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INTER CLUB AGREEMENT 1996 AND NONCULPABLE ACTS

We previously reported the first instance decision in the "YANGTZE HUA" where Charterers chartered the vessel on an NYPE charterparty incorporating the ICA to transport a cargo of soya beans from South America to Iran. Upon reaching Iran in December 2012 the Charterers ordered the vessel to remain off the discharge port until they had received payment for the cargo from Receivers. The laden vessel remained off the discharge port for over 4 months until it eventually discharged the cargo in May 2013. Upon discharge the cargo was found in a damaged condition and Receivers brought a claim against Owners which was settled by Owners for over €2.6M.

Owners sought to recover from Charterers 100% of their loss under Clause 8 (d) of the ICA which provides that liability for all cargo claims not covered under Clause 8 (a) – (c) was to be apportioned 50/50 as between Owners and Charterers, unless the claim arose out of the act or neglect of one or the other in which case that party shall bear 100% of the claim. Owners prevailed at first instance.

Charterers appealed to the Court of Appeal and argued that the word 'act' meant a 'culpable act' when construed in the context of the rest of Clause 8 of the ICA 1996 giving consideration to the 'archeology' of the ICA based on its earlier versions which were predicated upon fault. In rejecting the Charterers' arguments' the Court of Appeal noted that previous versions of the ICA were not an appropriate aid to construction especially given that the ICA 1996 represented a significant redrafting of and change to the ICA framework.

The Court of Appeal held that the critical factual question under Clause 8 was causation. No consideration of moral or legal culpability was required. Therefore Charterers, despite not being culpable in any way, were liable for 100% of the claim of Receivers because their 'act' in ordering the vessel to remain off the discharge port was the cause of the damage that gave rise to the claim.

LIMITATION UNIT MEANS PHYSICAL ITEM OF CARGO, NOT A UNIT OF MEASUREMENT

So held the Court of Appeal in the "AQUASIA" upholding the first instance decision of Sir Jeremy Cooke. In this case the Owners claimed they were entitled to limit liability for damage to a cargo of bulk fish oil at the amount of £100 per m/t of cargo damaged.

The Court rejected this and held the term "unit" is not apt for bulk cargoes.

TENDER OF NOTICE OF ABANDONMENT AND COSTS FOR INCLUSION IN CTL CALCULATION

In another case where the Court of Appeal upheld the first instance Commercial Court decision, it found in the "RENOS" that following a fire on 23 August 2012, the tender of Notice of Abandonment to insurers on 1 February 2013, while a long time after the original incident, was nonetheless timely because Owners did not have reliable information available to them prior to that date.

Costs incurred prior to tender of NOA could be counted as costs of repair for the purposes of calculating whether the vessel was a CTL. Costs arising under the SCOPIC provision of LOF could also be counted.

DEMURRAGE TIME BAR DOES NOT APPLY WHERE VOYAGE NOT PERFORMED

In a recent London Arbitration Charterers had chartered Owners' vessel by way of Asbatankvoy charterparty to carry a part cargo of 2,800-3,000 m/t of base oil from Thailand to South China or North China in Charterers' option. The Vessel arrived at the loadport and tendered NOR. Charterers failed to provide a cargo for loading. 14 days after the Vessel tendered NOR Charterers gave notice of cancellation of the charter. Owners accepted Charterers' repudiatory breaches as terminating the Charterparty and secured a substitute voyage in mitigation of their losses. Owners claimed 12.6 days demurrage and damages for Charterers' repudiatory breach.

Charterers submitted that the Owners' demurrage claim was timebarred as not all cargo documents had been presented within 90 days of completion of discharge. The Tribunal held that the timebar clause was predicated on the charterparty actually being performed and there being actual completion of discharge. Where the voyage was not performed at all

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such a clause could not be effective. The Hague/Hague-Visby Rules one year time bar expressly provides for a "date when [cargo] should have been delivered". Charterers' time bar clause did not so provide. The Tribunal would not imply a term presuming a date when discharge should have been completed. In any event all available documentation (which in circumstances where the voyage was not performed is very limited – perhaps requiring only a valid NOR and laytime calculation) was provided by Owners within 90 days of the Vessel tendering NOR. Owners were therefore entitled to the 12.6 days demurrage claimed.

Charterers further submitted that following Charterers' own repudiatory breach, Owners had affirmed the charterparty by initially forwarding their deadfreight and demurrage calculation and stating "... all time delayed beyond this point shall increase the amount of demurrage." The Tribunal had no hesitation in concluding this initial response could not be construed as an attempt by the Owners to keep the contract alive and did not amount to an affirmation of the charter. Owners were entitled to recover any damages arising from the repudiatory breach.

However the Charterers had never waived the South China port option in the Chartperparty (which attracted a lower freight rate). The freight actually earned for the substitute voyage was greater than that which would have been earned on the original voyage if Charterers had exercised the South China discharge option. The Tribunal therefore held that Owners suffered no loss as a result of Charterers' repudiation.

A significant amount of time and energy had been expended in respect of Owners' failed claim for damages for repudiation of the charterparty. Owners were therefore only awarded 80% of their costs.

COLLISION, GENERAL AVERAGE AND SUMMARY JUDGMENT

The Claimant's vessel "JIA LI HAI" came into collision with another vessel off China as a result of which the Claimant brought an action against that other vessel and joined the cargo insurer AIG Insurance Hong Kong as Second Defendant.

The Claimant's claim under the General Average guarantee was met with an allegation of unseaworthiness. It was alleged by AIG that the vessel's systems and procedures, which they said for a vessel to be seaworthy must be reasonably fit to withstand the perils which might foreseeably be encountered on the voyage and keep the cargo reasonably safe from those perils, were inadequate.

AIG referred to and relied upon a report by Mingbo Maritime Safety Administration which concluded that there was negligence attaching to the "JIA LI HAI" in respect of look out, safe speed and taking precautions required under special circumstances. AIG further contended that the vessel had no or no adequate passage planning, bridge management and/or safety management in operation to deal with the ordinary incidents of the voyage. Had such systems been in place, the collision would not have occurred.

The Claimant applied to strike out those parts of the insurer's Defence and Counterclaim.

An expert relied upon by AIG had said that it was difficult to see how the collision occurred if there were systems that were properly implemented and followed. The Court found however that contention did not mean that there were inadequate or insufficient systems in place as alleged. The burden of proving unseaworthiness initially rested upon the cargo insurers who must plead it with sufficient particularity.

The Court was satisfied that AIG had shown no foundation for their allegations as pleaded and that at best it could perhaps show that systems were breached on the occasion of the collision but it could not show any inadequate systems or inadequate arrangements for implementation of those systems.

In conclusion the Court was satisfied that the cargo insurers had no real prospect of success and that they had pleaded their Defence without foundation.

The Court further considered that waiting for disclosure was not a proper or sufficient reason for allowing the matter to proceed to trial and it was in principle amenable to strike out the parts of the Defence sought by Owners. The Court however preferred on balance in the exercise of its judgment to dispose of the case on the basis of summary judgment in favour of Owners.

ALLEGED SLOW CRANES AND SPEED UNDERPERFORMANCE IN PRACTICE

In a recent London arbitration two disputes arose under a trip time Charterparty. The Charterers alleged slow movement of the vessel's cranes during loading operations and they also asserted a claim for speed underperformance on voyages.

As to the crane dispute Charterers obtained a copy of the technical specification data from Owners and then obtained a report from consulting engineers.

The consulting engineers concluded that the vessel's gear was in good condition but also concluded that the cranes were working slowly whilst hoisting and slewing when

compared to the technical specification. Charterers calculated a time loss of 1.89 days. This calculation was made comparing the time taken to load the vessel with that of other vessels loaded with the same cargo at the same port slightly before the subject vessel. Owners denied the cranes were slow and attributed any delays to inefficiency of the crane drivers provided by the Charterers' Stevedores.

The Tribunal held that there was nowhere in the Charterparty any specific provision or undertaking as to the speed and performance of the vessel's cranes. There was no breakdown that might have brought the offhire provisions into play which left only the general maintenance provisions under Clause 1 of the NYPE Charterparty as a potential basis for the claim.

A major problem for the Charterers in seeking to pursue their claim under Clause 1 was their consulting engineer's report to the effect that the vessel's gear was in good condition. In the absence of any cogent evidence to substantiate their allegations the Charterers' claim under this head failed.

As to speed underperformance Charterers asserted a time loss of 12.97 hours with an attendant overconsumption of 2.829 MT IFO and 0.33 MT MDO during a transit at ECO speed between Fujairah and the Malacca Strait.

The Charterparty contained the phrase 'Technically Owners received below info from builders as ECO speed/cons.... all details about and given in good faith WOG'.

Owners relied upon the ruling in the "LIPA" that the WOG provision in the Charterparty meant Owners had given no warranty as to the vessel's speed and consumption when proceeding under orders at economic speed. Charterers requested an Order for production by Owners of the vessel's speed and consumption records on her previous voyage however they did not advance any positive case in that respect.

The Tribunal found the representation made in the recap went no further than stating that Owners had received the specified technical information from the builders – which they clearly had – rather than relating to the vessel's actual performing capabilities. In the circumstances the Charterers failed to establish any relevant warranty as to the vessel's speed and consumption.

FIRE AND HAGUE RULES EXCEPTIONS

As a result of fire the Owners of "LADY M" engaged salvors, the vessel was towed to Las Palmas and the Owners declared General Average. Glencore as cargo owners incurred liability to the vessel's salvors as well as further costs defending salvage arbitration proceedings in the total sum of around US$3.8m. Glencore sought to recover these costs from the Owners for alleged breach of the contract or contracts of carriage contained in or evidenced by four Bills of Lading, alternatively in bailment, together with a declaration that it was not liable to make General Average contribution. The contract or contracts of carriage contained in or evidenced by the Bills of Lading, and the bailment of the cargo, were subject to the Hague Visby Rules.

The Owners sought to rely upon defences under Article IV Rule 2(b) ("fire") and/or Article IV Rule 2(q) ("any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier") of the Hague-Visby Rules.

The Commercial Court considered the scope of each of these defences on the assumption that the fire had been started deliberately by the Chief Engineer with intent to cause damage at a time when the Chief Engineer was under extreme stress and possibly was mentally ill. After a detailed review of relevant case law, including consideration of whether the conduct of the Chief Engineer might have amounted to barratry the Court concluded that the Owners could rely on the defence of fire in Article IV Rule 2(b) even if the fire had been deliberately or barratrously caused.

However, the Court also concluded that for the purposes of Article IV Rule 2(q) the relevant test should be whether: "the conduct in question occurred in the course of the servant or agent performing a function in dealing with the ship or cargo which he was performing on behalf of the shipowners, deriving his authority to perform that function on behalf of the Owners directly or indirectly through contracts of agency or employment". Applying that test the Chief Engineer was acting as a servant of the Owners when setting fire to the engine control room. He had been put on board the vessel by the Owners to be responsible for management of the main engine, including the engine control room, for the purposes of carrying and caring for Glencore's cargo and caring for the ship within his field of responsibility which included the engine control room. He was performing the functions of the Owners in looking after the vessel and carrying and caring for the cargo which was within his field of responsibility on the vessel. In consequence the Owners would not be exempt from liability for the fire under Article IV Rule 2(q) even if the conduct of the Chief Engineer amounted to barratry.

SECURITY FOR AN AWARD PENDING APPEAL

In Progas v Republic of Pakistan, the Commercial Court reviewed the principles under which it will exercise its power under S.70(7) of the Arbitration Act 1996 when a party challenges an award under s.68 of the Arbitration Act 1996 for serious irregularity. S.70(7) is the provision under which the Court may order the amount awarded to be paid into Court or secured pending the outcome of the challenge.

The Court confirmed that the power to order security under section 70(7) in the event of an arbitral challenge is necessarily linked to the making of the challenge. There must therefore be something brought about by the challenge which makes an order for the provision of security appropriate. In order for the Court to make an order under S.70(7) the applicant must demonstrate that the challenge in some way prejudices the ability of the Claimant to enforce the award or diminishes the Defendant's ability to honour the award. Effectively this means the applicant must show that there is a risk of dissipation of assets, i.e. similar to what an applicant for a freezing injunction must demonstrate.

It makes no difference if the party making the challenge is funded by a third party even if the award is in respect of costs that have not been paid. The Court also stated that the power of the English Court to make a non-party liable for costs does not apply to arbitration and that s.70(7) should not be used as a means of enforcing an award.

STAKEHOLDERS WITH COMPETING CLAIMS

In 2010 the vessel "CV STEALTH" was bareboat chartered by its head owners to Disponent Owners for a period of 5 years. In 2014 the Disponent Owners chartered the vessel to time Charterers for a period of about 8 months. The obligation of the time Charterers to pay hire was guaranteed by Glencore. The time Charterers directed the vessel to Venezuela where she was detained whilst waiting to load cargo. She was only released from that detention in October 2017. The time Charterers redelivered the vessel to the Disponent Owners in 2015 but the bareboat charterparty remained in force and the Disponent Owners remained liable to pay hire under the bareboat charterparty while being unable to trade the vessel. The detention of the vessel gave rise to claims by the Head Owners against the Disponent Owners for unpaid hire and by the Disponent Owners against the time Charterers for an indemnity. Both sets of claims were referred under the respective charterparties to arbitration in London. Several arbitration awards were issued in both references.

On 1 November 2017, the Head Owners obtained from the US District Court of Connecticut a Rule B attachment order which attached or garnished the debts of the time Charterers to the Disponent Owners. That order was vacated on the application of the time Charterers on 20 November 2017 because the US Court decided it was unable to exercise personal jurisdiction over the time Charterers and accordingly property held by the time Charterers was outside the jurisdiction of the US Court. The Head Owners appealed against that decision. The Head Owners also asserted that the service of the Rule B attachment order on the time Charterers had created a proprietary claim on the debt owed by the time Charterers to the Disponent Owners which could be enforced in the event that the appeal of the Head Owners against the vacation of the Rule B attachment were subsequently to succeed. The time Charterers feared that if they were to pay the sums due to the Disponent Owners under the arbitration awards then they might be exposed to having to pay those sums again to the Head Owners.

The Commercial Court decided that the power of the English Court to give directions to stakeholders who face competing claims is not restricted to circumstances where those competing claims take the form of English Court proceedings. The power extends to include circumstances where the competing claims take the form of claims made in arbitration proceedings, including claims in respect of which an arbitration award has already been obtained but has not yet been enforced by the Court.

Similarly claims that are made in foreign court proceedings may amount to competing claims. A Rule B attachment could amount to a competing claim notwithstanding that the order was intended to provide security. This was because it was the nature and effect of the attachment that mattered and there was evidence before the court that a Rule B attachment order operates *quasi in rem* and therefore could give rise to a proprietary claim. But where the Rule B attachment had been vacated it could not be regarded as a competing claim. The Commercial Court also decided that where a surety is involved it is sensible that both the primary obligor and the surety be made party to the stakeholder claim even when it is the primary obligor that is facing the competing claims rather than the surety.

The above are only intended to be short summaries.

If you require any further information please feel free to contact us.

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