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wh Newsletter

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We are delighted to announce that the firm has been joined by Julian Morgan, a very experienced solicitor who has run his own firm for many years and brings with him his commodities, energy and shipping practice.

BUILDER NOT LIABLE FOR CONSEQUENTIAL LOSS

In the "STAR POLARIS" the claimant Buyer contracted with the defendant Builder for a new Capesize bulk carrier. After delivery the vessel suffered a serious engine failure and was towed to a repair yard. The Claimant sought (i) damages for the cost of repairs to the vessel (ii) towage costs and other costs associated with the engine failure and (iii) the diminution in value of the vessel.

Article IX.4 of the contract limited the Defendant's liability to the obligations set out expressly in that article, which included a guarantee that the vessel was free from defects for 12 months. The article also purported to exclude the Builder's liability for any 'consequential or special losses, damages or expenses'.

The Court rejected the Buyer's argument that 'consequential loss' should be interpreted in the context of the second limb of Hadley v Baxendale (which covers losses within the reasonable contemplation of the parties at the time the contract was entered into). The Court agreed with the Arbitration Tribunal that the proper interpretation of Article IX.4 was wider than this. Taken as a whole, the article was understood to exclude liability for all damages other than those directly resulting from defective materials or workmanship. This meant that financial losses caused by defects other than the cost of repair of physical damage were excluded.

INTERCLUB AGREEMENT, INHERENT VICE AND DELAY

In Transgrain Shipping v Yangtze Navigation, there was a dispute under a charterparty incorporating the Inter-Club Agreement 1996 (the ICA). Clause 8 of the ICA provided:

"(8) Cargo claims shall be apportioned as follows:

(d) All other cargo claims whatsoever (including claims for delay to cargo):
50% Charterers
50% Owners

Unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim"

The Charterers had ordered the ship to wait off the discharge port for over four months whilst awaiting payment for cargo. When the cargo was eventually discharged, damage was found and a claim against the vessel was settled for €2,654,238. The Owners claimed that amount together with hire from the Charterers.

The Tribunal found that the cause of damage was inherent vice of the cargo and the prolonged period of being anchored off the discharge port. The Tribunal held that the damage was due to the act of the Charterers, despite the fact that they were not in breach or at fault for loading the cargo. Therefore, the Charterers should bear the full cost of the claim.

The Court rejected the Charterers' appeal. Clause 8 should be given its ordinary, natural meaning and did not raise issues of fault. The reference in clause 8 to 'neglect' was used to cover claims arising out of a party's failure to act and did not import a requirement of fault.

INHERENT VICE AND INEVITABILITY OF DAMAGE

In Volcafe Ltd v CSAV, the Court of Appeal considered a claim by cargo interests in respect of condensation damage suffered by consignments of coffee beans carried in dry, unventilated containers from Columbia to Northern Germany. The Claimants' case was that the carrier failed to deliver them in the same good order and condition as upon shipment. Alternatively they argued that loss and damage had been caused by the carrier's failure to carry and care for the cargoes. In particular, because the kraft paper used to line the internal metal surfaces of the containers was inadequate. The expert evidence was that a degree of damage by condensation was usual for such cargoes.

WATERSON HICKS • SOLICITORS • IBEX HOUSE • 42-47 MINORIES • LONDON EC3N 1DY
Telephone: 020 7929 6060 Fax: 020 7929 3748 E-Mail: law@watersonhicks.com www.watersonhicks.com
AND 43 Tsamadou Street, Piraeus 185 32, Greece. Telephone (30) 210 429 4300

The Court of Appeal found that where goods were loaded in apparent good order and condition, the cargo claimant bears the burden of establishing they were lost or delivered in a damaged condition. If this burden is met an inference is drawn that the carrier was in breach of its obligation to properly and carefully carry and care for the goods. If the carrier wishes to raise an exception to liability, it has the burden of establishing such but the carrier is not required to prove the damage occurred without its negligence. Rather, the burden is on the cargo claimant to negate the operation of the relevant exception by establishing negligence or want of care.

Overruling the first instance judge, the Court of Appeal found that adequate lining paper had been employed, that the carrier had applied a sound system of carriage and that because of the high inherent level of condensation in the cargo as shipped damage was inevitable. The Owners were not liable for the damage.

CHANGES TO LIMITATION OF SHIPOWNER'S LIABILITY

On 30th November 2016 the limits of liability for maritime claims under the Convention on Limitation of Liability for Maritime Claims 1976 and its 1996 Protocol were increased under English Law. The limits for both physical damage and physical injury have been increased by 51% for all categories of vessel tonnage with the exception of vessels less than 300GT where there will be no increase. The new limits will only apply to incidents on or after 30th November 2016.

DELIBERATE SCUTTLING – NO LIMITATION

In the "ATLANTIK CONFIDENCE", following the sinking of a bulk carrier on a laden voyage from Ukraine to Oman, the Owners issued proceedings seeking a limitation decree pursuant to the Limitation Convention 1976. This was opposed by the insurers of one of the cargoes who contended that the vessel was deliberately scuttled. They argued that, pursuant to article 4 of the Convention, the Owners were barred from claiming limitation because the loss resulted from their personal act or omission and they intended to cause that loss.

It was held that the insurers had to prove their case on the balance of probabilities. This is the same standard of proof applied to whether a hull underwriter has shown on the balance of probabilities that a vessel has been scuttled.

The evidence in the case was sufficient to conclude a fire was deliberately started onboard the vessel and that the vessel was deliberately sunk by the Master and Chief Engineer. The Court found it difficult to accept that three improbable events had occurred in quick succession, namely an accidental fire, an accidental flooding of the engine room and an accidental flooding of two double bottom tanks. There was also other evidence such as an earlier change of the vessel's course into deeper water and an unscheduled abandon ship drill conducted in an odd manner. The Master initially sought to conceal the change of course and then attempted to explain it by reference to a risk of piracy when there was no such risk. Looked at cumulatively, this evidence justified the Court's finding.

The subsequent question was whether the vessel was sunk on the request of Mr A, the sole shareholder and director of the Owners. There was no evidence suggesting the Master and Chief Engineer had a motive to sink the vessel personally. Also, some evidence suggested the involvement of senior employees of the Owners. For example, the Owners failed to inform salvors that they had dispatched another of their vessels to the casualty, with the intention of their superintendents boarding the vessel before it was boarded by salvors. Further, Mr A had lied about the destination of hull insurance proceeds, suggesting an attempt to mask a benefit received from the vessel sinking.

The Court concluded the vessel was deliberately sunk by the Master and Chief Engineer at the request of Mr A. In those circumstances, the loss of the cargo was a natural consequence of his act and must have been anticipated. The Owners' claim for a limitation decree was dismissed.

BE CAREFUL UPON WHOM YOU SERVE

Sino Channel Asia Ltd v Dana Shipping and Trading highlights the care that must be taken when serving a Notice of Arbitration, in particular where an opponent is unresponsive.

Dana Shipping and Trading Pte Ltd, Singapore (Owners), entered into a Contract of Affreightment (COA) with Sino Channel Asia Ltd, Hong Kong (Charterers). The fixture negotiations were carried out via separate independent brokers acting on behalf of each of the parties. Subsequently, during the performance of the COA, Dana communicated with Sino Channel via Mr C, who was an employee of Beijing XCty Trading Limited, a company registered in the Peoples Republic of China.

On certain occasions Mr C represented himself to Dana as acting for Sino Channel and on other occasions as acting for Beijing XCty. Dana was not aware of the precise relationship between Sino Channel and Beijing XCty.

Following a dispute regarding the COA, Dana appointed an arbitrator and e-mailed a Notice of Arbitration to Mr C directly. Mr C responded on three occasions, including a request for a time extension. Nevertheless, Sino Channel did not appoint an arbitrator and so Dana appointed their arbitrator as sole arbitrator. Eventually an award was issued by the sole arbitrator in favour of Dana which was served on Sino Channel in Hong Kong. Sino Channel alleged this was the first time they had become aware of the arbitration proceedings. They argued that Mr C had no authority to accept service of process on their behalf and that therefore the arbitration was ineffective. Sino Channel commenced proceedings in the English High Court for a Declaration that the Tribunal had not been properly constituted.

It emerged in the subsequent Court proceedings that Sino Channel and Beijing XCty were in business together, but were independent companies. Beijing XCty found and arranged various back-to-back sale and purchase contracts in which Sino Channel would appear as the named party. In line with this arrangement, the relevant COA was signed by Sino Channel's director and bore Sino Channel's stamp, however it was Beijing XCty that concerned itself with the performance of the contract.

The Court held that while Beijing XCty may have had a wide general authority to communicate and act on behalf of Sino Channel for the fixing and performance of the COA, such authority did not (without more) include the authority to accept service of the Notice of Arbitration. The Court did not find evidence that specific authority had been given by Sino Channel and so rejected Dana's argument that Beijing XCty had actual implied authority to accept the service.

The Court also rejected Dana's argument that Beijing XCty had ostensible authority to accept service. There was no express representation made by Sino Channel to this effect and representations made by the intermediaries did not suffice. Whilst the Court accepted in some cases it may be possible to infer the existence of a representation by looking at the conduct of the principal, on the present facts there was insufficient evidence to merit such a conclusion.

Finally, the Court held there was no ratification by Sino Channel. Failing to participate in an arbitration which was improperly constituted did not amount to ratification or acceptance of the process. Nor did a 4 month period of inactivity after being served with the award. Accordingly, the Court granted the Declaration sought by Sino Channel. This case may come as a surprise to the shipping community which is accustomed to sending arbitration notices via broking channels and insurers. When faced with an uncooperative or silent opponent it is advisable to spend time ensuring notice is served correctly and in a manner that cannot be subsequently challenged.

EU SERVICE REGULATION

In the "PATRICIA SCHULTE", Cargo interests loaded containers of rape seed cake on the Owners' vessel. Similar cargoes loaded on another of the Owners' vessels self-ignited on passage. As a result of this, the Owners discharged the present Claimants' containers at an intermediate port on the grounds that they contained an undeclared dangerous cargo.

One day before expiry of the one year limitation period, the cargo interests issued a Claim Form in the Admiralty Court against the Owners. As the Owners declined to appoint solicitors for service in England, service needed to be effected under EU Service Regulation EC No. 1393/2007. The cargo interests' English solicitor flew to Copenhagen and purported to serve the claim form by handing it to an in-house lawyer at the Owners' offices in Denmark. The effectiveness of such service was challenged.

The Court held that service of an English Claim Form by an English solicitor directly on the Owners in Denmark was not permitted by the Service Regulation as applicable under Danish law. Article 15 of the Regulation allows service of judicial documents directly through "judicial officers, officials or other competent persons of the Members State addressed". However, an English solicitor is not a judicial officer, official or other competent person of Denmark. Accordingly there was no valid service of the Claim Form by such method. The Court also held that the attempted service was not merely a minor procedural error which could be remedied (for example, an incomplete or missing translation in circumstances where the recipient was fluent in the language of the original documents). The defect could not be remedied because there was no valid service whatsoever under article 15. Accordingly the Court had no jurisdiction to try the cargo interests' claim.

OBLIGATION TO PROVIDE VESSEL IN 'LIGHT BALLAST CONDITIONS' - VOYAGE SPEED

In Regulus Ship Services v Lundin Services, under an ocean towage contract on BIMCO terms, Regulus agreed to tow a Floating Production Storage and Offloading vessel (IKDAM) using its tug (HARMONY 1) between Sousse, Tunisia and Labuan, Malaysia. Following a number of disputes, Regulus diverted the voyage to Singapore in order to exercise a lien over the tow. Lundin completed the voyage by entering a new towage contract. Regulus subsequently commenced proceedings.

Firstly, Regulus claimed that the Defendants had breached an express term that IKDAM would be provided in 'light ballast conditions'. The Claimants argued that due to receiving the vessel in heavy ballast conditions, they had incurred excess fuel costs, demurrage charges and other expenses.

It was held that 'light ballast conditions' should be interpreted as carrying the minimum ballast that would enable the vessel to proceed safely and in a seaworthy condition on her voyage. The Court rejected Lundin's argument that the condition of the tow had to be legally fit for the voyage and satisfy the requirements of a marine warranty surveyor. The test was one of minimum ballast for physical safety and seaworthiness and was not transformed into one based on the wishes of a third party. Despite this, Regulus did not show that the breach caused any delay to the voyage. Accordingly they were entitled only to nominal damages.

Secondly, Regulus claimed it was entitled to delay payments on the grounds that IKDAM was incapable of being towed at the speed originally contemplated. Clause 17 of the contract stipulated that if the tug slow steamed because the tugowner or tugmaster reasonably considered the tow was incapable of being towed at the original speed contemplated, the tugowner was entitled to receive additional compensation at a delay payment rate. The Court rejected the Claimants' argument: the tugowner did not show that they had made a decision to steam slowly or intended to do so and there was no evidence that IKDAM was incapable of being towed at the intended speed, just that the tug could not average that speed using only two engines.

The Court also rejected Lundin's counterclaim that there was a collateral agreement the convoy would average a speed of 4.5 knots. The evidence relied upon by Lundin was part of contractual negotiations and was based on anticipated fuel consumption, rather than a guarantee of speed.

The Court held that Regulus repudiated the contract by sending an email giving notice of cancellation. Lundin had accepted the repudiation and was entitled to recover as damages the cost of an alternative tug to complete the voyage. Lundin was required to give credit for the US$ 100,000 which would have been due had HARMONY 1 completed the voyage.

LITIGATION FUNDING

Excalibur Ventures LLC v Texas Keystone Inc concerned an appeal by litigation funders in a claim regarding an interest in oilfields in Iraq. Lord Justice Tomlinson approved the trial judge's description of the underlying claim as "speculative and opportunistic" with "no sound foundation in fact or law". The claim failed on every point and the manner in which it was conducted was heavily criticised. It was ordered that the Claimant should pay the Defendant's costs on an indemnity basis. A complex and varied funding arrangement underpinned the claim. A number of parties provided a total of £31.75 million, £14.25 million of which was the Claimant's legal costs to bring the claim and £17.5 million in security for costs.

The Court of Appeal upheld the order of the trial judge that the litigation funders were liable for the Defendants' costs on an indemnity basis. The Court was not moved by the absence of discreditable conduct by the funders themselves. The conduct of a party was but one factor to be considered in the broad discretion to make costs orders. It was not necessary for the funder to know the egregious feature of the litigation which gave rise to indemnity costs.

A feature of the appeal concerned whether the money advanced as security of costs should count towards the "Arkin" cap (this cap limits the funders' liability to the amount that it invested in the litigation). It was submitted that contributions towards security of costs should not be added to the amount invested in solicitors' costs when setting this cap. The Court of Appeal rejected this and held that funds paid for security of costs should not be treated any differently from other litigation costs.

The above are only intended to be short summaries.
If you require any further information please feel free to contact us.

WATERSON HICKS • SOLICITORS • IBEX HOUSE • 42-47 MINORIES • LONDON EC3N 1DY
Telephone: 020 7929 6060 Fax: 020 7929 3748 E-Mail: law@watersonhicks.com www.watersonhicks.com
AND 43 Tsamadou Street, Piraeus 185 32, Greece. Telephone (30) 210 429 4300