
wh Newsletter

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We are delighted to welcome David High as the latest addition to the firm. David is a Cambridge graduate and has been working as a Solicitor with another shipping litigation practice for a number of years.

BRIBERY ACT

The UK Government has announced that the Bribery Act 2010 will come into force on 1 July 2011 and has issued its long-awaited guidance on adequate bribery-prevention procedures that can serve as a defence to the new strict liability offence of failing to prevent a bribe. The penalty for this offence will be an unlimited fine. The Act is considered to be stricter than its US counterpart, the Foreign Corrupt Practices Act, as it prohibits bribery and facilitation payments in the private sector with no carve-out for promotional expenditure.

The basic offence is defined as an intention to induce or reward improper conduct. Prosecutors will not be required to show that there was dishonesty or corruption.

The guidance states that the question of whether bodies incorporated outside the UK but which conduct business in the UK are to be subject to the Act will be left to the Courts to decide on a case-by-case basis using a common sense approach. This will involve examining whether or not the entity has a demonstrable business presence in the UK. Having a UK subsidiary will not in itself mean that the company will qualify as carrying on business in the UK. This appears to create a loophole through which foreign companies may be insulated from prosecution. Companies that are not already incorporated may now turn their UK operations into independent subsidiaries, taking advantage of their apparent exemption from liability.

The guidance has however eased concerns that the Act would define corporate hospitality as constituting bribery. The guidance confirms that the Act does not outlaw reasonable hospitality and other corporate expenditure aimed at establishing cordial relations with clients. Only lavish instances of hospitality that are obviously intended to have a direct impact on decision-making will fall under the new legislation.

EXPERT WITNESS IMMUNITY FROM SUIT ABOLISHED

The Supreme Court has abolished the rule that expert witnesses are immune from civil action arising from evidence they give in proceedings. In *Jones v Kaney* the Claimant brought an action for professional negligence against clinical psychologist Dr Kaney, whom he had instructed in a personal injury case.

Kaney was of the view that the claimant was exaggerating his symptoms. She therefore understated them and in a joint statement with the Defendant's expert she wrote that she agreed that he was not suffering post-traumatic stress disorder. This damaged the Claimant's case to such an extent that he felt constrained to settle it for much less than would otherwise have been the case. He issued a claim for damages against Kaney.

Kaney applied for the claim to be struck out on the basis of witness immunity rules. The High Court, bound by the decision *Stanton v Callaghan*, granted the application but allowed direct appeal to the Supreme Court.

A Supreme Court majority of 5-2 ruled in favour of the Claimant and held that there could be no justification for retaining the ancient rule of witness immunity. The rule dated back over 400 years and was no longer relevant to modern legal proceedings in which expert witnesses are rewarded for their services to litigants. The removal of Barristers' immunity from suit had not made them reluctant to perform their duty to the Court, which had been the initial rationale behind the immunity rules. It should therefore result in an increase in instances of experts giving evidence contrary to clients' interests in breach of their duty to the Court.

The decision does not affect expert witnesses' absolute privilege from claims in defamation or other witnesses' immunity from suit.

A LEG BREAKING WAVE

The oil rig “Cendor MOPU” was insured with the Defendant insurance company by the Claimant Owners for the voyage from Galveston, Texas to Lumut, Malaysia. The relevant cargo insurance policy incorporated the Institute Cargo Clauses and covered “all risks” save for specified exclusions, one of which was inherent vice.

The rig was carried on a barge. The arrangements for tow were approved by surveyors prior to departure from Galveston as required by the insurance policy. On arrival at Saldanha Bay just north of Cape Town the legs of the rig were inspected for cracks, as was also required by the policy, and repairs were made where fatigue cracking was found. The voyage resumed and shortly afterward the starboard leg broke off and fell into the sea. The next day the forward and port legs also broke off.

The loss of the legs resulted from metal fatigue, as a result of stresses caused by the effect the height and direction of the waves had on the pitching and rolling of the barge. The Claimants made a claim under the policy but the Defendants refused to pay, contending that the proximate cause of the loss was inherent vice in the legs. It was common ground that the weather experienced was within the range that could reasonably have been contemplated and therefore, they argued, the cause of the loss was the inability of the rig to withstand the ordinary incidents of the voyage.

At first instance the Defendants succeeded with that argument but the Claimants appealed successfully to the Court of Appeal, which held that the proximate cause of loss was a “leg breaking wave” which caused the starboard leg to break off, increasing the stresses on the remaining legs and causing those to break too.

The Defendants appealed to the Supreme Court, relying on Lord Diplock’s definition of inherent vice in *Soya GmbH v White* [1983] as “the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.”

The Supreme Court held that “the ordinary course of the contemplated voyage” in that definition was not intended to embrace all foreseeable weather conditions. Furthermore, under s.40 of the Marine Insurance Act 1906 the fact that goods were not reasonably fit in all respects

to encounter the ordinary perils of the seas did not automatically deprive the assured of cover.

As to the present case, it was held that the cracking sustained while crossing the Atlantic was caused by normal wear and tear as a result of the ordinary action of the wind and waves and did not involve any accident or casualty outside the ordinary course of the voyage.

However, the sudden fracturing of the three legs on the second leg of the voyage was a fortuitous marine accident, neither expected nor contemplated. It only occurred as a result of a leg breaking wave catching the first leg at just the wrong moment, leading to the subsequent collapse of the other two legs. The Defendants’ appeal was therefore dismissed.

ARBITRATION TIME LIMIT TO HALT REFUND GUARANTEES PAYMENT

Pursuant to a shipbuilding contract dated 8 November 2006 Nanjing Shipbuilding agreed to sell to Orchard Tankers one vessel. The scheme was familiar: the contract price was payable by way of instalments. The instalments were advances so that if cancellation occurred the instalments were repayable with interest. The Seller was to provide a refund bank guarantee as security for repayment. The agreed delivery date was to be extended in the event of a force majeure event and/or any permissible delay and, should there be delay in delivery beyond the contractual time limits, the Buyer was entitled to terminate the contract.

Two further provisions dealt with the right to cancel the contract. First, should the Buyer exercise the right to terminate and become entitled to demand refund of all instalments paid, the Seller had the right to dispute the cancellation by commencing arbitration in London within 30 days of cancellation. Once refund had been made all obligations, duties and liabilities under the contract were to be considered completely discharged. Second, disputes not to be determined by the classification society but relating to “construction” would be resolved by London arbitration and in case of any disputes arising out of the contract in general, those disputes were to be submitted to the English Court for determination. The right of the Seller to dispute the Buyer’s cancellation was linked to this second provision.

The refund guarantee entitled the bank to withhold and

defer any refund to the Buyer if arbitration was commenced between the parties and the bank was obliged to repay instalments to the Buyer if the Seller failed to honour an award or court order within 30 days after the Buyer's demand. It also stated that should there be arbitration proceedings underway between the parties before the expiration of the guarantee then the validity of the guarantee would be automatically extended for a further 90 days after the date of issue of a final award or, in case of appeal, 90 days after the date of issue of a final court order.

The Buyer paid the first four instalments. However, delivery was delayed and on 2 February 2010 the Buyers sent a Notice of Cancellation. Cancellation was disputed by the Seller but it failed to commence arbitration proceedings until after the prescribed 30 day period. The Buyer asserted the Seller's claim was time barred. The Seller argued its right to dispute cancellation was not time barred, only the remedy to obtain an arbitration award was time barred.

David Steel J refused the Seller's applications for leave to appeal. He held the Buyer's cancellation could only be disputed and refund of instalments deferred if the Seller commenced arbitration within 30 days of cancellation. The Seller had accepted that if it did not commence arbitration within the 30 days of purported cancellation the Buyer was entitled to repayment of all instalments under the bank guarantee.

The Judge further held the bank's liability under the guarantee only arose when the instalments became repayable and the Seller failed to repay the instalments. If arbitration had been validly commenced, the obligation of the bank to pay only arose if the Seller failed to honour the Award.

LIEN ON SUBHIRE AND SWISS LIQUIDATION

Cosco Bulk Carrier Co Ltd chartered the "SPAR SIRIUS" to Armada Shipping SA, who sub-chartered to STX Pan Ocean Co Ltd. Disputes arose after Armada filed for liquidation in the Swiss courts.

The head charter granted Cosco a lien on sub-hire and/or sub-freights for any amounts due under the charter but the sub-charter contained a prohibition on assignment. Both charterparties contained London arbitration clauses.

Cosco commenced arbitration proceedings ("the first arbitration") against STX. Their position was that the lien in the head charter operated as an equitable charge and that they could enforce as security assignee Armada's right to sub-hire.

STX commenced a separate reference against Armada ("the second arbitration") seeking a declaration of non-liability but deposited the sub-charter hire in an escrow account, acknowledging that it was due to either Cosco or Armada.

Armada's Swiss office-holder (a position approximately equivalent to an English liquidator) obtained a Recognition Order whereby the Swiss bankruptcy order was recognised as a "foreign main proceeding" under Article 17 of the UNCITRAL Model Law on Cross-Border Insolvency. All parties agreed this had the effect of automatically staying the second arbitration.

Cosco took the view that the first arbitration was not so stayed and applied under the Cross Border Insolvency Regulations 2006 for an Order confirming that was the case, or alternatively for an Order lifting the stay. Armada's office-holder made a cross-application for an Order that the first arbitration had been stayed, alternatively that it should be stayed.

There were therefore effectively two disputes. The underlying dispute was whether it was Cosco or Armada who were entitled to the sub-hire. That dispute raised several issues, including the juridical nature and effect of an owner's lien on sub-hire and the consequences in terms of priority in Armada's bankruptcy. The second dispute was as to the procedure by which the underlying dispute should be resolved.

Since it was agreed that the Court could impose or lift a stay in any event, Briggs J declined to decide whether the arbitration had been automatically stayed by the Recognition Order and approached the case as a matter of his broad discretion as to which procedural route was likely to best serve the interests of justice.

He held that the underlying dispute should, if possible, be determined in the first arbitration, to which Armada should be joined as a party. This case was unlike a typical claim against a company in liquidation and it would not be fair, just or convenient to expect a Swiss bankruptcy court to deal with a dispute concerning shipping matters and governed by English law, which was already the

subject of two arbitrations before experienced tribunals.

However, two conditions were imposed on the release or non-imposition of a stay. Armada was given liberty to apply for further relief under Article 22.3 in the event that they were unable to be effectively joined in the first arbitration and a stay of enforcement or execution of any Award was ordered until Armada had had the opportunity, following finalisation of the Award, to restore the matter to the court in the event that any aspect of the interests of its creditors had not been addressed by the arbitrators, or on appeal.

BEWARE THE CENTROCON TIME BAR

X, the Charterers of the vessel and Y, the Owners of the vessel entered into a voyage Charterparty on the SYNACOMEX 2000 form for 3 consecutive voyages. An additional clause was a modified Centrocon Arbitration Clause which included the crucial wording that a claim would be time barred unless a Claimant's arbitrator was appointed "within 12 months of final discharge or termination of this Charterparty". In addition, a further additional clause provided the balance of freight plus demurrage was payable 28 days after completion of discharge and receipt/agreement of all closing accounts and supporting documents.

Discharge under the first voyage was completed on 8 February 2008 and discharge under the third and final of the consecutive voyages on 18 May 2008. As the balance of freight fell due on 14 June 2008, X and Y agreed this as the date of Charterparty termination.

Y commenced arbitration proceedings claiming demurrage of approximately US\$376,000 on 23 February 2009, 15 days after the 12 month anniversary of completion of discharge on the first voyage. X contended that the claim was time barred and that clause 36 must be construed as meaning that the Claimant's arbitrator had to be appointed within 12 months of final discharge or termination of the

Charterparty, *whichever was the earlier*. X argued that per The Simonburn [1973] final discharge referred to completion of discharge on the voyage in respect of which any particular claim arose, thus on 8 February 2009.

Y countered that since the parties were dealing with a modified Centrocon Arbitration Clause The Simonburn was not binding and the final discharge referred to in the clause meant completion of discharge of the very last cargo, namely on 18 May 2008. Y denied the words "whichever was the earlier" should be read into the clause at all and submitted the clause contained two potential starting points for the commencement of arbitration/appointment of an arbitrator, either calculating the 12 month period from the date of final discharge or termination of the Charterparty. As the claim was made within 12 months of the termination of the Charterparty, namely before 14 June 2009, arbitration was commenced in time.

The arbitrator and the High Court on appeal by X held that where a voyage Charterparty comprised consecutive voyages a time bar would operate at the end of the agreed period from the final date of discharge of the particular voyage concerned. In other words, had Y only agreed to the wording "within 12 months of final discharge" then its claim would have been time barred. They also held that "termination of this Charterparty" meant termination of the Charterparty at the end of the third voyage. Therefore, The Simonburn did apply but Y was correct that there was an option to commence arbitration on termination of the Charterparty as a whole. In other words, the claim was in time if it complied with either deadline, which it evidently did.

Owners and Charterers should be aware that if an amended clause such as a Centrocon Arbitration Clause goes further than merely stating that arbitration is to be commenced within 12 months of final discharge, then a Claimant will have that additional amount of time in which to commence arbitration.

The above are only intended to be short summaries.

If you require any further information please feel free to contact us.