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wh Newsletter

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WE WISH ALL OUR READERS A MERRY CHRISTMAS PERIOD AND HEALTHY AND PROSPEROUS NEW YEAR.

BRIBERY CLAIMS NOT WITHIN THE SCOPE OF ARBITRATION AGREEMENTS

In Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others the Supreme Court was unanimous in finding that claims including bribery, unlawful means conspiracy and dishonest assistance, were not "matters" falling within the scope of arbitration agreements so that a stay of court proceedings under section 9 of the Arbitration Act 1996 ("S.9") was not required.

Three Special Purpose Vehicles wholly owned by the Republic of ("Mozambique"), entered into supply contracts with various entities within the Privinvest group. The contracts and arbitration agreements were governed by Swiss law. The supply contracts were funded by loans from London based-banks which were secured by Guarantees granted by Mozambique. The Guarantees were governed by English law and provided for disputes to be resolved in the English Courts.

Mozambique brought proceedings in England under the Guarantees against Privinvest claiming damages resulting from bribery, unlawful means conspiracy and dishonest assistance alleging Privinvest and others had paid significant bribes to officials of the Mozambican government and employees of the London banks which had exposed the state to liabilities of approximately USD 2 billion.

The Supreme Court held that whether the quantification of Mozambique's claim fell within the arbitration agreement was a matter of construction according to Swiss law and that the answer must be arrived at by having regard to what rational business people would contemplate as matters falling within the scope of an arbitration agreement. Such business people are likely to intend that contractual disputes be determined by the same tribunal and not that the subordinate factual question of the quantification of Mozambique's losses be sent separately to arbitration. Therefore, whether the quantification of Mozambique's claim was a "matter" or not, it did not fall within the scope of the arbitration agreements.

Since the Court proceedings initiated by Mozambique involved no "matters" which the parties had agreed be resolved in arbitration Mozambique succeeded and Privinvest were denied a stay under S.9.

CHARTERERS AND LIMITATION OF LIABILITY

In the MSC Flaminia the Court of Appeal dismissed the appeal of the charterers MSC against the shipowners Conti in circumstances where the charterers sought to limit their liability.

Following an explosion and subsequent fire in mid-Atlantic, the vessel was substantially damaged and three crew members lost their lives. An explosion had been caused by auto-polymerisation (a chain reaction in cargo that causes heat and fire) of the contents of three tank containers containing the chemical DVB which had been shipped from New Orleans.

Conti incurred substantial costs relating to the salvage of the vessel, dealing with the contaminated cargo, removing firefighting water and carrying out repairs. The vessel was placed offhire by MSC during this entire period and Conti commenced arbitration proceedings to recover the hire and other substantial losses. The tribunal held that the

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vessel remained on hire throughout and awarded Conti approximately US $200 million in damages.

MSC sought to limit liability. Article 2(1) of the Convention sets out the type of claims which can be subject to limitation of liability, subject to certain exceptions.

At first instance Mr Justice Andrew Baker held that MSC was not entitled to limit its liability because Conti's claims were not within the scope of any of the provisions of Article 2 of the Convention.

The Court of Appeal found that the material facts were very similar to the Court of Appeal decision in CMA Djakarta. The consequences of a situation where a shipowner's claim against a charterer would be paid out of a limitation fund created by the shipowners themselves were considered remarkable. The High Court ruled in that case against the Charterers and the Court of Appeal allowed the appeal only to the extent that it allowed the Charterers the ability to limit liability for certain type of claims - primarily third party claims from entities falling outside the class of "shipowners".

The Court concluded it was neither the object nor the purpose of the Convention to extend a Charterer's right to limit beyond the right already conferred to them under the 1957 Convention.

The Court agreed with the Owners that claims referred to in Article 2 of the Convention ought to be interpreted to exclude claims by an Owner against a Charterer to recover losses suffered by the Owner itself.

ANTI-SUIT NEWS

The law relating to anti-suit injunctions never stands still for long.

In Deutsche Bank v Ruschem Alliance the Court of Appeal granted an anti-suit injunction to restrain Russian court proceedings brought in breach of an agreement to arbitrate an agreement subject to English law before ICC arbitration in Paris.

French Courts do not possess domestic procedural rules to permit the granting of anti-suit injunctions. They will however recognise anti-suits which restrain a breach of an arbitration agreement where this is not contrary to International Public Policy, issued by a foreign court with sufficient links to the case and is not acquired by fraud.

In Renaissance Securities (Cyprus) v Chlodwig Enterprises the English High Court granted an anti-suit to restrain Russian court proceeding brought by sanctioned Russian parties in breach of a London LCIA arbitration clause. The English Court also granted an anti-suit injunction to prevent the sanctioned entities from pursuing counter measures before the Russian Court.

Editors note: we have similar experience involving anti-suit injunctions in China.

DELIBERATE CONCEALMENT AND LIMITATION

Payment Protection Insurance has given rise to an often vitriolic campaign against the providers of such insurance. In Canada Square Operations v Potter it emerged that 95% of a fee for a PPI policy by an insured to an intermediary as taken by the intermediary as commission and only 5% of the fee was paid to the insurer.

The Supreme Court found the intermediary had deliberately concealed this from the insured and that this was relevant to the insured's ability to plead her claim, although it was not necessary that the Defendant intermediary knew this would be relevant or that it was under any duty to have disclosed it.

The effect of deliberate concealment was that the limitation period only commenced when the Claimant became aware of the relevant facts. It is to be noted that the limitation period may also commence when a Claimant could with reasonable diligence have discovered the relevant concealment.

GENEAL AVERAGE ACCORDING TO YORK-ANTWERP RULES 1994 OR ANY SUBSEQUENT MODIFICATION THEREOF

This phraseology often appears in Bills of Lading or Charterparties. There has been a view that this wording does not serve to incorporate subsequent versions of the York-Antwerp Rules since these are considered to be entirely new rules rather than a modification of existing rules.

In the Star Antares Mr Justice Butcher rejected this argument as being unduly technical and found that this wording seemed to encompass subsequent editions of the York-Antwerp Rules, particularly York-Antwerp Rules 2016, which, amongst other matters, incorporates a one year time limit for bringing claims from the date of the average adjustment.

This judgment brings the law in line with the approach adopted to the Inter Club Agreement and its subsequent incarnations.

LATE COLLECTION OF CARGO

JB Foods agreed to sell 300 mt of Nigerian cocoa beans to JB Cocoa. The cargo was shipped by container on cif terms, to Tanjung Pelepas, Malaysia under a bill of lading with the consignee marked 'to order' and Maersk were named as the carrier.

Clause 5 of the B/L provided:

5.1 [T]he Carrier undertakes to perform…, the Carriage from the Port of Loading to the Port of Discharge. The liability of the Carrier for loss of or damage to the Goods occurring between the time of acceptance by the Carrier of custody of the Goods at the Port of Loading and the time of the Carrier tendering the Goods for delivery at the Port of Discharge shall be determined in accordance with Articles 1-8 of the Hague Rules…..

5.2 The Carrier shall have no liability whatsoever for any loss or damage to the Goods, howsoever caused, if such loss or damage arises…, after the Carrier tendering the cargo for delivery.

Clause 11 of the B/L provided:

If a Container has not been packed by the Carrier;

11.2 The Carrier shall not be liable for loss or damage to the contents…,

11.3 The Merchant is responsible for the packing and sealing of all shipper packed Containers and, if a shipper packed Container is delivered by the Carrier with any original seal intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery.

The cargo was discharged on 1 October 2017 and stored at a container facility and was not collected until 28 November 2017 by JB Foods. Upon inspection the cargo was founded damaged by condensation and mould. The cargo was sold in a salvage sale and JB Cocoa was indemnified by cargo insurers in the amount of £131,629.11.

Claims were brought against Maersk by JB Cocoa as Owners of the cargo and by JB Foods as the consignees. They alleged the cargo was in good condition upon loading and that Maersk had failed to take reasonable care of the cargo by failing to ventilate the cargo from the point of discharge to the point of delivery. Maersk argued that their responsibility for the cargo ended at the point of discharge of the cargo i.e. upon tendering the cargo for delivery.

The Court found as a fact that the damage to the cargo arose during the period between discharge and devanning of the cargo and did not occur during the period of Maersk's physical custody. Cargo Interests' claims were dismissed.

JB Foods' claim failed because Maersk's liability was excluded after the time it tendered the cargo for delivery. The time of "tendering the cargo for delivery" in Clause 5.2 of the bill of lading meant the time of discharge of the cargo, not as the Claimants contended, when the cargo was collected by the bill of lading holder. That was consistent with the Hague Rules which govern the carrier's liability for damage only between loading and discharge. After discharge, liability was governed by the terms of the contract which provided that Maersk's liability ended following discharge.

JB Cocoa had no claim against Maersk in contract because the bill of lading had been endorsed to and was held by JB Foods. JB Cocoa may have been able to establish a claim against Maersk in the tort of negligence if they could show they had legal ownership or possessory title to the cargo at the time at which the cargo suffered damage. They could not do so. Even if they had title to sue in tort, there was no evidence Maersk were at fault and there was no duty in tort upon Maersk to intervene to prevent loss and damage to the cargo.

COURT MUST ACCEPT UNCONTROVERSIAL EXPERT EVIDENCE

In a cautionary note for all involved in litigation the Supreme Court found in TUI (UK) Ltd v Griffiths that a party who wishes to argue that an opponent's witness evidence whether factual or expert – should not be accepted in a material respect must challenge the evidence by cross-examination.

The Court made it clear that the rule must be applied with flexibility so that a mere assertion of opinion without reasoned support or an opinion which is obviously illogical or contrary to the factual evidence may still be challenged.

In this case the Defendant did not rely on any expert evidence and did not seek to cross-examine the Claimant's experts, although it put a number of written questions to him which it then sought to develop in closing submissions.

Overturning the trial Judge and the Court of Appeal the Supreme Court found that the Defendant's criticisms of the expert's report should have been raised in cross-examination and that the trial judge's conclusion dismissing the claim had been reached unfairly.

COURT CAN OBLIGE PARTIES TO MEDIATE

In Jame Churchill v Merthyr Tydfil v CBC the Court of Appeal has held that a Claimant who unreasonably refuses to engage in alternative dispute resolution can be prevented from bringing or advancing a claim in Court.

The power of the court is discretionary but it can be exercised even if both or any of the parties do not wish to engaged in ADR.

CRANE ENQUIRY INTO ACTS OF FOREIGN STATE

In Crane Bank v DFCU Bank the Court of Appeal made an exception to the foreign act of state principle which provides that the English Courts will not ordinarily inquire into the legality of executive acts of a foreign state when such action takes place within the territory of that state under its own law.

Crane Bank Limited ("Crane") was until 2016 one of Uganda's largest commercial banks and was regulated by Uganda's central bank, the Bank of Uganda ("BoU"). In 2016 the BoU exercising its statutory and regulatory powers, took over management of Crane, closed it and sold off some of its assets and liabilities to the first defendant, DFCU Bank, another Ugandan bank.

In 2020 Crane and some of its shareholders issued proceedings in England for conspiracy to injure by unlawful means and knowing receipt alleging that the sale of Crane's assets was made at a gross undervalue and that the actions were part of a corrupt scheme carried into effect by the BoU using its statutory and regulated powers.

The Court of Appeal unanimously held that there were serious issues to be tried as to whether part or all of the appellants' claims fall within the Commercial Activity Exemption and/or the Public Policy Exemption. The Court considered that the nature and facts of the claim required the English Court to adjudicate on the validity and lawfulness in Uganda and under the Ugandan law of the actions of the BoU and its officials.

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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