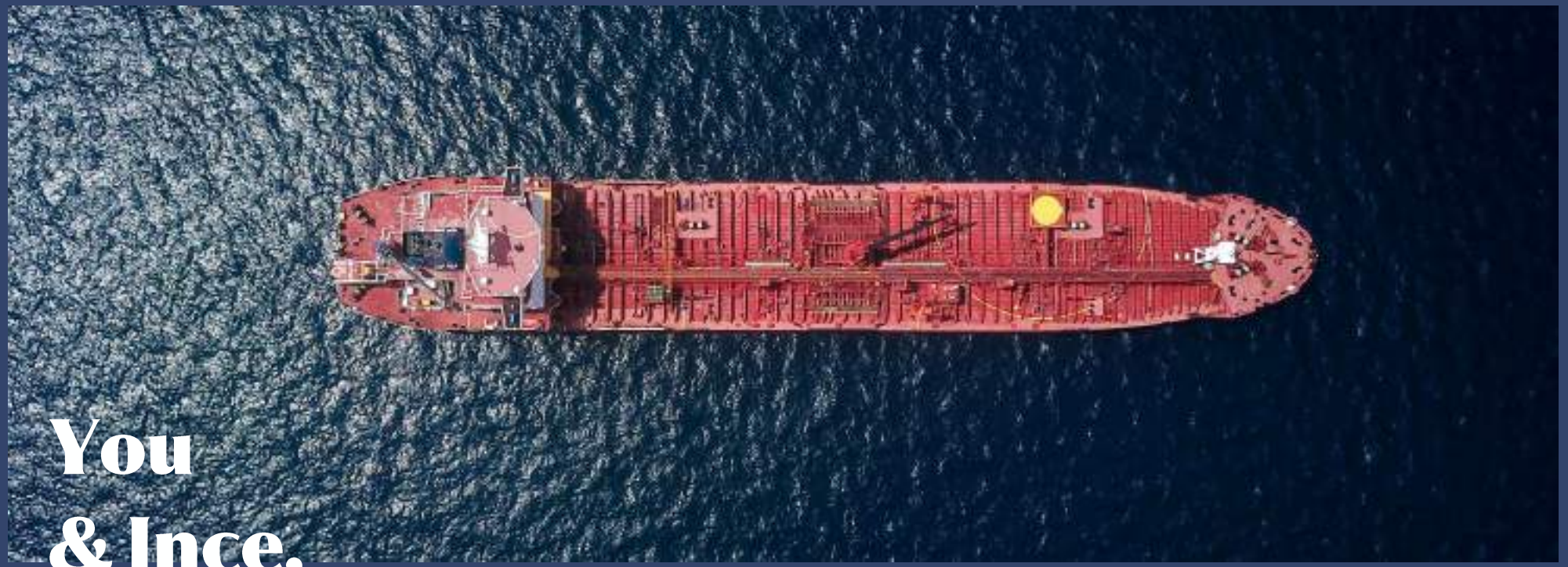
Shipping E-brief
May 2020



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Supreme Court has no jurisdiction over hull underwriters' claims against mortgagee bank in vessel scuttling case

Aspen Underwriting Ltd and others (Appellants) v. Credit Europe Bank NV (Atlantik Confidence) [2020] UKSC 11

In a decision that will be significant for marine and other insurers, the Supreme Court has found that the English Court did not have jurisdiction over claims brought by the hull underwriters of the vessel, Atlantik Confidence, as against the Dutch bank that was the mortgagee of the vessel and also the assignee of the insurance policy and the loss payee. The Supreme Court held that the bank was not bound by the exclusive English jurisdiction clauses in the policy, or by the settlement agreement with the vessel Owners and Managers. Nor could the underwriters rely on the special insurance provisions in the recast Brussels Regulation to establish English Court jurisdiction over their claims. The underwriters are now faced with the prospect of pursuing their claims against the bank in the Netherlands.

The background facts

In 2013, the vessel sank off the coast of Oman following a fire on board. The vessel was valued at US$22 million under the hull and machinery risks insurance policy, which incorporated an exclusive English jurisdiction clause. The underwriters subsequently entered into a settlement agreement, also governed by an exclusive English jurisdiction clause, with the Owners and their managers that resulted in the claim being paid.

A bank domiciled in the Netherlands had funded the refinancing of the vessel and had taken a mortgage over the vessel and an assignment of the policy, and was also named as loss payee. The bank was not directly involved in the settlement negotiations between the underwriters and the Owners/Managers, but it did issue a letter authorising the underwriters to pay the insurance proceeds under the policy to insurance brokers. This was duly done and the brokers paid out the proceeds to the vessel interests.

In subsequent court proceedings, the Court held that the vessel had been deliberately scuttled. The underwriters sought to set aside the settlement agreement and recover the money they had paid out in respect of the claim. The underwriters alleged misrepresentation by the Owners/Managers that misled them into believing that the loss was accidental and an insured peril, and inducing them to enter into the settlement agreement and pay the claim. In addition to suing the Owners and Managers, the underwriters sued the bank on the grounds that it was also liable for misrepresentation. Underwriters further claimed that the bank had "facilitated" the Owners'/Managers' misrepresentations that led to the pay-out. In response, the bank challenged the English Court's jurisdiction over the underwriters' claims against it.

The recast Brussels Regulation

Article 4 of the recast Brussels Regulation provides that a defendant must be sued in the EU member state where they are domiciled. However, where the claim is brought in tort then, pursuant to Article 7(2), the defendant may be sued in the place where the harmful event occurred. This is subject to Article 14 of Section 3 of the Regulation, which provides that in matters relating to insurance, an insurer may only bring proceedings in the courts of the member state where the defendant is domiciled, irrespective of whether the defendant is the policyholder, insured or beneficiary.

Article 25 gives jurisdiction to the member state court chosen by the parties. The parties' consensus on the choice of jurisdiction must be clearly demonstrated, usually by a written jurisdiction agreement.

The lower court decisions

At first instance, the judge held that the Court had jurisdiction over the claims for damages for misrepresentation, pursuant to Article 7(2) and also the Misrepresentation Act 1967, but not in respect of the claims for restitution. The judge further found that the exclusive jurisdiction clauses in the policy and settlement agreement did not bind the bank.

On appeal, the Court of Appeal held that the bank was not a party to the settlement agreement and so was not bound by the exclusive jurisdiction clause in that agreement. It further held that the bank had not become bound by the exclusive jurisdiction clause in the policy by asserting its right to payment under the policy as assignee or loss payee. The bank would only have been bound by the jurisdiction clause if it had commenced proceedings against the underwriters. Further, by issuing the letter of authority, the bank had not asserted rights against the insurers that made it subject to the jurisdiction clause. However, the Court of Appeal did not think that the bank could rely on Article 14, the reasoning being that while the recast Brussels Regulation provided protection for the "weaker party" in the case of certain types of contract, including insurance contracts, the bank could not be deemed as the "weaker party" in this case. The Court of Appeal, therefore, upheld the finding that it had jurisdiction over the damages claims, but not the restitution claim, which did not come within Article 7(2).

The Supreme Court decision

The Supreme Court agreed that the bank was not bound by the exclusive jurisdiction clauses. The bank was not a party to the policy that contained the jurisdiction clause. An assignment of contractual rights did not make the assignee a party to the contract. There were circumstances in which a non-party could become bound by an exclusive jurisdiction clause but the required consent to the jurisdiction agreement had not been demonstrated in this case. Specifically, the bank had not asserted any rights under the policy that also bound it to take on the obligations, including the obligation to litigate only in England. The bank was also not a party to the settlement agreement. The Supreme Court further rejected the argument that the bank had voluntarily submitted to English Court jurisdiction.

With regard to the insurance provisions in the recast Regulation, the Supreme Court concluded that the underwriters' claims against the bank came within the scope of Section 3, which applied to "matters relating to insurance". The wording of the provision was broad and it was clearly designed to protect the rights not only of parties to the policy but also third parties, such as beneficiaries and, in the context of liability insurance, injured parties who would not normally be party to the policy.

However, the Supreme Court disagreed with the lower Courts' conclusions that the bank could not be considered the "weaker party" and could not benefit from the protections afforded by Section 3. Article 14 applied equally to all categories of policyholder, insured and beneficiary, unless otherwise explicitly provided for in the Regulation. Any derogation from the jurisdictional rules in relation to insurance matters had to be interpreted strictly and to undertake an analysis of the relative strength or weakness of contracting parties would militate against legal certainty. The bank, as the named loss payee under the policy, was the beneficiary of the policy and entitled to be sued only in its country of domicile, namely the Netherlands. The underwriters would, therefore, have to pursue the bank in its domestic courts in respect of all claims, including the claim for damages for misrepresentation.

Comment

It is noteworthy that although the bank was in the business of ship finance, which involved it in the settlement of insurance claims, for the purposes of the special insurance provisions in the recast Regulation, it was still deemed to be the "weaker party" in its relationship with the insurers. This is a conclusion that will doubtless be noted by insurers going forward.

The judgment is also helpful in confirming the broad scope of the application of Article 14 of the recast Brussels Convention and the English Court's approach to interpretation, which will no doubt be of interest to insurers and other entities that may benefit from a contract of insurance to which they are not a party.

Finally, the decision is of general interest for its findings on when a non-party to a contract might be bound by a jurisdiction agreement in that contract.

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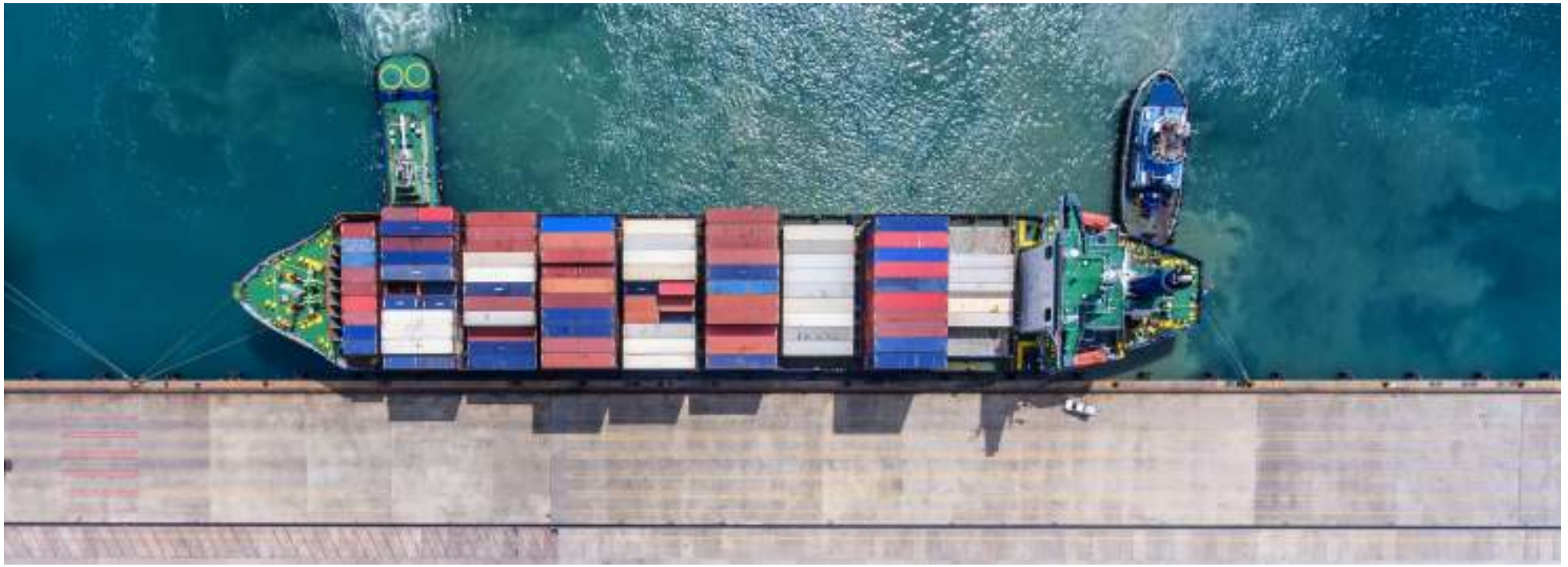
Failure to produce bills of lading in support of demurrage claim bars entire claim

Tricon Energy Ltd v. MTM Trading LLC (MTM Hong Kong) [2020] EWHC 700 (Comm)



The Commercial Court has held that where a charterparty requires demurrage to be calculated by reference to bill of lading quantities, and incorporates a demurrage time bar which requires provision of all supporting documents, a claim for demurrage will be time-barred if the shipowner fails to provide copies of the bills of lading within the required time.

The background facts

The vessel was chartered under an amended Asbatankvoy form, with the most relevant clauses being Clauses 10 and 38.

Clause 10 provided as follows:

> *"Laytime/Demurrage*
>
> *… …*
>
> *(e) If load or discharge is done simultaneously with other parcels then laytime to be applied prorate between the parcels.*
>
> *…*
>
> *(g) In the event of Vessel being delayed in berthing and the Vessel has to load and / or discharge at the port(s) for the account of others, then such delay and/or waiting time and /or demurrage, if incurred, to be prorated according to the Bill of Lading quantities."*

Clause 38 stated as follows:

> *"Time Bar Clause*
>
> *Charterer shall be discharged and released from all liability in respect of any claim/invoice the Owner may have/send to Charterer under this Charter Party unless a claim/invoice in writing and all supporting documents have been received by Charterer within [90] days after completion of discharge of the cargo covered by this Charter Party or after other termination of the voyage, whichever occurs first. Any claim/invoice which Owner may have under this Charter Party shall be waived and absolutely barred, if claim/invoice and all supporting documents are not received by Charterer before the time bar."*

The Owners brought a claim for demurrage as a result of delays at both the load and discharge ports. A formal demurrage claim, which attached a number of documents, including the demurrage invoice, laytime/demurrage calculations, NOR, vessel timesheet/statement of facts, hourly rate/pressure logs and various letters of protest was submitted within 90 days after completion of discharge. However, the Owners did not provide copies of the two bills of lading for the two parcels of cargo.

The Charterers disputed that the demurrage claimed was due to the Owners, arguing that the claim was time-barred by virtue of Clause 38, as the demurrage claim submitted by the Owners (within the 90 day period), had not attached all the necessary documents, specifically the bills of lading which contained the required information regarding the quantities.

In arbitration, the tribunal held that the Owners' demurrage claim succeeded in full, on the basis that all the Charterers needed was the statement of facts that recorded the bill of lading figure. The Charterers could use that to check that the apportionment of waiting and discharging time had been correctly stated. The tribunal did not think that the Charterers needed to see the bills of lading to satisfy themselves that the cargo quantity figures recorded in the statement of facts had been calculated on the same basis (i.e. measured in air or in a vacuum). Since the statements of facts were prepared by ship's officers in the knowledge that they would be required to pro-rate discharging time, they would have used the cargo quantity figure recorded by the same method in each bill of lading. The tribunal recorded that in disputes involving the discharge of different parcels of cargo, owners traditionally only ever adduced in evidence statements of facts and never any bills of lading.

The Charterers appealed. The point of law that the Court was required to consider was as follows: *"Where a charterparty requires demurrage to be calculated by reference to bill of lading quantities, and contains a demurrage time bar which requires provision of all supporting documents, will a claim for demurrage be time-barred if the vessel owner fails to provide copies of the bills of lading?"*

The Commercial Court decision

The Court held that, on a true interpretation of Clause 38, copies of the bills of lading had to be provided in this case. The Court did not, however, suggest that this was a general requirement.

The charterparty contained an express reference to *"Bill of Lading quantities"* in Clause 10(g), and while Clause 10(e) did not make a specific reference to bill of lading quantities, it was clear in 10(g) that *"pro rating"* was to mean a division according to bill of lading quantities. Therefore, clearly pro-rating for demurrage purposes had to be calculated by reference to the bill of lading quantities. Furthermore the charterparty in the present case referred not simply to *"supporting documentation"* but to *"all"* such documentation.

Accordingly, in the Court's view, it was not possible to treat the bills of lading as outside the requirements of Clause 38. In the present case, there was no evidence that the bills were unavailable to the Owners within the time frame. The suggestion was that they were confidential, but if there were sensitive elements to the bill of lading, those could very easily have been redacted and the redaction would not realistically include the quantities. If a bill of lading was not available, then a proper explanation of that fact would need to be provided for the purposes of Clause 38 alongside what was available.

Finally, Clause 38 referred to a claim/invoice as a single item and did not refer to *"constituent part[s]"* of a claim for demurrage. Therefore, the Court held that the Owners' failure to produce bills of lading in support of their demurrage claim barred the entire claim.

Comment

While the Court stated that this dispute was decided on the particular wording and interpretation of the relevant charterparty clauses, it seems that, following the decision in *MUR Shipping B.V. v Louis Dreyfus Company Suisse S.A. (Tiger Shanghai)* [2019] EWHC 3240 (Comm), a trend may be developing whereby the Courts are imposing a strict interpretation on the documents that must be submitted when raising such claims. Parties should be aware that whenever there is a time bar for submission of a claim, particularly demurrage claims, careful attention should be paid to the requirements, specifically in respect of supporting documentation. Parties are advised to err on the side of caution in order to avoid their claim becoming time-barred.

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We demand that you see to this guarantee right away

Shanghai Shipyard Co Ltd v. Reignwood International Investment (Group) Company Limited [2020] EWHC 803 (Comm)

The Commercial Court has recently given an important decision that highlights how the different types of guarantee provided under shipbuilding contracts can have important consequences as to how quickly a demand has to be paid.

The background facts

Shanghai Shipyard Co Ltd and Reignwood International Investment (Group) Company Limited were parties to a shipbuilding contract of a drillship (the "Contract"). An Irrevocable Payment Guarantee ("the Guarantee") was provided to secure a final payment of US$ 170 million (the "Final Instalment") by the Buyer. The contract was novated to bring in a new buyer, Opus Tiger 1 PTE Ltd, who was an indirect subsidiary of the Guarantor.

When Opus did not accept delivery of the drillship, the Builder issued a claim for the Final Instalment, and made a demand under the Guarantee. This was refused by the Guarantor pending resolution of the parties' LMAA arbitration.

The Commercial Court decision

The Commercial Court was asked to consider the following two preliminary issues:

1. Whether a guarantee provided on behalf of the Buyer was a demand guarantee or a traditional "see to it" guarantee.

a) A demand guarantee is an autonomous, irrevocable and absolute undertaking to pay a sum of money to a named beneficiary upon the guarantor's receipt of the beneficiary's demand, without concerning itself with the rights and wrongs of the underlying dispute (except where there are allegations of fraud). If properly drafted, a demand guarantee is more akin to a letter of credit than a contract of suretyship, and a guarantor's liability is a primary liability.

b) A "see to it" guarantee is more like an ancillary contract. It is a promise that when a debtor is in default of its contractual obligations, the guarantor will step in on its behalf. This type of guarantee is a secondary obligation which gives rise to a claim for damages rather than a claim in debt. Consequently, the guarantor is only liable to the extent that the original debtor was and the rules regarding mitigation of damages apply. There is, therefore, a need for the guaranteed party to establish liability in respect of the guaranteed obligation for payment to be made.

2. Whether the Guarantor was entitled to refuse payment pending the outcome of an arbitration between the Builder and Buyer in respect of the Builder's entitlement to claim the final instalment and the Buyer's liability to pay.

The first issue

The Court acknowledged that determining whether a guarantee is a demand guarantee is very difficult given the significant commonality in the language between the two different types of guarantees, and that one must consider the instrument as a whole without any preconceptions. The practical question to consider was whether the instrument was effectively payable on demand, with or without some supporting documentation, rather than the underlying liability being determined before a demand could be made.

The Court approached the interpretation of the guarantee in line with recent decisions in *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 and *Lukoil Asia Pacific Pte Ltd v. Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), and considered the presumption from *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2005] 1 WLR 2497 that, where a guarantee is given outside of a banking context, there is a strong presumption against it being interpreted as a demand bond.

The Court also considered *Wuhan Guoyo Logistics Group v. Emporiki Bank of Greece* [2014] 1 Lloyd's Rep 266 at [25] – [26], where the Court of Appeal indicated that the only assistance the Courts can in practice give is to say that *"while everything must in the end depend on the words actually used by the parties, there is nevertheless a presumption that, if certain elements are present in the document, the document will be construed in one way or the other."* Such elements include those derived from Paget's Law of Banking, which states:

> "Where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee. In construing guarantees it must be remembered that a demand guarantee can hardly avoid making reference to the obligation for whose performance the guarantee is security. …"

While considering Paget's presumptions, the Court focused on the fact that the Guarantee was not issued by a bank, despite the fact that the Guarantor had previously described itself in separate legal proceedings as a company that offered investment services. It, therefore, concluded that where the instrument was not given by a bank or other financial institution, there needed to be cogent indications that the instrument was intended to operate as a demand guarantee and the absence of indications of that strength, or quality, was material and adverse to the Builder's position. Accordingly, based on the language of the Guarantee, and with consideration to the background circumstances, the Court held that in this instance the Guarantee was a "see to it" guarantee such that a demand could not be validly made until the underlying liability had been determined in the arbitration.

The second issue

The Builder also argued that even if the Guarantee were held to be a "see to it" guarantee, based on its true construction, Clause 4 only operated as a defence to a claim under the Guarantee if the arbitration was commenced before the demand was made, which in this instance it had not been, and that any alternative construction of this clause would lead to an uncommercial result, as the Guarantor would be given two opportunities to litigate its liability under the contract which could result in undue delay to any payment.

Clause 4 of the Guarantee stated:

> *"In the event that [the Buyer] fails to punctually pay the Final Instalment guaranteed hereunder in accordance with the Contract or [the Buyer] fails to pay any interest thereon, and any such default continues for a period of fifteen (15) days, then, upon receipt by [the Guarantor] of [the Builder's] first written demand, [the Guarantor] shall immediately pay to [the Builder] or [the Builder's] assignee all unpaid Final [I]nstalment, together with the interest as specified in paragraph (3) hereof, without requesting [the Builder] to take any further action, procedure or step against [the Buyer] or with respect to any other security which you may hold.*
>
> *In the event that there exists dispute between [the Buyer] and the Builder as to whether:*
>
> *(i) [The Buyer] is liable to pay to the Builder the Final Instalment; and*
>
> *(ii)The Builder is entitled to claim the Final Instalment from [the Buyer],*
>
> *and such dispute is submitted either by [the Buyer] or by [the Builder] for arbitration in accordance with Clause 17 of the Contract, [the Guarantor] shall be entitled to withhold and defer payment until the arbitration award is published. [The Guarantor] shall not be obligated to make any payment to [the Builder] unless the arbitration award orders [the Buyer] to pay the Final Instalment. If [the Buyer] fails to honour the award, then [the Guarantor] shall pay you to the extent the arbitration award orders.*

While the Court appreciated the thrust of the argument put before it, it found that the two opportunities to litigate under the Guarantee came from two different perspectives. The first perspective was that the Guarantor could claim that no sums were payable by the Buyer and, therefore, no demand could be made under the Guarantee. The second could arise in the form of a dispute under the contract and would relieve the Guarantor's obligation to make a payment under the Guarantee until an award determining this point was published.

The Court was not persuaded that the benefits of Clause 4 would only arise if the dispute were submitted to arbitration before the demand under the Guarantee were made. It also found no basis to suggest that the parties had expressed any preference over whether the right to arbitrate or issue a demand should prevail first. Accordingly, the Court held that the true construction of Clause 4 of the Guarantee entitled the Guarantor to refuse to make payment pending the outcome of an arbitration between the Builder and Buyer irrespective of when the arbitration may be commenced.

Comment

This decision provides further guidance on the different types of guarantee that might be given under the same contract and which could have an impact on when payment has to be made. This is important, as it can take some time for an arbitral tribunal to reach a decision and issue an award.

Furthermore, it highlights the potential difference where a Builder provides a refund guarantee from its bank without a provision similar to Clause 4, where payment may need to be made immediately in response to a demand, even when the liability of the Builder to pay is disputed and referred to arbitration.

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Hong Kong Court affirms rule that arbitration clauses must be expressly incorporated into bills of lading

OCBC Wing Hang Bank Ltd v. Kai Sen Shipping Co Ltd (Yue You 903) [2020] HKCFI 375

This recent Hong Kong case confirms the rule that express wording must be used in order to incorporate an arbitration clause from a charterparty into a bill of lading. General words of incorporation will not be sufficient.

The background facts

Kai Sen was the owner of the vessel and the carrier of cargoes under four tanker bills of lading. OCBC claimed to be the lawful holder of the bills of lading and to be entitled to possession of the cargoes. Ken Sen had released the cargoes without presentation of the bills of lading and OCBC brought a misdelivery claim in the Hong Kong Court.

Kai Sen applied to stay the Court proceedings pursuant to Section 20 of the Arbitration Ordinance ("the Ordinance") on the grounds that OCBC's claim was subject to an arbitration agreement. The arbitration agreement was said to be contained in the bills of lading and to have been incorporated therein by reference to the terms of a charterparty.

The law

Under both English and Hong Kong law, reference to a separate document which contains an arbitration clause may be sufficient to incorporate that arbitration clause even without an express reference to the arbitration clause. However, the position is different where bills of lading are concerned. In *TW Thomas and Co. Limited v. The Portsea Steamship Company Limited (The Portsmouth)* in 1911, the UK House of Lords held that general words of incorporation in a bill of lading are insufficient to incorporate an arbitration agreement from a charterparty into the bill of lading. Several subsequent decisions have followed that precedent.

The rationale for treating bills of lading differently is that they are negotiable instruments, which are frequently traded internationally and so the incorporation of arbitration clauses would have jurisdictional consequences, including for parties with no connection to or knowledge of the charterparty the terms of which are incorporated.

Two Privy Council decisions on appeal from the Hong Kong Courts had previously confirmed that *Thomas v. Portsea* applies to bills of lading or negotiable instruments, but not to other contracts. In this case, therefore, Kai Sen was seeking to persuade the Court to depart from that position and to treat bills of lading the same as other kinds of contract.

Hong Kong Court of First Instance Decision

The Court of First Instance's decision confirms that the rule in *Thomas v. Portsea* is still good law in Hong Kong, despite the rule being over 100 years old. A general reference to the charterparty terms is insufficient for an arbitration clause (or other jurisdiction clause) to be incorporated. It follows that the position under Hong Kong law remains consistent with the English law position (and indeed with the position in several other common law jurisdictions).

Comment

This decision dismissed the argument that bills of lading should be treated in the same way as other types of contract, in which arbitration clauses can be incorporated by general reference. Instead, express wording is needed to incorporate an arbitration clause into a bill of lading.

Many standard forms include the required express wording. For example, Congenbill 2016 includes the following clause:

> *"All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause / Dispute Resolution Clause, are herewith incorporated." [Emphasis added].*

However, not all forms of bills of lading have such express wording. When using such forms, parties will need either to add express words of incorporation or simply add a provision dealing directly with jurisdiction, such as an arbitration clause. Otherwise, they risk finding that there is no effective jurisdiction provision in the bill of lading and that any disputes may be subject to being determined in an unfavourable jurisdiction. In addition, there might be a risk of proceedings being commenced in multiple jurisdictions, with potentially conflicting outcomes or, at the very least, costly and time-consuming efforts being required to consolidate the proceedings in a single jurisdiction. This could also lead to dispute as to the applicable limitation of liability regime.

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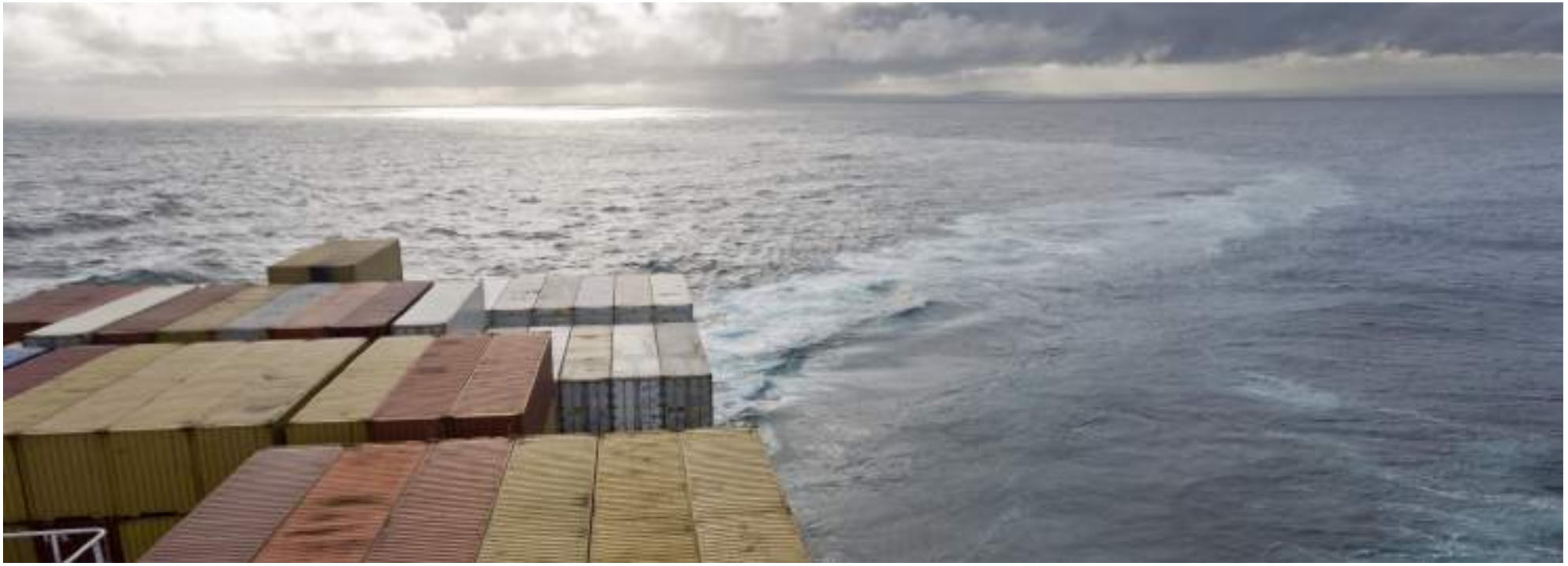
Court exhibits reluctance to interfere in arbitral process

Daelim Corporation v. (1) Bonita Company Limited (2) Eastern Media International Corporation and (3) Far Eastern Silo & Shipping (Panama) S.A. (DL Carnation) [2020] EWHC 697 (Comm)



This dispute, arising out of the early termination of bareboat charters, highlights once again that the English Courts will only interfere in arbitral proceedings in limited circumstances. It is also a reminder that any party making an arbitration application to the Court should ensure that it has followed the correct procedure, that it is seeking relief in the right forum and that it has named the correct party as the applicant.

The English Court's powers

Section 44 of the Arbitration Act 1996 sets out the powers that the English Court may exercise in support of arbitral proceedings. Pursuant to Section 44(3), these include making orders that the Court considers necessary for the purpose of preserving evidence or assets.

The background facts

The Claimant, Daelim Corporation ("Daelim"), bareboat chartered a Panamax bulker, the *DL Carnation* to Bonita Company Limited ("Bonita"), who subsequently sub-chartered the vessel to Eastern Media International Corporation and Far Eastern Silo & Shipping (Panama) S.A (together known as "EMIC"). Each bareboat charter provided for disputes to be resolved by way of LMAA arbitration in London.

On 4 June 2019, the parties jointly entered into a Termination and Settlement Agreement (the "TSA") in which they settled terms for the early termination of the bareboat charters. At that time, Bonita owed Daelim approximately US$ 1 million of hire under the head bareboat charter.

The TSA provided for payments by EMIC of: (i) approximately US$ 6 million, directly to Daelim; and (ii) approximately US$ 500,000, to Bonita as a "*full and final indemnity and settlement to any and all claims of loss, damage and/or incidental expenses with regard to the charter hire payable in the respective charter party and for the charter period not performed by EMIC and Bonita, and the costs of drydocking and damage repairs, if any…*"

*The TSA further provided for HKIAC arbitration i*n Hong Kong governed by English law.

A dispute arose in relation to the payment of the US$ 500,000 (the "Disputed Sum") that EMIC was to make to Bonita. Both Daelim and Bonita asserted that they had a right to be paid the Disputed Sum. Daelim asserted that their right arose out of an assignment under the terms of the head charter. Daelim was concerned that if EMIC paid Bonita, the money would disappear before there was any final determination of whether EMIC should have paid Daelim. EMIC was willing to pay the money into a joint account subject to agreed terms and to leave Daelim and Bonita to argue between them who should be entitled to the money. However, Bonita did not agree to this. In the absence of a consensual tripartite solution, EMIC stated that it would pay Bonita unless restrained from doing so.

Therefore, in June 2019, Daelim sought and obtained from the English Court an *ex parte* injunction ("the June Order") in respect of the Disputed Sum. The June Order:

i) restrained EMIC from paying the Disputed Sum to Bonita, pending further order of the Court (Paragraph 5.1 of the June Order);

ii) required EMIC to pay the Disputed Sum into an agreed account or failing an agreement, into Court (Paragraph 5.2 of the June Order); and

iii) restrained Bonita from demanding and/or taking any steps to demand or to recover the Disputed Sum from EMIC, until further order of the Court (Paragraph 5.3 of the June Order).

By the return date, EMIC had complied with (i) and (ii) above. Bonita was required to issue an application if they wished to challenge point (iii) of the June Order. At this stage, Daelim had commenced LMAA arbitration under the head charter against Bonita.

In their application, Bonita submitted that point (iii) of the June Order should not have been granted on the basis that it was: (a) not necessary; (b) not appropriate for the purposes of Section 44(3); and (c) was obtained on the basis of an incomplete, misleading and unfair presentation of the case to the Court. Daelim countered that the relief granted was a necessary and appropriate *quid pro quo* for point (ii) of the June Order and denied that there had been any unfairness in the *ex parte* presentation of the case.

The Commercial Court decision

The Court confirmed the limited nature of its power under Section 44(3). It relied on past Court of Appeal authority to emphasise that any orders made had to be necessary for the preservation of evidence or assets.

On that basis, it concluded that Paragraph 5.3 of the June Order should not have been granted because stopping Bonita commencing proceedings against EMIC was not required for the purpose of preserving some asset under Section44(3). Further, it was not necessary in order to enable compliance with points (i) and (ii) of the June Order. The Court ordered that Paragraph 5.3 of the June Order be discharged. The Court added that, while it noted the reason behind Daelim's original application for an injunction, *"it was the wrong application by the wrong applicant in the wrong forum"*. The Court, however, declined to make a determination on whether there had been an unfair presentation because it did not need to do so.

Comment

This is another example of the English Courts adopting a cautious approach regarding their intervention in arbitral proceedings. While the Courts are there to assist parties if necessary, those who have agreed to arbitrate their disputes should be aware that the Court's assistance is only available in a limited number of circumstances, which will be strictly adhered to by the Courts. Furthermore, those making any *ex parte* application to the Court should remain conscious of their duty of full and frank disclosure in relation to the evidence presented. While it was not a determinative issue in this case, in other *ex parte* applications, it might well be.

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Experts' fiduciary duty of loyalty to clients: practical implications for marine and offshore sectors

A Company v. X, Y and Z [2020] EWHC 809 (TCC)

In this case, companies of the same group were retained as experts by opposing sides in two related arbitration references in respect of an offshore construction project. The Court found that the whole company group, in its capacity as expert, owed a fiduciary duty of loyalty to their client, which was not inconsistent with an expert's paramount duty to the Court or tribunal. On this basis, the Court granted an injunction prohibiting the expert group of companies from acting for another party in the arbitration.

This decision highlights the need for clients to be quick in retaining their experts when facing complex marine or offshore disputes, given that the number of experts able to give evidence in relation to these fields in Courts and tribunals is very limited.

The background facts

The Claimant, a developer of a petrochemical plant, entered into two related sets of contracts: (a) a contract for engineering, procurement and construction management (EPCM) services with a third party group of companies (the "Third Party") and (b) contracts for the construction of facilities with a contractor (the "Contractor").

Disputes arose under those contracts and both the Contractor and the Third Party commenced ICC arbitration proceedings against the Claimant, seated in London with an English choice of law clause (referred to as the "Construction Arbitration" and the "EPCM Arbitration" respectively).

The disputes were interrelated since the sums claimed by the Contractor in the Construction Arbitration were in part caused by alleged delays of the Third Party in delivering their work to the Claimant. The Claimant brought a counterclaim against the Third Party in the EPCM Arbitration in respect of delay and disruption to the project (including any additional sums payable by the Claimant to the Contractor).

The Claimant retained the First Defendant for the provision of expert services in relation to the Construction Arbitration and subsequently the Third Party approached the Defendant group of companies for expert services in connection with the EPCM Arbitration. When the Claimant was informed of this, it tried to prevent the Defendants from providing expert services to the Third Party by: (i) notifying their expert (employee of the First Defendant) that it wanted to expand the scope of its instructions to include expert witness evidence in relation to the EPCM arbitration; and (ii) obtaining an *ex parte* interim injunction restraining the Defendants from acting on behalf of the Third Party in the arbitration proceedings.

On the return date, the Claimant sought to continue the interim injunction on the ground that the Defendants had breached their duty of loyalty by agreeing to provide expert services to the Third Party in connection with the EPCM arbitration in circumstances where there was a conflict, or potential conflict of interest.

The Defendants countered that independent experts did not owe a fiduciary duty of loyalty to their clients because such duty was excluded by the expert's overriding duty to the Tribunal. They also submitted that there was no risk that confidential material had been or would be disclosed to the third party and no conflict of interest since:

- each expert had a duty to act independently and to assist the tribunal;
- the expert assisting in each case was not the company – it was the individual;
- each individual was an expert in different disciplines and was based in completely different geographic regions; and
- consultancy companies like the Defendants maintained confidential information barriers between experts and their teams precisely to avoid transfer of any confidential information.

The Court considered whether each of the three Defendants could owe a fiduciary duty of loyalty to their clients and whether there was or might have been a breach of any duty of loyalty or confidence.

The Commercial Court Decision

The Court ruled that experts may owe a duty of loyalty to their client in addition to their paramount duty to provide independent expert evidence to the Court or tribunal and emphasised that those two duties were not inconsistent with each other. In doing so, it recognised that there may be occasions where experts have to act in a way which does not advance their client's case in order to satisfy their overriding duty to the Court/tribunal.

Whether a duty of loyalty arises is a fact-specific inquiry depending on the role of the expert in the proceedings. In this case, the First Defendant was engaged to provide expert services for the Claimant in connection with the Construction Arbitration as well as extensive advice and support for the Claimant throughout the arbitration proceedings.

Therefore a clear relationship of trust and confidence arose which gave rise to a fiduciary duty of loyalty.

Moreover, the Court held that where a fiduciary duty of loyalty arises, it is not limited to the individual expert concerned. It extends to the firm or company and may also extend to the wider group. In this case, the Defendant group was managed and marketed as one global firm and there was a common financial interest. Therefore, any duty of loyalty was owed by the whole of the Defendant group and not only by the First Defendant.

Finally, the Court concluded that there was breach of the fiduciary obligation of loyalty given that: (i) there was significant overlap of issues between the two arbitration references; and (ii) the obligation of loyalty was not satisfied simply by putting in place measures to preserve confidentiality and privilege; a fiduciary must not place himself in a position where his duty and his interest *may* conflict.

Comment

This decision emphasises that while experts must always keep in mind their overriding duty to the court/tribunal, they still owe a fiduciary duty of loyalty to their clients which effectively restrains them from putting themselves in situations of *potential* conflict of interest.

The practical implication of this is that clients facing major disputes should be quick in getting their team of experts ready, especially given the limited number of experts in the marine and offshore fields.

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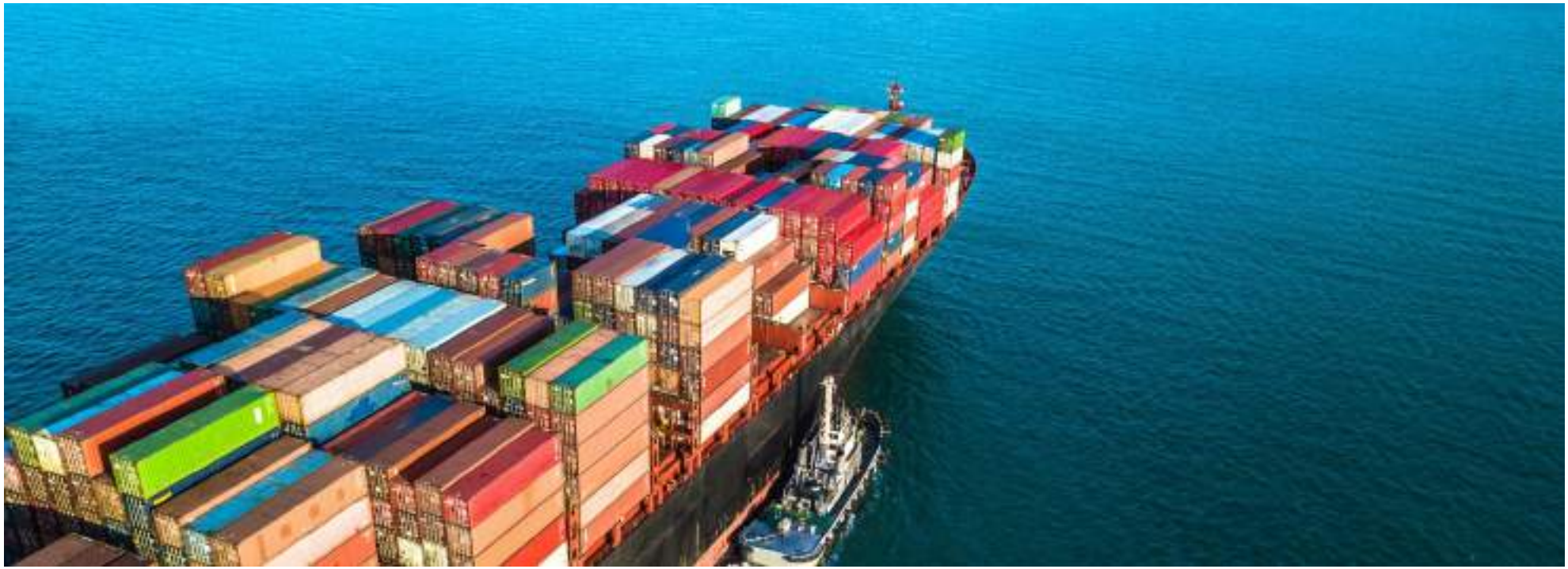
Court dismisses defences to non-performance under contract of affreightment

Classic Maritime Inc v. Limbungan Makmur Sdn Bhd and another company [2020] EWHC 619 (Comm)



This was the latest dispute under a Contract of Affreightment ("COA") between Classic Maritime Inc ("Owners") and Limbungan Makmur Sdn Bhd ("Charterers"), with the Owners claiming damages for unperformed shipments under the COA. In reaching its decision, the Court relied closely on an earlier Court of Appeal judgment relating to the Owners' claim for damages involving seven unperformed shipments.

The background to the majority of the disputes between the parties to the COA was a dam burst in Brazil in November 2015, which led to the Charterers previously attempting to rely, unsuccessfully, on force majeure and a contractual exceptions clause to excuse them from liability for non-performance under the COA.

The background facts

The parties entered into a COA dated 29 June 2009 providing for 51 shipments of iron ore pellets from Brazil to Malaysia. By 2014, the Charterers appeared to be experiencing difficulties in complying with the COA shipment schedule and the parties, therefore, amended the terms. As a result, the number of shipments under the COA was increased to 59 shipments to be performed by the end of 2017. Of these 35 were Scheduled Shipments, 16 were Unscheduled Shipments and 8 were Index Shipments.

Whilst Scheduled and Index Shipments were subject to timing requirements in the COA, for Unscheduled Shipments it was stated that the Charterers would declare the laycans for these as and when the requirements of the "Lion Group" (i.e. the Charterers' Group of Companies) for iron ore pellets in bulk could not be satisfied through the performance of: (i) the Scheduled Shipments or; (ii) the performance of other COAs or charterparties into which the Charterers had entered prior to the date of the COA (the "Extra Requirements").

The disputed issues

The Owners argued as follows:

1. The Charterers' primary obligation under the COA was to provide cargoes for shipment and they were to do so by declaring laycans for the shipment of those cargoes. The Owners contended that the Charterers did not do so in respect of 13 Unscheduled Shipments and 1 Scheduled Shipment ("the Missed Shipment") in 2013. The Owners further submitted that unless the Charterers could excuse that failure, they would be liable in damages for that non-performance.

2. The Owners also argued that if the Charterers' Group had "Extra Requirements" (which the Owners alleged there were during the period 2013 to 2015), then the Charterers were required to declare laycans for the Unscheduled Shipments. Alternatively, if there were no Extra Requirements, then all 13 Unscheduled Shipments should have been performed in any event by the end of 2017.

The Charterers were unrepresented in court. However, they had set out defences in their submissions which were taken into account. These included that:

1. They were only required to perform the Unscheduled Shipments if the Charterers' Group had Extra Requirements prior to the end of 2017. The Charterers denied that they or the Charterers' Group had any Extra Requirements.

2. If they were required to perform any Unscheduled Shipments, then they were required only to perform a maximum of 8 Unscheduled Shipments, which were 'odd numbered' shipments alternated with shipments under another COA.

3. Where Unscheduled Shipments were not required to be performed before the dam burst, the Charterers were not liable to perform them at all under the previously raised Force Majeure defence.

The Commercial Court decision

The Court held as follows:

- The COA was clear that the total number of shipments to be performed was 59. The Charterers' construction that certain shipments were only required if there were Extra Requirements was inconsistent with that provision. The Unscheduled Shipments were intended to be part of the 59 and, therefore, the obligation to make these was no more contingent than the Scheduled Shipments or Index Shipments.

- The commercial background to the COA was that it was concluded to settle disputes under earlier COAs and the logic behind it was to increase the number of shipments and increase the period over which they were to be performed. It was unlikely that the Unscheduled Shipments were contingent as this would have in fact reduced the number of definite shipments provided for under the previous COAs. Therefore, even where greater flexibility was given to the Charterers to perform the shipments, the Owners would not have given up the certainty of performance for the number of shipments.
- As for the Charterers' argument that they only had to make "alternate" shipments, this could not be right because shipments under contracts with other owners could not be regarded as shipments performed under the COA. A reference to eight in the COA clause was likely to have been a drafting error, given that sixteen unscheduled shipments was repeatedly referred to.
- Given the Court's finding that the Unscheduled Shipments were not contingent, it did not have to decide whether or not the Charterers did have Extra Requirements, although it did consider this point in terms of its impact on the performance of the Unscheduled Shipments. It inclined to the view that there were in fact such Extra Requirements.
- In relation to the force majeure defence relied on in the previous dispute, the Charterers contended that they did not perform their obligations as a result of the bursting of the Fundão Tailing Dam. The Court, however, followed the earlier judgment and determined that the Charterers were not able to demonstrate that they would have performed the COA but for the collapse of the dam.
- In relation to the Missed Shipment, the Court dismissed the Charterers' argument that the amendments to the COA treated it as cancelled with no right to damages. The amended contract referred to 59 shipments, and this included the Missed Shipment.

Quantum of Damages

The Court made it clear that the Owners were entitled to substantial damages (albeit it did not decide the final figure at this hearing). On the applicable principles, and with reference to the Court of Appeal judgment in the previous case, the calculation of damages required a comparison between: (1) the freights which the Owners would have earned if the cargoes had been supplied by the Charterers, less the cost of earning them and: (2) the actual position that the Owners found themselves in as a result of the breach.

The Court considered various principles on the calculations including:

1. the date before the assumed laycan that should be taken for the purpose of assessing the market rate (20 days);
2. as regards rate, that a voyage rather than time charter index should be used;
3. that the calculation should take account of potential positional advantage of being open at a particular discharge port when using index rates assessed between two fixed points; and
4. that the assumed cargo size should be based on average historical liftings under the COA that were performed (rather than the contractual provision).

Comment

Whilst the judgment turns on the terms of the COA and the factual circumstances of this case, there are key takeaways for any party considering entering into a COA or indeed any long-term contract, particularly where there may be uncertainty in the market. In particular, charterers should be clear as to the number of shipments that they are agreeing to perform under any COA and, if there is uncertainty on future performance, clear contingencies should be built into the COA to deal with this.

Furthermore, any force majeure clause, or other clause which excuses a party from performing their contractual obligation, should be carefully drafted. There is no general defence of force majeure under English law and the scope of any force majeure defence will depend on the contractual wording that has been agreed between the parties. Careful consideration should be given as to what anticipated events this may need to cover under the specific COA/contract.

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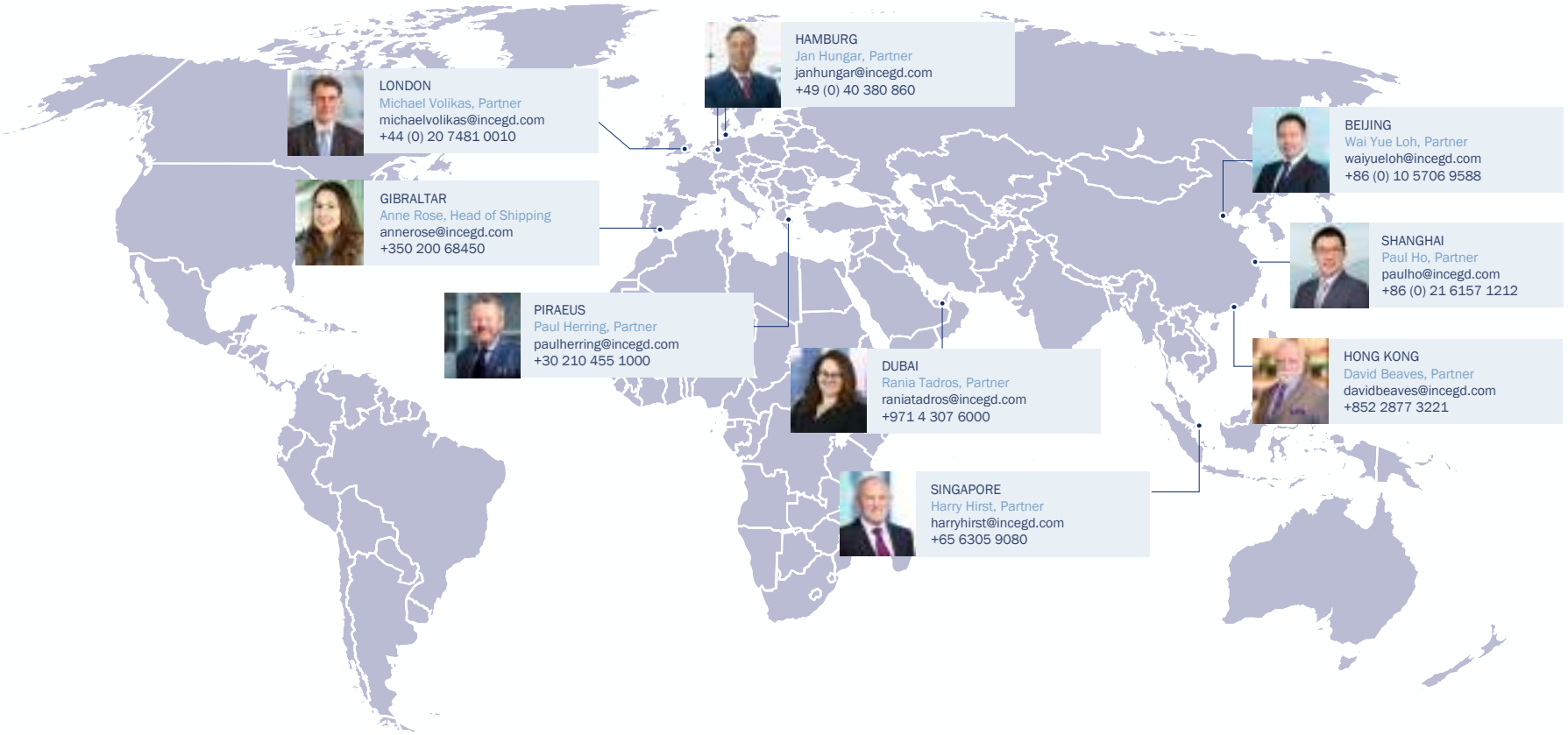

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