

## JURISDICTION – ANTI-SUIT INJUNCTION

### Injunction refused because of delayed challenge to Belgian proceedings

As we reported in our Newsletter No. 51 the European Court of Justice has been asked for a ruling as to whether the English Court should be permitted to grant injunctions to stop proceedings being pursued in another EU Court in breach of an English arbitration agreement. The decision in that case (the “FRONT COMOR”) is still awaited, and for the time being the position under English law is that the Court does have jurisdiction to grant such an injunction. However it remains a discretionary remedy and will not be granted if the Court is satisfied that there are strong reasons why the action in the other EU state should be permitted to continue.

In the case of the “SKIER STAR” (**Verity Shipping v Norexa**) shipowners obtained an injunction in December 2007 ordering cargo interests to discontinue proceedings started in Belgium in January 2005. Cargo interests, represented by Holmes Hardingham, successfully applied to the Court to set aside the injunction. The cargo of fresh fruit which was discharged from the vessel in Antwerp in January 2005 was condemned by the Belgian Food Safety Authorities (FAVV) because of oil vapour contamination. The cargo interests alleged that this had arisen from a leakage from the vessel’s bunker tanks and issued proceedings against the owners in the Belgian Court. The vessel was arrested in Antwerp and security provided by the P&I Club’s Antwerp correspondent. At the same time a court surveyor was appointed by the Antwerp Court to investigate the cause of the loss. The owners also started proceedings in the Antwerp court against FAVV, alleging that the decision to condemn the cargo was unjustified and seeking an indemnity for any liability they might incur for the loss of the cargo. In due course the cargo interests’ claim and the indemnity claim against FAVV were consolidated so that the proceedings would be heard together by the Antwerp Court.

As is usual, the substantive proceedings in Antwerp were adjourned pending the outcome of the court survey procedure. The cargo interests and owners, through their respective Belgian lawyers, both participated in the presentation of information and comments to the court surveyor in the usual way. The court surveyor completed his investigations and submitted a detailed report to the Antwerp Court in March 2007. At the beginning of December 2007 the Court fixed a timetable for the exchange of Submissions by cargo interests, owners and FAVV, leading up to an oral hearing to be held in December 2008.

The owners then applied to the English Court for an anti-suit injunction to restrain the cargo interests from proceeding further with the Antwerp Court action on the grounds that the relevant bills of lading incorporated the terms, including the law and arbitration clause, of a charterparty which provided for English law and arbitration in London. The owners said that as a matter of English law these terms were binding on the cargo receivers, although the Court was informed that under Belgian law a third party holder of a bill of lading in these terms would not be bound by the arbitration clause.

A temporary injunction was granted but when the matter was fully argued before the Court the Judge agreed with

cargo interests that the injunction was not justified. It is clear from previous case law that the English Court should only grant an anti-suit injunction if it is sought promptly and before the foreign proceedings are too far advanced. Accordingly it was incumbent on the owners to take steps to obtain an anti-suit injunction from the English Court in this case long before December 2007. The owners had argued that the delay was not material because the court survey was a purely investigative process which was without prejudice to the substantive jurisdiction of the Antwerp Court, and the proceedings on the merits had not in fact progressed at all until October 2007 when the cargo interests asked for a procedural calendar to be fixed. The Judge rejected this argument. He said that the question whether the foreign proceedings were “too far advanced” should be understood and applied in a commonsense and straightforward manner, and the completion of the court survey process meant that substantial progress had in fact been made with regard to the factual investigations relevant to the Antwerp proceedings, both between cargo interests and owners and between owners and FAVV.

The involvement of FAVV as third parties in the Antwerp proceedings also amounted to a strong reason to permit the matter to proceed in Antwerp, as there would otherwise be a risk of injustice resulting from inconsistent decisions. The injunction therefore should not be allowed to stand.

## CHARTERPARTY – DEMURRAGE

The “Northgate” was chartered to load a cargo of iron ore in Brazil for carriage to China. There were two anchorages where vessels could wait for loading at the loading terminal. The “Northgate” arrived at the outer anchorage and the Master tendered notice of readiness to the charterers’ agents and to the terminal. As a result of congestion at the terminal the vessel was unable to berth for another 10 days and the owners claimed demurrage of about US\$450,000. The charterers disputed the claim and said that in fact they were entitled to dispatch of about US\$43,000.

The matter came before the High Court in **Ocean Pride Maritime v Qingdao Ocean Shipping**. The first issue was whether the Master was entitled to tender a valid NOR at the outer anchorage at all under the terms of the charter. No complete charterparty had been signed and the parties were in dispute as to what terms had been agreed in respect of the commencement of laytime. The owners said that the charterparty permitted NOR to be tendered “whether in berth or not, whether in port or not” so that the notice tendered at the outer anchorage was valid. The charterers said that an additional provision had been agreed to the effect that NOR could only be tendered at the outer anchorage if the vessel was compelled to wait there because of unavailability of space at the inner anchorage. It was common ground that it would have been possible for the “Northgate” to proceed to the inner anchorage but this would have been more costly to the owners. Accordingly the charterers argued that the NOR tendered at the outer anchorage was not valid and time only started to count when the vessel berthed and loading commenced some 10 days later.

On the issue of the terms of the charter, the court agreed with the charterers and held that the NOR tendered at the outer anchorage was invalid. However the court then had

**Invalid NOR accepted by loading terminal**

to consider the owners' alternative argument that even if the NOR was not valid it had been accepted by the terminal on the charterers' behalf and the defect had therefore been waived. On this issue, the court agreed with the owners.

The charter contemplated that the NOR would be given to the terminal which was operated by the shippers/sellers of the cargo. Although not identified in the charterparty by name, they were impliedly authorised by the charterers to waive any defect in the NOR. A defect could only be waived if the recipient knew of the facts which made it defective, but it could safely be inferred that the terminal operators knew that the vessel was at the outer anchorage when they accepted the notice. They may not have been aware of the specific terms of the charter, but if the charterers did not bring these to the terminal's attention they took this risk. Accordingly the owners' claim for demurrage succeeded in full.

## CHARTERPARTY – DEMURRAGE

**Demurrage time bar clause must be strictly complied with**

The decision of the Commercial Court in **Waterfront Shipping v Traffigra** (the "SABREWING") illustrates the importance of owners complying strictly with charterparty requirements when presenting demurrage claims. The vessel was chartered on a Beepeevoy 3 Form to carry gasoline from New York to Vancouver. The total laytime allowed for loading and discharging had already been used up before the vessel sailed from New York and further demurrage was incurred at Vancouver. In total, the owners claimed demurrage of US\$114,887.40.

Part of the claim related to additional time used in pumping out the cargo at the discharging port. This arose under clause 16 of the charterparty, where the owners undertook that the vessel would discharge the full cargo within 24 hours or maintain an average discharge pressure of 100psig at the vessel's manifold, subject to the proviso that if the shore receiving terminal facilities were unable to accept discharge of the cargo at that rate the Master should present a note of protest to the terminal. The owners could then claim against the charterers for the additional time used if this was supported by relevant documentation including in particular an hourly pumping log signed by a responsible officer of the vessel and a terminal or charterers' representative or, in the absence of a signature from a terminal or charterers' representative, an appropriate note of protest. The charterparty also provided, in clause 23, that charterers were to be discharged and released from all liability in respect of any claim for demurrage unless a claim was presented to charterers "together with supporting documentation substantiating each and every constituent part of the claim" within 90 days from the completion of discharge.

Within the 90 days period the charterers received the owners' claim for demurrage together with various supporting documents, including documents said to be the pumping logs for the voyage, but these were not on their face described as pumping logs and were not signed. The charterers also obtained independently from their own agents at Vancouver a document purporting to record pressures at the vessel's manifold which was signed by the agent, but not by the vessel's chief officer.

The charterers applied to the Court for summary judgment dismissing the owners' claim on the grounds that it was time barred because of the owners' failure to provide the specific signed documents required by clause 16 within the period of 90 days.

The owners argued that the relevant provision was clause 23, the time bar clause, and this did not require the provision of the specific documents referred to by the charterers. The owners had presented sufficient documentation to support

their claim for demurrage on a prima facie basis. The pumping logs would only become relevant if the charterers raised a defence that the vessel had failed to comply with the pumping warranty, and the owners were not obliged to anticipate such defence when presenting their claim. Amongst other arguments, the owners also said that the absence of a signature was de minimis and that as the charterers had obtained a signed record of discharge from another source in any event the "futility principle" excused the owners from any obligation to provide another signed document proving the same facts.

The Court rejected the owners' arguments. The two clauses had to be read together and the clear commercial purpose was to ensure that within the specified period the charterers were presented with a package of documents by the owners that was sufficient in itself for them to consider "each and every constituent part of the claim". This had to include documents establishing whether the owners had complied with the pumping warranty, and if the charterparty required the documents to be authenticated by the signature of a responsible ship's officer that was an important requirement and could not be regarded as de minimis. For the same reason the futility principle could not assist the owners although on different facts it might have been relevant.

The owners had also argued that even if the pumping logs had to be supplied in support of the claim for additional pumping time, the absence of these documents could not invalidate the whole of the demurrage claim, which included demurrage incurred at the loading port. Again, however, the Judge rejected this argument. It was clear from the wording of clause 23 that in the absence of the required documentation the charterers were released from "all liability in respect of any claim for demurrage". Accordingly the whole of the owners' claim was time barred and the Court gave summary judgment dismissing the claim.

## INSURANCE

We reported in our February 2007 newsletter the decision of the High Court in the case of **AIG Europe v Faraday Capital** concerning the interpretation of a "claims cooperation clause" in a reinsurance policy. That decision has now been reversed by the Court of Appeal.

Insurers provided a Directors and Officers' Liability Policy to an Irish company, which subsequently merged with a US company. There was a sharp drop in the company's share price following an announcement by the new management that it was going to restate the financial statements of the company for the last three years prior to the merger. Shareholders brought class actions in the United States against the assured and various directors alleging that the value of the shares had been artificially inflated by the incorrect financial statements made previously. The claims were duly notified to the insurers but they did not pass the notification on to the re-insurers until after the underlying claims had been settled, more than one year later. The re-insurers refused payment on the grounds that there had been a breach of the claims cooperation clause which required that: "the reinsured shall upon knowledge of any loss or losses which may give rise to a claim, advise the re-insurers thereof as soon as is reasonably practicable and in any event within 30 days..."

At first instance the Commercial Court Judge rejected this defence, as he concluded that the "loss or losses" referred to were those of the Claimant insurers and they could not be said to have known of the loss until it was established by the settlement of the underlying actions. The Court of Appeal disagreed. The loss envisaged in the clause was not (or not necessarily) the loss which would in due course constitute the

**Claims cooperation clause – When did time run for notification of a loss?**

claim. What the reinsured had to know was “any loss or losses which may give rise to a claim”. The fall in the share price was clearly a loss, from the shareholders’ point of view, as soon as it happened, and the insurers knew when they were notified of it by their insured that the loss had occurred and had in fact given rise to claims. There was no reason why they could not have notified re-insurers within 30 days of that date and they had failed to comply with the requirements of the clause. Accordingly the re-insurers were not liable.

## SALE OF GOODS

### Did FOB Contract stipulate a shipment period?

A missing full stop in a sale contract caused a dispute which ultimately had to be decided by the High Court in **Cereal Investment Co v ED&F Man Sugar**. The FOB Contract incorporated the rules of the Refined Sugar Association (RSA) and a provision for payment by letter of credit. It contained the following clause: “Shipment period: one vessel only presenting October 2006 Shipment at buyer’s option, with 10 days pre-advise of vessel arrival”.

The buyers opened a letter of credit which required presentation of a bill of lading dated no later than 31<sup>st</sup> October 2006. The sellers objected to this and asked for the L/C to be amended to allow for a bill of lading dated in October or November. The buyers refused and when the sellers also maintained their position the buyers treated this as a repudiatory breach and terminated the contract.

The buyers’ claim for damages was referred to arbitration under RSA Rules and the arbitrators found that the letter of credit was not in accordance with the terms of the contract and rejected the claim. The buyers appealed to the High Court on a question of law as to what final bill of lading date and expiry date should have been provided for in the letter of credit. However it was agreed that this question would only arise if the contract in fact identified a shipment period under which loading had to be completed by 31<sup>st</sup> October 2006. According to the sellers, the contract only required that the vessel should present during October and the buyer had the option as to the date of actual shipment. However the buyers argued that the clause required “October 2006 Shipment”.

The court preferred the sellers’ interpretation of the clause. The ambiguity in the clause could be clarified by inserting a full stop. The buyers’ interpretation would involve placing the full stop after “one vessel only presenting”. This would make no commercial sense and it was more logical to put a full stop before the capital S of “Shipment”. In other words, all that had to happen during October 2006 was the presentation of the vessel. Shipment was then at buyer’s option. It was true that the clause, construed in this way, did not specify any final period within which shipment had to be completed, but there was nothing unfair or uncommercial about that. It could indeed be in the interests of the buyers to avoid having to nominate a vessel on which the cargo could be fully loaded by the end of the month.

## LITIGATION

### Can third parties be ordered to disclose incriminating information?

In **Kensington International Ltd v Republic of Congo** the Court of Appeal had to consider issues that arose in the course of actions taken by the claimants to recover substantial sums of money owing to them by the Republic of Congo under judgments of the English Court. One of the ways that the claimant wanted to enforce its judgments was by attaching the proceeds of sale of crude oil sold by the Congo Government on the world market, but in enforcement proceedings in the English Court it was found

that the Republic had been taking elaborate steps to conceal its oil trading activities so as to prevent the claimant from identifying assets that might be seized in execution. However the claimant obtained an order from a Swiss Court attaching debts said to be owed by V, a Geneva based oil trading group, to the Republic in connection with the sale and purchase of crude oil from Congo.

The claimant then applied to the English High Court for a similar order in respect of companies in the V Group incorporated in the UK, and also for an order for disclosure of information relating to contracts for the sale of cargoes shipped from the Congo.

Subsequently the claimant obtained information which suggested that payments had been made by or on behalf of companies in the V Group to employees or representatives of the Republic of Congo by way of bribes. The claimant applied to the English Court for further orders for disclosure of information relating to those payments. The Judge granted the order and the third parties (V) appealed to the Court of Appeal. They claimed that they were entitled to privilege against self-incrimination. The Judge in the High Court had held that the privilege against self-incrimination had been removed by Section 13 of the Fraud Act 2006, but in the Court of Appeal the third parties argued that this provision did not apply to proceedings of this kind, or alternatively that it could not be applicable to this case because the disclosure order concerned information about events occurring before the Act came into force.

The Court of Appeal rejected these arguments. The Court had power under Section 25 of the Civil Jurisdiction and Judgments Act 1982 to grant interim relief in support of proceedings in other jurisdictions and the orders made against V in England were necessary in order to provide effective support for the proceedings in Geneva. The disclosure orders were not burdensome or unreasonable and any privilege against self-incrimination had indeed been removed by Section 13 of the Fraud Act 2006. The Act applied to “proceedings relating to property” and this included money. The loss of the privilege was largely, if not entirely, balanced by a provision which made information disclosed under the Section inadmissible in proceedings for an offence under the 2006 Act itself or a related offence. The offering or giving of bribes, as alleged in this case, necessarily involved a form of fraudulent conduct or purpose and would therefore be “related offences” for the purposes of Section 13. Finally, the Court did not consider that the provision should be construed as retrospective. It only changed the law in relation to future proceedings and was a purely evidential provision. It did not have the effect of penalising conduct which would not have been criminal before the Act came into force.

## WAREHOUSING

In the case of **Matrix Europe v Uniserve** the Mercantile Court had to consider two preliminary issues. The case arose from the theft of a consignment of Bluetooth mobile telephone adaptors from U’s warehouse in January 2003. B, a freight forwarding company, had been engaged to arrange for the consignment to be sent to Hong Kong by air freight. B arranged for a courier company to collect the goods and deliver them to a warehouse and they were duly delivered to U, which had recently begun providing warehousing services to B and others as part of a consortium known as Group 99, handling sea freight business. The day after the goods were delivered to the warehouse the premises were burgled and the goods were stolen. The goods owners issued proceedings against both B and U, and U issued Part 20 proceedings claiming an indemnity from B on the basis that the warehousing

### Could standard terms apply to an accidental bailment?

agreement was governed by BIFA Terms.

B claimed that the standard terms could not apply because they had never intended the goods to be delivered to U's warehouse at all. They had instructed the courier company to deliver it to another warehousing company, R, but the instructions had been misunderstood and they were delivered to U by mistake. The two preliminary issues for decision by the Court were: first, whether the delivery to U was indeed unintended, and secondly whether (if so) B was right in its contention that BIFA Terms could not be applicable.

The Judge found that on the evidence B had not intended any bailment to arise between B and U. However he did not agree with B's argument that in those circumstances the standard conditions were incapable of applying. The terms of the preliminary issue did not permit or require the Judge to find whether the standard terms did in fact apply but it was alleged by U that the "Group 99" arrangements included an umbrella agreement covering all warehousing services provided to B, and that under that agreement all such services were subject to BIFA terms. When the goods were delivered to the warehouse U had understood that they had been delivered under that agreement. The Judge took the view that if it was proved that there was indeed such an agreement and that on the true construction of that agreement the BIFA terms were applicable even in the case of an unintended delivery, the Court would recognise and give effect to that agreement. He therefore rejected B's argument that as a matter of principle the standard terms were never capable of applying in the case of an unintended delivery.

## ARBITRATION – SALE OF GOODS

### Appeal Board's discretion under FOSFA rules

In common with other commodity trade association rules, the FOSFA Rules of Arbitration and Appeal provide that if no documentary evidence or submissions are presented within one year from the commencement of the arbitration, the claim is deemed to have lapsed unless it is renewed by a further claim for arbitration notified to the other party before the expiry date. In the event of failure to renew a claim in this way, the claim is deemed to have been withdrawn and abandoned "unless the arbitrator/s shall in his/their absolute discretion otherwise determine".

In the case of **Gulf Import and Export v Bunge** the High Court had to consider whether a claim which had lapsed under this rule could be allowed to continue by the discretion of a FOSFA Board of Appeal after a first tier arbitration tribunal had refused to exercise discretion in the claimant's favour.

The claim arose from delay in discharge of the goods sold under the contract. B as charterers faced a possible claim from the shipowners and commenced protective arbitration proceedings against G. However they then waited for the shipowners to take further action and took no steps to renew the arbitration claim when the one year period expired. Their request to the arbitrators to exercise their discretion to allow the claim to proceed was rejected under Rule 3. However they appealed to the Board of Appeal and the Board said that the claim should be allowed. G applied to the court to set aside this decision on the grounds that the rules specifically gave discretion only to the arbitrators and the Board had no power to overturn that discretion.

G pointed out that in various other places in the FOSFA Rules it is expressly provided that discretion to extend time limits is given to the arbitrators or the Board of Appeal as the case may be. They therefore argued that the

omission of any reference to the Board of Appeal in Rule 3 must indicate an intention to exclude such discretion.

The Judge disagreed. He said that Rule 7 of the FOSFA Rules gives an unsuccessful party an unfettered right of appeal against any first tier arbitration award. In this case the right of appeal necessarily involved the Board reconsidering the question of discretion and it had power to do so under Rule 7 regardless of the absence of any specific reference in Rule 3.

## IN BRIEF

The Court of Appeal recently had to consider a dispute under a liability insurance policy on the Bermuda Form, which states that it is governed by the internal laws of the State of New York but also contains an arbitration clause providing for disputes to be "finally and fully determined in London, England under the provisions of the English Arbitration Act". A claim under the policy was disputed and referred to arbitration in London. The tribunal made a partial award and the insurers indicated their intention to apply to the US Federal Court under provisions of US law which permit awards to be vacated where arbitrators have manifestly disregarded the law. The claimant applied to the English Court for an anti-suit injunction preventing the insurers from initiating proceedings on the award in New York.

The proceedings were held in private and the parties cannot be identified, but as the decision is of some interest it has been reported under the name of **C v D (London Arbitration Clause)**. The Commercial Court Judge, whose decision has been upheld by the Court of Appeal, held that by choosing England as the seat of the arbitration the parties had expressly or impliedly agreed that any proceedings seeking to attack or set aside the partial award would be only those permitted by English law. It was therefore not permissible for the insurers to bring proceedings in New York or elsewhere for that purpose.

Holmes Hardingham acted for the Chinese buyers of a cargo of Brazilian soya beans who appealed to the High Court against a FOSFA Appeal Award in the case of **San He Hope Full Grain v Toepfer International**. The court remitted the award for reconsideration by the Appeal Board and the proceedings are therefore not yet concluded. However the court's judgment is of interest as it reconfirms that the provision in the standard FOSFA default clause that damages "shall be limited to the difference between the contract price and the actual or estimated market price on the day of default" does not mean that there is an automatic entitlement to such damages in all cases. The court confirmed that the clause had been correctly interpreted by the first tier umpire, who stated that the clause requires the tribunal first to assess whether any loss has been suffered as a result of the default and then limits such damages (if any) to an amount equal to the difference between contract and market price.

**Contract governed by New York law but subject to London Arbitration – Challenge to award is governed by English law**

**Sale of goods - Interpretation of FOSFA Default Clause**

*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 Nicholas Walser at our office.*