Shipping & Transport news

Gateley Plc

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Voyage Charter

Assessment of damages for charterers' repudiation

The courts have considered a number of disputes in recent years concerning the assessment of damages for wrongful termination of charterparties. Another such dispute was considered in the recent case of the 'MTM Hong Kong' (*Louis Dreyfus Commodities -v- MT Maritime Management*).

The vessel had been chartered by the charterers (LD) for carriage of a vegetable oil cargo from South America to Europe. The charter was terminated due to LD's breach on 21 January 2011, shortly after the vessel had commenced her ballast voyage from West Africa, where the previous cargo was discharged, towards the South American loading port. The owners (MTM) ordered the vessel to continue on that voyage, since they expected substitute employment to be available in that area. The arbitrators found that this was a reasonable decision, but in fact it took longer than expected to fix an alternative charter, and the vessel finally discharged the alternative cargo in Rotterdam on 12 April 2011. The arbitrators found that if the original charter had been performed, the contract voyage would have ended on 17 March 2011 and the vessel would then have performed two transatlantic voyages with chemical cargoes, returning to Northern Europe at about the same time as the actual completion of the alternative voyage.

MTM claimed damages of about US$1.2 million, representing the difference between the profit actually earned on the substitute charter and the profit they would have earned if the vessel had performed not only the contract voyage but also the next two voyages between Europe and the USA. LD contested this method of assessment, and said that the correct approach was to apportion the earnings under the substitute charter so as to reflect the amount earned up to the date when the contract voyage would have been completed. On this basis, their liability would amount to about US$478,000.

The arbitrators accepted MTM's case on damages, and LD appealed to the Commercial Court. After reviewing the relevant case law, the judge concluded that there was no error of law in the arbitrators' reasoning, and upheld the award. He followed other recent decisions in which the courts have emphasised the importance of the compensatory principle, which requires that damages should place a claimant, so far as possible, in the same financial position as if the contract had been performed. Based on the arbitrators' findings in this case, it was clear that if the charter had been performed the vessel would have been able to take advantage of the lucrative North Atlantic freight market at an earlier date, and MTM were entitled to be compensated for the loss of this benefit, as well as the freight they would have earned under the charter itself. The judge did however stress that in many, perhaps most, cases it would not be possible for shipowners to claim damages extending beyond the date when the contract voyage would have ended. MTM's success in this case arose from a number of factors which might not apply in other cases; in particular, the delay in finding alternative employment was unexpected and there had been no failure to take reasonable steps to mitigate loss, and there was no suggestion that the losses claimed were unforeseeable or too remote to be recoverable.

Sale of Goods

OW bunkers decision upheld by Court of Appeal

In the Summer 2015 edition of this newsletter, we reported on the decision of the Commercial Court in the case of *PST Energy 7 Shipping -v- OW Bunker Malta*, which held the shipowners (P) liable to pay ING Bank (as assignee of the rights of the seller, OWBM) for bunkers supplied to P's vessel. The court rejected P's defences based on the Sale of Goods Act 1979 (SGA) and held that the bunker supply contract was not a contract for sale of goods as defined by the SGA. P's appeal against that judgment has now been dismissed by the Court of Appeal.

P's main contention was that because the ultimate physical supplier of the bunkers (RN) had not received payment from OW Denmark (due to its insolvency) RN retained title to the bunkers and OWBM as sellers were unable to transfer title to P. If the SGA applied, this would prevent them from claiming payment of the price. However, the Court of Appeal agreed with the judge that although the contract used the terms 'seller' and 'buyer' and the parties may have regarded it in commercial terms as a contract of sale, this did not mean that it was a sale contract as defined by the SGA. The fact that the contract allowed 60 days credit meant that a large proportion of the bunkers would be consumed before payment was due, and title to those bunkers could never be transferred. The transfer of title was not therefore an essential feature of the contract. What P was paying for was the delivery of bunkers to the vessel and the right to use those bunkers for the propulsion of the vessel. OWBM's inability to transfer title should not therefore deprive them of the right to payment.

Carriage by Road

Supreme Court reverses Court of Appeal on jurisdiction over successive CMR carriers

In the Winter 2013/2014 edition of this newsletter, we reported on the decision of the Court of Appeal in *British American Tobacco Switzerland S.A and Others -v- Exel Europe Limited and Others* in which the Court of Appeal overturned the first instance decision of the Commercial Court and held that the English courts had jurisdiction over the Defendant carriers. However, the Supreme Court granted the Defendants permission to appeal, and has recently given its judgment in favour of the Defendants.

In effect, the Supreme Court has reverted to the narrower approach adopted by the Commercial Court, and rejected the broader approach adopted by the Court of Appeal. As explained in our earlier note, the principal argument on which the Claimants relied, and on which the Court of Appeal had based its decision in their favour, turned on the concluding words of Article 36 of the CMR Convention: 'All the carriers concerned may be made defendants in the same action'. The Supreme Court held that these words did not qualify the jurisdictional requirements set out in Article 31.1 of the Convention, so that unless the particular successive carrier against whom the proceedings were brought comes within those requirements, the English courts do not have jurisdiction for the purposes of a claim against that carrier. This was despite the fact that two of the Supreme Court judges indicated that they had some misgivings in doing so, recognising that the 'commercial logic of these provisions points towards recognising a jurisdiction to receive claims against all [the carriers] in one set of proceedings.' (Lord Sumption). However, despite those misgivings, both followed Lord Mance, who delivered the principal judgment of the court, holding that the English courts do not have jurisdiction.

In the two cases before the court, although the first carrier clearly satisfied the requirements of Article 31.1 being resident in this country, since the successive carriers were not resident here, and since the goods were neither collected nor to be delivered here, it was not open to the Claimants to join them in the English proceedings. (Equally it would not have been open to the first carrier to do so as a result of the decision of the Court of Appeal in *Cummins Engine Co -v- Davis Freight Forwarding*). The Supreme Court followed the two lower courts in rejecting the Claimants' alternative arguments: they were not entitled to rely on the jurisdiction agreement between the Claimants and the first carrier since there was no mention of it in the CMR consignment note; the relevant 'branch or agency' for the purposes of Article 31.1(a) is that of the successive carrier concerned, not the first carrier; and finally the provisions of the Brussels Regulation were of no relevance.

We previously noted the limited scope of the particular decision, since in most cases claimants will be content to join all the carriers concerned in one of the jurisdictions designated by Article 31.1. Nevertheless, the decision may yet have a wider significance, perhaps signalling a more restrictive approach for the purposes of the interpretation of the CMR Convention in particular, and international conventions in general.

Collision Claims

Applications for extensions of time

It is relatively unusual for questions relating to collision claims in the Admiralty Court to be referred to the Court of Appeal, but in a recent combined judgment relating to two cases, the 'Stolt Kestrel' and the 'SB Seaguard', the court has clarified some important procedural questions.

Under section 190 of the Merchant Shipping Act 1995 (MSA), a two-year time limit applies to any claim arising from collisions between ships, but this time limit may be extended by the court in certain circumstances. In particular, there is an automatic right to an extension if there has been no reasonable opportunity to arrest the ship in question in England or in the claimant's jurisdiction within the two-year period. However, the court confirmed

that this only applies to 'in rem' proceedings brought against the vessel. Issuing a claim 'in rem' does not interrupt the time limit for a claim 'in personam' against its owner, which must be brought in separate proceedings. In those proceedings the court still has a discretion to grant an extension, but this requires a two-stage test to be applied: first, the court should decide whether the Claimant can show a good reason for an extension to be granted, which is a question of fact, and if a good reason is established the court can then consider whether it is appropriate to grant the extension as a matter of discretion. This approach was laid down in a previous decision, and the court in the present case confirmed that it is the correct approach. On the facts, the Claimants in the two cases before the court could not show a good reason for an extension. In one case, there had been a mistake by the Claimants' solicitors in failing to issue separate 'in personam' proceedings at the same time as issuing an 'in rem' action. In the other case, the claim had been handled by an insurance claims handler who did not know about the two-year time limit. Neither of these was regarded as a 'good reason' for granting an extension.

Sale of Goods

FOB buyer's nomination of substitute vessel was invalid under GAFTA 49 terms

In the recent case of *Ramburs Inc -v- Agrifert SA*, the Commercial Court reversed a decision of a GAFTA Appeal Board and held that when the buyer nominates a substitute vessel under a GAFTA 49 sale contract he must comply with the contract terms as to nomination and pre-advice in the same way as with the original nomination.

The dispute concerned a FOB contract for sale of maize, for delivery between 15 and 31 March 2013, with a requirement for the buyer to give 10 days pre-advice of the carrying vessel, including the vessel's name, flag, dimensions and deadweight. Clause 6 of GAFTA 49 states that buyers have the right to substitute the nominated vessel, but the original delivery period and any extension shall not be affected thereby. The buyers nominated a vessel on 20 March, giving an ETA of 26/27 March at the loading port. The Appeal Board held (and this was not challenged) that although less than 10 days notice was given this did not invalidate the nomination, but simply meant that the sellers were not obliged to load until 10 days after receiving the notice. However, on 26 March the buyers nominated another vessel in place of the first vessel, with an ETA of 28 March. The sellers rejected this nomination and declared the buyers in default.

In the appeal to the court, the sellers relied on a previous decision in which pre-advice requirements were held to apply to a substitute nomination. However, in the previous case the contract did not expressly provide for substitution. The buyers argued that clause 6 of GAFTA 49 gave them an express right to substitute the nominated vessel, and also stated that the original delivery period should not be affected, thus protecting the sellers against any disruption to their shipping arrangements due to late substitution. There was therefore no need for the pre-advice requirements to apply to the substitute nomination under a GAFTA 49 contract. Although the Board of Appeal had agreed with this interpretation, the judge disagreed. The parties had agreed that the pre-advice must comply with certain requirements, and the natural interpretation was that these should apply to the vessel which was to load the cargo.

Arbitration

Enforcement of foreign award under New York Convention

The New York Convention on enforcement of arbitral awards was originally adopted by a United Nations conference in 1958, and is now in force in most countries of the world. In the recent case of *IPCO (Nigeria) Ltd -v- Nigerian National Petroleum Corporation* in the English Court of Appeal, the convention was described as 'intended to foster international trade by ensuring a relatively swift enforcement of awards and a degree of insulation from the vagaries of local legal systems'. However, in the case before the court, a Nigerian arbitration award issued in 2004 had been challenged in the Nigerian courts and it was possible that those proceedings might not be finally resolved for another 20 years or more. The English court had to consider whether in these circumstances enforcement proceedings in England should be permitted, or delayed indefinitely whilst the litigation continued in Nigeria.

The matter had been before the English court on several previous occasions since 2004, and had been adjourned on certain conditions (including payment of undisputed sums and provision of security for part of the balance). On those occasions the courts had taken the view that there was a bona fide challenge to the award in Nigeria, partly based on allegations of fraud, which had a realistic chance of success, and the English court should therefore

defer to the Nigerian courts on this question. In the latest judgment on the subject in 2014, the judge held that the question should not be re-opened unless the claimant could show a significant change of circumstances, including that the allegations of fraud were 'hopeless and/or not bona fide'. On appeal, the Court of Appeal said this approach was too strict. Any significant change of circumstances was sufficient, and this included the fact that the delay in resolving the Nigerian proceedings was now likely to be much longer than the previous judges had thought. The court acknowledged that there could be an injustice if the Claimant was permitted to enforce the award and the Nigerian court subsequently determined that the award had indeed been obtained by fraud. However, it would also be unjust to the Claimant to prevent enforcement for such a lengthy period on the basis of a challenge which might turn out to be unjustified. In order to 'cut the Gordian knot', the court adopted a solution based on the terms of the New York Convention itself, which permits a court to refuse to enforce an award if it would be contrary to public policy to do so. The court therefore ordered that the enforcement action should now proceed, on the basis that the English Commercial Court would have to consider the evidence of fraud and decide whether it was in fact contrary to public policy to enforce the award. This would mean that the fraud issue would be considered by a court within a reasonable timescale, and would be consistent with the underlying purposes of the Convention.

Time Charters

NYPE 2015 - A new balance?

A new edition of the New York Produce Exchange form of charterparty (NYPE 2015) was launched on 15 October 2015. This brief note highlights what we consider to be some of its most salient points.

BIMCO say that the new form seeks to adopt and reflect recent case law and the most common amendments and rider clauses. It has arisen out of a three year consultation in the market and is issued jointly with the Association of Ship Brokers and Agents and the Singapore Maritime Federation. A copy is on the BIMCO website with a helpful guide.

Clause 1 now allows the parties to specifically choose whether the agreement is for a period or trip charter. It also provides for a 'Not Always Afloat but Safely Aground' provision. The Redelivery clause (4) provides more guidance on legitimate/illegitimate final voyage orders and takes into account the decision in 'The Zenovia' [2009] EWHC 739 where a charterer was held not to be bound by an 'approximate notice'. Owners are to maintain Certificates of Financial Responsibility for oil pollution (clause 6) but if such a certificate is not available on renewal, such ports as may be covered can ultimately be deemed to be added to the list of excluded ports. The bunkers clause (9) has been significantly amended and covers all bunker related scenarios. It runs to over two pages and will require some technical thought.

Clause 11 contains a significant extension allowing the owners to suspend performance if hire is not received. It clarifies the previous 'anti-technicality' requirement, now called a 'grace period' and removes the requirement for the charterer to fall within the 'oversight, error or omission' provision. (See the 'Astra' [2013] EWHC 865). The new clause does not specifically say that payment of hire is a condition of the contract and although the owners have the right to claim damages it remains to be seen whether this will be adequate. Clause 34 adopts the BIMCO CONWARTIME clause (and the decision in the 'Triton Lark' [2011] EWHC 2862) by adopting an objective test. The test is whether an area is 'dangerous' rather than whether it 'may be' or is 'likely to be' exposed to the risk. 'Piracy' now includes violent robbery, capture or seizure. Finally, there is an amended jurisdiction clause providing for New York, London or Singapore arbitration and various choices of law. Will the new default provision (New York arbitration and law) create jurisdictional disputes or avoid them?

In conclusion, the new form is much more comprehensive but will require some careful thought. Its popularity will in our view very much depend on whether some of the major operators adopt it.

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