Shipping

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Written by legal experts, Clyde & Co's Shipping Newsletter reviews recent legal developments within the marine sector and related areas of interest.

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Links to our most recent client briefings can be found in the "What's new?" section of the newsletter. These provide commentary on cases such as the "NEW FLAMENCO" (2015) and other topics of interest to the marine sector.

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"NORDLAKE"/"SEAEAGLE" - Collision case leads to rare decision

Andrew Gray

In a potentially unique English Admiralty case[1], Mr Justice Teare recently apportioned liability between four vessels involved in the collision between the container ship "NORDLAKE" and the Indian Navy warship "VINDHYAGIRI" off Mumbai.

In doing so, he re-iterated the principles set out by Sir Henry Brandon in his extra-juridical article Apportionment of Liability in British Courts under the Maritime Conventions Act 1911[2]. In this action, claims were brought by the owners and/or demise charterers of "NORDLAKE" and the owners of the container ship "SEAEAGLE". The other two vessels involved, the warships "GODAVARI" and "VINDHYAGIRI", were not parties to the action. Teare J also considered the issue of whether liability could be apportioned between four ships when only two were parties to the action, and no evidence had been provided by those who were not parties.

Facts

On 31 January 2011, Nordlake was proceeding outbound from the port of Mumbai in the dredged channel. At C-24, she was brought onto a heading of 236 degrees. On completing this turn, she was slightly to port of the centre line of the channel. At C-17, "NORDLAKE" agreed on VHF with one of a line of three inbound Indian Navy warships heading towards her in the channel that she would pass "all the warships…green to green" or starboard to starboard.

Astern of these three vessels were two more inbound warships, "GODAVARI" and "VINDHYAGIRI", followed by "SEAEAGLE". At C-15, "NORDLAKE" turned to port onto a heading of about 211 degrees, and reduced speed to nine knots. She was then substantially to port of the centre line of the channel.

Rule 9(a) of the Colregs provides that "A vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable".

All the inbound vessels were on their starboard side of the channel, in the correct water, while "NORDLAKE" was navigating towards them on her port side of the channel, in the wrong water. By C-8, "NORDLAKE" had passed clear of the first three inbound warships. At C-6, "NORDLAKE" and "SEAEAGLE" agreed on VHF to pass starboard to starboard. Shortly after this, "SEAEAGLE" overtook "VINDHYAGIRI" on her starboard side.

"NORDLAKE" and "GODAVARI" then agreed on VHF to pass port to port. At C-3.5, "SEAEAGLE" was fine off the port bow of "NORDLAKE" at about five cables. These two vessels confirmed on VHF that they would to pass starboard to starboard.

At C-2, "GODAVARI" passed clear to port of "NORDLAKE". However, a close quarters situation then developed between "NORDLAKE" and "SEAEAGLE". At C-1, following the intervention of Mumbai VTIS, both ships manoeuvred hard to starboard and passed port to port, narrowly avoiding a collision.

As "NORDLAKE" manoeuvred clear, "VINDHYAGIRI" was off her port bow at less than 1.5 cables. "VINDHYAGIRI" was shaping to cross ahead of "NORDLAKE". The master of "NORDLAKE" ordered hard to starboard. With "NORDLAKE" turning to starboard and "VINDHYAGIRI" turning to port, the bow of "NORDLAKE" collided with the starboard side of "VINDHYAGIRI".

[1] Owners &/or demise charterers of the vessel *"NORDLAKE" v Owners of the vessel "SEAEAGLE" (Now named MV "ELBELLA") (2015)*
[2] Apportionment of Liability in British Courts under the Maritime Conventions Act 1911 (1977) 51 Tulane Law Review 1025

Apportionment of liability

In apportioning liability, Teare J applied and commended to others the principles set out by Sir Henry Brandon within the general proposition that both culpability and causative potency should be taken into account when assessing liability:

- First, the nature and quality rather than number of a ship's faults should be taken into account
- Secondly, breaches of certain defined situations under the Colregs would usually be seriously culpable, ie a breach of Rule 9 of the Colregs concerning narrow channels
- Thirdly, causative potency comprises both the extent to which the fault contributed to the fact that the collision occurred and the extent to which the fault contributed to the damage resulting from the casualty
- Fourthly, in most cases it would be "right to treat the fault of a ship that creates a situation of difficulty or danger as greater than that of a ship that fails to react properly to such a situation after it has been created"
- Fifthly, a fault consisting of a deliberate act or omission might, in certain circumstances, be more culpable than a fault consisting of omission only

Teare J also tackled an issue which Sir Henry Brandon had indicated was an "open question of some difficulty", as to whether liability could be apportioned between multiple vessels when only some of them were parties to the action. Section 187 of the Merchant Shipping Act 1995 provides that "Where, by the fault of one or more ships, damage or loss is caused to one or more of those ships…the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault".

The electronic evidence, including VDR and ECDIS data and VTIS radar and audio recordings had enabled the parties to agree on the navigation of all the ships involved.

Teare J held that pursuant to section 187, he must take account of the causative faults of all the vessels involved and apportion liability, even if some were not parties to the action before the court, and his decision would therefore not be binding on those parties. He found that all four ships were to blame for the collision, and that there had been a number of breaches of the Colregs.

He particularly criticised "NORDLAKE" for her breach of Rule 9 which, in terms of causative potency, was the primary fault which gave rise to the dangerous situation. Her presence in the wrong water was a deliberate decision to breach a rule which was designed to avoid a close quarters situation. He also criticised the use of VHF to agree navigational manoeuvres in conflict with the Colregs. Teare J found that from C-8 onwards, a series of causative faults on the part of all four vessels led to the collision. He held that liability should be apportioned as follows: "NORDLAKE" (60%), "SEAEAGLE" (20%), "GODAVARI" (10%) and "VINDHYAGIRI" (10%).

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"OCEAN VIRGO" - Speed and performance: is this "good weather" period long enough?

Peter Ward

The High Court recently held[1] that, in relation to an owners' performance warranty for speed and consumption in good weather, the favourable weather conditions need not have lasted for a minimum of 24 hours from noon to noon, at any one time, to be admissible. It also confirmed that, should a period, or periods, of "good weather" be found admissible, then a breach established during those periods should be applied to the whole of the charter period, but excluding any periods of slow steaming ordered by the charterers.

Background

The proceedings were a Section 69[2] appeal from an arbitration award. They concerned a speed and consumption claim by the appellant Charterers, Polaris, arising out a of a time charterparty agreed with the respondent Owners, Sinoriches, on the NYPE form. Polaris took delivery of the "OCEAN VIRGO" on 14 December 2013, and performed a ballast voyage from China to Canada, and a laden voyage in the opposite direction. The ballast voyage was split into two legs, the Master being directed to steam at a different speed on each. The vessel was redelivered on 22 February 2014.

Owners had given various speed and consumption warranties on the basis of "good weather/smooth sea, up to a max BF SC 4/Douglas sea state 3, no adverse currents, no negative influence of swell." Charterers alleged that the vessel had not met the speed and consumption warranties in good weather, as defined, and claimed US$263,832 in damages. The matter was referred to arbitration.

The Arbitration Award

The arbitrator's position was that for a period to be considered "good weather", it must constitute a period of 24 consecutive hours, running from noon to noon. The charterers' weather analysts had set out the periods which they considered constituted "good weather".

The arbitrator decided that none of them constituted an admissible "good weather" period. He held the first and third periods of the ballast voyage (at 14 and 8 hours respectively) too short to be admissible, whereas the second and fourth periods did not qualify as they unfolded during bad weather. Regarding the laden voyage, he found that there was no "good weather" on one of the relevant periods, and that the other was again too short to be admissible.

In addition, the arbitrator noted that any speed and consumption analysis was a sampling exercise and that the "sample size must be sufficiently large as to be representative of the voyage in its entirety." With this in mind, he found that the potential "good weather" periods during the second leg of the ballast voyage constituted only 5.51% of the journey, which could not be taken as representative of the journey in its entirety. Therefore, there was, in the arbitrator's opinion, no satisfactory "good weather" analysis for that second leg. A similar finding could be inferred in relation to the laden voyage in its entirety, the "good weather" periods amounting to just 5.336% of the total voyage.

[1] Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd [2015]
[2] Arbitration Act 1996

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Decision

Mr Justice Teare noted that the traditional manner in which a charterer seeks to establish a breach of a speed and performance warranty is to assess the vessel's performance in "good weather", excluding any period for slow steaming at the request of the charterer. If analysis of the vessel's performance in "good weather" establishes a breach, then the extent of the shortfall in performance should be applied to the entire charterparty, whatever the weather conditions, excluding any slow steaming requested by the charterer.

The Court found that the arbitrator had erred in law by excluding periods of "good weather" that lasted for under 24 hours. There was nothing in the charterparty which could justify such an interpretation of the warranties.

However, the Court also held that the arbitrator had been entitled to exclude the periods of "good weather" relied upon in the second leg of the ballast voyage and in the laden voyage because they were too small a sample (5.51% of the second leg and 5.336% of the laden voyage). This only left the two periods of time of the first leg of the ballast voyage (excluded by the arbitrator) as potentially admissible. In the Court's judgment, these two periods constituted admissible "good weather" periods and were amenable to analysis to determine any breach of the warranties.

The Court allowed the appeal, and remitted the case to the arbitrator for him to determine whether the relevant periods were, on their own or cumulatively, a sufficient sample representative of the voyage in its entirety. If they were, the arbitrator would have to determine whether the vessel's performance during those periods constituted a breach of the warranties. Should a breach be established, then any consequential damages claim was to be assessed in relation to the whole of the charter period, whatever the weather. On this last point, the Court found that the arbitrator had made a further error in law when he had found that the warranties "are inapplicable in conditions that fall, for any reason, outwith the good Weather criteria". Once a breach is established, the damages claim is assessed by having regard to the whole of the charter period whatever the weather.

Comment

The judgment helpfully establishes that, unless otherwise stated, a period of "good weather" under a speed and consumption warranty does not have to last for 24 hours, from noon to noon, to be admissible. The Court's confirmation that a breach of performance over a sufficiently large sample of "good weather" should be considered as a breach for the duration of the entire voyage, excluding time for slow steaming requested by the Charterers, also brings welcome clarity to this issue.

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CMR Convention: Supreme Court overturns Court of Appeal on jurisdiction over successive carriers

Tom Gorrard-Smith and Elgan Rees Williams

In the recent matter of *British American Tobacco Denmark A/S and others v (1) Kazemier Transport BV [2015]*[1], the Supreme Court examined the question of choice of jurisdiction in a claim against successive road carriers under the CMR Convention[2].

Facts

British American Tobacco (BAT), the goods owner, contracted with Exel Europe Ltd (Exel), a company registered in England, for the provision of warehousing and distribution services. The agreement between BAT and Exel was governed by English law and subject to exclusive English jurisdiction, and permitted Exel to sub-contract services to approved sub-contractors.

The goods in question consisted of two consignments of tobacco to be carried by road, one from Switzerland to Holland, and the other from Hungary to Denmark, and CMR notes were issued for each consignment.

Exel sub-contracted the transport of the goods to two Dutch carriers, H Essers Security Logistics BV (Essers) for the consignment to be loaded in Switzerland, and Kazemier Transport BV (Kazemier) for the carriage commencing in Hungary. Both sub-contracts contained an English law and jurisdiction clause, but neither made reference to Exel's contract with the goods owner BAT.

During the transit, the first consignment was allegedly stolen in Belgium, and a substantial part of the second allegedly disappeared somewhere between Hungary and Denmark.

High Court

BAT started proceedings in the English court against Exel and the sub-contractors, Essers and Kazemier. The sub-contractors both challenged the jurisdiction of the English courts, invoking Art 31(1) of the CMR, and arguing that it should be read literally. Art 31(1) provides "In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory (a) the defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) the place where the goods were taken over by the carrier or the place designated for delivery is situated, and in no other courts or tribunals."

Essers and Kazemier argued that England was neither their principal place of business, nor did they make the contract of carriage in an English branch or agency. Furthermore, they did not take over the goods in England, and the delivery place was not England. Consequently, they contended, the English court had no jurisdiction over them, and they could only be sued where they were present (Holland), where the goods had been taken over (Switzerland or Hungary), or where they were due to be delivered (Holland or Denmark).

The High Court agreed and ruled that the English court had no jurisdiction to hear the claims. An order was made to set aside the claim forms.

Court of Appeal

BAT appealed against the decision, insisting that there was jurisdiction over Essers and Kazemier by virtue of Art 36 of the CMR[3].

[1] *British American Tobacco Denmark A/S and others v Kazemier Transport BV: British American Tobacco Switzerland SA v (1) Exel Europe Ltd (2) H Essers Security Logistics BV & Others [2015]*

[2] Convention on the Contract for International Carriage of Goods by Road 1956 enacted into English law by a schedule to the Carriage of Goods by Road Act 1965

[3] Article 36. Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers.

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The Court of Appeal held that it was necessary to consider the CMR Convention as a whole and give it a purposive, as opposed to a literal, interpretation. In that manner, jurisdiction could be obtained against successive carriers, pursuant to Art 36, in situations where jurisdiction was established under the contract of carriage against the primary carrier, under Art 31(1).

The Court of Appeal allowed the appeal and declared that the English court had jurisdiction over the claim against both sub-contractors.

Supreme Court

The Supreme Court allowed the appeal and restored the High Court's order setting aside the service of the claim forms. The Supreme Court judges based their decision on the following four reasons:

i) The tobacco companies' case was that once jurisdiction was established over one carrier under Art 31.1, the last sentence of that article ("…an action may be brought at the same time against several of these carriers.") entitled them to join in any other carrier who was potentially liable, even though proceedings could not be brought against that carrier under Art 31.1. Such an extension to an otherwise carefully defined jurisdiction seemed unlikely to have been intended

ii) There was no basis upon which the appellants had become bound by the English jurisdiction clause in the primary contract

iii) The appellants had become party to the contract by virtue of statute and under the terms of the consignment note. They were not party to it by someone making a contract with them through a "branch or agency". That phrase, as used in Art 31.1, meant a branch or agency of the relevant appellant

iv) Art 6(1) of the Judgment Regulation (previously the Brussels Convention)[4] could not impact on the interpretation of arts 31, 34 and 36 of the Convention, and there was no gap in the Convention that it was required to fill. The Convention had been adopted across a wide range of states, only half of which were EU members. It did not impinge on any EU law principles

Comment

The Supreme Court has now provided final clarification on where proceedings can be commenced in circumstances where a principal carrier is based in England but the successive carriers are based in different jurisdictions and goods are not transited to or from England.

In such circumstances, the English Courts will have no jurisdiction and the EU Jurisdiction Regulations will not interfere.

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[4] Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Iron Ore Impasse - A failed claim for conversion

Chris Metcalf and Jason Barnes

In the recent case of the "BAO YUE"[1], the English High Court found that the bill of lading holder was liable to reimburse the shipowner for three and a half years of storage charges, the cost of which exceeded the value of the cargo.

Facts

The claim was brought by Sang Stone, which was both the shipper and the bill of lading holder to whom delivery was to be made, for conversion in relation to 35,000 MT of iron ore, carried from Bandar Abbas (Iran) to Tianjin (China), on board the defendant shipowner's vessel, the "BAO YUE".

A dispute arose between Sang Stone, as seller of the iron ore under the FOB sale and purchase contract, and its buyer. As a result Sang Stone withheld the original bill of lading.

The bill of lading had no named consignee, but incorporated the terms of the voyage charter which provided for discharge into a custom bonded warehouse against a letter of indemnity in the event that the original bill of lading was not presented. The charterparty also stipulated that the cost of warehousing the cargo would be for the charterers' account.

On arrival of the cargo at Tianjin, the original bill of lading was not present so the master discharged the cargo into custom bonded warehouses, via an agent. The agent was then to release the cargo against receipt of the original bill of lading.

However, the cargo was never collected and, after three years, the storage charges exceeded its value. The warehouse owner exercised a lien, and refused to release the cargo before payment.

While Sang Stone accepted that the shipowner had been entitled to place the cargo in storage, Sang Stone claimed that the defendant shipowner had converted the cargo on the basis that:

i) "the defendant was not entitled … to arrange for storage of the cargo in a way which gave rise to a lien in favour of the warehouse owner…", and

ii) the conduct of the warehouse and agent amounted to denying the holder of the bill of lading access to the cargo

The shipowner denied the claims brought by Sang Stone, and counterclaimed for the storage charges.

Decision

There is an established principle that where a cargo owner fails to claim delivery of a cargo within a reasonable time, the shipowner is entitled to discharge and store the goods at the cargo owners' cost. While it was acknowledged by the Court that conversion could occur in circumstances where a lien was created over the goods without authority of the cargo owner, the creation of the lien was, in the circumstances, a "reasonable and foreseeable incident of the storage contract which the defendant was authorised to conclude". This was particularly the case where a charterparty incorporated into the bill of lading contained express terms that the cargo could be discharged into storage, which was the position here.

[1] *Sang Stone Hamoon Jonoub Co Ltd -v- Baoyue Shipping Co Ltd* [2015] EWCH 288

Whilst conversion may be applicable in instances where there is denial of access to goods such that the cargo owner is denied possession of them, the Court found that Sang Stone's claim fell far short of any deliberate encroachment of rights by the shipowner. Sang Stone had in fact never presented the bill of lading, and therefore the statements of the agent and warehouse operator had never been tested. Moreover, Sang Stone had not been deprived of the use and possession of the goods: the cargo was available on presentation of the original bills of lading and payment of the charges.

The claim for conversion therefore failed, and Sang Stone was liable for the storage charges exceeding the value of the cargo. The Court also ordered Sang Stone to deliver the original bills of lading to the shipowner, to allow the cargo to be sold.

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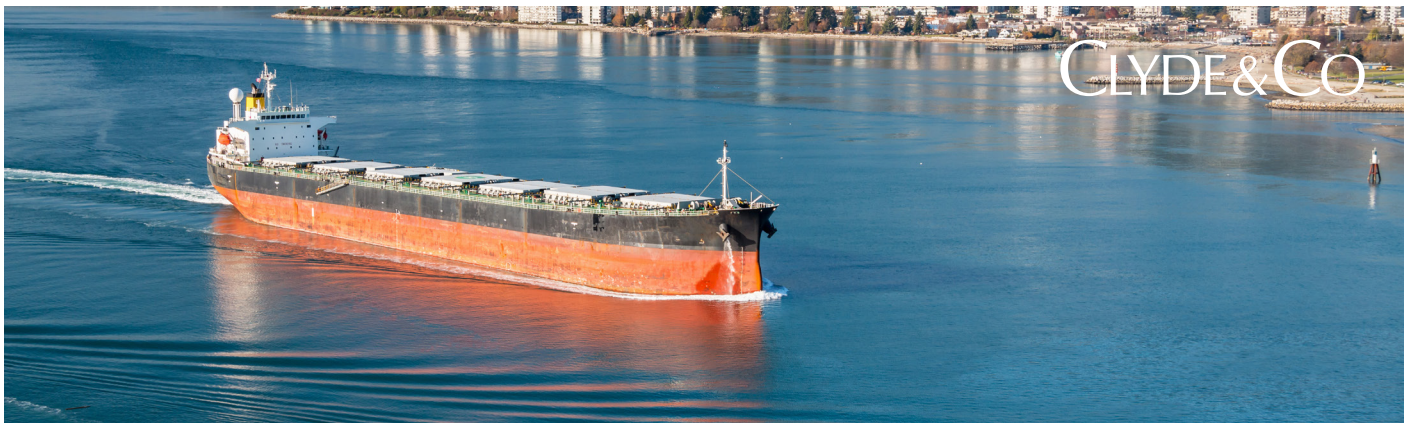

GAFTA 49: High Court rules on FOB buyers' right of nomination and substitution

Ivanna Dorichenko

Following the recent judicial examination of the GAFTA Default clause in *Bunge v Nidera*[1], in the case of *Ramburs v Agrifert*[2] the courts revisited GAFTA contracts to give fresh guidance on the rules for nomination and substitution of vessels by FOB buyers.

The facts and arbitration history

The dispute concerned a sale of 25,000mt of maize FOB Ukraine for delivery in March 2013.

Among other terms, the contract required the Buyers to serve a 10 day pre-advice of the vessel's name and ETA, and incorporated GAFTA 49, which included clause 6 "Period of delivery" and its unmodified paragraphs on vessel's nomination and substitution.

On 20 March 2013, the Buyers nominated M/V "PUFFIN" with an ETA at Nikolayev of 26/27 March. On 26 March, the Buyers purported to make a substitution and nominated M/V "SEA WAY" with an ETA of 28 March. Later that day, the Sellers rejected both nominations as false, and held the Buyers in repudiatory breach of contract. The Buyers disagreed, bought a substitute cargo, and claimed circa USD 800,000 as the market price difference.

In arbitration, the Sellers argued that the Buyers' nomination was invalid so the Sellers were entitled to terminate the contract. The first tier GAFTA Tribunal agreed with the Sellers; the Appeal Board disagreed and allowed the Buyers' appeal. The Sellers lodged an appeal to the High Court asking the court to clarify whether an FOB Buyer, substituting a vessel under Clause 6 of GAFTA 49, had to comply with contractual nomination and pre-advice provisions, and, if so, whether, on a true construction of the Contract and the Board's factual findings, the Buyers' claim was invalid.

The judgment

The parties' court debate was largely centred upon the case of *Cargill UK Ltd v Continental UK Ltd*[3], where in similar circumstances, the substitution was considered invalid due to its failure to meet an eight day pre-advice within the shipment period. The Sellers duly relied on Cargill while the Buyers sought to distinguish the case on the basis that the relevant clause in Cargill specifically provided for the consequences of non-compliance with its nomination provisions, and did not contain an express right of substitution.

The Buyers further contended that Clause 6 of GAFTA 49 was a complete code, defining and limiting their right to substitution, with the only restriction being that the delivery period should not be affected by the substituted nomination: that was the contractually agreed protection for disruption of the Sellers' arrangements by late substitution, and no further protection (i.e., compliance with pre-advice requirements) was necessary.

Mr Justice Andrew Smith disagreed with the Buyers and answered both questions in the Sellers' favour. In his view, on the natural interpretation of the nomination provision in Clause 6, it referred to the vessel that was to load the cargo: the only vessel whose name and "probable readiness date" could possibly matter. While the Sellers were to have the goods ready "at any time within the contract period of delivery" that did not mean that the Sellers would not be interested in receiving information about the

[1] [2015] UKSC 43
[2] [2015] EWHC 3548
[3] [1989] 1 Lloyd's Rep 193
[4] for example, the sellers might want the dimensions and draft of the vessel to arrange a safe berth

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time when the vessel, intended to carry the cargo, would probably be ready. Similar considerations applied to the pre-advice provisions in the confirmation of contract. The Board decided that the identity of the nominated vessel did not much matter to the Sellers; however, the judge endorsed the Cargill approach and emphasised that, where contracting parties had stipulated the information to be provided, what mattered was the parties' agreement, not the views of arbitrators, even those as experienced as here.

Mr Justice Smith further disagreed with the Board's conclusion that it would be "bizarre" for the right to substitute to be subject to the same requirement for 10 days' pre-advice as the original nomination: in the judge's opinion, it would be more bizarre to interpret the contract as requiring the Buyers to give detailed pre-advice information for a vessel that was never used. It was also the judge's view that his preferred interpretation left a sensible commercial purpose for the substitution provisions by making express the implied right to substitute, but qualifying it to give the sellers a remedy in case they relied on a nomination later changed by the buyers.

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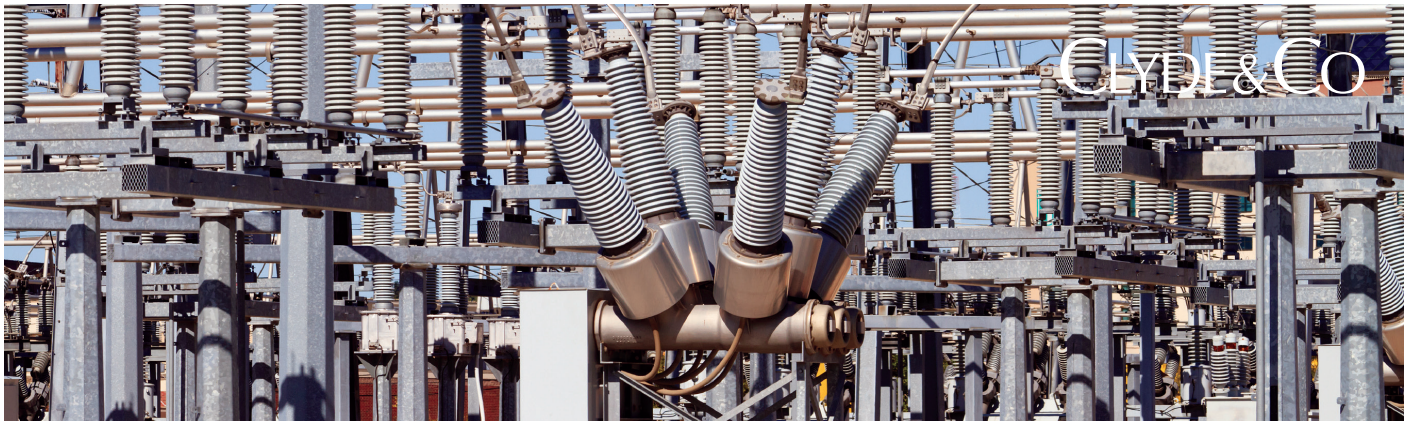

Trafigura v Taci Oil International – Court reviews sale agreement

Leon Alexander

In a decision dated 16 December 2015, the English High Court considered whether there was sufficient clarity in an agreement allowing for delayed payment of gasoil.

The facts and arbitration history

The (Claimant) Seller sold gasoil to the (Defendant) Buyer on an ex-works basis with delivery into the Buyer's trucks at Porto Romano, Albania.

The Buyer wanted to purchase an asset of the Albanian national oil company and, in order to facilitate the purchase, the Seller agreed a different financing regime with the Buyer. Under the regime, 50% of the price was payable in advance and 50% within 90 days of delivery. There was a US$5 million credit limit on the facility and the Buyer provided the Seller with a second priority mortgage over some of its real property as security.

In practice, this arrangement meant that the Buyer obtained twice the value of cargo that it actually paid for. The facility was used 11 times between 21 January 2013 and 25 February 2013, when the US$5m limit was reached.

The Seller's structured trade finance manager had agreed the facility with the Buyer and reminded them of the repayment deadline before it expired but the Buyer failed to pay within the 90 day period. The Buyer admitted that sums were due, and promised to make the repayments but only a few were ever made.

The Seller's lawyers wrote to the Buyer on 24 July 2013 and demanded US$4.4m. The Buyer responded to the Seller directly and admitted to US$3.5m of the debt. After further exchanges, the Buyer's Head of Finance confirmed the Seller's calculations and in an email dated 31 July 2013, admitted that the remaining US$800,000 was due and outstanding. However, no repayments were made.

Four issues were raised in defence and dismissed by the Court:

i) The Court disagreed with the Buyer's submission that the amounts and the due date were subject to discussion, and that there was a degree of flexibility on repayment, as submitted by the Buyer. The Court considered that the sale contract and deferred payment agreement were clear, and the Buyer had not particularised their allegation of flexibility

ii) The Buyer also argued that, contrary to the principle of cooperation and flexibility agreed between the parties, the Seller had refused to engage in good faith discussions. However, no such principle of cooperation and flexibility was found to have been agreed. The Court also rejected the suggestion that flexibility should be implied into the agreement (the written terms being silent on the issue) and held that the Seller had in any event engaged the Buyer into discussions on a number of occasions

iii) The Buyer disputed the significance of the admission in the email of 31 July, and argued that the Head of Finance did not have authority to make such an admission. The Court rejected these arguments finding that the relevant individual would likely have had actual or apparent authority to make the admission. They also rejected the suggestion that the admission was not significant

iv) Finally, the Buyer did not plead a positive case, but put the Seller to proof on the quantum of their claim. Again, the Court dismissed the Buyer's defence, and found in favour of the Seller

Accordingly, judgment was given to the Buyer in the full amount of their claim.

Comment

In the current difficult market, this judgment does serve as a reminder of the potential difficulties when extended and vague credit terms are afforded without formality on the terms being agreed.

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Seafarers: territorial jurisdiction test

Heidi Watson and Mark Howard

Pensions automatic enrolment

The Administrative Court has recently had to grapple with the issue of whether seafarers, who work on vessels which spend all or most of their time outside the UK, qualify for automatic enrolment into a UK-based pension scheme. In the process, the Court laid down a clear test for seafarers wishing to establish territorial jurisdiction for legal claims in the UK.

The Pensions Regulator is responsible for enforcing the obligations of British employers to automatically enrol their eligible employees. The Regulator concluded that seafarers employed by a Bermuda-incorporated company were eligible for auto-enrolment in the UK, and in line with its powers, issued a compliance notice on the company for failing to auto-enrol them. The company then sought judicial review of this.

What the court said

The court decided that:

- To establish whether a seafarer is considered to be ordinarily working in the UK, the test is: where is the seafarer based?
- For a seafarer, their base is the point at which they begin and end their journey – where they depart and return from a voyage. So even though they may work abroad frequently, and for extended periods of time, they will still be based in the UK if they habitually depart from and return to ports in the UK
- Seafarers who travel or commute to a port outside the UK would not be regarded as based in the UK. So a seafarer who lives in the UK but who works on a ship which spends most or all of its voyage time outside the UK, and does not usually start its voyages from a port in the UK, will not be regarded as ordinarily working in the UK

What this decision means for marine employers

This decision is the first court guidance on what it means to be ordinarily working in the UK for the purposes of the pension auto-enrolment rules. To establish whether seafarers have a base in the UK, and qualify for automatic enrolment into a UK-based pension scheme, employers should give careful consideration to each employee on an individual basis. The key question is: do they live in the UK and do their voyages usually begin from and end at ports in the UK?

The "base test" the court adopted is consistent with previous decisions regarding peripatetic workers in an employment context, and could be persuasive if looking at employment rights, in a claim by a seafarer seeking to establish employment rights in the UK. Employers should look at their seafarer population to establish any risks of such rights being established, and seek advice on dealing with this risk appropriately.

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What's new?

The "NEW FLAMENCO"

Written by Elizabeth Turnbull and Marcia Perruca

The Court of Appeal holds that the benefit arising from the sale of a vessel can reduce the claim for repudiation of a charterparty.

A pocket guide to English Law of shipbuilding

Clyde & Co's 'A pocket guide to English Law of shipbuilding' aims to provide you with a high level insight into key legal issues in relation to shipbuilding and offshore construction.

APAC Marine & Trade newsletter – January 2016

Asia Pacific Marine & Trade newsletter

The Rollback of Iranian Sanctions: what does this mean for trade and commodities?

Written by Michael Swangard and Anousheh Bromfield

As reported in our update of 17 January 2016, the lifting of EU sanctions following Implementation Day is expected to trigger a substantial increase in trade between western companies and their Iranian counterparts.

In-short – Edition 2

Trade and commodities newsletter

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- Global governance (risk management, regulation, sanctions)
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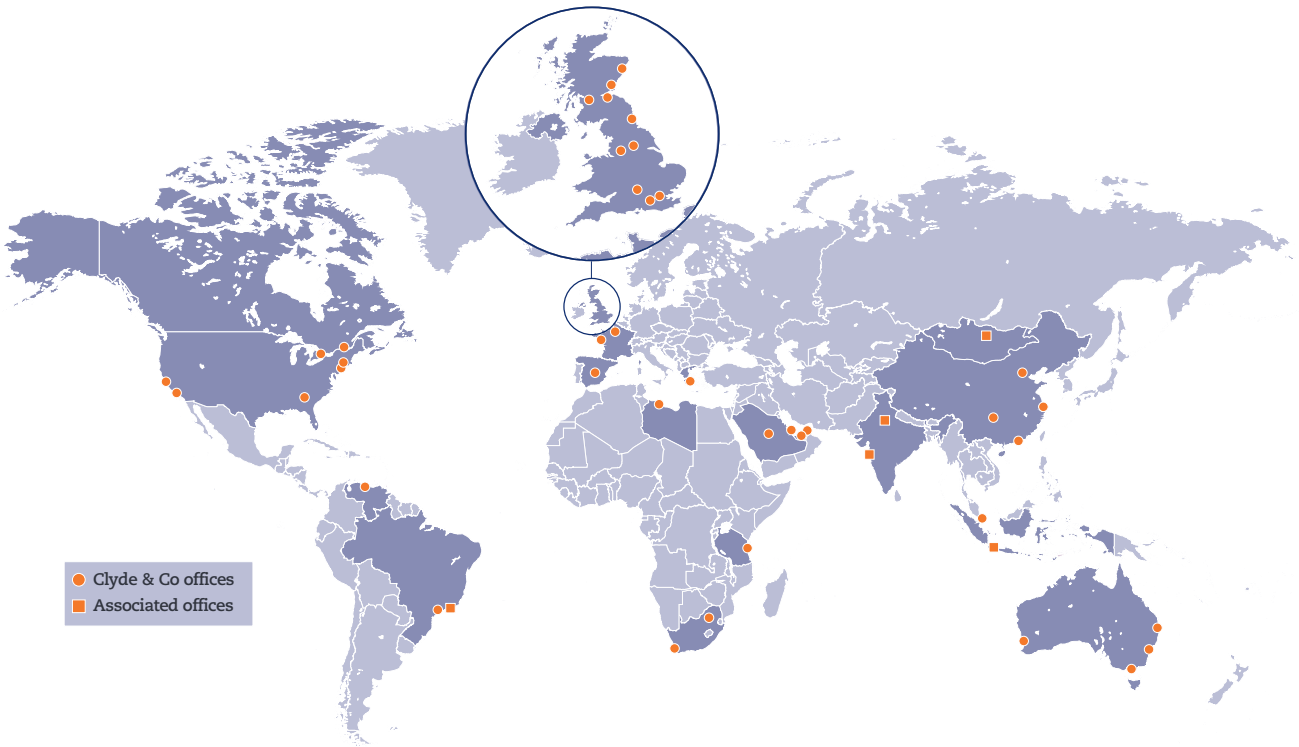

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Further advice should be taken before relying on the contents of this Newsletter.

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