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Cargo owners liable to pay contribution in general average in respect of ransom payment to pirates

Herculito Maritime Ltd and others v. Gunvor International BV and others (MV Polar) [2020] EWHC 3318 (Comm)

The Court has held that, pursuant to the terms of the bills of lading, cargo owners were liable to pay a contribution in general average in respect of a ransom payment to pirates. Whilst the insurance provisions of the underlying voyage charterparty meant that the shipowners had agreed to look solely to their insurers in respect of additional War Risks and Kidnap & Ransom premiums *vis a vis* the charterers, the terms of this exclusive insurance fund arrangement had not been incorporated into the bills of lading and did not, therefore, exclude the bill of lading holder's liability in general average.

The background facts

In 2010, whilst transiting the Gulf of Aden on a voyage from St Petersburg to Singapore carrying fuel oil, the vessel was seized by Somali pirates and held for ransom. The vessel was eventually released in August 2011, following the payment of a US$7.7 million ransom. General average (GA) was declared, cargo underwriters provided a GA guarantee, cargo owners provided a GA bond and subsequently a GA adjustment was issued. The vessel's Owners made a claim for a GA contribution in respect of the ransom payment but the cargo interests refused to pay and the dispute went to arbitration.

The underlying voyage charterparty was on an amended BPVOY4 form with additional clauses. It contained a long War Risks clause, together with an additional War Risks clause (with additional premiums to be for charterers' account) and an additional Gulf of Aden clause (with additional premiums for Kidnap & Ransom cover to be for charterers' account up to a maximum of US$40,000). The terms of the charterparty, therefore, allocated responsibility for the payment of insurance premia as between the Owners and the Charterers. The bills of lading contained a generally worded incorporation clause purporting to incorporate all terms and conditions, liberties and exceptions of the charterparty, as identified on the bills. No charterparty was identified on the bills, but it was common ground between the parties that the voyage charter terms were incorporated.

The tribunal was asked to determine, by way of preliminary issues, whether the bills of lading excluded their holders' liability in respect of a GA contribution because they incorporated the "exclusive insurance fund" found in the charterparty, with the result that the Owners could only look to their insurers where the losses they sought to recover were covered by the insurances. The tribunal found in favour of cargo interests. The Owners appealed.

The Commercial Court decision

The Court allowed the appeal.

The Court considered which terms of the charterparty had been incorporated into the bills of lading. Specifically, had the clauses dealing with responsibility for the payment of additional War Risk and/or Kidnap & Ransom premia been incorporated by the general words of incorporation?

As a general rule, charterparty terms that were directly germane to the loading, carriage and/or discharge of the cargo would be incorporated, but there was no presumption of incorporation and it would depend on the particular terms of the contracts in question whether manipulation of the wording or substitution (i.e. substituting "charterers" with "bill of lading holders") would be appropriate.

Whilst the Court found that the obligation to pay for the additional insurance premia was "directly germane" to the carriage and delivery of the cargo, it concluded that it would not be appropriate, when reading the terms of the relevant clauses into the bills of lading, to substitute the "holders of the bills of lading" for "the Charterers".

This was on the basis that the bills expressly obliged the holders to pay freight as the price of the carriage of the goods to destination and it was unlikely that they would have accepted liability for such additional sums that would be unknown and unlimited. Clear words would be needed to impose such an obligation on them. Further, it was unclear how the liability to pay such additional expenses would be apportioned among different bill of lading holders where there were more than one. The fact that these questions were unanswered by the terms of the bills indicated that it would not be appropriate to manipulate the clauses so as to impose on the holders a liability to pay the additional insurance premia.

The Court then considered the consequences of the insurance provisions in the charterparty both as between the Owners and the Charterers and also as between the Owners and the bill of lading holders. The Court agreed with the tribunal that the terms of the charterparty meant that the Owners and Charterers had agreed to an arrangement whereby the Charterers paid the additional insurance premia and, in return, the Owners agreed to look solely to their insurers in respect of losses covered by the insurance, including their claim in GA. This made sense because otherwise there would be no benefit to the Charterers in agreeing to pay the additional premia.

However, disagreeing with the tribunal on this point, the Court concluded that this insurance "code" did not extend to the position between the Owners and the bill of lading holders. On the basis that the latter had not agreed to pay the additional insurance expenses, it could not be said that the bills imported an agreement that the Owners would not seek a contribution in GA from the holders. On their true construction, therefore, the bills did not exclude the holders' liability in GA or in respect of other losses covered by the additional insurances.

Comment

This case is of interest because the Court considered for the first time whether and to what extent war risks clauses and similar provisions in a charterparty are incorporated into a bill of lading. It also considered the novel issue of the effect of charterparty insurance provisions on claims in general average against bill of lading holders. In deciding which charterparty provisions were incorporated into the bills of lading, the Court applied the rules of construction "intelligently and not mechanically".

The decision is a reminder that owners should ensure that their contractual arrangements accurately reflect the way in which the parties intend risk to be allocated for piracy losses.

This decision is being appealed.

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Court construes bill of lading and LOU arbitration provisions together

Lavender Shipmanagement Inc v. Ibrahima Sory Affretement Trading S.A. & Ors (Majesty) [2020] EWHC 3462 (Comm)

This was a cargo damage claim which raised the issue of whether the P&I Club's letter of undertaking ("LOU") amended the arbitration agreement contained in the bills of lading. In upholding the majority tribunal's award, the Court construed the dispute resolution provisions of the bills of lading and the LOU together. Applying commercial common sense, it concluded that these provided for the consolidation of all claims arising under the various bills of lading in one set of proceedings.

The background facts

A cargo of bagged rice was carried from Myanmar to Guinea pursuant to a voyage charterparty and under five bills of lading. Each bill of lading incorporated the law and arbitration clause of the voyage charterparty, which provided for LMAA arbitration with each party to appoint their own arbitrator and, in the case of claims not exceeding US$100,000, for the LMAA Small Claims Procedure ("SCP") to apply.

On arrival in Guinea, the claimant cargo interests alleged that the cargo was short, damaged and wet. Both the Claimants and the Owners instructed local surveyors who inspected the cargo. The survey reports did not refer to individual bill of lading numbers or cargo quantities carried under each bill, but simply addressed the total amount of loss.

A LOU was issued to the Claimants by ETIC SAS ("ETIC") on behalf of the Owners' P&I Club. The LOU heading referred to all the bill of lading numbers and to the total quantity of cargo. It also stated: *"We confirm that the Shipowners agree that the above-mentioned claims shall be subject to English law and shall be brought in arbitration proceedings in London."*

ETIC subsequently granted time extensions to the Claimants on behalf of the Owners. In due course, the Claimants purported to commence arbitration by sending one notice of arbitration that listed all five bills of lading and indicated that one arbitrator was being appointed either: (a) pursuant to the *ad hoc* arbitration agreement in the LOU or; (b) pursuant to the arbitration provision incorporated into the bills of lading.

In response, the Owners appointed their arbitrator without prejudice to the contention that there was no *ad hoc* arbitration agreement in the LOU and that any claims had to be brought as five separate references under the bills and pursuant to the SCP.

In arbitration, the tribunal decided by a majority that:

- Whilst each of the five bills of lading contained a separate arbitration clause governed in part by the SCP, by the terms of the LOU the parties had agreed to consolidate those arbitrations and to have them heard in a single *ad hoc* arbitration; and
- The time extensions operated to grant the cargo Claimants an extension in respect of commencing arbitration proceedings pursuant to the *ad hoc* arbitration agreement in the LOU.

The dissenting arbitrator found among other things that:

- the LOU did not contain the necessary means for an identifiable or workable arbitration procedure and that in fact taken in isolation, the LOU appeared to be contradictory; and
- the LOU referred to the pre-existing agreement to arbitrate in the bills of lading.

The Owners appealed, arguing that the LOU did not provide for an *ad hoc* agreement to arbitrate, nor did it consolidate five references under the five bills of lading into one. Among other things, the Owners contended that there was no provision in the LOU on how a properly constituted tribunal would be appointed so the reference to this was meaningless. Additionally, the Owners could not be taken, without more, to have readily given up the benefits afforded to them by the SCP.

The Claimants, on the other hand, submitted that the LOU wording made clear the parties' intention to arbitrate their disputes in a single set of proceedings. They highlighted, among other things, that: the surveys treated the bills of lading interchangeably; this was one cargo (all the bags of rice carried the same markings and were of the same size and weight); the factual basis of each cargo claim would be the same under each of the bills; and the Owners' defences under all the bills would be the same.

The Commercial Court Decision

The Court dismissed the appeal. It construed the LOU in light of the relevant background, namely:

- The charterparty arbitration provision, as incorporated into the bills;
- The fact that the surveyors did not classify their findings by bill of lading numbers or cargo quantities; and
- Just one LOU was issued in respect of the entire cargo.

It concluded that the LOU was an agreement to consolidate all of the claims in respect of the entire cargo before a London arbitration tribunal constituted in accordance with the charterparty provision for the following reasons:

- Whilst the LOU was somewhat informally drafted, it was clearly intended to apply to anyone who was entitled to sue in respect of these claims;
- There was a clear intention to bind the Owners to the LOU since the P&I Club had irrevocable authority from the Owners to give the LOU;
- The LOU arbitration provision referred back to the charterparty on how the tribunal was to be constituted; and
- There was considerable commercial sense to this construction of the LOU, as it meant that the issues with one shipment of rice could be resolved once and for all in one arbitration, avoiding the inconvenience of having to commence five separate arbitrations and the risk of inconsistent awards. This afforded a sound commercial reason as to why the Owners would give up an entitlement to use the SCP.

The Court also found that the notice of arbitration was a valid notice, as it purported to appoint one individual as arbitrator in a consolidated procedure under the terms of the LOU and expressly stated that the SCP did not apply to the claims thereunder.

Finally, the Court concluded that the extensions of time applied to the LOU despite reference in them to proceedings *"as per the above Bills of Lading"* and not as per the LOU. The Court held that the wording of the time extensions should be read to mean that the extensions applied to disputes arising under the bills, which had been agreed to be resolved in a consolidated arbitration under the LOU.

Comment

This decision is a reminder that dispute resolution provisions in a LOU are potentially as important as those in the underlying contracts of carriage. To avoid an argument as to which procedure applies when a dispute arises, the parties should ensure that the dispute resolution wording of an LOU is comprehensively and clearly drafted and, where desirable, is consistent with the corresponding provisions in the bills of lading and/or charterparty.

The dispute also highlights that it is important to draft both notices of arbitration and time extensions precisely to make it clear which disputes are covered and under which contracts.

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Court of Appeal finds experts had conflict of interest that breached client retainer

Secretariat Consulting Pte Ltd & others v. A Company [2021] EWCA Civ 6

The Court of Appeal has agreed with the lower Court that separate entities within an international group of companies should not be permitted to act as experts for different parties in related arbitrations. It, therefore, upheld the injunction that had been granted by the judge at first instance against the entire expert group. However, whilst the judge had granted the injunction on the basis that for the experts to act in the two arbitrations would breach a fiduciary duty of loyalty owed to the Claimant client, the Court of Appeal founded its decision on a conflict of interest that breached the terms of the confidentiality agreement with the Claimant.

The background facts

Briefly, the Secretariat Group of companies comprised separate entities operating in different jurisdictions, all of which acted as delay and quantum experts in construction arbitrations. The Claimant company, a developer of a large petrochemical plant, had appointed the Singaporean entity, Secretariat Consulting Pte Ltd ("SCL"), to act as its expert in an arbitration against certain sub-contractors in relation to the project ("Arbitration 1"). The retainer included a confidentiality agreement and a conflict check was carried out across the whole Secretariat Group. SCL expressly confirmed in writing that it had no conflict of interest in acting for the Claimant.

The third party project manager, TCP, subsequently commenced a separate arbitration against the Claimant in respect of unpaid fees relating to the project ("Arbitration 2"). The Claimant counterclaimed against TCP, alleging that they had failed to manage/supervise the sub-contractors properly, further that they were responsible for certain delays on which the sub-contractors were relying in Arbitration 1.

TCP retained Secretariat International UK Ltd ("SIUL"), the UK entity of the Secretariat Group, as its expert in Arbitration 2. The Claimant contended that this was a conflict of interest and obtained an injunction against the entire Group, which effectively prevented SIUL from continuing to act for TCP in Arbitration 2.

In granting the injunction, the judge at first instance stated that the Claimant was owed a fiduciary duty of loyalty not just by SCL but by the Secretariat Group as a whole. The Group was managed and marketed as one global firm and there was a common financial interest between the different entities. It was, therefore, unrealistic to limit this duty of loyalty to SCL. Further, the fiduciary duty had been breached because there was a significant overlap in the issues in the two arbitrations and there was plainly a conflict of interest for the Group in acting for the Claimant in Arbitration 1 and against the Claimant in Arbitration 2.

The Group appealed.

The Court of Appeal decision

The Court of Appeal dismissed the appeal and upheld the injunction, but on somewhat different reasoning to that of the judge.

Noting that there was no prior English authority on the issue of whether an expert owed a fiduciary duty of loyalty to his client, the Court of Appeal was reluctant to conclude that there was such a duty in circumstances where it did not have to do so to decide the appeal. In its view, however, such a fiduciary duty might have unforeseen ramifications and might not be the most accurate way to define the relationship between a client and an expert. It, therefore, assumed that the experts in this case did not owe the Claimant a fiduciary duty and considered instead the effect of the express provision dealing with conflicts of interest in the parties' confidentiality agreement. As to whether SCL owed the Claimant a contractual duty to avoid conflicts of interest for the duration of its retainer, the Court of Appeal concluded that the terms of the parties' agreement meant that it did.

The Court of Appeal further found that this contractual duty extended to the other Secretariat entities. Among other relevant considerations, the way in which the Group marketed itself and dealt with its correspondence and other administrative matters meant that there was no clear outward differentiation between the different Group entities and the individual experts working for those entities. The Court of Appeal stated ultimately that as the conflict check was carried out across the whole Secretariat Group, the undertaking given by SCL in its retainer bound all the Group companies. They were all providing the same form of litigation support and expert services.

The Court of Appeal decided that this contractual duty had been breached. Based on the scope of their retainer, both SCL and SIUL had a wide expert advisory role *vis a vis* their clients that extended beyond merely giving evidence at the arbitration hearings. If an expert were involved in numerous aspects of the preparation of a client's case before it was presented, then that increased the risk that there would be a conflict of interest with that same expert being employed by another party to carry out the same or similar wide-ranging role, but this time against the interests of that client. The Secretariat entities were delay and quantum experts who, as highlighted by the Court of Appeal, were traditionally retained at an early stage in construction disputes to provide wide-ranging support and advice in the hope that their assistance would help to settle the case so that there would be no hearing at all. They were rarely engaged merely as testifying experts.

The Court of Appeal acknowledged that conflict of interest was a matter of degree. However, given the overlap of parties, role, project, and subject matter in this case, there was a clear conflict of interest.

Comment

This dispute was decided ultimately on its own particular facts and by reference to the relevant retainer. In concentrating on the experts' contractual duty to avoid a conflict of interest, the Court of Appeal has left open the question of whether a fiduciary duty of loyalty can exist in other expert/client relationships, for example where the retainer does not impose a contractual duty of confidentiality or does not adequately deal with conflicts of interest.

The Court of Appeal did, however, state specifically that delay experts are often key to assisting an arbitration team to focus on the relevant factual issues. In that context, it would arguably be inapt for the same firm of experts to be putting forward factually inconsistent cases on delay in related or similar arbitrations.

In industries such as construction, shipping and energy, where experts can be confined to a few well-known names, it is important to get your expert instructed quickly and to ensure that any retainer or agreement includes provisions on conflicts of interest and confidentiality - which is usually the case nowadays.

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Rescission of charterparty: when words speak as loudly as actions

SK Shipping Europe PLC v. (3) Capital VLCC 3 Corp and (5) Capital Maritime and Trading Corp (C Challenger) [2020] EWHC 3448 (Comm)

The Court has held that charterers were in repudiatory breach of charter by redelivering the vessel early. The Charterers claimed that they were entitled to rescind the charter because the Owners had misrepresented the vessel's performance capabilities. The Court, however, held that the Charterers had affirmed the charter by their conduct and had thereby lost the right to rescind it, even though they had continued to perform their charter obligations under a *"reservation of rights"*. In coming to this conclusion, the Court gave some useful guidance on the effect of a reservation of rights on affirmation of charter and hence the ability to rescind it.

The background facts

The Owners, SK Shipping Europe, decided to offer the vessel, *C Challenger*, for time charter during November 2016. In order to do so, the market required the Owners to offer warranties as to the vessel's speed and consumption performance. The Owners circulated this information to the brokers. Subsequently, Capital VLCC entered into negotiations with the Owners for a potential charter of the vessel. Shortly thereafter, the parties concluded a two-year time charter, in which a warranty regarding the vessel's bunker consumption was provided. Capital Maritime guaranteed Capital VLCC's obligations under the charter; for the purpose of this article, Capital VLCC and Capital Maritime will be referred to as the Charterers.

The vessel entered into the charter in February 2017. During the charter period, the vessel consumed more bunkers than the warranty had suggested that she would. As a result, the Charterers alleged that the Owners had misrepresented the vessel's performance capabilities. After some intense argument, the Charterers purported to rescind the charter for misrepresentation; or alternatively terminate the charter for repudiatory breach. In turn, the Owners contended that the Charterers had acted unlawfully and sought damages for breach of charter.

The issues

The judgment in this case is in excess of 100 pages and deals with a number of issues that are very case-specific. This article focuses on an issue that arguably has wider industry and general contractual significance:

- Can a party purport to rescind a contract even though it continues to perform its obligations thereunder whilst reserving its rights? Or;
- Will that party still be deemed to have affirmed the contract, thereby cancelling out its right to rescind?

When considering these issues, it is important to have a good understanding of what "rescission" and "affirmation" are.

What is rescission?

Rescission is a remedy whereby the contract is set aside; and the parties are put back into the position that they were in before the contract was made. Crucially, it is one of the remedies available for misrepresentation. It will not be available if one of the bars to rescission is present (such as affirmation of the contract).

What is affirmation?

When a repudiatory breach of contract occurs (as was alleged by the Charterers in this case), the innocent party has one of two choices: (a) elect to treat the contract as terminated, i.e. accept the repudiation; or (b) treat the contract as continuing, i.e. affirm the contract. Affirmation can be express or implied through words or conduct (and, in very limited circumstances, through inaction).

What effect does a reservation of rights have on affirmation and the right to rescind?

The Charterers first accused the Owners of misrepresenting the vessel's consumption warranties during a meeting in London on 21 March 2017. However, it was not until October 2017 that the Charterers purported to rescind and/or terminate the charter. Therefore, between March and September 2017, the Charterers continued to:

- use the vessel;
- periodically deduct from hire; and
- reserve their rights.

It was not until the end of September/beginning of October 2017 that the Charterers stopped giving orders to the vessel.

The Owners argued that the Charterers had affirmed the charter by conduct and had thereby lost the right to rescind it. In other words, because the Charterers had continued to use the vessel for a period of around six months from the initial allegation of misrepresentation, they had acted in a way that was wholly inconsistent with a wish to rescind the contract.

The Charterers counter-argued that they had not affirmed the charter because all their actions had occurred under an express reservation of rights.

The Commercial Court decision

The Court noted that there had been very little previous judicial consideration of this issue and acknowledged that it was possible to find differing approaches in the authorities.

The Court set out the following guiding principles:

1. A reservation of rights will often have the effect of preventing subsequent conduct constituting an election to affirm or rescind (although this was not an invariable rule);
2. The Court will have regard to all the material, including any reservations which have been communicated;
3. Where conduct is consistent with the reservation of a right to rescind, but also consistent with the continuation of the contract, then an express reservation will preclude the making of an election to affirm or rescind;
4. Where a party makes an unconditional demand for substantial contractual performance of a kind that will lead the counterparty to alter its position, such conduct may be wholly incompatible with the reservation of some kinds of rights; and
5. Determining whether particular conduct gives rise to an election is ultimately a matter of legal characterisation and, in some contexts, actions speak louder than words.

On the facts, the Court held that the Charterers had knowledge of their right to rescind but had demonstrated by their conduct an unequivocal choice to keep the contract alive. The Charterers were, therefore, held to be in repudiatory breach of the charter and the Owners were entitled to claim damages.

Comment

Although a reservation of rights is often added to the end of messages in pre-action correspondence as a matter of course, it is dangerous to ignore or underestimate its significance. Such a reservation could potentially have the effect of preventing an affirmation of contract from being treated as such. Equally, a party's conduct may in certain circumstances compromise its ability to subsequently rely on any reservation of rights, as happened in this case.

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Anti-suit injunction granted where foreign proceedings breached London arbitration agreement in contracts of carriage

Ulusoy Denizilik AS v. COFCO Global Harvest (Zhangjiagang) Trading Co Ltd (Ulusoy-11)
[2021] EWHC 3645 (Comm)

In finding that the parties were bound by a London arbitration agreement incorporated into the bills of lading, the Court has dismissed an argument that a letter of undertaking ("LOU") issued as security for the receivers' cargo claims had varied the contracts of carriage such that the receivers were entitled to bring their claims in Chinese Court proceedings. Those Chinese proceedings were brought in breach of the arbitration agreement and consequently, an anti-suit injunction was justified.

The background facts

The Owners chartered the vessel to time charterers on an amended NYPE form. The time charterers, in turn, sub-chartered the vessel for one time charter trip from Brazil to China. Both the head charter and the sub-charter provided for London arbitration and English law.

A cargo of Brazilian soya beans was subsequently loaded pursuant to five bills of lading. On discharge in China, however, the receivers (bill of lading holders) alleged that parts of the cargo were heat damaged. They arrested the vessel and subsequently declined to accept a letter of indemnity from the Owners' P&I Club in order to get the vessel released. Instead, the Club provided security to Chinese insurers, who then issued a LOU to the receivers. This LOU provided for Chinese law and jurisdiction.

The arrest was subsequently lifted, but the Chinese proceedings remained afoot. The Owners sought and obtained an interim anti-suit injunction to prevent the receivers from pursuing the claims in China on the grounds that this would be in breach of the arbitration agreement between the parties. In resisting the subsequent application to make the anti-suit injunction final, the receivers argued that they were not party to any arbitration agreement and, alternatively, that the LOU had varied the arbitration agreement in the bills of lading such that their claims were properly brought in Chinese Court proceedings.

The Commercial Court decision

The bills of lading were on the Congen form and contained a very wide incorporation clause: *"All terms and conditions, liberties and exceptions of the charter party dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."* Pursuant to English law, this incorporation clause was wide enough to incorporate the law and jurisdiction clause of the relevant charterparty. However, the receivers argued that the issue of incorporation should be decided in accordance with the law of their domicile, namely Chinese law.

The Court disagreed and stated that English law governed the question of whether a London arbitration clause was validly incorporated into the bills of lading. This was confirmed by previous decisions and also leading texts. Further, to ignore the London arbitration clause would go against the parties' ordinary commercial expectations, particularly where there was an English law clause as well.

The Court added that it was common in the trade for cargo receivers to become bill of lading holders without being aware of or seeing any charterparty terms that were incorporated into the bills, including any law and arbitration clause, and consequently becoming bound by those terms. As the lawful holder of the bills, the receivers were entitled to take delivery of the cargo and to claim losses in respect of the alleged damage against the carrier under those bills. At the same time, the receivers became bound by the original contracting party's liability under the contracts of carriage as evidenced by the bills, including the obligation to resolve any claims in accordance with the terms of the bills pursuant to the law and jurisdiction provision. The Court concluded that the receivers had not sufficiently demonstrated that they did not consent to be bound by the arbitration agreement in the bills.

As the head charter and sub-charter both provided for English law and London arbitration, the Court did not need to decide which was incorporated. However, it inclined to the view that it was the head charter that was incorporated as the charter to which the carriers were party.

The Court also dismissed the argument that the LOU varied or superseded the bills of lading and the parties' agreement to arbitrate disputes arising under those bills. The LOU wording specifically stated that it was the LOU that was subject to Chinese law and jurisdiction. The LOU provisions did not indicate any agreement or intention to abandon the agreement to arbitrate disputes under the bills. The Court also highlighted that the LOU had been issued by a third party on its own behalf and was an entirely separate contract.

It was not issued on behalf of the Owners and could not, therefore, bind them.

The Court further rejected the argument that the Owners had submitted to the Chinese Court's jurisdiction such that they had waived their right to arbitrate. It also found that the LOU would respond to an arbitration award and even if did not, this was what had been agreed. This was not a good enough reason for the Court not to grant or continue the anti-suit injunction. In any event, the practice of the Chinese Courts was to give effect to arbitration awards by entering a civil judgment that would lead to the LOU responding according to its own express terms.

Finally, the Court found that the Owners were not subject to Chinese jurisdiction but that even if they were, that was not a sufficiently strong ground for not granting an anti-suit injunction in circumstances where there was a binding agreement to arbitrate in London that continued to be breached. Accordingly, the Court granted a final anti-suit injunction.

Comment

In another recent decision, the *Majesty*, the Court read the dispute resolution provisions of the bills of lading and the LOU together and concluded that the LOU had varied the arbitration agreement in the bills. One point of distinction between the two disputes, however, is that the LOU in that case was given on owners' behalf, whereas in this case it was issued by an unconnected third party.

Ultimately, the outcome of such disputes will depend on how the Court construes the express wording used by the parties in the relevant agreements and also by considering the commercial context.

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Court finds state had no immunity in respect of salvage claim

Argentum Exploration Limited v. The silver and all persons claiming to be interested in and/or to have rights in respect of the silver [2020] EWHC 3434 (Admty)

The Court has held that the Republic of South Africa (the "RSA"), the owner of silver bars salved from a shipwreck, was not entitled to state immunity in respect of the salvors' *in rem* claim against the cargo for any salvage reward. This was because, at the relevant time, the silver bars were intended for use for commercial purposes. Therefore, state immunity did not apply.

The background facts

The *SS Tilawa* sank in the Indian Ocean on 23 November 1942, along with its cargo which included 2,364 bars of silver. In 2017, the Claimant arranged for the cargo to be recovered from the wreck. The cargo was subsequently taken to Southampton and declared to the Receiver of Wreck.

The Claimant initially contended that it was entitled to the cargo as an unclaimed wreck, alternatively to a salvage reward if ownership was claimed. The RSA subsequently claimed that it owned the silver bars, but denied that it was liable for salvage on the grounds that it had state immunity. The Claimant commenced *in rem* proceedings and, having accepted that the RSA was the owner, sought a salvage reward in respect of its salvage services.

The Admiralty Court decision

S.1 of the State Immunity Act 1978 (the SIA) grants a state immunity from the jurisdiction of UK courts with certain exceptions. S.10 of the SIA applies to Admiralty proceedings and provides at s.10(4) that a state is not immune in respect of:

> *(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes;…*

S.3(3) of the SIA defines commercial transactions, which include at s.3(3)(a) *"any contract for the supply of goods or services".*

The cause of action in salvage accrued in 2017. The essential question for the Court was whether, at that time, the bars of silver were in use or intended for use for commercial purposes. In deciding this issue, it was relevant to consider the status of the vessel and cargo in 1942, when the vessel sank.

The parties offered extensive and conflicting evidence on the vessel's activities and the intended use of the silver bars. On the evidence, the Court found that, in 1942, the vessel was used for commercial services. Further, the South African government had purchased the silver bars pursuant to a FOB contract of sale and they were being carried on board the vessel from India to South Africa pursuant to a contract of carriage. Therefore, the silver bars were the subject both of a contract for the supply of goods and of a contract for the supply of services.

Reference was made to the only decision on the SIA in the context of a claim for salvage against cargo interests, the *Altair* [2008] 2 Lloyd's Reports 90. In that case, the Court thought that the cargo in question was a commercial cargo in use for commercial purposes because it had been bought and shipped commercially, notwithstanding that it was intended for public distribution in Iraq as part of the Iraqi Government's Public Distribution System. In that Court's view, there was no unfairness in a state, having enjoyed the benefit of salvage services, becoming liable to pay for them subject to any enforcement issues.

In this case, the silver was bought and shipped on board a merchant ship pursuant to a FOB contract of sale and a contract of carriage contained in or evidenced by a bill of lading; two ordinary commercial contracts. The Court concluded that both the vessel and the silver bars were in commercial use when the wreck was salved and nothing had happened between 1942 and 2017 to alter the status of either.

The Court stated that those who entered such contracts could find themselves subject to liabilities in salvage which were ordinary commercial liabilities. It would be surprising if a state which, like any private entity, entered into such contracts, were immune from actions *in rem* against its cargo in respect of salvage. Therefore, the RSA was not immune from proceedings *in rem* claiming salvage.

The Court, however, appeared to leave open the question of whether it could exercise the enforcement aspect of an *in rem* action against the RSA, namely if the Claimant sought to arrest and sell the cargo. At this stage, however, the silver bars remained with the Receiver of Wreck and the Court was required only to determine the amount of salvage due.

Comment

This decision echoes the inclination of the English courts to limit a foreign state's reliance on immunity in circumstances where it has acted as a commercial entity and engaged in commercial activities. In those circumstances, it is arguably acting as a private entity and should be treated as such.

This decision will be of particular interest to offshore and sub-sea contractors engaged in the recovery of high value cargo such as the many cargoes of precious metals known to have been lost particularly in times of war. The Court's approach may well encourage such salvage operations in the future where there is a possibility that the owner of the cargo might turn out to be a state or state-controlled entity.

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Supreme Court checks out of Orient Express Hotel

The Financial Conduct Authority & others v. Arch Insurance (UK) Ltd & others [2021] UKSC 1

On 15 January 2020, the Supreme Court handed down its judgment in this test case that was initiated by the Financial Conduct Authority (“”FCA”) in order to determine a number of common coverage issues pertaining to the correct response of non-damage business interruption policies to the Covid-19 pandemic. The Supreme Court’s decision is, however, of general significance to all classes of insurance and beyond.

One of the central issues in the case was that of causation. The Court found that the risk insured under the various policies that it had been asked to consider was the business interruption loss resulting from an outbreak of disease within a fixed radius of the insured premises or, in some cases, the denial or prevention of access to the insured premises as a result of action by the authorities following the outbreak of a ‘notifiable disease’ at or within a certain radius of the insured premises.

This analysis of the insured risk meant that the issue of causation became central - could it be said that a single occurrence of Covid-19 at or close to the insured business had caused the Government to impose the restrictions which in turn caused the interruption of the business?

In answering this question in the affirmative, the Supreme Court considered that it was realistic to analyse the situation as one in which *“…all cases [of Covid 19] were equal causes of the imposition of the national measures.”* Whilst it obviously could not be said that the occurrence of a case of Covid-19 within the required radius of the insured premises was either necessary or sufficient to bring about the imposition of the Government restrictions, it was, nonetheless, one of many concurrent causes of those restrictions. Consequently, as long as none of the other concurrent causes was excluded by the policy, the necessary causal link between the happening of the insured peril and the insured’s loss could be established.

This result led the Supreme Court to conclude that policy holders were entitled to recover from their insurers if there had been a single case of Covid-19 within the required radius and the business had suffered loss following the imposition of the Government restrictions.

Like the High Court below, the Supreme Court was reinforced in this conclusion by the fact that the policy expressly provided cover for losses resulting from infectious diseases of a kind which the parties must have expected would occur all over the country and not just within the specified radius of the insured premises. The Supreme Court also pointed to the fact that the policies under consideration did not stipulate that the outbreak of the infectious disease to which they responded should *only* occur within the defined area.

The Supreme Court then turned to consider the controversial decision in *Orient Express Hotels v. Generali* [2010] EWHC 1186. That case concerned a claim for business interruption loss by a hotel in New Orleans which had been devastated by hurricanes Katrina and Rita. The insurers successfully defended the claim on the basis that, even if it had not itself suffered damage, the loss to the hotel would have been the same because of the devastation to the surrounding area of New Orleans. As a result, insurers argued, the damage to the hotel, which was the insured risk, could not be said to have ‘caused the loss’ to the hotel. The Court upheld this analysis, finding against the claimants. The insurers in *FCA v. Arch* placed much reliance on this decision to argue that because the loss to the insured businesses would have been caused by the Government’s national response to Covid-19 in any event, the fact that the loss might also have been caused by an outbreak of Covid-19 within the necessary radius of the premises was irrelevant.

It can be seen that this approach is unsustainable in the face of the Supreme Court’s analysis of the doctrine of concurrent causes – both damage to the hotel and the damage to the surrounding area were causes of the loss in that case. Accordingly, the Supreme Court held that *Orient Express* was wrongly decided and should be overturned. Interestingly, two of the Supreme Court judges who reached this conclusion had been involved in formulating the original decision in *Orient Express* – one as an arbitrator and the other as the appellate judge.

In summary, the Supreme Court decision was a resounding success for the FCA and the policy holders and an important reminder to everyone concerned with insurance that the doctrine of concurrent cause is very much alive and kicking. The Supreme Court has checked out of the Orient Express hotel.

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