

JURISDICTION

The Brussels Convention 1968 and anti-suit injunctions

An anti-suit injunction is an order of the English Court which requires a defendant to stay or discontinue proceedings started in another jurisdiction. The most usual reason for such an order is because of the existence of a clause in a contract expressly providing for English jurisdiction. Other reasons also arise, such as a contention that the foreign proceedings are vexatious or unconscionable. The European Court of Justice in two recent and important decisions (Gasser v MISAT and Turner v Grovit) has now made it clear that these English anti-suit injunctions in general are not compatible with the Brussels Convention 1968.

In T. v G., the European Court expressed its ruling succinctly. It said that the Convention is based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the Courts within the purview of the Convention are required to respect.

The Court then went on to hold as follows:

"...a prohibition imposed by a Court, backed by a penalty, restraining a party from commencing or continuing proceedings before a Foreign Court **undermines the latter Court's jurisdiction** to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the Foreign Court which, as such, is incompatible with the system of the Convention." (our emphasis added)

All the arguments advanced in support of the anti-suit injunction, including the alleged risk of conflicting decisions and the avoidance of a multiplicity of proceedings, were swept aside in favour of the principle quoted above.

Although the Brussels Convention has now been largely superseded by EC Regulation No. 44/2001 the rules on jurisdiction remain unchanged, and this decision is therefore applicable to cases covered by the Regulation as well as the Convention.

It therefore seems clear that for the future, anti-suit injunctions will not be available to English litigants to restrain proceedings in another EU country (or one of the non-EU states within Europe which are covered by the same rules under the Lugano Convention). The ruling in T. v G. does not apply in respect of proceedings in Courts outside Europe but it is thought that the English Court may nevertheless be influenced by it in such cases.

There is an important remaining question. What is the position in respect of anti-suit injunctions that are sought with a view to attempting to enforce arbitration agreements? Doubts have been expressed by some commentators, primarily because arbitration is excluded from the relevant EC Regulation. However, the European Court emphasised that what makes injunctions "improper" is that they interfere with other Courts' jurisdiction and the actual grounds for the injunction are likely to be immaterial. So it remains to be seen how the English Court will deal with this point as it surely will very soon.

SHIPPING

Observations on the International Code for the Security of Ships and Port Facilities

On 1st July 2004 the International Code for the Security of Ships and Port Facilities (the ISPS Code) will come into force and a "revolution" in the whole ambit of maritime security will begin. The aim of the Code is to establish an international framework involving cooperation between contracting governments, government agencies, local administrations and the shipping and port industries to detect security threats and take preventative measures in respect of security incidents affecting ships and port facilities used in international trade.

The ramifications of the Code have already been the subject of much discussion in the maritime press. Space does not permit anything like a full analysis of the Code and we therefore confine ourselves to a few necessarily somewhat random comments.

The Code was produced by the IMO and has to be read together with the new SOLAS Convention Chapter XI-2, "Measures to Enhance Maritime Security". They place a series of obligations on contracting governments, shipping companies and port facilities and their provisions are mandatory.

Governments are responsible for setting security levels (1, normal; 2, heightened; 3, exceptional) applying to their territory, including territorial sea, ships and port facilities. Different levels may be set for individual ships and ports. Governments must designate bodies within government to deal with ship and port security and may delegate to "recognised security organisations". They must approve ship security plans (and can test their effectiveness) and must undertake a security assessment of all port facilities and approve the security plans which they produce.

Shipping companies are responsible for drawing up security plans for each ship and appointing and training security officers both ashore and at sea. The ship's security plan must be submitted to government, leading to the issue of its "International Ship Security Certificate". New hardware will be required for ships in the form of automatic identification systems and security alert systems.

Port facilities must, if requested by government, appoint security officers and prepare security plans which the officer must after approval implement and monitor.

Control measures. Under SOLAS Ch XI-2, reg 9, ships intending to enter a port are required to provide advance information on request, including details of the last ten port facilities visited. Ships are subject to government inspection when in port or territorial waters. The ship's Certificate is subject to inspection. When an inspecting officer has "clear grounds" for suspecting a breach of the Code, he will have powers of detention, suspension of operations, and denial of entry to, or expulsion from, the port.

It seems inevitable that ship owners will find themselves subjected to more inspections, delays and costs as a result of the Code. Delays and costs, whether due to inspections or non-compliance with the Code, will need to be apportioned between owners and charterers. Further, compliance with the Code is very likely to impact upon certain Charterparty provisions such as those governing NOR and the calculation of laytime and demurrage. Difficulties and

delays are also likely to arise in relation to the day to day operation of the “clear grounds” provision, when for example a suspicion by an inspecting officer turns out to be unjustified.

BIMCO has produced draft time and voyage charter clauses which attempt to address a number of the problems that are considered likely to arise as a result of the Code, a few of which are indicated above. Owners and charterers should certainly have the Code in mind when negotiating new fixtures and also consider attempting to amend existing fixtures.

Whilst the Code has been welcomed in the current state of world affairs and whilst it is expected to have wide support for its general objectives, it is also anticipated that initially at least its operation will throw up numerous problems, in particular for owners and charterers of ships.

CONTRACT – BAILMENT

The liability of a forwarding agent for goods in its care

The Commercial Court, in *Euro Cellular v Danzas*, has recently considered where liability lay for the disappearance of a large quantity of mobile phones from a warehouse in Spain. EC were dealers in mobile phones. D were freight forwarders who provided carriage and warehousing services. During the contractual negotiations, D had made it clear to EC that they would do business on the standard terms of the British International Freight Association. Under those terms, D’s liability for loss of goods in its care would be limited to two special drawing rights (SDRs) per kilo. However, EC habitually used its own freight forwarders guide and the parties also agreed to comply with the guide with one amendment. The amendment was that the liability clause in respect of goods on hold should provide that full cover for the negligent release of goods would be provided by D’s insurers and full cover for any other eventualities leading to loss of goods would be provided by EC’s insurers.

EC alleged that 7,000 mobile phones had “gone missing” from a warehouse in Spain owned and operated by D. EC accordingly made a claim and alleged that D was liable in respect of the loss to the full value of the goods. They contended that the phones had been negligently released by D and that D was therefore liable in full for their loss. D accepted liability for 2,000 phones (there being a dispute over EC’s title to the balance) but argued that the goods were lost as a result of theft or robbery. D therefore maintained that EC’s insurers should meet the claim alternatively they were entitled to limit their liability to two SDR’s per kilo in accordance with the contract terms.

The dispute came before the Court. On the facts the Judge held that there was no evidence that pointed to a theft or robbery from the warehouse as opposed to a negligent release of the goods. There was available evidence from D’s computer from which it could be inferred that the goods had in fact been released. On the balance of probabilities, it was held that the goods were lost by reason of a negligent release. To the extent that EC could prove title to the goods, it followed that D were liable in full for their loss. D was not entitled to rely on the limitation provisions of the BIFA terms because of the agreed amendment to EC’s guide.

Whilst not a part of his judgment, the Judge also gave a useful indicator for the future. He said that if the cause of the loss could not have been established (on the balance of probabilities) by either party, then the proper construction of the contract as well as “justice and common sense in bailment cases”, required that the burden would have been on D to prove that the cause of the loss was an event other than negligent release. Failure to do so would have prevented reliance on the limitation provisions.

INSURANCE

In Issue 30 p 3 we reported on the Court of Appeal case *Alfred McAlpine v BAI (Run-Off)*. In that case, the Court found that a Notice of Claims provision did not amount to a condition precedent to liability under the policy. In a footnote to our report we suggested that careful drafting was required if insurers wished a Notice of Claims clause to give rise to a condition precedent. The Court of Appeal has recently considered this topic in further detail in *Pilkington UK v CGU Insurance* and distinguished it from *McAlpine*.

P effected a global liability policy with CGU. Following a problem that arose with glass panels supplied by P for the Eurostar terminal at Waterloo, London, P brought a claim under the policy. The facts of the problem with the panels are unimportant because both at first instance and in the Court of Appeal, it was held that P’s claim fell outside the scope of the cover provided by CGU’s policy. However, the Court of Appeal gave detailed consideration to the Notice of Claims provisions in the policy and the findings are of general interest and application.

The policy contained a “Claims Provisions and Procedures” section. This provided, inter alia:

Notice of Claims

Any... occurrence which might give rise to a claim... shall be reported in writing... as soon as possible... The Insured shall give immediate notice of any impending civil proceedings in connection with the occurrence...

General Condition 7 of the policy, which was headed “Observance of Conditions” provided as follows:

“The due observance and fulfillment of the terms and provisions and conditions insofar as they relate to anything to be done or complied with by the Insured... shall be conditions precedent to any liability...”

In considering the Notice of Claims Clause, the Court pointed out that this required:

- (i) that any occurrence which might give rise to a claim should be reported as soon as possible; and
- (ii) that the Insured should give immediate notice of any impending civil proceedings.

P did not in fact contest that there were failures on their part to comply with requirements (i) and (ii). The delay on P’s part in notifying CGU under (i) was some seven months. And the delay in reporting impending proceedings under requirement (ii) was at least six weeks. No explanations for the delays were offered by P.

Against that background, the Court went on to consider whether compliance with the Notice of Claims clause was or was not a condition precedent to CGU’s potential liability.

In considering the terms of General Condition 7 (quoted above) it was common ground that there were four clauses in the policy containing obligations on the part of P to which the Condition could apply, including the Notice of Claims clause. P therefore argued, following *McAlpine*, that the obligations in the Notice of Claims clause should be treated not as conditions precedent but as innominate terms which could only create a defence for CGU if P’s breaches were so serious as to give rise to a right of rejection by CGU.

No, said the Court. The policy terms in *McAlpine* were distinguishable. Further, provisions in a policy which are stated to be conditions precedent should not be treated as a mere formality. Rather, they should be construed fairly to give effect to the object for which they were included in the policy (but also protecting an insured from “being trapped by obscure or ambiguous phraseology”). In the result, and in the light of General Condition 7, compliance with the Notice of Claims clause was a condition precedent to CGU’s liability.

Did the provisions of a Notice of Claims clause amount to conditions precedent to liability?

CARRIAGE OF GOODS BY ROAD CMR

Court of Appeal decision on scope of CMR Article 23.4

In the case of *Sandeman Coprimar v Transitos y Transportes Integrales and Ors*, the claim concerned the loss of a consignment of tax seals. The seals were to have been carried from the Spanish excise office in Madrid to Scotland. CMR applied to the main contract and the sub-contracts of carriage.

The seals were intended to be attached to bottles of whisky destined for Spain. The claimants had entered into a guarantee with the Spanish tax authorities to the effect that, if the seals were not used for their proper purpose (or returned), they would pay the equivalent of the duty which would have been levied on the bottles to which the seals should have been attached. As a result of the loss of the seals in the course of the carriage to Scotland, the claimants were unable to produce the seals. Accordingly they became liable under the terms of the guarantee in the sum of approx £420,000. The claimants therefore attempted to recover their outlay from the road carriers.

It was common ground that the seals themselves physically had no commercial value. It was also clear that the sum paid to the Spanish authorities did not form part of the value of the goods (namely the seals) under CMR Article 23.2. The Court of Appeal therefore had to consider whether the claim fell within "other charges incurred in respect of the carriage of the goods" in Article 23.4.

It had been held by the Court at first instance that the case was in this respect indistinguishable from the House of Lords decision in *Buchanan v Babco*. In that case, it was held that customs duty payable following the theft of goods was in fact recoverable under Article 23.4.

The Court of Appeal disagreed. The present case was distinguishable from *Buchanan*. The guarantee given by the claimants, and the payment made under it, was **not** a duty paid in respect of the goods carried. Rather it was simply a liability arising under the guarantee as a result of the claimants' inability to produce the seals.

Accordingly the claim was not recoverable under Article 23.4 and must fail.

MARINE INSURANCE

Were Insurers liable for a vessel's agreed value following explosion and capsize?

The vessel "GAME BOY" became a constructive total loss following an explosion in her hull whilst she was lying afloat awaiting repairs and conversion at a yard in Greece. The explosion caused serious damage resulting in partial sinking. The vessel had been bought with a view to being converted for use in the offshore gambling industry.

Insurance was arranged on the vessel for the period projected for repairs and conversion and the period was subsequently extended by agreement. The agreed insured value of the hull, machinery, materials etc was US\$1.8m. The policy also contained an express warranty in these terms:

Warranted approval of Lay-up arrangements, Fire Fighting Provisions and all movements by Salvage Association and all their recommendations to be complied with prior to attachment.

Following the loss, the assured claimed the insured value from insurers. In an attempt to support the insured value, a number of documents were presented by the assured. These included a valuation report, a management agreement, documents relating to the intended employment of the vessel, a bareboat charter and documents purporting to show that the assured had paid

US\$1.24m for the vessel, supported by a sale and purchase agreement.

The insurers rejected the claim on a number of grounds and the dispute came before the Commercial Court (*Eagle Star Insurance v Games Video Co*). The assured's claim was dismissed and the insurers were granted a declaration that the policy had been validly avoided and that they were under no liability to the assured. There were three principal reasons.

First the value of the vessel had been materially misrepresented and the assured had no genuine belief that the vessel's actual value was equal to the insured value. Valuation is a matter of opinion but if the opinion is not honestly held, so that the assured is not acting in good faith, it amounts to a misrepresentation. Similarly, there is a non-disclosure by the assured of the true value. The Court concluded that the vessel was worth substantially less than the insured value and that the assured was well aware that its value was not as presented. The documents produced in support of the valuation were not genuine. Accordingly the insurers were entitled to avoid the policy for misrepresentation and non-disclosure.

Secondly, there was a breach of the Salvage Association warranty. There was a dispute as to its true meaning. The assured argued that it only needed to comply with the SA recommendations prior to the attachment of the risk and possibly at the time the policy period was extended. Insurers maintained that there was a continuing obligation throughout the policy period. The Court agreed with insurers' views: the assured's argument made no commercial sense. It was plain that the purpose of the warranty was that the SA recommendations must be complied with at inception and throughout the period of the risk. On the facts, there was failure to comply with two important recommendations. It followed that insurers were discharged from liability under the Marine Insurance Act because of the breaches of warranty.

Thirdly, the Court took the view that the claim had been supported by "fraudulent devices". The assured had sought to promote an otherwise valid claim by dishonest means. The documents prepared for the insurers were deceitful and intended to support the claim. The result of that was that insurers were discharged from any liability for the claim.

SHIPPING LIMITATION OF LIABILITY

We reported on the case of the "CMA DJAKARTA" in Issue 39 p 2. As anticipated, Charterers appealed and the Court of Appeal has now given its decision.

A fire on board the "CMA DJAKARTA" resulted in serious damage to the vessel and cargo. Owners brought a recovery action (for the cost of repairs to the ship and also salvage, general average and cargo liabilities) against Charterers CMA. They claimed breach of charter arising from the carriage of a dangerous cargo. CMA accepted they were in breach but claimed that they were entitled to limit their liability, under the 1976 Limitation Convention, to some US\$5m against the total claim of over US\$26m. The Admiralty Judge dismissed the claim. Following the principles in the "AEGEAN SEA", he ruled that charterers' right of limitation under the convention was restricted to liabilities incurred by charterers when undertaking "activities associated with ownership" of the vessel. CMA were not doing so in this case and their claim failed.

The matter came before the Court of Appeal and there were in essence two issues for consideration. The first issue was the true meaning of the word "charterer" in Art 1.2 of the Convention which reads as follows:

Court of Appeal decision on meaning of the 1976 Convention on the Limitation of Liability for Maritime Claims Arts 1.2 and 2.1

“2. The term “shipowner” shall mean the owner, charterer, manager or operator of a seagoing ship.”

By Art 1.1, a shipowner is a person entitled to limit liability. So why should CMA as charterers not be entitled to limit their liability?

The Court ruled that the word charterer must be given its ordinary meaning. No “gloss” should be given to it. There was nothing in the Convention to suggest otherwise and certainly nothing to suggest that a charterer must be acting as if he were a shipowner before he could limit his liability. The “AEGEAN SEA” was wrongly decided on this point. There was no requirement that a charterer must act in the role of a shipowner before being able to rely on the limitation provisions of the Convention.

However, this important ruling turned out to be of very limited help to CMA in the present case. The second issue was whether the nature of the owners’ claims (indicated above) were such as to fall within the category of claims which were subject to limitation as set out in the Convention. The relevant provision reads:

“Article 2. Claims subject to limitation

1... the following claims... shall be subject to limitation of liability:

(a) claims in respect of... loss or damage to property... occurring on board or in direct connexion with the operation of the ship...”

The Court held that this wording could not include loss of or damage to the vessel itself since neither the loss of a ship nor damage to a ship can be said to be loss or damage to property on board.

Accordingly, CMA were not entitled to limit their liability in respect of the owners’ claims for repairs to the ship or (for the same reason) the salvage and general average claims. CMA’s appeal therefore failed except to the extent that they were entitled to limit their liability in respect of the owners’ own liability for cargo claims.

In short, the decision means that a charterer’s ability to limit liability depends on the type of claim brought against him rather than the capacity in which he was acting when his liability was incurred.

IN BRIEF

Court of Appeal confirms legitimacy of charterers’ final voyage order

We reported on the case of the “KRITI AKTI” in Issue 40 p 1. The facts are set out in that report. The question was whether the charterers of the vessel on Shelltime3 form had given a legitimate order for a final voyage. If they had, then they were entitled to damages from owners who had refused to comply with the order. At first instance, the court found for charterers. Owners appealed. The Court of Appeal has now dismissed that appeal in a judgment that provides certainty on an important topic for owners and time charterers generally. The effect of the judgment is that (i) generally, charterers will have a vessel at their disposal for any period between the basic stated period and any margin period, and (ii) for vessels chartered on Shelltime 3 with clause 18 unamended, any final voyage may be commenced at any time during the period that the vessel is at the charterers’ disposal.

Did arbitrators have power to award costs relating to the provision of security?

In a recent London arbitration, disputes under a time charter on NYPE form were heard. Arbitrators made an interim award in the charterers’ favour and awarded them their costs. A question arose as to the costs incurred relating to the provision of security. The tribunal was aware that the Courts had allowed such costs. However, those decisions were based on the Court rules which permitted a much wider scope than was the case for arbitrators. The Tribunal was also aware that other arbitrators had allowed such costs but the Tribunal thought they were wrong. The

Arbitration Act 1996 made it clear that the costs of the arbitration which tribunals might award was just that – costs of the arbitration. Costs incurred in relation to security were not costs of the arbitration and could not therefore be awarded in an arbitration.

The legal principle that a claimant’s own impecuniosity was not something that could be taken into account when assessing the amount of his loss was established in *Liesbosch Dredger v Edison*. The claimants dredger was lost in a collision and they incurred much more expense in chartering a replacement dredger (in order to fulfil an on-going contract) than if they had bought a new one. This arose entirely because of their lack of means. But they failed to recover the cost of the charter hire and were awarded only the market cost of an alternative dredger. That decision was followed but was frequently criticised and distinguished where possible. Now at last the House of Lords (in *Lagden v O’Connor*) has declined to follow that decision and held that the impecuniosity of a claimant may be taken into account and damages assessed accordingly.

On 13th May 2004, the 1996 protocol to the 1976 Limitation Convention came into force. The principal changes resulting from this are substantial, and in some cases very sharp, increases in the amounts to which shipowners (and others) will be entitled to limit their liability. The details of the new limits are available from David Padovan on request. In addition, it is provided that states which are parties to the Convention may impose their own rules in certain areas and the UK has done so in respect of vessels intended for navigation on inland waterways, for ships less than 300 tons and for certain passenger claims.

An interesting point on foreseeability arose in *Stan James v Peter Walker*. J and W owned adjoining properties. W negligently allowed the electrical installation in his property to be inundated with rainwater over a long period. This, by a scientific phenomenon known as “tracking” led to a flashover between electrical conductors, resulting in a fire and serious damage to J’s property. As there was no other plausible explanation as to how the fire started, the Court accepted that tracking was the cause. But should it have been foreseen by W? Yes, said the Court. The risk of fire damage was small but ought reasonably to have been foreseen by W if he had thought about allowing water to inundate his electrics. It did not matter that the actual mechanism by which the risk materialised was the “technically complex and rare process” of tracking.

In the Court of Appeal case *Shamil Bank of Bahrain v Beximco Pharmaceuticals*, a short point arose on the true meaning of a governing law clause. B entered into a financing agreement with S. The governing law clause of the contract provided that “subject to the principles of the glorious Shari’a, this agreement shall be governed by and construed in accordance with the laws of England”. B defaulted on the agreement and S sued. B then raised the defence that the agreement was contrary to Shari’a law and compatibility with Shari’a was a condition precedent to the enforceability of S’s rights. The Court disagreed. English law was the governing law. Shari’a law had not been chosen as the governing law because it was not the law of a country. It could not have been intended that the secular English Court should resolve matters of religious controversy.

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.

The end of the rule in the *Liesbosch* case of 1933

Substantial increases in levels of limitation of liability with effect from 13th May 2004

Was fire damage resulting from a build up of rainwater foreseeable?

What was the governing law of a financing agreement?