Weightmans

Marine & Transit

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In this quarterly instalment of our newsletter, we review a number of recent shipping and marine insurance cases including two Court of Appeal judgments overturning earlier decisions of the Commercial Court.

Marine insurance: inherent vice or marine peril?

If cargo is damaged at sea in predictable conditions, must inherent vice be inferred? With a blow being struck against underwriters, Mike Burns reviews the Court of Appeal's judgement in **The "Cendor MOPU"**.

Set back for London arbitration

Cargo receivers have succeeded in establishing that a Spanish Court decision overrules the possible application of London arbitration to a claim. Terry Donaghy discusses the recent Court of Appeal judgment in **The "Wadi Sudr"**.

Somali pirates: coverage issues and public policy concerns

Piracy afflicting the Gulf of Aden has reached epidemic proportions. Emma Rice discusses how the Commercial Court's decision in **The "Bunga Melati Dua"** provides welcome reassurances to the shipping industry and marine insurance market in the face of this crisis.

"Achilleas" revisited: damages for loss of sub charter

When time charterers lose a sub fixture because of a head owner's breach of charter, can damages for loss of profits be recovered in the light of the House of Lords 2008 ruling? Mike Burns sees the Commercial Court take stock of the law of contractual damages in **The "Sylvia"**.

Port or berth charter – Who pays for delay?

When there is congestion at a load port, who is responsible for delay as between owners and charterers? Terry Donaghy reviews the recent decision in **The "Merida"** on this issue.

Newsletter

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Marine insurance: inherent vice or marine peril?

Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad (The "Cendor MOPU") – Court of Appeal (Waller, L.J.; Carnwath, L.J.; Patten, L.J.) [2009] EWCA Civ 1398

In our June 2009 newsletter we reported on the Commercial Court's decision in this marine policy coverage dispute concerning the tow of an oil rig on board a barge from Galveston to Malaysia via the Cape of Good Hope, which was insured for the carriage for US$10 million under ICC (A) Clauses.

The rig was transported such that its three 300ft legs, rather than being cropped or removed for the carriage (as may have been possible) were left intact in the air and were thus subject to anticipated stresses of the ocean voyage.

Following a call at Saldahna Bay for fatigue assessment and repairs to cracking, the tow proceeded, but north of Durban the legs fell off the rig in sea conditions reasonably expected for the time of year.

Initially the rig owners were unsuccessful in claiming indemnity. The Commercial Court, in applying **Soya GmbH v White [1982] 1 Lloyd's rep 136**, was satisfied that the fatigued legs were obviously unable to withstand the ordinary incidents of the voyage, and that a finding of inherent vice must follow. Blair J. concluded that, as a matter of common sense, the legs of the rig failed not because of the repairs – which the rig owners contended – but despite them. The real problem lay with the inherent inability of the legs to withstand the ordinary incidents of the voyage; there was always doubt that the legs would make it round the Cape and accordingly cover under the policy was excluded.

The Court of Appeal has now overturned the decision. As well as providing a useful review of the case law, the appeal court has produced a decision which debunks the common (but mistaken) view that a loss in anything other than extreme conditions will lead to an inference of inherent vice, thus excluding cover.

In this regard, the Judge had mistakenly followed the restrictive reasoning in **The "Mayban" [2004] 2 Lloyd's Rep 609** – which involved damage to a transformer in reasonably anticipated weather conditions – but should have approached matters differently. This was because, commercially, if policy coverage (or not) was determined with reference to the foreseeability of weather conditions, then "all risks" cover would be confined to loss or damage occasioned by only unusual or extreme events e.g. there would be no cover for loss caused by predictable hurricanes in tropical areas. However, much of the point of all risks insurance would disappear if it only responded to losses which might be considered fanciful. It was precisely because there was a certain level of probability of a particular kind of loss that made insurance a sensible investment.

Therefore, having decided that the accident was not inevitable (whilst the legs were fatigued, they were not bound to fail) the Judge must also have concluded that a "leg breaking" wave – such as caused the chain of events – was not *bound* to occur on the voyage. Although with hindsight it might have been probable, that was a risk against which the rig owners insured – **NE Neter v Licenses and General Insurance (1944) 77 Lloyd's Rep 20**.

This decision shows that in such coverage cases, whilst the initial burden is on the insured to demonstrate the operation of a peril (here, a large wave) insurers will be unlikely to demonstrate an exception (e.g.

inherent vice) by simply arguing in general terms that weather conditions were predictable. Instead, underwriters will have to prove the causal incident (whether wave, or otherwise) was itself inevitable.

Set back for London arbitration

National Navigation Co v Endesa Generacion SA (The "Wadi Sudr") - Court of Appeal (Waller, L.J.; Carnwath, L.J.; Moore-Bick, L.J.) [2009] EWCA Civ 1397

In a set back for London as a forum for maritime arbitrations, the Court of Appeal has overturned an earlier decision of the Commercial Court granting owners a declaration that a London arbitration clause in a voyage charter was incorporated into a bill of lading contract and should be upheld.

The "Wadi Sudr" was chartered to carry a cargo of coal from Indonesia to Spain. During the voyage the vessel's rudder was damaged and the cargo was discharged at an alternative port in Spain. The bill of lading receivers commenced court proceedings in Spain claiming damages for the costs of the onward delivery of the cargo. The Spanish Mercantile Court ruled that a London arbitration clause in a voyage charter for the vessel was not incorporated into the bill of lading contract and that it had jurisdiction to hear the claim.

The owners started proceedings both in the English Court and by arbitration in London seeking (i) a declaration that the arbitration clause was incorporated in the contract; and (ii) an anti-suit injunction preventing the receivers from continuing with the claim other than by arbitration in London. The subsequent decision of the European Court in **The "Front Comor" [2009] 1 LLR 413** made it clear that the English Court could not grant an injunction in such circumstances and this issue fell away. However the Spanish receivers argued that the decision of the Spanish Court was binding on the English Court under Article 33 of Council Regulation (EC) 44/2001.

Gloster J in the Commercial Court ruled that the Spanish Court decision, while being a judgment within the Regulation, was not binding in the arbitration proceedings which were excluded from the regulation by Article 1 (2) (d). The judge further granted the owners a declaration that under English law the bill of lading did contain the arbitration clause.

The receivers appealed and the primary issues before the Court of Appeal were whether the decision of the Spanish Court was a judgment to which the EC Regulation applied and if so was it fully binding in England whatever the nature of the proceedings commenced there.

The Court of Appeal has allowed the receiver's appeal holding that the Commercial Court was not entitled to refuse recognition of the Spanish Court's judgement. In reaching this decision the Court of Appeal followed the ECJ decision in **The "Front Comor"** in holding that the Spanish Court decision, although dealing with a preliminary issue on whether arbitration applied, was a judgment within the Regulation. Further the Court decided the Judge had been wrong to rely on **Through Transport Mutual v New India Assurance (The "Hari Bhum") [2005] 1 LLR 67** to find that a Regulation judgment would not be binding on arbitration proceedings. The Court of Appeal decided that case did not mean that a Regulation judgment could not be recognised by the court in relation to English arbitration proceedings even though the arbitration proceedings lay outside of the ambit of the Regulation. The declaration upholding the

arbitration clause should not have been made in view of the Spanish Court judgment and the Court accordingly allowed the appeal.

The case raises further concern on the use of maritime arbitrations in London for the resolution of disputes between parties based in the European Union.

Somali pirates: coverage issues and public policy concerns

Masefield AG v Amlin Corporate Member Ltd (The "Bunga Melati Dua") – Commercial Court (David Steel J) [2010] EWHC 280 (Comm)

On 19 August 2008 the "Bunga Melati Dua", a chemical/palm oil tanker, was seized by Somali pirates in the Gulf of Adan during a voyage from Malaysia to Rotterdam. The vessel, together with crew and cargo, was taken to Somali waters. Shortly after, the Somali pirates demanded a ransom for the vessel's safe return – a familiar story but this time with a significant legal twist. A dispute arose between the owners of two parcels of bio-diesel shipped on board the vessel and the insurer of that cargo under an open cover contract covering loss by piracy and theft. This lead to Commercial Court proceedings before Mr Justice David Steel, whose judgment is of considerable importance to anyone dealing with marine insurance and piracy claims.

Soon after seizure, negotiations between the pirates and the owners commenced with the view to obtaining release of the vessel, cargo and crew. During those negotiations (about a month after the vessel was seized) the cargo owners served a notice of abandonment on the insurers. This was declined but the parties agreed that proceedings should be deemed to have commenced on 18 September 2008. About ten days later, the vessel's owners paid a ransom to the pirates and the vessel was released, together with the crew. The vessel arrived in Rotterdam on 26 October 2008 and the cargo was discharged.

The cargo owners' primary case was that the capture of the vessel by pirates and its removal into Somali waters meant the cargo had become an actual total loss ("ATL") for the purposes of Section 57(1) of the Marine Insurance Act 1906 ("the Act"). Alternatively, they claimed the cargo had become a constructive total loss ("CTL") under Section 60(1) of the Act in that the vessel and cargo had been reasonably abandoned on account of its ATL appearing to be unavoidable. Finally, they also submitted that ransom payments were contrary to public policy and therefore should not be taken into consideration in considering the prospects of vessel and cargo recovery.

The key issue, therefore, was whether as of 18 September 2008, the cargo owners were "irretrievably deprived" of the cargo. Steel J's view was that they were not. In reaching this decision, he took the following facts into consideration:

1. All interested persons (including the cargo owners) were fully aware that the cargo was likely to be recovered. The ship owner was in contact with the pirates very soon after the vessel was seized, the pirates had demanded a ransom and the ship owner was negotiating that ransom with a view to securing the safety of the crew as well as the vessel and cargo. The total value of the property at stake was in excess of US$80 million; as such it was likely

that the ship owners would pay the ransom demand of US$4.7 million. By 31 August 2008, the Malaysian Government was indicating to the crew members' families that the ordeal would be over in 30 – 40 days and by 2 September 2008, the Malaysian Navy had sent two Naval vessels to the area, the obvious implication being that the vessels carried the ransom payment and would be used to escort the "Bunga Melati Dua" back to safety.

2 Expert evidence was presented which showed that prior to 18 September 2008, nine vessels had been taken and released by Somali pirates between 2007 and that date. The taking of this vessel fitted the typical profile for a Somali pirate seizure. The pirates would not have been interested in the cargo and there would have been a high expectation that upon the vessel being released, the cargo would also be released.

3 Other vessels seized by Somali pirates had been promptly released following negotiations over a relatively short period.

4 Indeed the vessel and cargo were safely recovered only 11 days later.

Despite these facts being accepted by the cargo owners, they nonetheless contended that an ATL had occurred as and when the vessel was seized by the pirates, thus entitling them to cover under their policy. In doing so, they relied on the decisions in **Dean v Hornby (1854) 3 El & Bl.180** and **Kuwait Airways Corp v Kuwait Insurance Co SAK (No 1) [1996] 1 Lloyd's Rep. 664**, which they alleged supported the proposition that in the case of capture by pirates who intended to exercise dominion over a ship or cargo there is straight away an ATL even though the property is later recovered. However, the court distinguished these cases from the case in hand stating that the impact and effect of a capture is very fact sensitive. In the current case, what had happened was transfer of possession and not transfer of title. Furthermore, it had been highly likely that possession would be recovered and the condition of the cargo had not deteriorated significantly by the time it was recovered.

Regarding the alternative claim for CTL, the Court held that the cargo claimants had failed to satisfy the criteria of Section 60 of the Act as the cargo had not been abandoned due to an ATL appearing unavoidable. To the contrary the ship owners and the cargo owners had every intention of recovering the property and were fully hopeful that this would be achieved from the outset.

Steel J was also wholly unpersuaded by the cargo owners' submission that ransom payments were contrary to public policy and therefore should not be taken into consideration in respect of the vessel and cargo's irretrievability. Whereas he acknowledged that ransom payments do encourage further actions of piracy, he also noted that diplomatic or military intervention could not be relied on. In practice therefore, there is little option but to pay a ransom where that is the only effective means of removing crews and property from harm. Furthermore, he supported the view that such ransoms are recoverable as expenses of sue and labour under general average.

This decision provides welcome reassurance to the shipping industry and marine insurance market, placing a seal of approval on ship owners negotiating with pirates to ensure no harm comes to vessel, crew and cargo. However, the question of whether a vessel or cargo seized by pirates will be considered an ATL for insurance purposes depends on the individual facts of each case.

"Achilleas" revisited: damages for loss of sub charter

Sylvia Shipping Co Ltd v Progress Bulk Carriers Limited (The "Sylvia") - Commercial Court (Hamblen J) [2010] EWHC 542 (Comm)

This arbitration appeal to the Commercial Court provides a useful reminder of the possibly limited ramifications of the House of Lords decision in **The "Achilleas" [2009] 1AC 61**, following the initial hullaballoo caused by the judgment, in connection with the recoverability of damages for the loss of a charter party fixture.

It will be recalled that decision concerned a vessel under a time charter being redelivered nine days late, which resulted in owners losing a lucrative fixture albeit re-fixing with the same charterer at a much lower rate. Owners' claim for damages for loss of fixture profits failed, and was instead limited to the traditionally understood measure of the difference between the charter and market rates for the period of overlap.

Two of the judgments (Lord Roger, Baroness Hale) followed the traditional **Hadley v Baxendale** reasoning i.e. that loss of a particularly lucrative fixture was too remote to be recoverable, not being a loss the parties would contemplate as likely to follow from the breach, whilst two Law Lords (Hoffman and Hope) applied a more novel, broader approach based upon the parties' assumption of risk, which Lord Walker tacitly approved.

The circumstances in **The "Sylvia"** were superficially similar, albeit with roles reversed and here charterers were claiming from owners damages for loss of fixture.

The vessel had been period time chartered by owners to Progress who, in turn, had sub chartered to Conagra for the carriage of the cargo of wheat from Quebec to Casablanca. However, port state control rejected the fitness of the vessel for loading. The time taken to complete de-scaling and repairs meant that the sub charter laycan overran and Conagra cancelled. Progress managed to arrange a substitute charter but for a less favourable rate.

It was agreed that owners were in breach of their contractual maintenance obligations, and the question to be determined by the tribunal and the Commercial Court on appeal was the recoverability of charterers' loss.

Predictably, owners contended that **The "Achilleas"** decision meant that Progress's claim was limited to the difference between the charter and market rates during the 7 day period of delay. However, the Court agreed with the tribunal's assessment that Progress was entitled to damages based on the loss of the Conagra charter less receipts for the substitute fixture: a recoverable loss of about US$273,000.

In so deciding, Hamblen J. made a number of observations:

- Owners' argument that they had not "assumed the risk" of this type of loss (i.e. the novel **"Achilleas"** approach) was misconceived.

- **The "Achilleas"** was an amalgam of orthodox (**Hadley v Baxendale**) and broader approaches, but in the great majority of cases it was unnecessary to address the issue of assumption of responsibility. The House of Lords decision concerned unusual circumstances, a volatile market, and a background of market expectation of liability being restricted in specific late redelivery situations.

- Usually the fact that the type of loss arises in the ordinary course of things or out of special circumstances will carry with it the necessary assumption of responsibility. Therefore **Hadley v Baxendale** remained the standard rule which was to be applied in most cases.

- There was nothing unusual or extraordinary about this case. There was authority that loss of a sub charter was recoverable: **The "Derby" [1984] 1 Lloyd's Rep 635,** and there was no market understanding to the contrary.

- Further the liability was not unquantifiable, uncontrollable or disproportionate. Owners would expect the vessel to be sub chartered, the period for which could never be for longer than the time charter itself. The loss was therefore within reasonable and fixed confines. As such, it was foreseeable, and therefore recoverable.

This case underlines the fact that **The "Achilleas**" dealt with a discrete issue and was a case very much on its own facts. The traditional contractual approach to recoverability of contractual damages is therefore undisturbed. In this case, it was easily foreseeable that if the vessel was not fit to load upon presentation, that this could have adverse implications for any sub charter, and cancellation was an ordinary consequence of breach.

Port or berth charter – Who pays for delay?

Novologistics Sarl v Five Ocean Corporation (The "Merida") – Commercial Court (Gross, J.) [2009] EWHC 3046 (Comm)

As between owners and charterers, who is responsible for delay in loading a vessel following its arrival at the load port? Under established charter party law, if there is a port charter, the owners are entitled to tender notice of readiness (NOR) immediately upon arrival at the port and any delay thereafter will be for the charterer's account. On the other hand, if there is a berth charter, NOR cannot be tendered until the vessel actually berths at a berth within the port and any delay incurred waiting for a berth will be for the owner's account.

This issue arose in **The "Merida"**, a case on appeal to the Commercial Court from a London arbitration. Gross J had to decide whether the charter was a port charter or a berth charter and accordingly which of owners or charterers was responsible for delay in loading at the load port due to congestion.

The charter party was for the carriage of a cargo of steel plates from China to Bilbao and Cadiz in Spain. The vessel arrived at the Chinese load port of Xingang and immediately tendered NOR. The vessel then anchored awaiting a berth. However due to congestion at the port the vessel did not berth for some 20

days. The owners accordingly pursued a claim for demurrage of about US$500,000 for the resultant delay in the vessel's loading.

The charter party was based on a "recap" which rather unusually did not refer to a previous pro-forma charter party. The charter included the following terms:

One good and safe chrts' berth terminal 4 stevedores Xingang to one good and safe berth Cadiz and one good and safe berth Bilbao – (described by the Judge as the "opening term")

n.o.r/time-counting as per below c/p terms

clause 2
[1] The vessel to load at one good and safe port/one good and safe charterers' berths Xingang and to discharge at one good and safe port/one good and safe charterers' berth Cadiz and at one good and safe port/one good and safe charterers' berth Bilbao.
[2] Shifting from anchorage/warping along the berth at port of load and at ports of discharge to be for owners' account, while all time used to count as lay time.

The arbitrators had found that the wording of clause 2 provided for a port charter, as primarily it referred to both safe ports and berths and also the shifting time provision allowed for the master to tender NOR once the vessel arrived at the port, as had in fact occurred.

Following review of the authorities however, Gross J came to the opposite conclusion, deciding that the arbitrators had erred in finding that there was a port charter. He considered that the charter was in fact a berth charter.

It was necessary to identify what was the "specified destination" under the charter (**The "Johanna Oldendorff" [1974] AC 497**) and whether that destination was the port or was a berth within the port (**The "Radnor" [1955] 2 LLR 668, The "Finix" [1975] 2 LLR 415** and **The "Puerto Rocca" [1978] 1 LLR 252**).

In this case the Judge ruled that the opening term of the charter identified the destination as the berth at terminal 4 at the port of Xingang. The judge further held that clause 2 did not qualify the opening term so as to turn the charter into a port charter. The clause merely introduced a safe port warranty that reiterated the existing safe berth warranty provided for in the opening term. The judge therefore allowed the charterer's appeal with the consequence that the owner's claim for demurrage failed.

The case illustrates that owners and charterers must consider very carefully the precise wording introduced into such lay time clauses when negotiating the charter party contract.

This update does not attempt to provide a full analysis of those matters with which it deals and is provided for general information purposes only and is not intended to constitute legal advice and should not be treated as a substitute for legal advice.

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