Shipping

CLYDE&CO

Newsletter

July 2015

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Expert legal advice in uncertain waters

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For further information about any of the issues raised in this newsletter, please do not hesitate to speak to your usual contact or the authors listed herein. You can also email us at info@clydeco.com

Ballast Water Management Convention: The tricky waters of compliance

Beth Bradley and Chris Moxon

One of the great difficulties with worldwide regulation is ensuring consistent implementation and compliance. The IMO's Ballast Water Management (BWM) Convention ratified by more than 40 states but not yet in force, is a case in point.

In assessing whether to approve BWM systems as meeting the IMO's Ballast Water Performance Standard (the IMO Standard), flag states that have signed up to the Convention must take into account the guidelines set out by the IMO (Resolution MEPC 174(58)). Those guidelines are also intended to inform shipowners and technology manufacturers about the evaluation procedure for the equipment.

The US Coast Guard (USCG) has, however, developed its own ballast water performance standard (the USCG Standard) and guidelines for approving systems. The IMO Standard and USCG Standard are identical, but the respective guidelines are not.

As a result, shipowners and technology manufacturers should take care to ensure that both the IMO guidelines and USCG guidelines are consulted when considering developing, fitting and using BWM systems. A BWM system approved as meeting the IMO Standard may be eligible for approval as an Alternate Management System (AMS) by the USCG, entitling the ship to which it is fitted to trade in US and Canadian waters without full type approval.

That said, AMS approval only lasts five years beyond the date when the ship would otherwise be required to comply with the USCG Standard. Although the AMS regime is a useful *"stop gap"* measure, the lack of clarity about whether or not BWM systems approved under the IMO guidelines will ultimately obtain USCG-type approval – and even whether or not the IMO guidelines will be applied consistently in the BWM Convention's signatory states – is unwelcome.

The IMO seems alive to these issues in obtaining approvals. It initiated a study on the implementation of the IMO Standard in late March, exploring the similarities and differences in testing and certification of BWM systems worldwide.

The survey was open to technology manufacturers and shipowners (among others) until 1 June 2015. If the study assists in getting nearer to a consistent worldwide approach to testing BWM systems and applying the guidelines for approval, it will have been a success.

Once the Convention has come into force, shipowners and operators should ensure that ballast water samples taken to monitor regulatory compliance are representative of the entire discharge, and that the operation of multi-use tanks does not give rise to mixing of different water types.

Failure to keep a close eye on these matters could lead to fines and delays in ports for breach of IMO or USCG guidelines, with the risk of charterparty disputes ensuing. A ship *"unduly detained or delayed"* by Port State Control under the BWM Convention may, however, be entitled to compensation.

First published in The Motorship, May 2015 issue

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Jurisdiction of the Admiralty Court reviewed in *Harms v Harms*

Marcia Perucca

The Admiralty Court ruled in a recent decision[1] that a German ship management company was entitled to issue proceedings in the English Court to obtain security for its claims against the German shipping companies in a dispute subject to German arbitration.

Background

The dispute between a German ship management company and the owners of six tugs registered in Germany arose from the owners' decision to sell the vessels to one of their competitors. The management company claimed this was a breach of the partnership agreements to which it was a party, and which gave it pre-emptive rights to purchase four of the vessels. The owners, on the other hand, said they had discovered that two of the management company directors had been taking secret commissions from the builders of three of the vessels which led them to lose trust in the company and, as a result, to terminate ship management agreements that were also in place between the parties.

The claims in the English court

The ship management company issued six in rem claims against the owners in the English court. There were two separate sets of claims. The first was a claim for damages for the unlawful termination of the ship management agreements by the owners, by way of selling the vessels without notice to the management company (the ship management claims). The second was a claim for breach of the articles of association of the corporate entity of the owners, which allegedly required notice of the sale of the vessels to be given to the management company, a shareholder in the corporate entity (the articles of association claims).

The purpose of the management company in issuing the claims in the English court was to obtain security for its claims in arbitration and German court proceedings. Although the in rem forms were not served and none of the vessels had been arrested, the owners filed an acknowledgement of service, and entered an appearance for the purposes of challenging jurisdiction. They later changed their approach, indicating they wished the English court to hear the ship management claims, but not the articles of association claims. The management company's position was that it was content for both substantive claims to be decided in the English court, but not just the ship management claims.

The ship management claims

The ship management agreements provided for German law and arbitration. On the other hand, it was common ground that the claims fell within the jurisdiction of the Admiralty Jurisdiction of the High Court by reason of s.20(1)(a) and s.20(2)(h) of the Senior Court Act 1981, as amended, these being claims arising out of an agreement relating to the use of a ship. This allowed the management company to issue the in rem claims in order to obtain security.

In submitting that the claim should be heard by the English court, the owners argued that there had been an agreement between the parties, in the exchange of submissions, to confer jurisdiction on the English court. Upon an analysis of the submissions, this argument was rejected by the court.

The owners also argued that once an in rem claim had been issued, it was always open to a defendant to file an acknowledgement of service and submit to the jurisdiction and that they had decided to do so in relation to the ship management claims.

[1] *Harms Bergung Transport und Heavylift GmbH & Co KG v Harms Offshore AHT "URANUS" GmbH & Co KG & 5 Ors sub noms THE "URANUS" : THE "MAGNUS"* (2015)

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Simon J held that the starting point was Council Regulation (EC) No. 44/2001 (the Brussels I Regulation). He referred to Article 31, which provides that an application can be made to the courts of one member state for security which is available in that particular member state, even if, under the Regulation, the court of another member state has jurisdiction over the substance of the matter.

Simon J held that the management company's action in issuing in rem claim forms in order to obtain security was both unexceptional in domestic terms and consonant with the Brussels I Regulation. The Court, he said, *"will normally recognise both the obligation to submit disputes to arbitration or courts in a foreign jurisdiction, and the claimant's right to obtain and retain security in respect of such disputes"*.

Simon J concluded that the proceedings had not been brought in breach of the arbitration clause, and the owners were not entitled to submit to the jurisdiction of the court for the substantive claims. These claims were, therefore, stayed pending the provision of security in the arbitration proceedings.

The articles of association claims

The article of association claims were linked to proceedings before the German courts, which had jurisdiction under Article 22.2 of the Brussels I Regulation since the proceedings had as their object the validity of decisions of companies whose seat was in Germany.

The issue in dispute in the English court was whether the in rem claims issued in England fell within the admiralty jurisdiction under section 20 of the Senior Courts Act 1981.

The management company argued that they fell under section 20(2), being either (a) a claim to the possession or ownership of a ship or the ownership of any share therein; or (b) a question arising between the co-owners of a ship as to possession, employment or earnings of that ship.

The purpose of the German proceedings was to nullify the resolutions to sell the vessels. The management company argued that, if the resolutions were annulled, their rights of pre-emption would be vindicated, making it a claim to the ownership of the vessels. The claim forms in the English court characterised the sale of the vessels as constituting a breach of the articles of association and a claim in tort and/or breach of statutory duties. The court concluded that in both sets of proceedings, the claim was essentially for damages resulting from the sale of the vessels, and could not be properly characterised as a claim to the ownership of the vessel (within the meaning of s.20(2)(a)).

As for s.20(2)(b), Simon J held that the section was concerned with co-ownership of vessels or shares in the vessel, and not with claims relating to the ownership of shares in companies or other legal entities which may own vessels. It followed that the English court had no jurisdiction in relation to the articles of association claims.

Comment

Simon J's decision confirms that in circumstances where a claim falls within the admiralty jurisdiction, a party's right to issue a claim in order to obtain security will be upheld even where the dispute is subject to an arbitration agreement or to the jurisdiction of a foreign court.

High Court upholds refund guarantees despite findings in China of fraud, and injunctions against the guarantor

Tom Kelly and Sapna Jhangiani

The case of *Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd* (2015) concerned two refund guarantees for two hulls (38 and 39) built for Spliethoff's Bevrachtingskantoor BV (SBV), the Claimant. The refund guarantees were provided by the Bank of China (BOC). As the vessels were not delivered on time, SBV claimed the repayment of instalments from the shipyard. SBV claimed payment from BOC under the guarantees after obtaining arbitration awards to that effect.

In parallel, the shipyard brought proceedings against SBV, in China, claiming SBV had been fraudulent in assisting engine manufacturers supply second hand engines to the vessel. The Chinese Court upheld fraud, and issued orders requiring SBV to provide a guarantee in the Chinese Court, and preventing any payment out under the BOC guarantees.

Consideration of the guarantees

The guarantees were found to be on terms consistent with *"on demand"* guarantees, as considered in a number of recent cases[1]. This was, notwithstanding the inclusion of a proviso to the effect that where arbitration was commenced, payment needed to be made only in accordance with the terms of any award obtained by SBV.

BOC's main arguments on the issue of the guarantees were that:

(a) The arbitration award in the hull 39 reference was not an award for the purposes of the guarantee which triggered an obligation on the part of BOC to pay under the hull 39 guarantee

(b) On the basis that the guarantees were true guarantees, or sureties, they were discharged by the findings of fraud against SBV in China

As to argument (a), the Court held that any demand by SBV was valid, regardless of any arbitration award. The demand was independent of any dispute between SBV and the shipyard, and the disputes served only to defer payment under the guarantee. They did not affect the validity of the demand itself. The Court, therefore, held that once the arbitration award ordered the instalments to be repaid, and the shipyard failed to repay those instalments, BOC was obliged to pay under the guarantee.

In light of the Court's decision that the guarantees were performance bonds, argument (b) fell away. However, the Judge did go on to consider the situation had the guarantees been sureties in light of the wording, which stated that *"our obligations shall not be affected or prejudiced by any dispute between you as the Buyer and the Seller"*. The Court held that this would include any finding of fraud against SBV. In particular, the Judge held that the word *"dispute"* was sufficiently wide to cover a situation where a judgment had been handed down following a dispute. There was, therefore, no need for a matter still to be contentious in order to count as a dispute.

The Court also considered the orders against BOC in China.

Chinese orders

Issue 1

First, the Court had to consider, as a matter of Chinese law, whether the orders against BOC, preventing any payment out under the guarantees, were still current. Based on expert evidence, the Court considered that the orders were indeed still current and, therefore, remained live. Certainly, the fact was that the Court in China regarded those orders as live.

[1] *Such as Wuhan Guoyo Logistics Group Co Ltd v Emporiki Bank of Greece SA [2012] EWCA civ 1629 and Meritz Fire and Marine Insurance Co Ltd v Jan Denul NV [2011] 2 Lloyd's Rep 379*

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Issue 2

The Court then considered whether those judgments should be recognised by the English Courts, despite being obtained in breach of the law and jurisdiction clause of the relevant contracts. The Court considered the fact that SBV had opposed jurisdiction of the Chinese Court to the full extent possible, but that when the Chinese Court ruled against it, and assumed jurisdiction, SBV took full part in defending the claims in China.

The Judge held, therefore, that the numerous clear authorities stating that it would be *"manifestly against public policy to give recognition to the foreign judgment at the behest of the defendants who have procured it in breach of an order emanating from this court"*[2] did not apply. Where a party takes full part in foreign proceedings, even where those proceedings were started in breach of a jurisdiction clause and, in fact, of an anti-suit injunction, that party is held to have submitted to that jurisdiction, and loses its shield against recognition of the foreign judgment.

Despite the enforcement of the Chinese Court Orders, the Court declined to order a stay of enforcement of the guarantees. The Judge held that when considering an English law contract, such as the refund guarantees, English law regards illegality by the place of the performing party's domicile or place of business as irrelevant. The Judge, therefore, ordered judgment for SBV in the full amount of the guarantees claimed.

[2] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka [2002] EWHC 104*

"SFL HAWK" – Passing of title under a bill of lading

Giyan Tang and Charlotte Gale

A holder of a bill of lading was deemed the owner of the cargo under section 25 of the Sale of Goods Act, even where the particular terms of a back to back sale contract indicated property only passed on payment, rather than on transfer of the bill.

Background

PT Awindo International (PT Awindo) were the shippers of a cargo of frozen swordfish, which they agreed to sell to Fishco BVBA (Fishco) (the First Contract). On the same date, Fishco also contracted with the Claimants, Carlos Soto Sau (Carlos Soto) for the on-sale of the cargo at a profit (the Second Contract).

The terms of the two contracts were materially similar with one main exception – the First Contract contained a rejection clause which was not replicated in the Second Contract.

In both cases, the cargo was to be paid for by an irrevocable letter of credit providing for payment within 45 days of shipment under the First Contract and within 60 days under the Second Contract.

The cargo was shipped on board the "SFL HAWK" and a *"to order"* bill of lading was issued by Maersk, naming PT Awindo as the shipper and Carlos Soto as the notify party. This bill of lading was endorsed in blank and passed to Fishco, who delivered the bill of lading and associated documents to Banco Santander, with whom Carlos Soto had opened the letter of credit. Although Banco Santander alerted Carlos Soto to discrepancies in the documentation, Carlos Soto waived these and collected the documents, amongst which was a packing list stating *"LC 45 days after shipment with rejection clause"*.

At discharge, the temperature of the cargo was found to be overly high. Consequently, the Vigo Port Authority rejected the cargo, which meant that it could not be sold in the European Union. No payments had yet been made for the cargo by either party.

Fishco presented the rejection certificate to their bank, who cancelled the letter of credit in favour of PT Awindo. Carlos Soto paid Fishco in full for the cargo, before reselling the damaged cargo back to Fishco for 10% of the invoice value, by way of mitigation.

PT Awindo brought a claim against Maersk in respect of their losses. The parties settled on terms where PT Awindo warranted that they were the lawful holder of the bill of lading, that no other party had title to sue and that they were authorised to act on behalf of all other cargo interests.

Irrespective of that settlement, Carlos Soto brought their own claim against Maersk for damages.

Maersk agreed that Carlos Soto had paid for the cargo, were the lawful holder of the bill of lading and *were entitled to possession* of the cargo at all relevant times. Maersk did not agree that Carlos Soto *were the owners* of the cargo at the relevant time or that they had suffered any loss.

The Court was therefore asked to consider the following points by way of preliminary issue:

Did property in the cargo pass such that Carlos Soto were at all relevant times the owners of the cargo?

Whilst endorsing and transferring a bill of lading is prima facie evidence that there is an intention to pass property, this does not necessarily always follow. The question of passing of property is one of *"actual intention"*.

The First Contract and letter of credit provided for delayed payment, the right to reject the cargo and the right to cancel the letter of credit. These particular features led the Court to conclude that the parties did not intend for property in the cargo to pass until PT Awindo had received payment from Fishco. As Fishco had cancelled the letter of credit, property remained with PT Awindo.

Carlos Soto raised an alternative argument that they received the bill of lading in good faith, with the consent of the seller and without notice of any rights of the original seller to retain title. It was submitted that Carlos Soto should be considered the owners of the cargo pursuant to s.25 of the Sale of Goods Act 1979 (SGA 1979).

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Maersk argued that Carlos Soto should have been put on notice by the packing list, which referred to a rejection clause. The Court accepted that even if Carlos Soto had seen the words on the packing list (which, on the evidence, they had not), they would not have realised property in the cargo may have been retained by PT Awindo.

The Court was satisfied that Carlos Soto were the owners of the cargo at all relevant times pursuant to s.25 of the SGA 1979.

Was the claimants' loss caused by Maersk's breach of duty?

Maersk argued that the true cause of Carlos Soto's loss was not their negligence as carrier, but Fishco wrongfully retaining payment from Carlos Soto despite not having paid PT Awindo. Fishco's retaining payment was an *"intervening act"* breaking the chain of causation, meaning that Maersk could not be liable.

The Court disagreed with this analysis. The cargo had been damaged prior to, or upon discharge at Vigo, so that the loss crystallised before any intervening act.

The Court recognised that the chain of causation could only be broken if the impact of an intervening act was severe enough to *"obliterate"* the previous wrongful act of the carrier. It was held that Fishco's actions did not obliterate Maersk's breach.

Comment

A carrier should exercise caution when settling a claim with a shipper because the holder of the bill of lading can also be deemed the owner of the cargo in their capacity as a *"bona fide"* purchaser under s.25 of the SGA 1979.

Reminder on the measure of damages for non-delivery

Leon Alexander

A recent decision[1] of the English Court has underlined that where there is an available market, the prima facie measure of damages for non-delivery is the difference between the contract price and the market price of the goods, and not the loss of profit claimed by the aggrieved party.

Facts

A Moroccan steel company entered into two contracts for the purchase of steel billets from a Dubai based company. Following the seller's failure to deliver the goods under both contracts, the buyer commenced proceedings and sought damages for non-delivery.

Section 51 of the *English Sale of Goods Act* 1979 provides:

"51. Damages for non-delivery

…

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver."

The buyer contended that as the seller's non-delivery caused production to stop at its factory, it should be entitled to damages for its loss of profits. The seller was not represented at the hearing but, in its pleadings, had argued that as there was an available market for the goods in question, any damages should be assessed by reference to the prima facie rule set out in section 51(3) above.

Decision

Notwithstanding the interruption to the buyer's production, the Court ruled that there was an available market for the goods and that section 51(3) applied. The Court added that the buyer's loss of profit claim was, in any event, too remote and would not, therefore, have been recoverable.

In assessing the market, the Court took the average price of similar contracts entered into by the buyer which evidenced the relevant market price.

Comment

Whilst there is nothing ground breaking in this decision, it is a timely reminder that displacing the measure of damages for non-delivery as set out in s. 51(3) is no mean feat.

[1] *Somasteel SARL v Coresteel DMCC [2015]*

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"DC MERWESTONE" – Fraudulent device rule receives firm support from the Court of Appeal

Jaime Albors

It is well known that English law takes a very strict approach towards fraudulent claims. An insured who makes a fraudulent claim will not recover anything under his policy of insurance even if he could have made a recovery, had he made an honest claim.

The rationale stems from the principle of good faith in insurance contracts, and is supported by public policy reasons. An insured should not be led into thinking that he loses nothing by submitting a fraudulent claim.[1]

With regard to fraudulent devices (i.e. where an insured uses a fraudulent device to promote an otherwise valid claim), the Court of Appeal judgment in "The AEGEON"[2] held (although obiter) that the rule of fraudulent claims should extend to fraudulent devices provided that the fraudulent device:

(i) Directly relates to the claim and intends to promote it

(ii) If believed, would objectively yield a not insignificant improvement to the insured's prospects

Against this background, an action[3] was brought by the owners of the "DC MERWESTONE" against underwriters who had refused coverage of a loss suffered by the owners of the vessel when water flooded the main engine room. The underwriters defended the claim, inter alia, on the basis that the insured had used a fraudulent device by recklessly misrepresenting that an alarm had been heard by the Master of the vessel. A member of the crew had sent a letter to the underwriters informing them that the bilge alarm had sounded on the day of the water ingress, but that it had been ignored by the crew. It later transpired that the alarm had not sounded, and that the member of the crew had no grounds to believe that the alarm had sounded. He believed that it would *"assist the claim if he minimised any opportunity for attributing fault to the owners, rather than the crew, in relation to the cause of the casualty"*.

At first instance, Popplewell J decided to follow the judgment of Mance LJ (as he then was) in "The AEGEON" and agreed with the underwriters. The Court of Appeal confirmed Popplewell J's judgment and upheld Mance LJ's test in "The AEGEON". The Court of Appeal's reasoning was that there were powerful public policy reasons, such as the importance of honesty in the claims process, and that insurance contracts are governed by the duty of good faith.

Comment

This judgment will no doubt be welcome by underwriters as it strongly supports both the test set out in the "The AEGEON", and the public policy considerations behind the rule of fraudulent claims and fraudulent devices.

Although Popplewell J, at first instance, was reluctant to follow the fraudulent device test in "The AEGEON", and expressed support for a test that would allow the Court to take proportionality into account, he ultimately decided to follow "The AEGEON" and support the fraudulent device principle. The fact that the new Insurance Act 2015 which received Royal Assent in February 2015, and will come into force as of 12 August 2016, does not consider the position in relation to fraudulent devices, highlights the importance of this Court of Appeal ruling.

[1] *Manifest Shipping co Ltd v Uni-Polaris Insurance Co ("The STAR SEA") HL (2003)*
[2] *Agapitos v Agnew (2002)*
[3] *(1) Versloot Dredging BV (2) SO DC Merwestone BV v HDI Gerling Industrie Versicherung AG & 6 Ors (2014)*

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Man over board: Was it suicide?

Heidi Watson and Ruth Bonino

What does an employer or insurer have to do, in cases of suspected suicide, to determine if death in service benefits are payable? Establishing the cause of death can give rise to complex issues such as those explored in a recent case involving a marine crew fatality. The matter of *Braganza v BP Shipping Ltd (2015)* revolved around the disappearance of Mr Braganza while working as chief engineer on an oil tanker managed by BP Shipping Ltd (BP).

BP's investigation

BP, the employer, was contractually liable to pay compensation for the death of its employees unless, in its opinion, the loss was by *"wilful default"* (i.e. suicide). BP concluded that the most likely explanation for the disappearance was that the deceased had committed suicide by throwing himself overboard. BP reached its conclusion after conducting a safety investigation into how its systems could be improved to prevent such a situation re-occurring. The resulting report, identifying six factors supportive of suicide, was sent to the General Manager responsible for employing individuals aboard the tanker who determined that no further enquiries were necessary, and that there had been a *"wilful default"* by Mr Braganza; therefore, no death in service benefits were payable to his widow.

Was BP's conclusion reasonable?

The deceased's widow challenged BP's findings. On the evidence, the High Court was unable to make a finding as to cause of death; however, the widow's claim for death in service benefits was upheld on the basis that BP's conclusion sustaining suicide was not reasonable. This decision was then overturned by the Court of Appeal which held BP's findings of suicide reasonable.

The importance of cogent evidence

An appeal to the Supreme Court followed, where it was held that the inherent improbability of suicide demanded that there be cogent evidence to support the finding. Here, the General Manager had simply accepted the enquiry's conclusion that suicide was the most likely explanation; however, this enquiry was set up, not to determine the cause of disappearance, but to establish whether BP systems could be improved. To make a positive finding of suicide, strong evidence was required to overcome the inherent improbability that Mr Braganza had indeed committed suicide. The six indicating factors of suicide stated in the report were deemed by the Supreme Court not to be positive indications but merely *"straws in the wind"* and should have been set against the evidence of his normal behaviour immediately before his death, which increased the inherent improbability of suicide in his case. Interestingly this was not a unanimous judgement, Lord Neuberger reasoning that there was a combination of reasons sufficiently cogent to justify the finding of suicide.

Some practical pointers for employers and insurers

The fact that various senior judges could not agree demonstrates the difficulties which employers and insurance companies can face in these situations. The case illustrates the importance of conducting a full investigation into the cause of death of an employee, set up specifically for that purpose. It will be important to consider all the facts, and to gather sufficient cogent evidence to support any decision which is eventually reached.

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"Gazprom" OAO: Can a EU State recognise and enforce an anti-suit arbitration award?

Nigel Brook and Michelle Radom

Since the recast Brussels Regulation 1215/2012 came into force on 10th January 2015, it is now possible to bring proceedings before the courts of an EU country even though the courts of another Member State have been first seised, if those proceedings are brought "*in support of arbitration*" (i.e. they are started in order to obtain a declaration that there is a valid arbitration agreement between the parties). However, the recast Regulation is silent on whether an anti-suit injunction can be obtained to restrain proceedings in the court first seised.

Advocate General Wathelet issued an Opinion at the end of last year in the Court of Justice of the European Union (CJEU) "Gazprom OAO" case in which he opined that the recast Regulation overturns West Tankers (which prevented Member State courts from issuing anti-suit injunctions to restrain the breach of an arbitration agreement where another Member Court is first seised) and that an anti-suit injunction in such circumstances would not be incompatible with the Regulation. That is arguably incorrect though, given that the Regulation would appear to allow for both sets of proceedings continuing before the courts of the respective Member States - although an eventual New York Convention award is likely to have primacy over the judgment of the EU court first seised which finds that there is no valid arbitration agreement.

The CJEU has now delivered its judgment in the "Gazprom OAO" case. Unfortunately, it does not resolve the issue mentioned above since the decision is based on Regulation 44/2001 rather than the recast Regulation. It was held that Regulation 44/2001 does not preclude a Member State's courts from recognising and enforcing (or refusing to recognise and enforce) an arbitral award obtained from a tribunal in another Member State which prohibits a party from bringing certain claims before it.

Comment

In effect, therefore, this decision confirms that an anti-suit injunction can be obtained from the arbitrators to restrain proceedings brought in a Member State in breach of the arbitration agreement, assuming that the arbitrators have the power to grant the injunction. However, it does not resolve the problem that that Member State's courts may still refuse to recognise and enforce the arbitral anti-suit injunction. Nor does it resolve the wider issue of whether the courts of a Member State might also grant an anti-suit injunction under the recast Regulation, the penalties for the breach of a court injunction being potentially more serious for a litigant than the breach of an injunction obtained from arbitrators, which can only be enforced by an order from the supervisory court.

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GAFTA introduces consolidated "*Prevention of Shipment*" clause to replace Prohibition, Force Majeure and Strike clauses

Francesca Corns

Traditionally handled through separate clauses, GAFTA's Prohibition, Force Majeure, and Strike provisions have now been revised in all CIF, C&F and FOB standard form contracts entered into since 1 June 2014, with the central notion of *force majeure* now singularly encapsulating all three.

At first glance, the Prevention of Shipment clause (which applies equally to FOB contracts except that the clause refers to "*Delivery*" as opposed to "*Shipment*") merely consolidates the pre-existing provisions, but traders need to be acutely aware of the subtle differences which we set out below.

The Clause

The contract will be suspended if an Event of Force Majeure (Event) prevents the sellers' performance (partially or otherwise), provided that sufficient notice of the Event is given (within 7 consecutive days of the Event, or not later than 21 consecutive days before commencement of the shipment period, whichever is the later.)

The new Prevention of Shipment clause defines an Event as follows:

Prevention of shipment

"Event of Force Majeure" means (a) prohibition of export, namely an executive or legislative act done by or on behalf of the government of the country of origin or of the territory where the port or ports named herein is/are situate, restricting export, whether partially or otherwise, or (b) blockade, or (c) acts of terrorism, or (d) hostilities, or (e) strike, lockout or combination of workmen, or (f) riot or civil commotion, or (g) breakdown of machinery, or (h) fire, or (i) ice, or (j) Act of God, or (k) unforeseeable and unavoidable impediments to transportation or navigation, or (l) any other event comprehended in the term "force majeure".

Buyers have the option to cancel the unfulfilled part of the contract if the Event continues for 21 consecutive days after the end of the shipment period by serving notice on the sellers exercising the option no later than the first business day after expiry of this 21 day period.

If the buyers do not exercise this option, the contract remains in force for a further 14 consecutive days after which, if the Event has not ceased and therefore continues to prevent performance, any unfulfilled part of the contract is automatically cancelled.

If the Event ceases before the contract can be cancelled, sellers must notify buyers that this is the case and then sellers themselves are entitled to as much time as remained for shipment under the contract before the Event occurred; or 14 days, whichever is longer, to perform.

As previously, only the sellers can invoke the new "*Prevention of Shipment*" clause but the clause now explicitly puts the burden of proof on sellers to prove that an Event occurred which prevented performance.

Key changes

We set out below the key changes in this approach that both sellers and buyers alike need to look out for:

- Force majeure is now all-encompassing, defined by reference to 12 listed impediments, including those that were previously dealt with under the Prohibition and Strike clauses. This definition now also includes an explicit reference to "*acts of terrorism*"
- Very significantly, the cancellation of the contract is no longer automatic in the event of a prohibition of export, blockade, hostilities or legislative act restricting export. Instead, as explained above, performance is suspended for up to 21 days following the shipment period (as long as the sellers have complied with the notice requirements), following which either i) buyers have the option to terminate; or ii) the Event continues for a further 14 consecutive days and the contract terminates automatically

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- This new articulation requires the sellers' performance of the contract to actually be prevented for the clause to operate to suspend performance, unlike the previous articulations of Force Majeure terms which allowed notice to be given if delay was *"anticipated"* or *"likely to occur"*. Therefore the bar is now set higher for sellers wishing to invoke the clause, although it is more in line with the old Prohibition clause in which a partial or total restriction was required
- The notice provisions for sellers are now less onerous, requiring notification of only the Event, and not a second notice claiming an extension of time for shipment, as was required under the old Force Majeure and Strikes clause
- Timings on termination of the contract have diminished in the new revision, with buyers able to cancel if the Event continues for 21 consecutive days after the shipment period, as opposed to 30 days under the previous Force Majeure and Strikes clauses, and now 14 as opposed to 30 consecutive days before automatic cancellation if buyers do not exercise this option. This constitutes a dramatic reduction, with the contract now terminating (at buyers' option or otherwise) significantly earlier if the Event persists
- Sellers are now obliged to notify buyers *"without delay"* if the Event ceases before the contract can be cancelled, and are then entitled to the remaining time left for shipment under the contract before the Event began, or, if the time remaining is less than 14 days, the sellers are now granted 14 consecutive days to perform

Comment

The uniformity now introduced by GAFTA between the various prevention of shipment, strikes, and prohibition clauses should be welcomed by traders. The streamlined and simplified notification process should lead to fewer missed deadlines on the part of the sellers. However, both sellers and buyers alike would be well advised to familiarise themselves with the revised deadlines and notice periods under this new clause.

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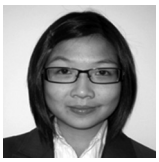

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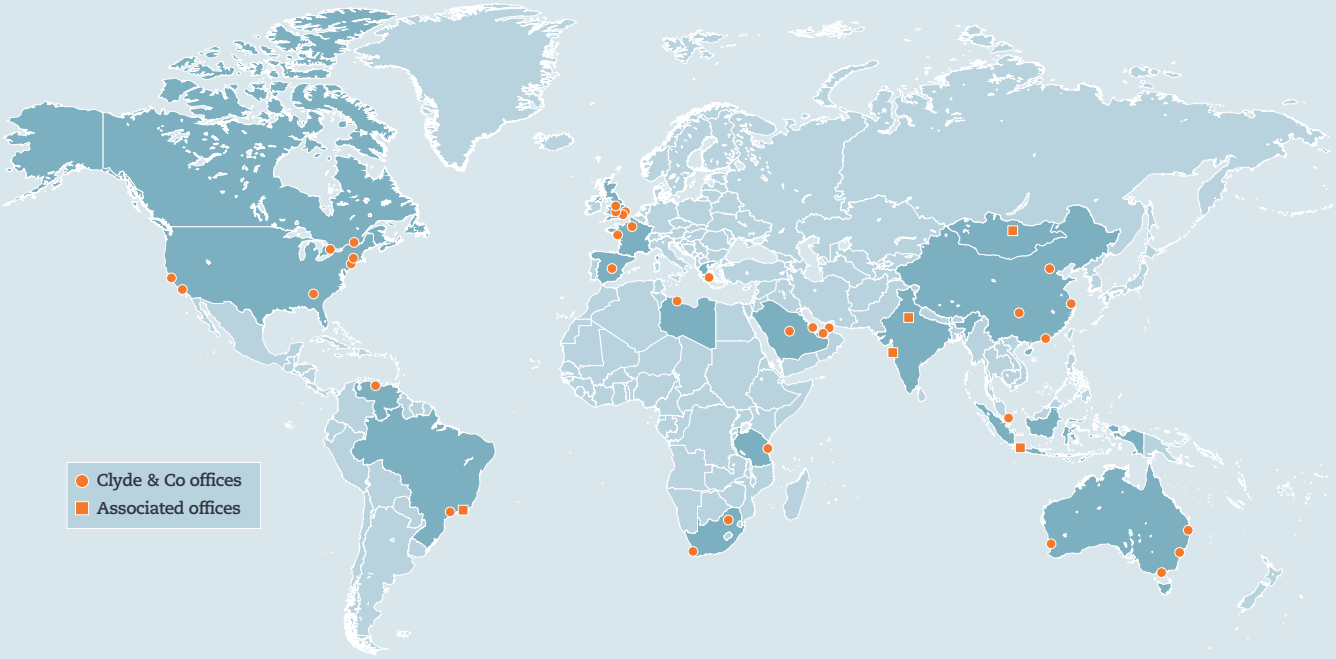

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CC007866 - July 2015