

TIME CHARTERPARTY – REDELIVERY

Measure of damages payable by Charterers for delayed redelivery

In the case of *Transfield Shipping v Mercator Shipping* the court had to consider the correct measure of damages payable by charterers for late redelivery under a time charter of the vessel "Achilleas". The last permissible date for redelivery under the time charter was 2 May 2004. Charterers gave notice that redelivery was expected between 30 April and 2 May, and owners arranged the vessel's next employment on this basis. They fixed a time charter to C at a rate of US\$39,500 per day with a laycan of 28 April – 8 May. Then on 26 April the charterers advised that discharge under the vessel's sub-charter had been delayed and the vessel would not be redelivered until 8-9 May. In the event redelivery did not take place until 11 May. The owners were forced to renegotiate their charter with C and agreed a reduced rate of US\$31,500 per day in return for the extension of the cancelling date. They claimed against the charterers, as damages for late redelivery, the difference of US\$8,000 per day for the whole period of the charter with C, which amounted to more than US\$1 million. The charterers argued that the prima facie measure of damages was the difference between the market rate and the charter rate for the period from the time when the vessel should have been redelivered until the time of her actual redelivery, ie a period of about 9 days. This would have amounted to only US\$158,000. The arbitrators found in favour of the owners and awarded the full amount of the loss on the subsequent charter. The charterers appealed against this award but the Court dismissed the appeal. The owners had undoubtedly suffered a loss of more than US\$1 million as a result of the charterers' breach of contract and were entitled to be put into the same position as if that breach had not occurred. To award damages limited to the short overrun period would compensate the owners for only a fraction of their true loss. The so-called rule in *Hadley v Baxendale* should not be applied with excessive rigidity. The principle, as interpreted by the House of Lords in the "HERON II", is that a claimant is entitled to recover damages in respect of a foreseeable type of loss which either will happen in the great majority of cases or, on the facts known or available to the defendant, can be regarded as not unlikely to happen. Applying this to the facts of this case, the majority arbitrators were right to find that the claim was not too remote. It was recognised and accepted by the parties as a hazard of late redelivery that the vessel would miss her cancelling date for the next fixture and the kind of loss suffered by the owners was within the contemplation of the parties as a not unlikely consequence of the breach.

TIME CHARTERPARTY – CANCELLATION

Cancellation clause did not apply when Charter was suspended by agreement

Under a time charter of the vessel "Fu Ning Hai" there was a clause providing that if the vessel was off-hire for a period of more than 30 days the charterers would have the right to cancel the balance of the charter. Another clause provided that the vessel was due to go into dry-dock in China for about 15 days for which period the vessel would be placed off-hire and Charterers would have the option to add this off-hire period to the charter. Before the scheduled dry-docking the owners asked if the vessel could first be used for a short voyage by the head

owners, expected to last about 15 days, then go into drydock for 15 days as scheduled before going back on hire under the charter. This was agreed by the charterers, but then they purported to cancel the charter on the grounds that the vessel had been off-hire for more than 30 days. The owners challenged the cancellation and arbitrators, ruling in owners' favour, held that the right to cancel did not apply to the agreed dry-docking period. The charterers appealed to the court against this decision but the appeal was dismissed (*HBC Hamburg Bulk Carriers v Tangshan Haixing Shipping Co*). The court held that the agreement reached by the parties had effectively taken the vessel out of the service under the charterparty in a way which was not contemplated by the original charter. This was a special arrangement which did not come within the cancellation provisions at all. Effectively, the charter was suspended during the head owners' use of the vessel and in any event the standard off-hire provisions of the charter could not have been intended to cover an event of off-hire to which the charterer had agreed. The off-hire clause referred to events which prevented the full working of the vessel. If the charterer agreed to the vessel being taken out of service he was not being prevented from using the vessel; he had agreed not to use it.

SALE OF GOODS – DUTIES OF INSPECTION COMPANY

In issue no. 47 we reported on the decision of the Commercial Court in *AIC v ITS Testing Services*, where the court commented on the duties of inspection companies in international trade. The Judge's findings have now been partially reversed by the Court of Appeal. The case arose from a sale of gasoline shipped from a UK Refinery for carriage to the USA. ITS had tested the gasoline prior to shipment and certified that the fuel met the contractual specification. When it was found to be off specification at the discharge port an internal investigation by ITS revealed that it had used the wrong test method, and the results of re-testing some retained samples by the correct method suggested that the goods would have been found to be off specification if that method had been used in the first place. However the re-test results were not disclosed to the Buyers, AIC. The Judge had held that by reassuring AIC as to the validity of the original certificate, without disclosing the re-test results, ITS was liable for deceit and this gave rise to a liability for all the financial consequences, whether or not reasonably foreseeable. In the Court of Appeal, this finding was reversed. ITS had not expressly or impliedly stated that the certificate was and remained "valid" or "reliable" and the Judge was wrong to make his decision on the basis of his overall impression rather than the words actually used. The tort of deceit requires clear evidence of a false statement of fact made with knowledge that it was false, and the evidence was not sufficient in this case to justify that finding. The court did however uphold the Judge's finding that by failing to disclose the re-test results ITS had deliberately concealed material information, with the result that the time limit for commencement of proceedings for AIC's negligence claim was extended under the provisions of the Limitation Act 1980 until those facts came to their knowledge. The case therefore reconfirms that inspection companies have duties which continue after the issue of certificates and should correct any errors that may be discovered and notify all interested parties.

Deceit judgment overturned by Court of Appeal

ARBITRATION

Court of Appeal confirms restrictions on right of appeal in arbitration cases

In two judgments delivered on the same day the Court of Appeal has recently restated the limitations on the jurisdiction of that court to consider appeals against decisions of the High Court in arbitration cases.

In *ASM Shipping v TMI* the Commercial Court had dismissed an application to set aside an arbitration award for serious irregularity under sec 68 of the Arbitration Act 1996. Although the court found that there was apparent bias on the part of the third arbitrator it also found that the applicants had waived the irregularity by failing to apply earlier for the third arbitrator to be removed. The Judge refused permission to appeal against this decision to the Court of Appeal. The shipowners applied directly to the Court of Appeal and submitted that the Judge's holding that the irregularity had been waived was so clearly and obviously wrong that it was not a decision under sec 68 at all, and furthermore it contravened Article 6 of the European Convention on Human Rights, which guarantees a fair hearing before an impartial Tribunal. The Court of Appeal dismissed these arguments. The Judge had made a decision, even if it was a wrong decision, or even obviously wrong. There had been a public and impartial hearing of the application to the court under sec 68 and the Human Rights Convention did not lay down any overarching principle that an arbitration award tainted by apparent bias had to be set aside in all circumstances. In the absence of any realistic argument that the decision of the High Court itself contravened the Convention there was no jurisdiction to grant permission to appeal to the Court of Appeal.

In the second case, *CGU International Insurance v Astra Zeneca Insurance*, the Commercial Judge had allowed CGU's appeal against an arbitration award on questions of law under sec 69 of the Arbitration Act 1996, but refused AZ leave to appeal against his decision to the Court of Appeal. AZ sought to challenge this in the Court of Appeal by relying on the previous decision in the *North Range Shipping* case, which allowed the Court of Appeal a residual discretion to permit an appeal where the Judge's refusal of permission could be challenged on the grounds of unfairness under Article 6 of the European Convention on Human Rights. AZ submitted that the Judge's decision refusing leave to appeal was misguided and arbitrary, making it unfair and thus in breach of Article 6. The court accepted that the *North Range* case was binding authority and a residual jurisdiction did exist for reviewing a first instance Judge's decision to grant or refuse leave to appeal, on the grounds of misconduct or unfairness. However on the facts of the present case there was no cause to believe that the Judge's decision was unfair in this sense. Even if the decision was perverse, ie one that no reasonable decision maker could make, this was not enough. There had to be such a substantial defect in the fairness of the process as to invalidate the decision. It was likely to be an exceptionally rare case where the submission of unfairness was justifiably advanced, and the court would not permit the residual jurisdiction to become a means of subverting the statutory provisions and undermining the process of arbitration.

ARBITRATION – JURISDICTION

Incorporation of arbitration clause

The vessel "Athena" was damaged by an explosion at a Sri Lankan port, said to have been caused by Tamil Tigers terrorist action. Her owners, ST, made a claim against the war risks insurers. ST brought proceedings in New York but the insurers successfully applied for a stay of these proceedings in favour of arbitration in London under an arbitration clause in the Association Rules which were incorporated into the policy. ST contended that the relevant

rule was not incorporated into the contract of insurance and the arbitrators therefore had no jurisdiction. The tribunal held as a preliminary issue that the rule was incorporated and it therefore did have jurisdiction, and ST challenged this by applications to the High Court under sec 67 and 69 of the Arbitration Act 1996 (*Sea Trade Maritime Corp v Hellenic Mutual War Risks Association*). ST relied on the line of authority which establishes that arbitration provisions of a contract are not incorporated into another contract by general words without express reference to the arbitration clause. For example this applies in particular to the incorporation of terms of insurance policies into reinsurance contracts and incorporation of terms of charterparties into bills of lading. The court rejected ST's arguments. The rule on which ST relied applied only in "two contract cases". It was justified in those cases because the other party might have no knowledge, nor ready means of knowledge, of the relevant terms in a second contract to which he was not a party. When there was only a single contract involved this did not arise and general words of incorporation would be sufficient to incorporate an arbitration clause from another document such as the standard rules of the Association in this case.

Although this case arose under an insurance contract ST's submissions, if they had been upheld, would have had far reaching effects in other contexts. For example it is common practice for commodity sale contracts to make reference to trade association standard form contracts, and for chartering fixtures to refer to standard charterparty forms, without necessarily making express reference to the arbitration clauses which those forms contain. The decision reconfirms that the arbitration provisions are effective in such cases, even without express reference.

Footnote

ARBITRATION – RESTRAINT OF FOREIGN PROCEEDINGS

In *Kallang Shipping SA v Axa Assurances Senegal* the Commercial Court considered a dispute as to jurisdiction for claims for cargo damage. Cargo was carried on K's vessel to Dakar, Senegal under bills of lading which incorporated an English law and London arbitration clause. The cargo was damaged on outturn and the Senegalese receivers and insurers of the cargo demanded security for their claim. K's P&I Club offered to provide a letter of undertaking in its usual form subject to English law and London arbitration, but the cargo interests contended that they were not parties to the London arbitration clause in the bills of lading. They commenced proceedings in the Senegalese Courts claiming the amount of the cargo damage and also an arrest of the vessel. The Owners obtained an injunction from the English Court preventing the Claimants from proceeding under the bill of lading contracts otherwise than by London arbitration. The court found that there was evidence that the cargo interests were attempting to use the security proceedings in Dakar as a means of avoiding or frustrating the London arbitration clause. They were entitled to go to the Senegalese Courts to secure the arrest of the vessel, but not to insist on a bank guarantee that would respond to anything other than a decision in the London arbitration.

Arrest proceedings must not be used to evade arbitration agreement

ARBITRATION

31st January this year marked the 10th Anniversary of the coming into force of the Arbitration Act 1996, which radically reformed the English law of arbitration. A committee of arbitrators and lawyers was set up at the instigation of the British Maritime Law Association, the Commercial Court Users' Committee and other bodies to review the working of the Act, and its report was published at

Review of Arbitration Act 1996

the end of November 2006. Having canvassed views from a wide cross-section of those involved with arbitration in London, including representatives of the shipping and commodity trades, the committee concluded that for the most part the Act is working well and made no recommendations for change. However one area in which the committee did identify some dissatisfaction with the present system concerns the right of appeal to the court against arbitrators' decisions on their own jurisdiction under Section 67 of the Act. This procedure can sometimes lead to unnecessary expense as the court can effectively re-hear the jurisdiction argument (including factual evidence) and does not simply review the arbitrators' findings as a matter of law. Whilst not recommending any change, the committee drew attention to the fact that Section 32 of the Act provides an alternative mechanism whereby the jurisdiction issue can (subject to certain conditions) be referred directly to the court without being decided first by the arbitrators, and suggested that in appropriate cases more use might be made of this procedure.

INSURANCE

Notification of loss clause in reinsurance contract

In *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* the Commercial Court had to consider the interpretation of a commonly used 'notification of loss/claims co-operation clause' in a reinsurance contract.

A had issued a directors and officers liability policy which included cover for 'securities claims' in the USA. Following a merger between the insured company and a US corporation the company's financial statements were revised and consequently the value of its shares fell. Class actions were commenced by shareholders who alleged that they had bought their shares at an artificially inflated value. The company settled the claims following a mediation, and the insurer, A, paid the claim under the policy and sought to recover from reinsurers, including F. In response to A's claim, F alleged that it had been notified too late under the relevant clause. The clause provided that it was a condition precedent that 'the reinsured shall upon knowledge of any loss or losses which may give rise to a claim, advise the reinsurers thereof as soon as is reasonably practicable and in any event within 30 days...' F argued that A was aware of the losses at the time when the shares fell in value and the notification requirement therefore arose at that time.

The Court held that on the true construction of the clause the 'loss or losses' referred to were not those of the shareholders or even of the original insured, but those of the reinsured, A. There was no loss known to A until the settlement agreement was signed by the original insured and the shareholders. Before that, A only knew of a possible loss, which was turned into an actual quantifiable loss for purposes of the reinsurance upon conclusion of the settlement. The formal notification had been given to F within 30 days from that point.

Could management company claim on PI policy after member firm's cover had been avoided?

A worldwide organisation of accountancy firms took out a professional indemnity insurance policy in which 94 member firms were listed as assured firms. The organisation was managed by an "umbrella" corporation, GTI, which was a non-profit corporation with no practice or clients of its own. GTI itself was not listed as a member firm in the policy but an extension to the policy provided that "[GTI] is included as an assured firm but solely in respect of claims made against [GTI] arising from claims made against a member firm... insured by the terms and conditions of this policy". In the case of *Brit Syndicates Ltd v Grant Thornton International* the Court of Appeal had to consider the proper interpretation of this wording.

One of the member firms had audited an Italian company and claims were brought in the USA against the member firm (GTI Italy) and GTI by investors complaining of violations of US securities laws. GTI Italy had in fact already been expelled from the worldwide organisation and the insurers had validly avoided GTI Italy's insurance on the ground of non-disclosure. The issue in the proceedings was whether GTI remained entitled to cover under the policy. It was not disputed that the policy was a composite policy at least in the sense that each member firm was insured separately and avoidance against one did not avoid against others. The Judge at first instance held that in these circumstances the insurance also extended to GTI as an assured firm and its position should not be affected by the conduct of other assureds of which it was ignorant. However the Court of Appeal took a different view. Under the extension to the policy GTI's cover related to claims made against a member firm "insured by the terms and conditions of this policy". On its true construction, this meant a claim against an assured firm which was within the ambit of existing cover and which the insurers would be bound to pay subject to compliance by the assured firm with the terms and conditions of the policy. A claim under a policy which had been validly avoided would not fall within the policy. As the policy had been avoided ab initio in respect of GTI Italy it was not insured for the claims and any claim against GTI would not arise out of a claim insured under the terms of the policy. The insurers were therefore granted a declaration that they were not liable for the claims.

CHARTERPARTY – UNSAFE PORT

A series of unfortunate events led to a dispute between owners and charterers of the vessel "Count" which came before the High Court in the case of *Independent Petroleum Group v Sea Carriers Count Pte*. An *Asbatankvoy* charter provided for discharge at "1, 2 or 3 safe ports East Africa Mombasa/Beira Range" and the charterers nominated Beira for discharge. Just after the vessel had arrived and tendered her NOR another inbound vessel, "Vessel A", went aground in the channel linking the port to the sea. Vessel A was re-floated but then grounded again and it was only after she had been re-floated again and completed her discharging that the "Count" was able to proceed to the discharge berth after 5 days delay. Then when discharge had been completed the "Count" was unable to sail for another 4 days because in the meantime another inbound vessel had grounded in the approach channel at almost the same point as the original grounding of Vessel A. The owners claimed that charterers were responsible for all of the delays because the port was not a safe port under the terms of the charter. Arbitrators upheld the claim and the charterers appealed to the court. Charterers pointed out that the arbitrators had made no finding that the "Count" was itself exposed to danger at any time but had only found that the port was unsafe due to the grounding of two other vessels which had nothing to do with these charterers. The court held that on a fair reading of the award it was clear that the arbitrators had judged the port to be unsafe at the time of the nomination. This was based on characteristics which were more than merely a temporary hazard, namely that the buoys were out of place as a result of shifting sands and there was no accurate system for monitoring the channel. There was nothing to bar the arbitrators from finding that these characteristics were such as to create a continuing risk of danger to vessels, including the "Count", when approaching and leaving the port. The grounding of the other vessels could not be regarded as independent events breaking the chain of causation between the charterers' breach and the owners' loss.

Charterers liable for delays although chartered vessel not exposed to danger

JURISDICTION

Did jurisdiction agreement fulfil requirements of European Regulation?

An agreement relating to sponsorship of a racing yacht was the subject of a judgment of the Privy Council on appeal from the Courts of Gibraltar in the case of *Bols Distilleries v Superior Yacht Services*. SYS, a Gibraltar based yacht management company, approached BD with a proposal for the design and construction of a new yacht which was to be funded by BD and operated and raced in accordance with a programme agreed between the parties. SYS sent BD a draft contract which included a Gibraltar law and jurisdiction clause. Discussions took place between the parties and an amended version of the draft contract was sent to BD which still included the jurisdiction clause. BD had objections to some of the other terms and these draft agreements were never signed or finalized. However following further communications between the parties SYS commenced construction of the yacht and some time after construction had been completed BD gave notice of the termination of SYS' appointment as the yacht's operator. SYS sued BD in Gibraltar claiming wrongful termination and BD disputed the jurisdiction of the Gibraltar Courts. BD was incorporated in the Netherlands and argued that the case should be brought in the Dutch Courts. SYS relied on Article 23(1) of EC Council Regulation 44/2001, which provides that the court of another Member State will have jurisdiction if the parties have made an agreement conferring jurisdiction on that court which is "(a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves". The Gibraltar Court found that it had jurisdiction as SYS had a good arguable case that the Gibraltar jurisdiction clause had been agreed. BD appealed to the Privy Council in London, which reversed the Gibraltar Court's decision. Whilst there was a good arguable case that an agreement concerning some significant matters relating to the proposal had been concluded, the questions of ownership of the yacht and jurisdiction had not. The draft contracts that SYS had sent to BD could not be regarded as having formally concluded a contract, incorporating the jurisdiction clause, between the parties, and the requirements of Article 23(1) had not been met. SYS had also failed to demonstrate that the draft agreements should be regarded as written evidence of an oral agreement between the parties concerning jurisdiction.

CONTRACT – TERMS AND CONDITIONS

Standard terms printed in two different versions: which one applied?

In *Gordon Russell (UK) Limited v Warwick* the Claimant GR was a manufacturer of bespoke furniture. It provided two quotations to the Defendant W for furniture, with its standard conditions printed on the back. These included a provision that payment would be due at the end of the month following the month of the invoice. W did not accept those two quotations but he accepted a third quotation which he signed and sent back to GR. This also had some standard conditions on the back, but in a different version which provided that payment was due on "completion/sign-off". In due course GR sent W an acknowledgment of order, which again had standard conditions printed on it. However these were in the same version as the first two quotations, rather than the third one. After the furniture had been delivered, a dispute arose between the parties and W contended that payment was not due until "completion/sign-off" in accordance with the conditions that he had accepted. However the County Court Judge found that the contract was not formed until GR sent its acknowledgment of the order, which contained the first version of the conditions, and the contract therefore provided that payment was to be made at the end of the month following the month of the invoice. W appealed to the Court of Appeal but the appeal was dismissed. The Court held that there had been sufficient

evidence for the Judge to conclude that no contract had been formed at the time of W's acceptance of the quotation. It was a question of fact for the Judge and provided he had not erred in law or misconstrued the evidence his conclusions could not be interfered with.

TORT

A claim by a ship's engineer for injuries suffered whilst carrying out the replacement of a thermosensor unit in the ship's high temperature cooling line was considered by the Court of Appeal in *Dziennik v CTO Gesellschaft für Containertransport*. The accident happened when the claimant attempted to remove the unit without first cooling and draining the system, believing that the line was fitted with a "safety pocket". If there had been a safety pocket the method adopted would have been entirely safe, but as there was not, hot water and steam escaped from the line and the claimant suffered severe burns. In their defence to the ensuing claim, the shipowners relied on a discussion which had taken place a few days earlier between the claimant, the Master, the chief engineer and the second engineer. During that discussion the second engineer had described how on a previous occasion he had been drenched with cold water when attempting to replace a similar thermosensor by loosening the hexagonal nut which held it into position. The chief engineer had then described an alternative method of changing the sensor safely without shutting the system down, by unscrewing the ring that held the wire sensor in place instead of removing the whole unit. The claimant was present during this discussion and demonstrated how this would be done. However when he actually changed the sensor a few days later he did not use this method but tried to remove the unit by loosening the nut, and was injured. The judge at first instance found that the owners were liable for the claimant's injuries, but reduced his award of damages by 60% because of the claimant's contributory negligence. This was based mainly on the judge's view that the claimant had no rational basis for his apparent belief that the system was fitted with a safety pocket, and that he could therefore remove the unit without the risk of an escape of water. The shipowners appealed against the judge's finding of negligence, and the claimant cross-appealed on contributory negligence. The Court of Appeal dismissed the owners' appeal and also found for the claimant on the issue of contributory negligence. The judge had been entitled to find, on the evidence, that the informal discussion of the safe alternative method of doing the job ought to have been confirmed by a specific instruction by the chief engineer, and that if that had been done the claimant would have followed that instruction and the accident would not have happened. However the judge was wrong in his findings on contributory negligence. The owners had alleged only that the claimant was negligent in failing to adopt the method described in the informal discussion. The judge had not found that he was negligent in this respect but had based his decision on the claimant's mistaken and unreasonable belief that there was a safety pocket. This was not part of the owners' pleaded case at trial and the claimant and his counsel had not had a proper opportunity to deal with it. This was not a mere technicality of procedure but was fundamental to the fairness of the proceedings.

Shipowner held liable for injury to engineer

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.