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wh Newsletter

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We welcome to the firm Edward Bayliss, who has been working for the last 3 years with the International Maritime Organization. Edward has been called to the Bar and will requalify as a solicitor. Edward is also an accomplished yachtmaster.

POWER OF SALE OF CARGO

In the 'MOSCOW STARS" Claimant shipowners applied for the sale of a cargo of crude oil loaded on board their vessel. A lien had been exercised over the cargo for unpaid hire and although some payments had been received they did not discharge the full balance due. Arbitration proceedings were commenced and as at the date of the hearing the cargo was subject to arrest not only by the Claimant but also by 11 other companies within the same group who were owed hire under different Charterparties.

The Defendants argued that the court could only order a cargo sale under CPR 25.1(c)(v) if the cargo was perishable or needed to be sold quickly and that the cargo was not the subject of the arbitral proceedings per Section 44(2)(d) of the Arbitration Act 1996.

Mr Justice Males concluded that since a contractual lien was being exercised over the cargo as security for an arbitration this was a sufficiently close connection under the Arbitration Act. He considered that the CPR Power of Sale was appropriate since the cargo had been on board the vessel for over 9 months and without an Order for Sale would remain there for some time further to the prejudice of the Claimant Owners. Exercise of the Power of Sale would enable all parties to move forward.

NOTICE OF COMMENCEMENT OF ARBITRATION

In Sino Channel Asia Ltd v Dana Shipping & Trading PTD the Court of Appeal had to decide whether a notice to commence arbitration had been properly served when the shipowners (Dana) had addressed the notice to its contracting party (Sino) but had sent it to a person (Mr C) who was not actually an employee or representative of Sino and had not sent the notice to Sino's registered office.

The notice was so given because Mr C had described himself and had been held by Sino's brokers as being an employee or representative of Sino when in fact Mr C was not. Unknown to Dana, Mr C was actually a representative of a different company (BX) for which Sino had agreed to front the contract. Dana at all times believed the employees of BX were representatives of Sino being unaware they were separate companies although Sino signed the COA. Sino did not respond to the notice and did not participate in the arbitration. After an award was published Sino sought a declaration under s.72 Arbitration Act 1996 that the tribunal had not been properly constituted.

The Court of Appeal considered issues of ratification, implied actual authority and ostensible authority. The Court decided that "positive ratification" required an unequivocal act and the facts fell far short of demonstrating that Sino had adopted or recognised what Mr C had done. The Court observed that there is no obligation on a person who denies being a party to an arbitration agreement to take any steps in advance of enforcement proceedings.

The Court also observed that actual authority may be express or implied. It is *implied* when it is inferred from the conduct of the parties and the actual circumstances of the relationship between principal and agent. Although even a wide general authority to deal with a case on behalf of a principal will not (without more) translate to authority to accept service of originating process, there may be implied actual authority where the actual circumstances of the relationship between principal and agent justify it.

Upon a detailed review of evidence of the relation and dealings between Sino and BX, the Court of Appeal concluded that the correct inference to be drawn from the actual circumstances of the relationship was that BX did have implied actual authority to accept service of the notice.

The Court noted that although an employee/agent cannot purport to create his own ostensible authority nevertheless the conduct of the principal may give rise to an inference that the employee/agent's representation is that of the principal. The Court reached the conclusion that Mr C had ostensible authority on behalf of Sino because the appearance given to Dana was that BX/Mr C were to be dealt with for all purposes. It was not a holding out simply made on the part of BX/Mr C. The holding out manifested itself in Sino's conduct of its relationship with BX.

AVOIDANCE OF LOSS FOLLOWING BREACH

In the "NEW FLAMENCO" the Supreme Court considered whether Owners' damages following acceptance of a Charterers' repudiatory breach should be reduced if avoidance of a fall in the value of the ship has occurred.

The "NEW FLAMENCO" was a cruise ship that had been chartered for a two year period but was redelivered early on 28 October 2007 which was treated as a repudiatory breach by the Owners. Shortly before 28 October 2007 the Owners entered into an agreement for the sale of the vessel for USD$23,765,000. It was found that if the Charterers had continued the vessel would only have been worth USD$7,000,000 at the original intended redelivery date in 2009 mainly due to the financial crisis in 2008. Owners argued that the difference in value was legally irrelevant, whereas Charterers argued Owners were bound to credit to them the difference between the two figures in any damages assessment.

It was held by the Arbitrator that selling the vessel two years earlier was an act of mitigation caused by Charterers' repudiation of the Charterparty. On appeal, Mr Justice Popplewell disagreed and found it could not be considered as mitigation of Owners' loss.

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The Court of Appeal disagreed holding that the benefit to the Owners was to be regarded as mitigation arising from the Charterers' repudiation.

On appeal to the Supreme Court, Lord Clarke observed that the sale was not directly caused by the repudiation of the Charterparty. The question was whether there was a close link between the Charterers' breach and the decision to sell the vessel. He focused on a test of causation between the breach and the benefit and decided the decision taken by the Owners to sell was a commercial decision, not a result of the Charterers' breach.

VESSEL COSTS ALLOWED IN GA DURING PIRACY SEIZURE

On 29 January 2009 the chemical carrier "LONGCHAMP" was transiting the Gulf of Aden on a voyage from Rafnes, Norway to Go Dau, Vietnam, laden with a cargo of 2,728 m/t of vinyl monomer in bulk when 7 heavily armed pirates boarded the vessel. The pirates commanded the Master to alter course towards the bay of Eyl, Somalia. At 1405 on 30 January 2009 a negotiator for the pirates boarded the vessel and demanded a ransom of US$6M.

Negotiations between the pirates and the Owners' crisis management team continued over the following seven weeks with various offers and counteroffers being made. Eventually on 22 March 2009, after a negotiation period of 51 days, a ransom was agreed in the amount of US$1.85M. On 27 March 2009 the ransom sum was delivered by being dropped at sea. On 28 March 2009 the pirates disembarked and the vessel resumed her voyage.

It was accepted that the US$1.85M ransom payment itself was allowable in General Average under Rule A of the York Antwerp Rules. It was also accepted that the costs and expenses of the negotiator in relation to the ransom, and of his special advisers, were allowable as were some media expenses. The issue that went to the Supreme Court was whether the vessel operating expenses incurred during the period of negotiation were allowable in General Average under Rule F which admits extra expenses which are incurred in place of another expense which would have been allowable in General Average. The vessel operating expenses comprised bunkers consumed during the negotiations, crew wages, additional bonuses to which the crew were contractually entitled while the vessel was in a high risk area and food for the crew.

The Average Adjuster considered that the vessel operating expenses were allowable under Rule F but the opposite view was taken by the Advisory Committee of the Association of Average Adjusters in an opinion that cargo interests obtained after release of the GA adjustment. This resulted in the cargo interests issuing court proceedings to challenge the adjustment.

Contrary to the view taken by the first instance judge and by the Court of Appeal, a majority of the Supreme Court took the view that the words in Rule F "another expense which would have been allowable as a general average" referred to an expense of the nature described in Rule C rather than an expense that would have qualified under Rule A. The effect was that the vessel operating expenses were allowable to the extent that the shipowners could establish that the total costs (ransom and all expenses) did not exceed what would have otherwise been a reasonable amount under Rule F.

The Court rejected arguments that the vessel operating expenses should not be allowable because Rule C excludes General Average expenditure which is an "indirect loss" including delay or demurrage. The Court accepted that Rule C applies to expenses and other sums claimed by way of General Average as consequences of a General Average Act as defined by Rule A. The Court, stated the fact that operating expenses are allowed by Rule XI in one specific type of case, does not mean that it should be presumed that they are excluded from every other type of case.

In a dissenting judgment Lord Mance expressed the view that even if operating expenses were allowable in principle under Rule F not all such expenses were recoverable as it would not have been reasonable to pay the initial ransom demand and therefore a period of negotiation and some vessel operating expenses were inevitable.

LATE ARRIVAL UNDER VOYAGE CHARTER WITHOUT AN ETA

Where a vessel has an obligation to proceed to the load port with all convenient speed and gives an ETA for readiness for loading there is an absolute obligation to commence the approach voyage at a time so that the vessel will comply with the date given. The recent decision in CSSA Chartering and Shipping v Mitsui considered the position where there is no express ETA or date when the vessel is expected to be ready to load, merely a cancellation clause in the event of non-arrival by cancelling date.

The vessel was fixed for a voyage from Rotterdam to the Far East. At the time of the fixture the vessel was carrying a previous cargo due to be discharged in Egypt and the vessel was then to reload a part cargo at Alexandria and discharge at Le Havre before ballasting to Rotterdam. The Charter contained various ETA dates in respect of this schedule the last of which was ETA Le Havre on 25 January. There was a cancellation provision if the vessel was not ready to load at Rotterdam by 4 February.

During transit of the Suez Canal the vessel suffered water ingress attributed to contact with a submerged object in respect of which there was no suggestion of fault on the part of Owners but the vessel had to be drydocked for repairs which were expected to take several months. The Charterers cancelled on 6 February and claimed damages arguing that the cancelling date should be treated as equivalent to an expected ready to load date.

Mr Justice Popplewell rejected this argument but found that the Owners were under an absolute obligation to commence the approach voyage to Rotterdam at the end of a reasonable discharging period for the vessel if she had arrived for final discharge at Le Havre on 25 January. He awarded the Charterers damages of about US$1,200,000.

DAMAGES FOR LATE PAYMENT BY INSURERS

The entry into force of the Enterprise Act 2016 brings amendments to the Insurance Act 2015, including the new Section 13A designed to allow policyholders to recover damages from insurers who have not paid valid claims within a reasonable time.

A 'reasonable time' includes a reasonable time to investigate and assess the claim, and depends on all the relevant circumstances including, but not limited to;

- the type of insurance,
- the size and complexity of the claim,
- compliance with any relevant or statutory rules or guidance,
- factors outside the insurers' control.

Previously the insurers' liability was limited to sums due under the policy and interest on the late payment of those sums. Now insurers may also be liable for loss incurred by the insured caused by a delay in payment on the sums due under the policy.

A failure to pay within a reasonable time now constitutes a breach of an implied term of the contract of insurance giving rise to a claim for damages in accordance with the general principles of contract law - to place the insured in the position he would have been in had the contract been properly performed. The recoverable losses may extend to include loss of profits.

To protect against the risk of exposure, insurers should consider taking the following steps to avoid unnecessary delays in payment of the claims:

- proactive management of the claims process including conduct of investigations,
- maintenance of claim progress reports to satisfy transparency requirements and show reasonableness of disputing claims,
- identification and prompt payment of uncontested elements of a claim.

Section 16A of the Insurance Act 2015 enables insurers to contract out of the provisions of Section 13A (in non-consumer insurance contracts only), unless there are deliberate or reckless breaches of the implied 'reasonable time' term. Insureds have one year from the date of final payment to bring a claim in respect of damages for late payment.

AGREEMENTS TO AGREE

In Teekay Tankers v STX Offshore and Shipbuilding Co the High Court provides an interesting illustration of the difficulties that can occur when the terms of a commercial deal are left by the parties to be agreed upon at a later date. Subsidiaries of the Claimant Teekay entered into an agreement for the purchase of four tankers with the Defendant shipbuilder STX and Teekay itself entered into an 'Option' agreement with liberty to exercise three options to purchase further tankers from STX. In the event STX refused to enter into shipbuilding contracts under the Option agreement. Teekay sought loss of bargain damages of $180M for STX's repudiation of the Option agreement. STX contended that the Option agreement was void for uncertainty or unenforceable.

The main issue was whether the Option agreement was an enforceable contract. This turned on whether the Court would imply a term to determine delivery dates using the wording of Clause 4 of the Option agreement which provided that the parties would agree on delivery dates at a future juncture. Clause 4 stated:

"The Delivery Dates for each Optional Vessels shall be mutually agreed upon at the time of Teekay's declaration of the relevant option, but [STX] will make best efforts to have a delivery within 2016 for each First Optional Vessels, within 2017 for each Second Optional Vessels and within 2017 for each Third Optional Vessels."

Under English contract law the Court will attempt to preserve the parties' bargain by striving to give effect to an essential term not agreed where both parties intended the term to be binding, which the court in this case found was their intention. Teekay proffered two alternative bases on which to imply a delivery term:

(i) the earliest possible date STX could offer using its best efforts or
(ii) a date that was objectively reasonable to be determined by the Court if not agreed by the parties

After detailed analysis of the case law on implication of contractual terms, Mr Justice Walker held that no such term as to delivery dates could be implied and the Option agreement was therefore void for uncertainty. The Court found the first argued basis for implying a term would mean that STX effectively had unilateral control over deciding the delivery date and therefore the date would not be 'mutually agreed upon'. As to the second proposed basis for implication it was held that objective reasonableness would be inconsistent with the phrase 'will make best efforts', since both parties had competing interest which would preclude identification of what would be a 'reasonable' delivery date. The Judge found a crucial distinction between making best efforts to achieve a particular result and agreeing to use best efforts to reach an agreement in the future.

It remains prudent for contracting parties to ensure all key terms are decided upon and expressed in a contract. Where parties prefer that a key term is to be decided in the future they should include specific objective criteria that the court can use as a tool to facilitate the implication of a term.

A further point of interest was the correct date from which to assess the damages attributable to a failure by STX to honour the Option agreement, had the court determined that the Option agreement was not void for uncertainty.

Two of the three purchase options under the Option agreement had been exercised by Teekay at the time of STX's repudiation of the Option agreement. The third option was exercisable by Teekay at a date after repudiation by STX. With regard to the exercised options Teekay argued the correct method for assessment of damages should be to take the market price of a shipbuilding contract at the date of STX's repudiation of the Option agreement. STX on the other hand argued the proper approach was to identify the market value of the relevant vessels at the dates when they ought to have been delivered. The Court held the correct date to apply in assessing damages was the market price of a shipbuilding contract at the date of repudiation of the Option agreement. It was breach of the Option agreement which caused the loss, not of the actual shipbuilding contracts due to be entered into under the Option agreement. With regard to the option yet to be exercised at the time of STX's repudiation, the Court held the correct method for the assessment of damages should be the market price of a shipbuilding contract on the date on which the option could have been exercised.

Had the Option agreement been held to be certain the Court would have awarded damages of US$116,920,000. Paradoxically, had STX succeeded in its argument as to the correct method of assessment, damages payable to Teekay would have been considerably higher at US$139,320,000. The judgment also offers useful analysis by the Judge of the competing methods for assessing market resale values of ships upon consideration of evidence by expert witnesses for each side.

ABNORMAL OCCURENCE, JOINT INSURANCE AND LIMITATION OF LIABILITY BY SUBCHARTERERS

The Supreme Court gave judgment in the "OCEAN VICTORY", a case involving a bulk carrier that ran aground whilst exiting the port of Kashima, Japan and became a total loss. The vessel was required to exit the port during a severe gale after swell caused by long waves meant it has become dangerous for the vessel to remain in port. The case raised three issues:

(1) whether the port was unsafe within the meaning of the safe port undertaking in the demise charter of the vessel, particularly whether the two events (the swell and the severe gale) taken together constituted an abnormal occurrence within the context of the safe port undertaking, meaning the port was not an unsafe port.

(2) whether, assuming there was a breach of the safe port undertaking, the provision for joint insurance in Clause 12 of the Barecon 89 form meant that Owners were not entitled to claim against the demise Charterers in respect of insured losses for breach of the safe port undertaking; and

(3) whether, assuming there was a breach of the safe port undertaking, sub-charterers were entitled to limit their liability for loss of the vessel pursuant to the 1976 Convention on Limitation of Liability for Maritime Claims.

Issues 2 and 3 would only arise to be answered by the Supreme Court if the port was found to be unsafe.

ISSUE 1 - SAFETY OF THE PORT

At first instance, the High Court decided that the swell and a severe northerly gale were both characteristics of that port and therefore the combination of events was foreseeable, which meant that Kashima was an unsafe port within the meaning of the safe port undertaking in the demise charter. The Court of Appeal reversed the High Court's decision holding that the Court should consider the situation in the context of all the evidence to ascertain whether the combination of events taken together was sufficiently likely to have become an attribute of the port. The Court of Appeal held the combination of events was a rare occurrence in the history of the port, even if each event separately may have been a characteristic of the port. Therefore the combination was an abnormal occurrence so that the port was not unsafe. The Supreme Court unanimously upheld the decision of the Court of Appeal. This aspect of the judgment is uncontroversial as it affirms the existing law.

ISSUE 2 - JOINT INSURANCE CLAUSE

Issue two proved to be the most contentious issue considered by the Court, even though it was not strictly necessary for the Court to address it. By a 3:2 majority, the Supreme Court agreed with the Court of Appeal in holding that Clause 12 of the demise Charterparty represented an "insurance-funded result" that in effect excluded the liability of the demise Charterers to the Owner in the event of loss or damage to the vessel caused by marine risks. Since the demise Charterers had procured joint insurance for marine, war and P&I risks as required by Clause 12 of their Charterparty, any losses would be covered by the insurance and therefore no liability arose that the demise Charterers could pass on to time Charterers for breach of the safe-port warranty. On that analysis, the demise charterers' insurers also had no subrogated claim against time charterers.

In dissenting judgments, Lords Clarke and Sumption found that clause 12 did not codify the rights and liabilities with regard to insured risks absent an express provision codifying their rights and liabilities. Rather, while agreeing with the majority that co-insureds (or their insurers) are prevented from suing one another for loss, this did not prevent liability of the demise Charterers from arising, nor did it preclude the demise Charterers or their insurers from recovering for a breach of contract caused by a third party.

In light of the Supreme Court decision, it seems that where Clause 12 of the Barecon 89 form is applicable and insurance is procured, demise Charterers or their insurers will not be able to recover damages from subcharterers for the types of loss covered by the insurance policy. Insurers and underwriters of bareboat Charterparty arrangements should reassess the risk profile of liability under such arrangements given that their subrogation rights would be extinguished by the clause following the analysis provided by the Supreme Court even though this aspect of the judgment is obiter and therefore persuasive only, where a future dispute arises on this point.

ISSUE 3 - LIMITATION OF LIABILITY

The subcharterers in control of the vessel at the time of the loss sought to rely on Article 2.1(a) of the 1976 Convention on Limitation for Maritime Claims to limit their liability for the loss of the vessel and any consequential losses arising out of the loss of the vessel. Article 2.1(a) of the Convention provides that Charterers' claims in respect of loss of or damage to property occurring 'on board' or 'in direct connection' with the operation of the ship shall be subject to limitation of liability. The Supreme Court unanimously held the subcharterers could not limit their liability in reliance on the Convention: the phrases on board and in direct connection given their ordinary meaning could not mean the loss of the ship herself, but meant something other than the ship herself.

THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

A precursor to this Act has existed since 1930 and required third party Claimants to establish liability against the insured, if necessary by bringing a company back into existence where it had ceased to exist, before proceeding against an insurer.

In Redman v Zurich Insurance the Court found that the 1930 Act procedure still applies to cases arising prior to the 2010 Act having come into force in August 2016.

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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