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WH Newsletter
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We are delighted to welcome to the firm Brian Taylor, a solicitor with 25 years of experience of maritime law, who has worked both in specialist maritime law firms and with substantial ship managers.

CHINA: NO LIABILITY FOR DIFFERENT COLOURS OF DDGS CARGO

Owners, facing a cargo claim for USD2.5 million brought by Chinese Receivers have successfully overturned the judgments of the Guangzhou Maritime Court and the Guangdong Higher People's Court in the Chinese Supreme People's Court. This firm acted for the successful Owners.

The Vessel arrived at Huangpu in October 2015 with a cargo of 55,000 mt DDGS loaded at Destrehan, Louisiana. Immediately upon arrival the Receivers alleged cargo damage on the grounds the cargo was caked and burned. Receivers set about segregating the DDGS into separate warehouses according to the lightness of its colour. The Receivers' surveyors refused to allow Owners' surveyors to observe the sampling of the cargo.

Some 26,000 mt of the lighter coloured cargo was sold and, over two months later, Receivers alleged that the remaining 29,000 mt of the darker cargo was off-specification due to a Hunter-L value below the contractually agreed value of 50. A higher Hunter-L value represents a lighter colour which is more desirable in China. The cargo's Certificate of Quality recorded a Hunter-L value of 50.8. The cargo sample relied on by Receivers returned a Hunter-L value of 42.5.

It was clear that the sampling of the darker 29,000 mt portion of cargo would return a lower Hunter-L value than if a proper composite sample of the whole 55,000 mt cargo had been tested. Despite this, the Guangzhou Maritime Court rejected Owners' arguments that on the evidence the ("GMC") had failed to discharge the burden upon them to show that the cargo had been damaged during transit. The GMC found that the cargo had altered during the period of responsibility of the Vessel - i.e. during transit - because the Hunter-L value of the cargo had decreased and Owners had failed to prove otherwise. The GMC also rejected Owners' inherent vice defence under Article 51(9) of the Chinese Maritime Code.

On appeal, the Guangdong Higher People's Court, upheld the GMC's decision and ruled that the Bill of Lading recorded the cargo was in apparent good condition and the Master had failed to record on the Bill of Lading that the cargo was of different colours. Accordingly, under Articles 75 and 76 of the Chinese Maritime Code, Owners were responsible for the different colours of the cargo.

The issues for determination in the Supreme Court were (1) whether the goods were damaged during the carrier's period of responsibility and (2) whether the Master should have annotated on the Bill of Lading that the cargo was of different colours.

The Supreme Court held that Article 46 of the CMC places the responsibility upon the carrier for damage to cargo arising during the period between loading and discharge of cargo. Per Article 67 of the Chinese Civil Procedure Law, the burden of establishing damage during the carrier's responsibility period rests with the party bringing the claim.

In this case, Owners had submitted evidence to establish there were different colours of DDGS when the cargo was loaded from 42 barges at Destrehan and that a composite sample of the cargo from these barges gave a Hunter-L value of 50.8. Overruling the local CICC inspector the Court found the Receivers' sample surveys at the discharge port were unreliable and could not prove a change in colour during transit, there were no temperature increases in the cargo which might explain a change in colour of the cargo and the cargo was discharged in the same condition as when loaded. The Receivers had failed to discharge the burden upon them under Article 67 of the Civil Procedure Law to show that the cargo changed condition during the carrier's period of responsibility.

Under Articles 75 and 76 of the Chinese Maritime Code, the carrier has the right to make annotations to the Bill of Lading when the carrier deems the condition of the cargo unsatisfactory. If no annotation is made the carrier will bear the consequences. DDGS is known to have different colours which indicate the quality of the cargo. However, the law did not expect the Master or crew to assess with precision a dusty cargo loaded through conveyors and grabs nor did it require the carrier to annotate the internal quality of the cargo. It was not necessary for the Master to annotate or clause the Bill of Lading, in particular because the Bill of Lading did not specify any colour features of the cargo. The Master and crew were not expected to have expert knowledge of DDGS. It was therefore reasonable for the Master not to annotate the Bill of Lading and to leave it marked as in apparent good order and condition.

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TIMEBARRED MISDELIVERY CLAIM

In the Giant Ace, FIMBank appealed against a decision of the High Court that its claim for misdelivery of cargo which occurred after discharge was timebarred. A cargo of 85,510 m/t of coal was carried aboard the Giant Ace under 13 Bills of Lading on the Congenbill form, each of which was governed by English law and incorporated the Hague-Visby Rules, Article III Rule 6 of which reads:

...the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods unless suit is brought within one year of their delivery or of the date when they should have been delivered...

The cargo was loaded in Indonesia and discharged against letters of indemnity between 1 and 18 April 2018 at a jetty at Jaigarh, India and held in a customs bonded stockpile. The cargo was subsequently misdelivered from that stockpile. It was common ground that delivery and discharge could be separate events and were so in this case.

FIMBank held the Bills of Lading as security for the finance it provided to the buyer of the cargo but only commenced proceedings for misdelivery against KCH who were the demise charterer and contractual carrier under the Bills who were Lading, more than 1 year after the subject misdelivery took place.

LMAA arbitrators and the High Court agreed with KCH that FIMBank's claim was timebarred notwithstanding that the misdelivery of the cargo took place subsequent to discharge and therefore outside the general scope of the Hague-Visby Rules. It was further held that clause 2(c) of the Congenbill form - which reads "The Carrier shall in no case be responsible for loss and damage to the cargo, howsoever arising prior to loading into and after discharge from the Vessel" - did not affect the timebar.

The Court of Appeal upheld the High Court decision and found that though the Hague Rules did not apply once the cargo had been discharged, the revision of Art III Rule 6 of the Hague-Visby Rules, which replaced the words "all liability in respect of loss or damage" with "all liability whatsoever in respect of the goods" was intended to be of wider scope and therefore applied to misdelivery claims. That the provision was to apply even to liability which was outside the general scope of the Hague-Visby Rules was evident from the clear positive change in the wording of Article III Rule 6, particularly the inclusion of the word "whatsoever". FIMBank's claim was timebarred.

The Court of Appeal found it unnecessary to decide the alternative argument advanced by KCH that a term could be implied into the Congenbill form that the Hague-Visby Rules govern the parties' relationship after the discharge of the cargo, but expressed doubt that this would be the case.

The Court of Appeal further held that the wording of clause 2(c) of the Congenbill form was not sufficiently clear to relieve the carrier of liability for misdelivery and that there was no reason why the ordinary one year time limit should not apply as a result of this provision. If, however, clause 2(c) excluded liability then no question of time bar arose.

HSFO AND LATE REDELIVERY

A fixture was made in May 2019 and at the time of entering into the charterparty the parties were both aware that the IMO 2020 Fuel Regulations were due to come into force on 1 January 2020 so that the vessel would not be able to burn HSFO after 1 January 2020. The fixture was for about four months for a maximum period until 15 December 2019. Bunkers on redelivery were expressed to be on a sliding scale reducing from "about 250 – 450 metric tons" in the event of redelivery in September/October down to about 100 – 250 metric tons in the event of November/December redelivery.

The vessel arrived at her final discharge port on 27 September 2019 but due to Receivers' failure to pay for the cargo, there were delays and the vessel was not redelivered until 4 February 2020 with 165.475 m/t of HSFO remaining on board. By that time the vessel's hull had become fouled. Following redelivery the vessel proceeded to another port where Charterers arranged for hull cleaning and the Owners arranged for the HSFO to be debunkered.

Owners claimed that Charterers had breached Clause 10 of the recap (which they characterised as the "debunkering prevention provision") through redelivery with non-compliant bunkers remaining on board at a time after the Regulations had come into force, as a result of which they had to debunker.

Further or alternatively Owners submitted there were two implied terms which operated when redelivery exceeded the maximum permitted duration of the charter. The first was that in the event of redelivery before 31 December 2019 the vessel would be redelivered with a quantity of HSFO that could have been consumed by the vessel by that date. The second was that in the event of redelivery after 31 December 2019 the vessel would be redelivered with no bunkers on board whose use was barred under the Regulations. The Owners submitted neither term had been expressed in the charterparty because the parties had presumed redelivery would take place by no later than 15 December 2019.

Charterers argued they could have redelivered the vessel at any time until 31 December 2019 with up to 250 m/t HSFO remaining on board. Under the Regulations, although HFSO could not be consumed after 31 December 2019 it could still be carried on board a vessel until 1 March 2020.

The Tribunal found the situation was not envisaged by either party in that it related to a time beyond when the parties expected the charter to have come to an end. The real cause of the losses alleged by Owners was late redelivery caused by delays at the final discharge port.

It was clear the Charterers were aware consumption of HSFO after 1 January 2020 would be prohibited since they agreed to the sliding scale of bunker quantities upon redelivery. This brought into play the second limb in Hadley v Baxendale so

the Charterers were aware of the consequences of the vessel being redelivered late with the quantity of bunkers it had on board. The type of loss claimed by Owners was consequently recoverable in principle. The Tribunal held it was necessary for the HSFO to be debunkered and the time and bunkers consumed in this operation were recoverable. As to the value of HSFO debunkered Owners had realised a price of USD 80 per m/t which Owners credited to Charterers. Charterers on the other hand considered that USD 80 per m/t was not a reasonable, fair or proper commercial price and that this was a failure to mitigate loss. They claimed that USD 230 per m/t based on Platts prices was a proper price. Owners said it was clear the sale of the vessel's HSFO had been a distressed sale conducted from a weak negotiating position. The Tribunal held Owners were not in the business of selling bunkers and had little doubt the HSFO would have been viewed as a distressed sale by potential buyers. The price obtained by Owners was accepted.

The Tribunal held on the evidence that underwater cleaning was not possible at the final discharge port and that Clause (d) of the BIMCO Hull Fouling Clause applied. Having concluded that the vessel would have proceeded to the debunkering port in any event and since the Charterers had already paid the actual cleaning costs the Owners' claim was limited to the time and bunkers used during cleaning.

MUST A PRUDENT UNINSURED SEEK APPROVAL TO SETTLEMENT?

Technip Saudi Arabia Ltd v Mediterranean and Gulf Cooperative Insurance and Reinsurance Co is the first Court decision on the construction of the Damage to Existing Property ("DTEP") Endorsement within the WELCAR standard form, which is the standard form wording for offshore construction all risks cover. The form is designed to provide cover for all those involved in an offshore construction project.

The case confirmed the general principle that under English law it is not enough for a policyholder simply to prove that a settlement agreement reached with a third party is reasonable in order to claim the resulting loss under a liability policy, but it must also prove that there was a legal liability to the third party and that the settlement does not exceed the amount of that liability. The decision by Jacobs J dismissing a US$ 31m claim under the WELCAR Form also provides clarification on how the Court will deal with insurance claims for sums due under a settlement agreement.

Technip was the main contractor for a project in an offshore oil and gas field in the Persian Gulf and in 2015, a tug chartered by it allided with and damaged a platform in the field. Technip and the platform owner KJO reached a settlement for US $25 million. Technip then sought to claim this and other losses under its insurance with its insurer Medgulf under the Offshore Construction All Risks policy.

The settlement with Technip had occurred some three years after Medgulf had declined indemnity for the original claim, instead telling Technip that it should act as a prudent uninsured. Technip claimed in respect of its liability to the platform owners for the cost of repairing the platform plus additional costs incurred in relation to carrying out a survey to assess the damage and other ancillary costs. The total claim amounted to US$31,038,265 plus €458,052. Medgulf declined cover on the basis of certain exclusion clauses in the policy as well as arguing that Technip was not liable and had not sought insurers' consent to the settlement. Liability policies usually require the insurer's consent before a policyholder takes various steps during a dispute with a third party. These steps may include admission of liability, settlement discussions, negotiations and entering into settlement agreements.

Technip argued that the sums payable under the settlement agreement comprised, in part, compensatory damages and so fell under the definition of "damages" under the policy. Medgulf argued that the four categories identified in the first part of the definition of "damages" had a degree of separation and that compensatory damages must be sums awarded by a court or tribunal, which would not include the sum of US$25 million Technip paid to KJO. The Court rejected Medgulf's argument and did not view the four categories as disjunctive. The settlement payment was therefore within the definition of compensatory damages with the result that the absence of consent by Medgulf was irrelevant.

Technip also argued that, even if the settlement sum did not constitute compensatory damages and instead was only potentially covered as a "compromise settlement", there was no need for Medgulf's consent given that it had refused to indemnify Technip in 2016 (three years before the settlement agreement) and told Technip to act as a prudent uninsured. Technip contended that, in these circumstances, the provision requiring consent did not apply, as the provision presupposed the insurers' acceptance of liability under the Policy. The Court agreed with Technip and held that it would have little difficulty in concluding that the insurer had waived any requirement for the insured to seek its consent or was estopped from asserting that such consent should have been sought. The Court therefore found that Medgulf was prevented from relying on the insurers' consent requirement for compromise settlements.

In finding that Medgulf was not liable under the policy Jacobs J referred to the Existing Property Endorsement and held that it operated to exclude Medgulf's liability. The Endorsement stated that all existing property was within it, subject to identified items of KJO property. A reasonable person with the background knowledge available to the parties when they entered the contract would have understood this to mean that if damage was caused to the existing property owned by any Principal Assured, then the only property where there was coverage was that identified in the Schedule of Existing Property in the endorsement.

The issue of quantum did not arise on the facts but was dealt with at length in the event that there may be a successful appeal against the ruling that the Existing Property Endorsement excluded liability under the policy. Repair costs and other costs, if the policy had responded, were assessed at US$10,377,059, substantially less than the amount of the settlement.

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The decision stands in contrast to the Privy Council's previous judgment in Diab v Regent [2006] UKPC 29, which had held that, where an insurer has declined indemnity, a policyholder is still bound by all the claim conditions, including the need to seek insurer's consent for a settlement.

ARRIVAL AT DISCHARGE PORT ONE YEAR AFTER LOADING: DEMURRAGE

The Owners of a vessel fixed to carry 557 mt of steel pipes from Turkey to Futuna Island in the French Pacific Ocean Islands claimed the amount of USD 37,317.71 in demurrage from the Charterers.

The vessel's arrival at the discharge port was delayed by 6 months in part due to a breakdown of the main engine off Mauritius and the need to call at a port to make the necessary repairs. Those repairs took longer than would ordinarily be the case due to the Covid-19 pandemic. The vessel's arrival at the discharge port was further delayed by its taking the longer route via Gibraltar rather than Suez and then by discharge at Beira where it remained at anchor for more than a month.

In the meantime conditions at the intended discharge port Futuna Island, including new regulations and a reduction in the maximum permitted draughts, meant that the vessel could no longer berth there. The parties agreed, the day before the vessel's arrival, to change the discharge port to Lautoka in the Fiji Islands. The last-minute nature of this change meant that the Receivers were unable to make the necessary arrangements for discharge to take place promptly on the vessel's arrival at Lautoka. Laytime was used up and the vessel went on demurrage.

Charterers sought to defend the Owners' claim for demurrage by arguing that the delay in commencing discharge was a result of the engine failure which, they claimed, was attributable to the fault of the Owners.

The Tribunal found the Owners were not at fault and there was nothing precluding their entitlement to demurrage. It had not been made out that there were any engine problems prior to loading in Turkey - indeed the engine breakdown did not occur until 5 months after sailing from the load port - and it was therefore not the case that the vessel was unseaworthy at the commencement of the voyage. Further, the unusual length of time required to effect repairs was a consequence of the Covid-19 pandemic and by the time of arrival at Lautoka the vessel was fully operational. It followed that the Notice of Readiness tendered by the Owners was valid and time counted in full.

BANK NOT LIABLE WHEN CUSTOMER ORDERS PAYMENT AFTER BEING DECEIVED

Mrs Philipp and her husband were deceived by criminals into instructing Barclays Bank to transfer £700,000 in two payments from Mrs Philipp's current account with the bank to bank accounts in the United Arab Emirates. The instructions were carried out and the money was lost. Mrs Philipp argued that the bank owed her a duty under its contract with her or under common law not to carry out her payment instructions if - as she alleged - the bank had reasonable grounds for believing that she was being defrauded.

The bank applied to have the claim summarily dismissed on the ground that as a matter of law it did not owe Mrs Philipp the alleged duty. The High Court agreed and granted summary judgment in favour of the bank. The Court of Appeal reversed that decision and decided that in principle a bank owes a duty to its customer of the kind alleged and whether such a duty arose on the facts of the case should be decided at trial. The bank appealed to the Supreme Court.

The Supreme Court unanimously allowed the appeal and decided the bank did not owe the alleged duty to Mrs Philipp as it would have been inconsistent with the ordinary obligations owed by a bank to its customer. Provided the customer's account is in credit, the ordinary duty of a bank when instructed by its customer to make a payment from the account is to carry out the instruction and make the payment. In making the payment, the bank acts as the customer's agent – its duty is strict. Unless otherwise agreed, the bank must execute the instruction and do so promptly. It is not for the bank to concern itself with the wisdom or risks of its customer's payment decisions although the duty is subject to an implied condition that the bank cannot be required to carry out an unlawful act.

The Supreme Court distinguished between a situation where a customer itself gives the bank a payment instruction and a situation where a bank receives a payment instruction from an agent of the customer. Where a bank receives payment instructions from an agent the bank owes a duty to its customer not to carry out the instruction if the bank has reasonable grounds for believing that the agent is defrauding the customer by using the money for the agent's own purposes.

[N.B. Since 2023 there is a UK statutory compensation scheme that may apply to frauds of this type in some instances.]

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

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