Shipping & Transport news

Gateley Plc

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Sale of Goods

Supreme Court rejects final appeal in OW Bunkers dispute

We have reported previously on the litigation arising from the insolvency of the OW Bunkers Group, and involving the supply of fuel to the owners of the 'Res Cogitans'. The owners resisted a claim by ING Bank, as assignee of the rights of OW Bunker Malta Ltd (OWM), for the price of the fuel on the grounds that due to the insolvency of OWM's Danish parent company the ultimate physical supplier had not been paid and OWM was unable to transfer title as required by the Sale of Goods Act 1979 (SGA). The Supreme Court has now confirmed, upholding the decisions of the lower courts, that the contract between OWM and the owners was not in fact a contract of sale and the SGA did not apply. OWM's only obligation was to procure that the fuel would be delivered to the vessel and the owners would be permitted to use it for the vessel's propulsion, although legal title had not been transferred (and would never be transferred, insofar as the fuel was consumed before the end of the agreed 60 days credit period). That obligation had been fulfilled and the price was due and payable.

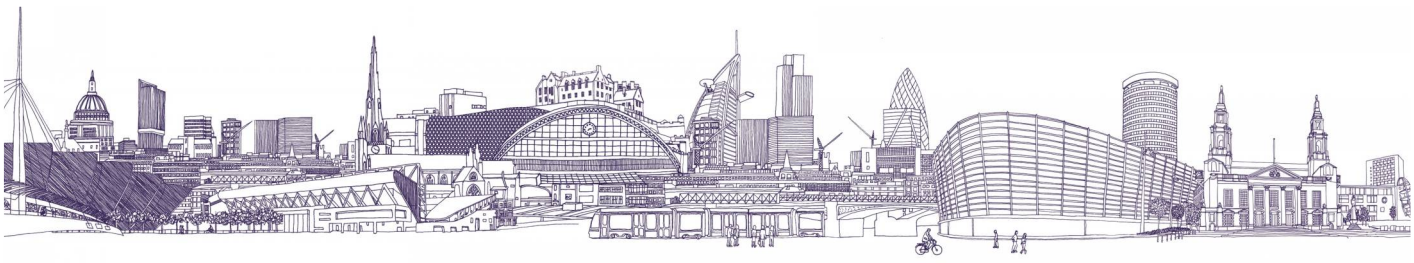
The decision will affect a large number of other parties affected by the collapse of OW Bunkers, and shipowners may now find themselves exposed to the risk of having to pay twice if the unpaid physical suppliers are able to establish a direct claim against the vessel. Owners and operators will need to consider whether the wording of their bunker supply contracts can be modified in the future to avoid similar problems.

Time Charter

Supreme Court clarifies the meaning of 'charterers or their agents' in off-hire clause

Another recent Supreme Court judgment in the case of the 'Global Santosh' (*NYK Bulkship -v- Cargill International*) has clarified the circumstances in which time charterers are obliged to pay hire when a vessel is arrested due to a dispute involving unrelated parties. The court reversed the decision of the Court of Appeal and held that the charterers (C) were entitled to rely on the off-hire clause for the relevant period.

The vessel had been sub-chartered for a voyage to Nigeria, and following arrival at the discharge port a dispute arose under the contract of sale of the relevant cargo. Neither C nor their immediate sub-charterers were parties to the dispute. The dispute resulted in an arrest of the cargo, and by an error in the arrest order it was extended to the vessel itself. The dispute was eventually resolved between the sellers and the buyers, but C claimed that the vessel was off-hire due to the delay which the arrest had caused. The off-hire clause provided that the vessel was to be off-hire if it was detained or arrested by any legal process, unless this was 'occasioned by any personal act or omission or default of the charterers or their agents'. The owners claimed that the responsibility for discharging the cargo had effectively been delegated by C down the chartering chain to the ultimate receivers, and the buyers and sellers were therefore to be regarded as C's agents for these purposes. Maritime arbitrators rejected this argument and held that the buyers and sellers were not acting as C's agents when arresting the vessel. On appeal to the High Court and Court of Appeal, the owners were successful but the Supreme Court has now overturned those decisions and held (by a majority) that the arbitrators' reasoning was correct. In a dissenting judgment, Lord Clarke took a broader view and considered that C remained in charge of discharging operations in general, and delegated those operations to the sellers and buyers. However the majority rejected that approach.



Carriage by Sea

Package Limitation

The case of *Yemgas FZCO -v- Superior Pescadores SA* concerned a claim for damage to cargo during a voyage from Belgium to Yemen. The bills of lading contained a paramount clause providing that the carriage was to be governed by the 'Hague Rules … as enacted in the country of shipment', but the parties were in dispute as to which version of the Rules was applicable, and therefore whether the claim was subject to a limit of £100 per package under the Hague Rules of 1924 or the limit calculated according to the weight of the cargo under the Hague-Visby Rules of 1968. In this particular case, the total damages recoverable would be about US$200,000 higher if the (old) Hague Rules limit applied.

The parties had agreed that the claim should be subject to English law and jurisdiction. Under the Carriage of Goods by Sea Act 1971 the Hague-Visby Rules are applicable as a matter of English law when carriage is from a contracting state. Belgium is a contracting state, having adopted the Hague-Visby Rules in 1978. The shipowners therefore argued that the Rules 'as enacted in the country of shipment' must be the Hague-Visby Rules. The judge who considered the matter in the Commercial Court would have liked to agree with them, but felt constrained by previous case law to hold that because the paramount clause referred to the 'Hague Rules … dated …1924' this was a contractual agreement to apply the old version of the Rules. However, he ultimately decided the limitation issue in the owners' favour on the grounds that the parties could not be taken to have agreed to override the new limitation formula which became part of English law under the 1971 Act.

Both parties appealed against this judgment, and the Court of Appeal held that on a correct analysis of the previous authorities, they did not compel the judge to hold that the old Hague Rules applied. The court pointed out that strictly speaking there is no such thing as the 'Hague-Visby Rules'. Although the new version set out in the Brussels Protocol of 1968 is generally known by that name (because the Protocol was agreed at a conference held in the Swedish city of Visby) the formal text of the 1971 Act refers to 'The Hague Rules as amended by the Brussels Protocol'. The shipowners were therefore right in their straightforward argument that the 'Hague Rules … as enacted' in both England and Belgium were in fact the Hague-Visby Rules, and the judge had come to the right conclusion, albeit for the wrong reasons.

Time Charter

Were charterers under a trip time charter entitled to order vessel to a further loading port?

The vessel 'Wehr Trave' was chartered on a New York Produce Exchange form for 'one time charter trip … via East Med/Black Sea to Red Sea/PG/India/Far East … Duration minimum 40 days without guarantee' and the redelivery range was defined as 'Colombo/Busan range including China'. Cargo was loaded at three ports in the Black Sea and discharged at several ports in the Red Sea, Gulf of Oman and Persian Gulf. Whilst the vessel was discharging the last of the Black Sea cargo at Dammam, the charterers gave orders for loading of a further cargo at Sohar (Oman) for discharge in India. The owners said that this was an illegitimate order, because the agreed 'trip' ended at Dammam, and the charterers had no right to give orders to load further cargo. Maritime arbitrators decided that the charterers were entitled to give those orders, and the owners appealed to the High Court.

The judge agreed with the arbitrators and dismissed the appeal (*SBT Star Bulk -v- Cosmotrade*). He pointed out that the defining characteristic of any time charter is that the vessel is under the orders and directions of the charterer as regards employment during the charter period, whether the period is agreed in advance (a period time charter) or defined by reference to a trip within a geographical range (a trip time charter). The concept of a trip time charter may embrace a number of possible permutations of loading and discharging ports, and there is no single definition of what constitutes a 'trip'.

Ultimately, it is a question of interpretation of the particular terms agreed between the parties. In the present case, the charter specified a delivery port/range and a redelivery port/range. By and within that range, it specified a route. The charterers were therefore entitled to call at such ports as they wished provided that they were within the agreed trading limits and the route was not inconsistent with the contractual route from the port of delivery (Algeciras) to the Colombo/Busan range via the other ports/ranges specified. The owners' argument that the word 'via' identified the only permitted loading ports and the word 'to' identified the discharging ports (so that the vessel could not be ordered to load at a port in Oman) was rejected. The carriage of cargo from Sohar to India was within the permitted range and was on the agreed route to the agreed redelivery range, and the charter did not contain sufficiently clear words to exclude the charterers' right to perform that voyage.

Time Charter

Mitigation of damages case to be decided by Supreme Court

We have previously reported on the case of *Fulton Shipping Inc -v- Globalia Business Travel*, in which Gateley's clients, the owners of the cruise ship 'New Flamenco', claim damages of about €7.5 million for loss of profit arising from the charterers' repudiatory breach of a two-year time charter agreement. An arbitrator held that the loss could not be recovered because the owners had sold the ship and had to give credit for the difference between the sale price received in 2007 and the value the ship would have had if it had been sold two years later, after the collapse of global shipping markets. Our clients successfully appealed to the Commercial Court, which held that any benefit derived from the owners' decision to realise their capital investment in 2007 was not caused by the charterers' breach and did not have to be brought into account by way of mitigation of the loss of profit under the charter. On a further appeal by the charterers, the Court of Appeal has now reversed that decision and held that the benefit must be brought into account. The court rejected our clients' argument that a gain or loss on the capital value of an asset is fundamentally different in nature from a loss of the profit that should have been earned from the hire of that asset. This could have significant implications for many claims for damages under English law, not limited to shipping disputes, and the Supreme Court has now granted our clients permission to appeal in order to provide a definitive ruling on the issue.

Arbitration

Tribunal's appointment covered counterclaim as well as original claim

The case of *Glencore -v- PT Tera Logistic* concerned disputes under a series of contracts for the hire of floating cranes by G in connection with the loading of coal on board ocean vessels. In case of delays in loading, the contracts provided for the crane owners (PT) to pay for demurrage incurred by the vessels, or for G to pay for detention of the cranes, depending on the cause of the delay. PT claimed detention and commenced arbitration against G 'in respect of their claims' under the relevant contract. G responded by appointing a second arbitrator 'in relation to all disputes arising under [the contract]'. In due course, PT served claim submissions and G served defence and counterclaim submissions, raising counterclaims against PT for vessel demurrage. However, by this time the limitation period for claims under the contracts had expired, and the arbitration tribunal (by a majority) held that G's claims were time barred. G appealed to the Commercial Court, which reversed the arbitrators' decision. The judge pointed out that these were contracts in which delay was capable of giving rise to money obligations on either side, with a net sum falling for payment. The party commencing arbitration was asserting that the balance was in its favour, but it was commercially unlikely that the parties would have intended that counterclaims by the other party had to be the subject of a separate arbitration. Where a claim and counterclaim arose from a single set of facts giving rise to a balance of accounts under a contract, notices referring to 'claims' and to 'all disputes' under the contract would ordinarily suffice to interrupt the running of time in respect of both claims and counterclaims.

Charterparty

Damages for loss of freight

The recent decision of the Commercial Court in *Glory Wealth Shipping -v- Flame SA* concerned claims against charterers (F) for their failure to nominate cargoes for shipment under a contract of affreightment made with GW as owners. GW did not own vessels but operated vessels under charter, which would have been sub-let to F at a profit to carry cargoes under the contract. GW therefore claimed damages assessed by reference to the margin between the freight payable by F and the freight or hire that GW would have paid to the owners of vessels chartered in to perform the voyages.

Following the collapse in the shipping market in 2008, GW itself became insolvent and faced substantial claims made against it by shipowners and others. In order to protect itself against attachments of funds, GW had used two other companies (E and G) to receive all inward freight earned under the contract with F. In these circumstances, F argued that GW had suffered no loss, because the freight for the unperformed voyages would not have been received by GW in any event. The arbitration tribunal found that E and G were not GW's agents and would not have held the freight on GW's behalf. They therefore agreed with F that GW could not prove any loss. GW appealed, and the court reversed the arbitrators' decision on this point. GW had a contractual right to payment of freight and had been deprived of that right by F's breach. The tribunal had found that the difference between the incoming and outgoing freight would have been more than US$3 million, and this was the value of the rights of which

GW had been deprived. That value was not reduced by GW's decision that the freight would be paid to another company. Although the tribunal's finding that E and G were not GW's agents was a finding of fact, it did not lead in law to the conclusion that GW had suffered no loss. The tribunal had failed to take into account that the right to receive freight included the right to give it away. F's breach had deprived GW of the benefits of ownership of the right to freight under the contract.

P & I Insurance

Anti-suit injunction to stop direct action against P & I Club

The container vessel 'Yusuf Cepnioglu' was operating on a liner service between Turkey and North Africa when she ran aground and eventually became a total loss. Cargo claims were made in Turkey against the owners and charterers of the vessel, both of which were Turkish companies, but the charterparty provided for English law and London arbitration, and the charterers commenced arbitration in London against the owners. At the same time, they commenced proceedings in Turkey against the owners' P & I Club, seeking an attachment of funds due to the Club in Turkey as security for their claims. This action was based on the Turkish Commercial Code which provides for a direct right of action against liability insurers.

The P & I coverage was subject to English law and London arbitration and contained the customary 'pay to be paid' rule: i.e. the Club was only liable to reimburse the owners after they had paid the claims. The Club therefore applied to the English Court and obtained an anti-suit injunction preventing the charterers from pursuing claims against it in Turkey (*Shipowners' Mutual P&I Association -v- Containerships Denizcilik Nakliyat Ve Ticaret AS*). The charterers appealed to the Court of Appeal, which has now upheld the decision of the Commercial Court judge and confirmed the injunction. The court considered that although the charterers were not a party to the contract of insurance, the correct analysis of the Turkish legislation was that their claim was a contractual one: for example, they would be obliged to show that the loss occurred during the period of the contractual cover, and any claim would be subject to the financial limits contained in the contract. Accordingly, following earlier English case law, the Club could not be deprived of its contractual right to insist that claims should be brought in London arbitration and under English law, and there was no good reason to refuse an anti-suit injunction to prevent the charterers proceeding in a different jurisdiction.

Carriage by Sea

New SOLAS rules for container weight verification come into force on 1 July 2016

Important amendments to the Safety of Life at Sea (SOLAS) Convention, which come into force on 1 July 2016, will require that before a packed container can be loaded on board a ship the carrier must receive the shipper's declaration of its verified gross mass (VGM). The new rules have implications for shippers, carriers and port terminals, all of whom should be reviewing their procedures and contractual terms in preparation for this change.

The primary obligation is imposed on the shipper (i.e. the exporter of the goods or freight forwarder named as shipper in the bill of lading) to provide the VGM certification. This can either be based on weighing of the container on a calibrated and certified weighbridge after it has been packed, or on weighing the contents and adding this weight to the tare weight of the container. The second option of course depends on the shipper being able to obtain the accurate tare weight from the carrier or owner of the container, and systems will need to be devised for the sharing of this information so as to avoid errors and delays. If the required certificate is not provided, or if the carrier has reason to believe that the certified VGM is incorrect, the carrier may weigh the container before accepting it for carriage. This may lead to delays and extra costs. The Convention does not specify how the ultimate responsibility for these and other consequences should be allocated, and this will depend on the applicable contractual conditions.

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