

Marine & Transit

December 2009

In this quarterly instalment of our newsletter we review a number of recent shipping and marine insurance cases of interest and highlight their possible impact for P&I, hull and goods in transit insurers.

Pulling the plug on charters: anticipatory repudiatory breach

Before the time for performance arises, in what circumstances can an innocent party terminate a charter by reference to the other's conduct? Mike Burns reviews the decision in **SK Shipping (S) Pte Ltd v Petroexport Ltd** on this topical issue.

Pilotage – duty of master and bridge team to assist

Should a pilot be left to his own devices to navigate a vessel safely? Terry Donaghy discusses issues raised in the recent Marine Accident Investigation Branch's report on the “**Vallermosa's**” collision at Fawley Marine Terminal earlier this year.

Wharfers' insurance: theft and breach of warranty

To what extent can insurers rely on an insured's breach of security warranties to avoid claims, and how are such warranties interpreted? Mike Burns comments on the Commercial Court decision in **A C Ward & Sons Ltd v Catlin (Five) Ltd & Ors**.

Voyage charters – no Christmas cheer

Relying on fixture recaps could lead to disputes subsequently arising between the parties as to the charterparty's terms. In **The “Lowlands Orchid”** the owners claimed that super holidays were excluded from laytime, whereas charterers argued they were not. Terry Donaghy reports on the Commercial Court's decision in this case.

Adiós Rule B?

Have we seen an end to US maritime attachments? Emma Rice considers the recent United States Court of Appeals ruling in **The Shipping Corporation of India Ltd v Jaldhi Pte Ltd** and its impact on obtaining security for maritime claims.

Newsletter

Pulling the plug on charters: anticipatory repudiatory breach

SK Shipping (S) PTE Ltd v Petroexport Ltd – Commercial Court (Flaux J) [2009] EWHC 2974 (Comm)

Before the time for performance has arisen, in what circumstances can an innocent party terminate a contract by reference to the other's (anticipatory) repudiatory conduct?

This was a Commercial Court dispute under a voyage charter between SK as owners and Petro as charterers on the Asbantankvoy form, for the carriage of a cargo of naphtha to be loaded at Karachi and for discharge at various Far East port options. The charter was terminated before laytime commenced with ensuing claims by SK against Petro for damages for loss of freight and wasted expenses.

Against the charter background, oil traders Petro had contracted to purchase from one Pakistani supplier 15,000 m.t. naphtha (parcel 1) and was in negotiations with another supplier to buy a further 10,000 m.t. (parcel 2). Unknown to SK, problems developed with the purchase and following conclusion of the charter, Petro failed to establish a letter of credit for the purchase of parcel 1, and negotiations for parcel 2 fell through. Compounding the problem was the fact that Petro, despite having two potential on-buyers for the cargo, Glencore and Delta Oil, saw these negotiations ultimately fail. The timing was unfortunate since the vessel was en route to Karachi about to tender notice of readiness.

In the days leading up to the vessel's arrival, a number of things happened:

- Despite a concluded voyage charter, Petro made two alternative proposals – loosely described as “a change of itinerary” – to discharge at Aqaba (rather than the Far East) followed immediately by a time charter of 45 days to redeliver in Singapore/South Korea range, or alternatively a three month time charter with option for a further three month extension
- Petro ordered the vessel to reduce speed en route to Karachi
- Petro failed to return a signed copy of the charter to SK which would have entitled Petro to a Pakistani freight tax exemption
- It came to light that Petro had not furnished the letter of credit to secure parcel 1

Matters then revealed themselves. Petro sent SK a message advising that it might be necessary to declare force majeure due to circumstances beyond their control, and that they would consider releasing the vessel from its current charter to permit owner to seek other business, and to enable “mutual cancellation.”

In response, SK advised Petro they understood that charterers were declaring they would not perform the charter and that they, SK, would have to look to mitigate their losses. Petro rejected SK's “declaration of non performance” and offered an alternative loading option from West Coast India to the Far East.

SK demanded final confirmation of Petro's willingness to perform the charterparty on its agreed terms, but such confirmation did not appear. SK accordingly treated the charter as terminated by reason of Petro's anticipatory repudiatory breach and claimed damages for the freight differential between the current charter and the substitute fixture.

SK was successful. The approach of the Commercial Court in deciding whether or not SK were entitled to terminate was to judge Petro's emails against their background context and to ask whether a reasonable person in the position of SK (as well as SK personnel, subjectively) would consider the words and conduct as demonstrating a clear intention not to perform the contract. Although a number of matters (as highlighted above) reasonably caused SK concerns as to Petro's ability and/or willingness to perform they might not individually be repudiatory. Nonetheless, individual bricks cumulatively could amount to "a wall of renunciation" and which made it legitimate for SK to demand a clear direction from Petro as to their intention to perform. Indeed the lack of clear confirmation underlined the conclusion that Petro would not perform the contract or would only perform it on some other non-contractual basis (**The "Nanfri" [1979] AC 757**).

Reluctant contractual partners, their conduct and communications, can sometimes require the innocent partner having to carefully consider entitlement to terminate, which not only is a draconian step, but if misjudged can have serious financial consequences. This decision illustrates that in considering a party's conduct, the English courts (and maritime arbitrators) will look not simply to isolated communications and actions, but will be heavily influenced by background events and conduct leading to the immediate crisis, and both the objective and subjective understanding of such conduct.

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Pilotage – duty of master and bridge team to assist

MAIB report on the "Vallermosa"

This recent Marine Accident Investigation Branch (MAIB) Report on the collision incident involving the tanker "Vallermosa" at Fawley Marine Terminal has again highlighted the serious issue of how a pilot's effectiveness can be compromised by a lack of integration into the vessel's bridge team.

In February this year the "Vallermosa" was proceeding inbound to the BP Hamble Terminal in Southampton Water laden with a full cargo of 35,000 tonnes of jet fuel. Whilst approaching the terminal to berth the vessel made contact with two other oil tankers, the "Navion Fennia" and the "BW Orinoco" that were discharging alongside at the Fawley Marine Terminal. Damage was caused to all three vessels and to the jetty and there was some minor oil pollution.

The incident was investigated by the MAIB who found that the pilot who was assisting the navigation of the "Vallermosa" lost control of the vessel which started to sheer to port on the final approach turn. The pilot was unable to regain control before the vessel came into contact with the other tankers at the berth.

The pilot involved was very experienced and qualified. However the MAIB concluded that a number of safety issues had contributed to the accident:

- The vessel's approach to the terminal had been unnecessarily aborted for administrative reasons

- The pilot's effectiveness was reduced due to his heightened workload, frustration and increasing stress
- The master and bridge team did not monitor the pilot's actions sufficiently

In particular it appeared the master of the "Vallermosa" had effectively placed total reliance and trust in the pilot's ability to control the vessel. No effort had been made by the bridge team to support the pilot, who was to a great degree left on his own to deal with the safe navigation of the vessel.

This is notwithstanding the clear position under English pilotage law that a marine pilot on board a ship conducting the navigation is considered as the employee of the shipowner. As such the shipowner remains fully liable for any negligence or fault on the part of the pilot. In addition, the safety management system for vessels requires the master and bridge team of a vessel to carefully monitor the activities of a pilot and provide assistance where necessary.

The report highlights the severe consequences that can occur if a pilot is left to his own devices without any support from the bridge team. It was fortunate indeed that this incident did not result in injury or loss of life and more serious damage to the vessels and greater pollution.

The message for ship operators and their insurers is clear. The master and bridge team are ultimately responsible for the safety of their ship and should always monitor the actions of a pilot assisting with the navigation.

Terry Donaghy, Partner
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Warehousers' insurance: theft and breach of warranty

A C Ward & Sons Ltd v Catlin (Five) Ltd & Other – Commercial Court (Flaux J) [2009] EWHC 3122 (Comm)

In our November 2008 legal update we reported on the Court of Appeal decision in **Pratt v Aigion Insurance (The "Resolute") [2008] EWCA SIV 1314** which concerned a total loss – caused by fire – of an unmanned fishing boat while in berth. Insurers declined cover on the basis of a breach of warranty that the boat was "warranted skipper onboard at all times", and succeeded at trial. However, the Court of Appeal overturned the decision, and held that such warranties should not be read literally if an absurd result would follow; proper construction should look to the contractual context and surrounding circumstances.

This recent Commercial Court decision raised a similar issue, save that this concerned a warehouse theft involving the theft of cigarettes and tobacco to the value of £432,940.00. Under the policy the insured warranted, inter alia, that:

- The protections for the warehouse would be maintained in good order throughout the period of insurance and would be in effective operation at all times when the warehouse was closed for business

- The burglar alarm system would be in full and effective operation at all times when the warehouse was closed for business and maintained in good order throughout the period of insurance

There were a number of issues as to the adequacy of the warehouse security, including the fact that CCTV was not activated by reason of the ADSL line (which provided the link for the remote monitoring of the CCTV system) having been switched off as a consequence of BT having disconnected the landline for that period. There was also evidence of a guard wire, installed after the inception of the policy, having too been disconnected.

Insurers argued the warranty was strict insofar as the alarm system was not in full working order at the time of the theft and, as a result of its breach, underwriters could avoid the policy.

The court disagreed, holding that the words in a warranty must be restricted if their literal construction produced a result inconsistent with a reasonable and businesslike interpretation of such warranty. Flaux J. concluded that the warranties were qualified:

“...In the sense that the insured is only in breach of warranty there is a defect in the particular protection or the burglar alarm system, of which the insured becomes aware or should reasonably have become aware and the insured has then failed to remedy the defect promptly.”

To give the warranty any other meaning would result in the insured automatically being in breach and the insurers relieved from liability even before the insured knew of a defect or had the opportunity to remedy it.

Therefore, the purpose of the warranty was to impose upon the insured a duty to take prompt steps to rectify defects. On the facts presented the warehouse owner was at the time of the theft reasonably unaware of these issues.

Meanwhile, the defect of the guard wire was irrelevant: the warranty only applied to security in place at the time of policy inception.

Separately, insurers argued that the circumstances pointed to an “inside job”, which would be excluded under the policy. However the court was reminded of the strict burden of proof in relation to such a serious allegation. Despite circumstantial evidence, adopting the principles in **The “Ikarian Reefer” [1995] 1 Lloyd’s Rep 455**, the burden of proof would not be discharged if the evidence failed to exclude the substantial, as opposed to fanciful or remote possibility, that the loss was otherwise explainable. Flaux J. concluded the most probable explanation for lapses in security (including upward angling of motion detectors) was that they were left that way by engineers. Other aspects of the theft further suggested that internal assistance was unlikely: “... If this had been done with collusion, it indicated an Inspector Clouseau like bungling, which is belied by the professionalism of other aspects of the theft.”

However, at the final hurdle insurers succeeded in establishing there had been a material misrepresentation enabling the policy to be avoided. The goods had been stolen from the mezzanine floor of the warehouse. At the inception of the policy, there was an endorsement to the policy excluding theft outside business hours unless goods were stored in a secure floor on the ground floor. The insured later managed to obtain the removal of the endorsement upon giving assurances to underwriters that,

following inspections and upgrades that the security system was compliant with a “Risk Improvement Requirement 2006/02”. The facts established that such representation was not in all respects true, the representations were material, and induced underwriters to vary the policy so as to exclude the endorsement – **Pan Atlantic Insurance v Pine Top Insurance [1994] 1 AC 501**.

The message for insurers therefore continues to be that for warranties to be effective, clear and unambiguous wording is required. The courts will otherwise construe the warranty against insurers and will look to achieve a balanced commercial interpretation with reference to surrounding circumstances and common sense. Here the material misrepresentation saved the day for underwriters, but such arguments are usually more difficult to run– having to show materiality and inducement– than proving breach of warranty.

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Voyage charters – no Christmas cheer

Cobelfret Bulk Carriers NV v Swissmarine Services SA (The “Lowlands Orchid”) – Commercial Court (Beatson J) [2009] EWHC 2883 (Comm)

This decision is a good example of the difficulties that can arise if a charter party is not drawn up and signed at an early stage, a dispute subsequently arises between the parties, and they then have to try and rely on other evidence confirming the contract such as a fixture recap telex making reference to another charter party.

In this case the voyage charter party was summarised in a fixture recap email from the brokers to the owners and charterers that contained the following references:

Scale load/25.000 MT SHINC

O/WISE AS PER EUROSAILOR–CP DTD 02/MARCH 2004 ... LOGICALLY AMENDED TO REFLECT MAIN TERMS AGREED AS ABOVE ...

The “Eurosailor” charter party contained an additional clause concerning laytime providing that the discharging rate for the vessel would be 25,000 metric tonnes “Sundays and Holidays included, excluding Super Holidays.”

The vessel loaded a cargo of coal which was discharged partly at Rotterdam with the balance at Immingham between 23 and 28 December 2005. The issue between the parties was whether there was an inconsistency between the fixture recap and the additional clause. The owners argued there was a clear inconsistency so that the provisions of the additional clause should apply. On this construction of the charter party, the super holidays (i.e. Christmas holidays) were excluded from the laytime and the owners were entitled to US\$142,177 demurrage.



The charterers argued that the clauses could quite easily be considered together and that by virtue of the fixture recap terms, all holidays including super holidays were included in the laytime. On this approach the charterers were entitled to US\$106,500 dispatch money.

The dispute went to arbitration before a panel of three arbitrators in London. By a majority of 2:1, the arbitrators decided in favour of the charterers. The matter went on appeal to the Commercial Court.

Mr Justice Beatson reviewed the applicable authorities before coming to the view that there was no direct and clear conflict between the clauses and the respective provisions could be read commercially and logically together. The result of this was that the fixture recap dealt with holidays and included all holidays including super holidays. This meant the fixture recap term qualified the additional clause in the incorporated charter thereby removing the reference to the exclusion of super holidays from the laytime.

The case is a clear warning to parties that they should not allow their contracts to remain unclearly set out, by reference to other contract documents which may have terms that do not sit easily with other terms agreed between the parties.

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Adiós Rule B?

The Shipping Corporation of India Ltd v Jaldhi Pte Ltd – United States Court of Appeals, Second Circuit (Circuit Judges Feinberg, Winter and Cabranes) – 2009 WL 3319675 (2d Cir. Oct. 16, 2009)

This recent US Court of Appeals ruling has severely curtailed “Rule B” attachments of electronic fund transfers (“EFTs”) in New York for maritime and other claims.

Rule B allows claimants to freeze defendants’ assets pending a final decision in court or arbitration, regardless of the jurisdiction of the principle claim provided the defendant has attachable property within the relevant US judicial district. A floodgate of such suits was opened seven years ago following the case of **Winter Storm Shipping Ltd v TPI, 310 F 3d 263 (2nd Cir. 2002)**, in which the US Court of Appeals extended the application of Rule B to electronic fund transfers. Thus, funds passing momentarily through New York clearing banks became attachable property.

However, the US Court of Appeals has now overruled the decision in **Winter Storm**, stating that EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank and as such do not fall within Rule B. Furthermore, following the more recent decision of the US Court of Appeals on 13 November 2009 in **Hawknet Limited v Overseas Shipping Agencies et al 2009 WL 1309854 (S.D.N.Y. 2009)**, the decision in **SCI v Jaldhi Overseas** is to be applied retroactively. Therefore, pre-existing Rule B attachments of EFTs may also be set aside.

This about-face comes as no surprise. It is believed that Rule B law suits constituted 33% of all law suits filed in New York between October 2008 and January 2009 – an obvious burden on the clearing banks involved. Suits were often filed speculatively by claimants merely in the hope that a defendant would

engage in a dollar denominated transaction involving an EFT through a New York clearing bank during the period an attachment order was in effect. This is said to have discouraged international companies from engaging in U.S. dollar transactions or using New York banks for international agreements. However, this relatively straightforward and effective way of obtaining security for maritime claims is no longer available.

As a result, it is predicted the number of vessel arrests will increase dramatically as maritime claimants seek more traditional methods to secure claims, especially in arrest friendly jurisdictions such as South Africa. However, those with assets in the United States will still need to take heed of any threatened attachment orders. Rule B can still be used to attach ships, cargo, bunkers and other assets such as bank accounts. Even EFTs in the hands of an intermediary bank potentially remains subject to attachment under Admiralty Rule C whenever there is a lien on the particular funds. Under New York State law, there is also another procedure, albeit more complicated and time consuming than Rule B, which allows attachments "in aid of arbitration" in any commercial dispute including maritime claims. In certain circumstances therefore, US attachment orders remain a viable way of obtaining security.

Weightmans' Marine and Transit team can advise on all aspects of maritime attachments throughout the United Kingdom as well as worldwide through our network of international correspondent law firms. Should you require advice in this respect, please contact Terry Donaghy, Mike Burns or Emma Rice.

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