Shipping & Transport news

Gateley

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Time Charter

'Unsafe port' decision reversed by Court of Appeal

In an earlier newsletter we reported on the decision of the Commercial Court in the case of the *'Ocean Victory'*, holding time charterers liable for the total loss of a Capesize bulk carrier due to their breach of the 'safe port' warranty in the charterparty. That decision has now been reversed by the Court of Appeal.

The vessel was lost as she tried to leave the port of Kashima in Japan, which was affected at the time by a combination of heavy swell and a severe northerly gale, causing the master to lose control of the vessel. The hull insurers paid out US$70 million under the insurance policy taken out by the vessel's demise charterers and then pursued the time charterers for damages for breach of the 'safe port' warranty. In the Commercial Court, the judge held that the port was unsafe, and rejected the charterers' argument that the conditions which affected the port at the material time amounted to an 'abnormal occurrence' for which they were not responsible. The Court of Appeal disagreed. Kashima was a modern, well-used port with a first-class safety record, and the loss of the vessel was unprecedented. The concept of 'safety' was not absolute, and a realistic approach should be taken to the question whether an event amounted to an abnormal occurrence. The master had been faced with a situation in which the vessel might be in danger alongside the berth because of the swell but also unable to leave the port safely because of the gale. The judge had decided that neither the swell nor the gale were unusual in themselves; however, he had failed to ask himself whether the combination of the two events (which had led to the casualty) was a normal characteristic of the port. If he had properly evaluated the likelihood of such a combination of events, the judge should have concluded that it was an abnormal occurrence and the charterers were not liable for the vessel's loss.

Sale of Goods

Export licence clause did not override GAFTA prohibition clause

Several cases have come before the Courts as a result of the Ukrainian Government's restrictions on export of agricultural products in 2010. In the latest case, *Public Company Rise -v- Nibulon*, the Commercial Court had to consider the relationship between the 'prohibition' clause in a standard GAFTA contract form, and a specially negotiated clause which obliged the seller to obtain an export licence at his own risk and expense.

The Ukrainian Government imposed grain export quota restrictions which limited the quantity of grain which would be licensed for export in a stated period. The sellers (R) had contracted to sell three shipments of Ukrainian corn to the buyers (N) but despite their best endeavours they were not granted export licences, so they purported to cancel the three contracts under the prohibition clause (clause 17). N treated this as a repudiation and claimed default damages of more than US$17 million. The GAFTA Appeal Board found in favour of N, on the basis that R had undertaken an absolute obligation to obtain export licences and this overrode clause 17. If there had been a total ban on exports this would have excused R's non-performance, in the Board's view, but there was no total ban and licences had in fact been granted for export of 3 million metric tons of grain during the relevant period. On appeal to the Court, the judge took as the starting point that clauses in a contract must be read together where possible, and there is no inconsistency unless that cannot sensibly be done. Although the obligation to obtain export licences was absolute, in the sense that it was not merely an obligation to use best endeavours, it could still be qualified by other clauses in the contract. The Board had in fact accepted that it would be qualified by clause 17 in case of a total ban, but N had argued that this was wrong and the export licence clause overrode clause 17 in all

circumstances. The judge disagreed with both of these interpretations. The wording of clause 17 was not limited to absolute prohibition but also covered Government acts restricting export, partially or otherwise. The clause therefore qualified the export licence clause, and would relieve R of its obligation to obtain a licence in case of a partial restriction as well as a total ban. However, the judge confirmed that R still had to prove that their inability to obtain export licences was in fact caused by the quota restrictions, and he remitted the case to the Appeal Board for further findings on this point.

Time Charter

Is late payment of hire a breach of condition? (Round 2)

In a case reported in our Summer 2013 newsletter, the *'Astra'*, a Commercial Court judge held that a time charterer's obligation to pay hire on time is a 'condition' of the contract, meaning that as well as the right to withdraw the vessel under an express withdrawal clause the shipowner also has a right to terminate the charterparty for late payment and claim damages for lost revenue. Although welcomed by shipowners, this was a controversial decision, and in the recent case of S*par Shipping -v- Grand China Logistics*, another Commercial Court judge has reached the opposite conclusion.

The judge in the *Spar Shipping* case reviewed earlier case law and concluded that the obligation to pay hire on time should be treated as an 'innominate term', meaning that the consequences of a breach will depend on the seriousness of the breach. In his view, it could not be the parties' intention that a delay of even a few minutes beyond the stipulated time for payment would have the same effect as a repudiation of the charter. The fact that the owner might (in the absence of an 'anti-technicality clause') have the right to withdraw the vessel in those circumstances under an express clause in the charter did not mean that he had the right to terminate the charter at common law: in fact, it suggested the contrary, since there would be no need for a withdrawal clause if such a right existed in any event. He did not consider that the need for commercial certainty, which strongly influenced the judge in the earlier case, was a sufficient reason for construing the payment obligation as a condition.

It remains to be seen whether the case will now go to the Court of Appeal in order to resolve the conflicting decisions.

Insurance

Insurance Act 2015 heralds major reforms of business insurance law

Following a review of English insurance law by the Law Commission, the Insurance Act 2015 has now received Royal Assent and will come into force in August 2016. The Act amends key sections of the Marine Insurance Act 1906 and is intended to update the law in line with best practice in the modern UK insurance market. It modifies some of the more draconian remedies available to insurers and introduces a new approach based on the concept of proportionality.

For insurance policies entered into or varied after the Act comes into force, there will be a new duty on the insured to make a 'fair presentation' of the risk, and an insurer's remedies for breach of that duty will be more flexible and proportionate than the right under the existing law to avoid the policy for non-disclosure. The Act also abolishes 'basis of the contract' clauses (which have the effect of converting pre-contractual information supplied to insurers into warranties). It also provides that, if there is a breach of warranty, the insurer's liability should be suspended, rather than discharged, so that insurance coverage is restored after a breach has been remedied. Finally, it provides that breach of a warranty or similar term should not allow an insurer to refuse to pay a claim if the insured shows that the breach was completely irrelevant to the loss suffered.

The Act also amends the Third Parties (Rights Against Insurers) Act 2010 (which has not yet been brought into force), clearing the way for the 2010 Act to come into force.

Carriage of Goods

Could carriers claim container demurrage following consignees' failure to collect goods?

Bill of lading terms used by container shipping lines invariably include a provision for payment of container demurrage at a daily rate when containers are not collected promptly following discharge. In the recent case of *MSC -v- Cottonex Anstalt*, the Commercial Court had to consider a dispute relating to such a provision.

C agreed to sell a quantity of raw cotton to a buyer (R) in Bangladesh, and a total of 35 container loads were shipped under bills of lading issued by MSC and discharged at Chittagong in May/June 2011. The sale

contract provided for payment by letter of credit and also contained a retention of title clause, providing that the goods remained the property of C until they were paid for by R. Initially, R disputed its obligation to pay for the goods and took legal action in Bangladesh to stop the payment under the letter of credit, but eventually C did receive payment from R's bank. However, R still did not take any steps to collect the goods, and the containers (with the cotton inside them) remained at the port. They were still there at the date of the English Court's judgment in February 2015. The carrier (MSC) claimed that C, as the named shipper in the bills of lading, was liable for demurrage for the 35 containers, which amounted (by the time of the trial) to more than US$1 million. C resisted this claim on various grounds, including that MSC was suffering no actual financial loss due to the detention of the containers, and in any event, such loss could have been mitigated by buying additional containers for much less than the amount of the demurrage. The judge did not accept these arguments, as the demurrage clause in the bill of lading terms was a liquidated damages clause, the purpose of which was to make proof of actual loss unnecessary, and the mitigation principle did not apply. However, it did not follow that MSC could continue claiming demurrage indefinitely. In September 2011, C had informed MSC that it was no longer the owner of the goods, and it was made clear to MSC that there was no realistic prospect of C being able to arrange for the containers to be collected. C was, therefore, in repudiatory breach of the bill of lading contracts. Although a repudiatory breach does not normally bring a contract to an end unless the repudiation is 'accepted' by the innocent party, there is an exception to this rule if the innocent party has no legitimate interest in keeping the contract alive. In this case the judge considered that MSC was simply keeping the contract alive in order to continue earning demurrage, and this was not reasonable or legitimate. If the demurrage clause had the effect of giving MSC an unfettered right to claim demurrage indefinitely although it was suffering no real financial loss, it would be a penal clause which would not be enforceable. Accordingly demurrage ceased to accrue after September 2011.

Marine Insurance

Insurers must pay for loss of vessel detained in Venezuela due to drug smuggling

A further round of litigation arising from the detention in 2007 of the vessel 'B Atlantic' was decided recently by the Commercial Court: *Atlasnavios-Navegacao -v- Navigators Insurance Co*. The vessel was detained, and ultimately confiscated, by the Venezuelan authorities after bags of cocaine were found attached to the hull. After lengthy proceedings in the Venezuelan Court in which the owners unsuccessfully challenged the detention, they finally abandoned the vessel and claimed under their insurance policy for a constructive total loss. The insurers rejected the claim and relied on a policy term which excluded loss due to 'infringement of customs regulations'. They did not suggest that the owners were themselves implicated in the drug smuggling, but the Court held in an earlier judgment that this did not in itself prevent them from relying on the exclusion. In the second trial, the Court now had to decide whether the exclusion applied, both as a matter of construction of the clause and as a matter of causation.

The Court decided this issue in favour of the owners as a matter of construction. Since the policy expressly covered loss caused by malicious acts, there was an implied limitation on the exclusion of loss caused by infringement of customs regulations where the only reason for the infringement was a malicious act of a third party. The judge also rejected the insurers' alternative argument that the loss was caused by the owners' failure to provide security. The owners had made every effort to put forward proposals for security, but through no fault of theirs these proposals came to nothing. However, the judge rejected a further argument by the owners that in any event the decisions of the Venezuelan Courts to keep the vessel under detention were perverse and/or the result of political interference. There was no break in the chain of causation between the original infringement of the customs regulations and the loss of the vessel.

Shipbuilding Contract

Buyers' cancellation due to excessive delay

In the case of *Zhoushan Jinhaiwan Shipyard -v- Golden Exquisite Inc*, the buyers of four vessels exercised contractual rights to cancel the shipbuilding contracts with a Chinese shipyard due to excessive delay in construction. The yard contested the cancellations, saying that a relevant part of the delay had been caused by the buyers' own breach of contract and the cancellations were therefore wrongful. An arbitration tribunal found in favour of the buyers on this issue, and this decision has been confirmed on appeal to the Commercial Court.

The breach of contract alleged by the yard related to the conduct of the buyers' supervisor, who was said to have worked very short hours, imposed unreasonable requirements, and delayed unreasonably in returning procedures or drawings of the vessel, all of which caused delays in the construction process. The yard claimed that these delays had to be excluded in calculating the periods of delay triggering the buyers' right of cancellation, and that on this basis the notices of cancellation were premature and wrongful. The judge analysed the contract terms and concluded that only three categories of delay were contemplated; 'permissible' delays and 'non-permissible' delays were defined in the contract, and there were also other delays for which the contract expressly provided that the delivery date might be extended without any adjustment or reduction of the contract price. These delays (which the Court referred to as 'excluded delays') were also not counted as delays for the purpose of any right of cancellation. In the Court's judgment, these three categories of delay were intended to cover the whole field. There was no further and separate category of 'buyer's breach delays'. The duties of the buyer's supervisor were set out in Article IV of the contract, and delays caused by a breach of Article IV were not included in the list of excluded delays. Although delays 'due to default in performance by the buyer' were excluded, the Court considered that this term referred to defaults as defined by Article XI, the 'Buyer's Default' clause, and did not cover a breach of Article IV.

Arbitration

Two decisions arising from inconsistent arbitration provisions in charterparties

At the time of negotiating a fixture, the parties and their brokers do not usually expect disputes to arise, and arbitration clauses are rarely discussed in any detail. Two recent cases in the Commercial Court illustrate the kind of problem that can arise as a result.

In the first case, *Transgrain Shipping -v- Dieulemar Shipping (the 'Eleni P'),* the charterparty included two arbitration clauses, providing for slightly different arbitration procedures. One clause provided for a tribunal of two arbitrators and an umpire, and stated that if the second party failed to appoint an arbitrator within 20 days the first party could appoint a second arbitrator on the other party's behalf. The other clause was the standard BIMCO arbitration clause, providing for a tribunal of three arbitrators, and stating that if the second party did not appoint an arbitrator within 14 days the first party could appoint its arbitrator as sole arbitrator. A dispute arose as to which clause applied, and who were the validly appointed arbitrators, and this had to be resolved by the Court before the arbitration could proceed. The judge held that the inconsistency should be resolved in favour of the BIMCO clause. Since both clauses referred to the LMAA, and the use of the BIMCO clause was recommended by the LMAA, it was objectively more likely that the parties intended this clause to apply. Accordingly the three arbitrators appointed under this clause had jurisdiction to deal with the dispute on the merits.

In the second case, *Shagang South Asia Trading -v- Daewoo Logistics,* a fixture note stated 'Arbitration to be held in Hong Kong. English law to be applied'. However, it also referred to 'other terms/conditions based on Gencon 1994 charterparty'. This charterparty form allows the parties to choose between three options: English law and London arbitration; US law and New York arbitration; or arbitration in a place chosen by the parties, subject to the law of that place. The reference to Hong Kong arbitration and English law did not fit any of those options. The judge pointed out that whilst it is not unusual for parties to specify that the substantive law applying to a dispute is not the law of the country where the arbitration takes place, it is usually implied that the law of that country is the law governing the arbitration procedure itself (sometimes called the 'curial law'). It would, therefore, be unusual if the parties had intended the arbitration in Hong Kong to be conducted according to English procedural law as set out in the Arbitration Act 1996. In the absence of clear wording indicating that this was their intention, he interpreted the clause in the fixture note as a provision for the dispute to be decided in Hong Kong under Hong Kong procedural law, but with English law as the substantive law governing the dispute. Accordingly, a sole arbitrator who had been appointed under the default provisions of the English Arbitration Act did not have jurisdiction to decide the dispute.

In both cases, significant legal costs and delays could have been saved if more care had been taken in drafting the arbitration provisions at the time of concluding the charters.

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