed the usual six year limitation period for contractual claims under the Limitation Act. As a result the provision fell foul of the reasonableness requirements of the 1977 Act. Alternatively it was contended that specific notice of the provision should have been given by G to M.

G argued that a one year time limit was appropriate and in line with other time limits contained in other carriage of goods contexts such as the Hague-Visby Rules, CMR and the BIFA Conditions. In response, M attempted to distinguish the RHA time bar by pointing out that time began to run from the "commencement of the carriage"

rather than from the date of the loss.

The court rejected all M's arguments. In particular, the Judge held that it was fanciful to suggest that goods owners using road hauliers in the UK could not readily bring a claim within one year of transit commencing or that they would not be pressing the hauliers for their goods well within that period. The RHA time bar was not unfair or unreasonable and the court followed the reasoning of the Court of Appeal in *Granville Oils v Davies Turner* – see Issue 39 p1.

SALE OF GOODS

In the recent Commercial Court case *AIC v ITS Testing Services*, important issues arose about the duties of inspection companies in domestic and international trade. The facts of the case are of less importance than the detailed and wide-ranging remarks and observations of the Judge which are summarised below. Suffice to record that the court found that ITS had been negligent in making a series of errors in the initial testing of a cargo of gasoline. It was liable to the buyers of the cargo, AIC for deceit in concealing subsequent re-test results and reassuring AIC in relation to the original certificates. It must pay damages accordingly.

We understand there is to be an appeal against the decision. However the Judge's comments on the duties of inspection companies are of general interest.

In the course of his judgment, the Judge drew attention to the critical role played by inspection certificates in regulating the rights and obligations of the parties to contracts for the sale of goods and their ability to obtain payment through the banking chain. He high-lighted the following points:-

- (a) Inspection companies owe a duty of care to anyone who might be expected to rely on their certificates, especially buyers and banks. They are instructed in documentary sales because they have the facilities and expertise to determine whether sellers have performed their contracts. They are trusted to exercise independent judgment. The whole purpose of their employment is that they assume responsibility for their certificates.
- (b) The duties of inspection companies are continuing. They do not end with the issue of original certificates. They extend to correcting errors that might come to light as well as retention and analysis of samples and deciding what should be done, if an error is discovered, by way of notification to interested parties.
- (c) The tort of deceit gives rise to a liability for all damages directly flowing from the deception, whether or not reasonably foreseeable.

The Judge held that the duty of ITS had been to take reasonable care to ensure that any certificate it issued was accurate as to those matters on which it had been instructed to report. That duty included (in summary) the following implied obligations to both sellers and buyers:-

1. To determine whether sellers had performed their contract with buyers in the relevant respects.
2. To exercise independent and impartial judgment.
3. To report the result of tests independently,

The duties owed by inspection companies in domestic and international trade

accurately, clearly, unambiguously and objectively.

4. To include in any certificate, all information relevant to the validity and application of the test results.
5. To make it clear whether tests were carried out on a single item or batch of items.
6. To include in any certificate: any departures from standard condition; reference to the test method and procedure used; any standard or other specification relevant to the test method or procedure, and deviations, additions to or exclusions from the specification concerned.
7. To issue material amendments to any certificate by way of a supplement to be passed to all recipients of the original certificate.
8. Where doubts arose about the quality of tests, to ensure that tests were promptly reviewed. Where a review led to the necessity for a supplement, such must go to sellers and buyers and anyone to whom the original certificate had been provided.

Certain other issues arise from this case which remain unresolved. For example, it is not clear whether inspection companies owe duties to third parties such as carriers, charterers, terminal owners or insurers. Neither is it clear to what extent inspection companies' standard terms and conditions excluding liability for negligence, or limiting their liability, might be effective in the light of the above implied obligations. Both are important matters affecting the day to day operations of inspection companies and are likely to be problematic in the future.

The importance of providing ETAs honestly and on reasonable grounds

In *SHV Gas Supply & Trading v Naftomar Shipping & Trading* the court had to consider the circumstances in which ETAs appeared in a sale contract.

On 17 February 2003, SHV agreed to sell 2,700mt of butane to N to be shipped at Melilli (Sicily) cif Tunisia Port (Gabes or La Goulette). The contract referred to the vessel "AZUR GAZ" and to an Asbatankvoy charterparty. It also provided "Laycan: Feb 17-19 2003 consequently ETA Gabes Feb 20 am La Goulette Feb 19 pm".

On the morning of 17 February, SHV had received an email from its agents concerning "AZUR GAZ". Nothing in it suggested bad weather or berthing problems at Melilli. SHV calculated the vessel's ETAs in Tunisia accordingly.

The vessel arrived at Melilli on 17 February and tendered NOR immediately. However, as a result of unusually bad weather, the jetty became inoperative from 17 February to 2 March. On 25 February, N purported to cancel the contract, relying on the failure of SHV to load within the "agreed period" said to be 17-19 February. N repeated the cancellation on 27 February.

Subsequently, SHV brought proceedings for damages for the loss it had incurred in selling the cargo elsewhere. N defended the claim and contended that it had been entitled to terminate the contract on one or more of three bases. The first and second were rejected by the court. The third basis was that SHV was in breach of its obligation that the ETAs given were reached honestly and on reasonable grounds. N maintained that the ETAs had not been given on reasonable grounds because no attempt had been made, as it should have been, to obtain information from anyone about the situation at Melilli.

The court agreed with N's contentions. SHV was in breach of a condition of the contract with regard to the ETAs and N had therefore been entitled to terminate the contract. SHV's claim therefore failed.

SHV's estimate of the time of the vessel's arrival at the discharge ports in Tunisia was not based on reasonable grounds in the absence of any information whatever as to the berthing prospects at the loading port. Bad weather, port closure and berthing difficulties could and did occur at Melilli in winter. The estimator had had no experience of this port and it was not reasonable to assume that in February there would not be a problem.

The court went on to hold that, even if, contrary to its view, the ETAs were not a condition of the contract but should be regarded as an innominate term, the result would be the same because the consequences of the breach were sufficiently serious. Furthermore, the ETAs constituted a misrepresentation which also entitled N to cancel the contract.

CHARTERPARTY – ASSESSMENT OF DAMAGES

An interesting point on the quantum of damages in a charterparty dispute was considered in the Court of Appeal case *Golden Strait v Nippon Yusen Kubishika Kaisha* (The "GOLDEN VICTORY").

The vessel "GOLDEN VICTORY" was chartered in July 1998 by GS to NYKK for a period of 7 years, 1 month more or less in charterers' option. Clause 33 of the charter provided that if war or hostilities broke out between, inter alios, the United Kingdom and Iraq, then both owners and charterers had the right to cancel the charter.

NYKK decided to redeliver the vessel prematurely in December 2001. GS accepted the redelivery as a repudiatory breach terminating the charter. At that time, the charter had a period of approx 4 years to run.

The second Gulf war began in March 2003, some 14 months after the repudiation and some 32 months before the period of the charter would have expired. A dispute arose as to the quantum of damages recoverable by GS for the repudiatory breach by NYKK. At the time of repudiation, there was an available market for the chartering in of vessels such as "GOLDEN VICTORY" (albeit at a rate less than the charter rate) and GS chose to trade her on the spot market.

GS argued that since there was an available market, they were entitled to damages to be assessed, at the date of the repudiation, at the charter rate less the market rate for the whole of the balance of the charter term, ie approx 4 years. NYKK, on the other hand, maintained that in the light of clause 33 and the fact that a war had broken out, they would have been entitled to cancel on the outbreak of the war, so limiting their liability to pay damages to the period of only some 14 months.

The dispute went to arbitration. The arbitrator in effect accepted the argument of NYKK and held that the second Gulf war had placed a "temporal limit" on the recoverability of damages by GS.

GS appealed to the court. They contended that there was a clear test for the assessment of damages in a case such as this. Damages should be assessed at the date of repudiation as the difference between the charter rate and the market rate for the whole balance of the charter period. No, said the court. Under the compensatory rule of damages, GS were entitled to be put in the same position as they would have been in if NYKK had not repudiated. And if the charter had not been repudiated, it would (on the arbitrator's findings) have come to an end on the outbreak of the war.

Before the Court of Appeal, GS asserted that there were "powerful considerations of commercial certainty" militating in favour of adhering to the normal measure of assessing their damages (as summarised above). The court

How should owners' damages be assessed following charterers' repudiation?

disagreed. Whilst certainty, finality and ease of settlement were all important general considerations, the element of uncertainty resulting from clause 33 meant that GS were never entitled to absolute confidence that the charter would run for its full 7 year term. Further, it was often the case that the assessment of damages depended on, or was informed by, subsequent events.

In any event, this was a case where considerations of certainty and finality must yield to the greater importance of giving compensation to GS which more accurately reflected their actual loss. The appeal must be dismissed.

CONFLICT OF LAWS – ARREST OF SHIP

What was the proper law of the alleged tort?

In Issue 37 p3 we reported on the case *Anton Durbeck v Den Norske Bank*. Following an initial stay of the proceedings, the case has now been before the Commercial Court. The Norwegian bank DNB, through its London branch, provided a loan for the purchase/refinancing of three reefers. The loan was secured by mortgages on each vessel and was entered into and administered by the London branch of DNB. The loan agreement was governed by English law.

A cargo of bananas was loaded on board one of the vessels, “TROPICAL REEFER”, for intended delivery to AD in Germany. Shortly afterwards, the vessel was arrested in Panama in an action begun by DNB who claimed there had been a default in the loan agreement. As a result of a long period of arrest, the cargo became a constructive total loss and was eventually discharged. The vessel was sold by order of the Panamanian court.

AD brought proceedings against DNB claiming damages in respect of its loss on the ground that DNB had wrongfully and tortiously interfered with the performance of the bill of lading contracts under which the bananas were being carried. The issues for the court were: (i) should Panamanian or English law be used to decide if the arrest was improper; (ii) if the answer was Panamanian law then was the arrest unlawful by that law; and (iii) if English law applied then was the arrest lawful and was the court bound by an earlier decision (The “MYRTO”, 1977) which might be unfavourable to DNB.

The court held that the applicable law was Panamanian. The arrest of the vessel and loss of the cargo happened in Panama where DNB had availed itself of a judicial procedure which, in the result, caused loss to AD. The law pursuant to which that procedure was initiated by DNB should also decide whether DNB had misused its right to invoke it.

On the facts found, and applying Panamanian law, the court held that DNB was not liable to AD. Panamanian law did give to a bill of lading holder, whose cargo was lost following a valid arrest of the carrying vessel, a right to sue if the arrest, albeit legitimate as between the arrestor and the ship, was carried out in bad faith or with the deliberate intention of harming the bill of lading holder. DNB had done neither. Bad faith had not been alleged. The facts did not begin to support an inference that DNB had intended to harm AD or even that it was recklessly indifferent to whether it did so or not.

DNB was entitled to look to its own interests and to take advantage of the security to which it was lawfully entitled, even if that prejudiced AD to whom it owed no duty of care. Accordingly, AD’s claim was dismissed.

Although it was not necessary to do so, the court also held that the result would have been the same if English law had applied.

CHARTERPARTY – DEMURRAGE

London arbitrators have recently decided a dispute relating to demurrage under a voyage charter on amended Asbatankvoy form for the carriage of a cargo of chemicals.

The vessel was initially chartered for a voyage from Haifa to two ports in Taiwan. After the fixture was concluded, the parties agreed that charterers should have an option to load at Iskenderun as a second port, and the option was duly exercised. Therefore when the vessel arrived at Haifa and tendered notice of readiness, it was intended that she should load only a part cargo there, and then go to Iskenderun to complete loading. However two days after the vessel’s arrival, the charterers changed their arrangements and said that they would in fact load the full cargo at Haifa and would not load at Iskenderun.

At this time the vessel was still waiting to berth, because of problems between the charterers and the shippers. In the meantime the vessel’s tanks had been inspected by the charterers’ surveyor, and he required further cleaning of certain tanks. They were not however the tanks which would have been required for loading at Haifa if (as was still intended at that time) the vessel was going to load at two ports.

In due course the owners claimed demurrage and this was disputed by the charterers on the grounds that the notice of readiness was not valid, as the vessel was not fully ready to load when the notice was given.

The arbitrators considered that a notice of readiness had to be read in the context of the circumstances prevailing at the time it was given. When the vessel arrived and gave notice of readiness the cargo was to be loaded at two ports, and the tanks required for loading at the first port were in fact ready. The vessel was ready to do what was required of her at that time, namely to load a limited quantity of cargo in certain specified tanks. Accordingly the notice was valid, subject to any contrary terms in the charter.

The charterers relied on a clause in the charter which provided for laytime to start “...6 hours after the vessel is in all respects ready to load... and written notice thereof has been tendered.” However the arbitrators held that it was not commercially sensible to read the words “in all respects” as meaning that, at the time notice was given, the vessel had to be ready to load all the cargo, wherever it was to be loaded.

The owners’ claim for demurrage therefore succeeded.

In the recent Commercial Court case *Tidebrook Maritime v Vitol*, useful guidance has been given as to when laytime should be regarded as having commenced in circumstances where a vessel has arrived and begun loading before the first stipulated layday.

T let its vessel “FRONT COMMANDER” to V on Asbatankvoy form including V’s own voyage chartering terms. Clause 5 of the charter provided that “laytime shall not commence before the date stipulated in Pt 1 except with the charterers’ sanction”. Clause 31 required laytime to commence before the stipulated date only where “charterer consents in writing”. The laycan agreed in the charter was 9-10 January 2004.

The vessel proceeded to Escravos, Nigeria to load oil. On 6 January, V emailed T stating “Charterers confirm NOR to be tendered on arrival Escravos, and to berth/load as soon as instructed...”. V sent a similar email the next day. This was followed by a third email stating that the vessel should “tender NOR on arrival ie 08 January 0030 and we want her to berth/commence loading 08 January”.

Rejection of vessel’s tanks at first loadport – was notice of readiness valid?

When did laytime begin?

The vessel arrived at Escravos and tendered NOR at 0001 on 8 January. She berthed at 1200. Loading began at 1648 and was finished on 10 January. She sailed that day.

Demurrage was incurred on the voyage and T sent V a claim. In their calculation of the laytime at Escravos T worked on the assumption that it began at 1200 on 8 January when the vessel had berthed. V disagreed and contended that laytime should not start to count prior to 0600 on the first of the laydays, 9 January.

T began proceedings. It contended that V had in fact consented to the commencement of laytime on 8 January, (rather than 9 January) expressly or impliedly, by the terms of the emails sent by V to T. Alternatively, T contended that the fact of loading having started with the knowledge and consent of V had the same effect.

The court was unable to accept T's arguments. Laytime commenced at 0600 on 9 January as provided by clause 31 of the charter. V had not, either by the terms of its emails or by commencing loading, consented to earlier commencement of laytime. T had failed to show that the emails amounted to consent in writing to earlier commencement. The emails confirmed that NOR was to be tendered on the vessel's arrival and that V wanted her to berth and begin loading early. But the emails were not sufficiently explicit (or implicit) to have the contractual significance claimed by T.

IN BRIEF

Judicial consideration of Carriage of Goods by Sea Act 1992

The Carriage of Goods by Sea Act 1992 has over the years given rise to a number of difficulties in interpretation. The latest case in which the Act has been the subject of extensive analysis is *Primetrade v Ythan* and has been named as one of the more significant shipping cases of 2005. Space does not permit a full summary of the case which arose from an explosion and the total loss of a ship and cargo. The cargo was alleged to have been dangerous and the crux of the legal dispute was the identity of the party which was the 'lawful holder' of the bills of lading and thereby incurred contractual liabilities for the cargo. In the course of judgment, the court gave valuable guidance for the future on the meaning and operation of a number of the sections of the Act including s 2(1) and (2), s 3(1)(b) and s 5(2)(b) and (c).

In *R v Goodwin* the Court of Appeal (Criminal Division) has recently considered whether a jet ski is a vessel "used in navigation". G was riding a jet ski when he collided with another stationary jet ski causing its rider serious injuries. G was indicted under the provisions of the Merchant Shipping Act 1995 and sentenced to six months imprisonment. He appealed. The essential questions for the court were whether a jet ski and its operation by G fell within the ambit of the Act. One of the key considerations was whether it could be said that a jet ski is "used in navigation". For a variety of reasons the court held that it is not. On that ground as well as others, the appeal was allowed. It follows that new legislation will be required if the dangerous driving of a jet ski is to be the subject of criminal prosecution.

Was service of arbitration proceedings by email a valid means of service?

In *Bernuth Lines v High Seas Shipping* the main issue for the court was whether an arbitration had been validly commenced where notification of an arbitrator's appointment (and all subsequent submissions and orders and the award) had been conveyed by means of email. Sec 76(3) of the Arbitration Act 1996 provides that a notice or other document may be served "by any effective means". B objected to HS having used emails for service in its arbitration claim. B said that emails were not an "effective means" and that the persons in its office who had received them had ignored them and thought they were "spam". The court disagreed. Email was an effective

means of service. The emails were plain and straight forward and bore none of the hallmarks of "spam". B's application to set aside the award was dismissed.

The United Nations Commission on International Trade Law (UNCITRAL) has adopted a draft Convention on the Use of Electronic Communications in International Contracts. Its aim is to enhance "legal certainty and commercial predictability" where electronic communications are used both in the making and performance of international commercial contracts. The draft deals with and refines issues overlooked by or outside the scope of the Model Law on Electronic Commerce 1996 (such as the need for a communication or contract to be in writing, to have a signature, to be in original form and to record time and place of dispatch and receipt) as well as new subjects and problems arising from the use of automated systems and all forms of electronic communications. Its importance to the shipping industry is obvious.

In *Republic of Kazakhstan v Istil Group*, K began arbitration proceedings against IG in a dispute over a steel supply contract. In the course of the arbitration, K made certain applications to the court. IG requested K to provide security for its costs and an agreement was reached whereby K provided satisfactory security. Subsequently, IG applied for further security, claiming that since the agreement, there had been a "material change of circumstances". The Commercial Court Judge agreed that there had been a change of circumstances but declined to increase the security, holding that to do so would be wrong save in "wholly exceptional circumstances". IG appealed. The Court of Appeal, in an important ruling, allowed the appeal and held that the court did have power to order additional or further security, provided only that there had been a "material change of circumstances", which the Judge had found to be the case. Accordingly, IG's security figure was increased.

An unusual short point arose in *Carisbrooke Shipping v Bird Port*. C's motor vessel berthed in a port owned and operated by B. The vessel proceeded on its voyage but subsequently, damage was discovered to her hull and internals. C brought a claim in negligence against B, maintaining that the damage had been caused by a steel coil lying on the bottom of the berth at B's port. C adduced no direct evidence whatsoever of the presence of a coil. Instead, it relied on evidence as to the nature of the damage, the behaviour of the vessel at the port and as to the timing of the discovery of leaks on board. The court held that that evidence was sufficient to fix B with liability for the damage.

In Issue 36 p2 and Issue 46 p4 we reported on two cases in which assureds had presented exaggerated claims to their insurers but which the courts had ruled were not fraudulent and which must be paid. In a recent case in the Technology and Construction Court, *Danepoint v Allied Underwriting Insurance*, the same matter has been considered. In that case, wholly "overstated" and exaggerated invoices were submitted by D to AU in support of a building damage claim. They were described as "potentially fraudulent" and "at the very edge of credibility". Even so, the court indicated that D would have been given the benefit of the doubt and the claim would have been payable but for an additional "plainly fraudulent" claim for lost rent which was sufficient to vitiate the cover.

For further information on any of the summarised cases and other articles in this newsletter or for initial advice on any marine legal matter, please contact in the first instance David Padovan at our office.

UNCITRAL adopts draft Convention to supplement Model Law

Could the court make an order for further security for costs?

Did damage to claimant's vessel occur whilst berthed at defendant's port?

When exaggerated claims amount to fraud