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ARBITRATION NOT POSSIBLE AGAINST EXTINCT ENTITY

In Ga-Hyun Chung v Silver Dry Bulk an arbitration had arisen out of the sale in 2011 of a ship, HN 1045, by a company "HH" (incorporated in the Marshall Islands) to Silver Dry Bulk Co. Ltd ("SDBC"). The memorandum of agreement dated 1 February 2011 contained a London arbitration clause. The only parties to the memorandum of agreement were SDBC and HH.

SDBC alleged that the purchase price paid by them to HH for the vessel in February 2011 had included the cost of a payment of a US$5 million secret commission paid by HH to Hannibal Gaddafi, the fifth son of Colonel Gaddafi and the then controller of General National Maritime Transportation Company ("GNMTC"), the Libyan state maritime company and the parent company of SDBC. After the sale HH filed articles of dissolution in the Marshall Islands on 28 February 2011. Following the subsequent regime change in Libya, SDBC had sought to commence arbitration in October 2014 against HH.

A provision of Marshall Islands law stipulates that corporations continue in existence for 3 years after their dissolution for the purpose of prosecuting and defending suits by or against them. The 3 year period after dissolution expired on 28 February 2014 some 8 months prior to the purported notice of arbitration. A further provision of Marshall Islands law stipulates that upon dissolution of a corporation or expiration of the period of the corporation's existence its directors remain empowered as trustees to do any act necessary for the final settlement of the unfinished business of the corporation.

There had been no response to the purported notice of arbitration and the arbitrator had subsequently accepted appointment as sole arbitrator. Notice had also been sent to another company "Sinokor" that SDBC asserted was owner of HH. Sinokor had declined to take part in the arbitration proceedings but (through solicitors and counsel) did attend on occasions before the arbitrator to dispute jurisdiction and in particular to dispute whether there was a valid arbitration and whether the tribunal was properly constituted. The arbitrator heard evidence as to the effect of the provisions of Marshall Islands law and determined that he did have jurisdiction and had found that HH's payment constituted a bribe and SDBC was entitled to damages.

In the Commercial Court application the claimant "Mr Chung" was the trustee of HH and he applied under S.67 Arbitration Act 1996 to challenge the award on the grounds that the arbitrator had no jurisdiction because HH had ceased to exist by the time of the purported notice of arbitration. The Commercial Court confirmed that an application under s.67 takes the form of a rehearing of the jurisdiction issue, (not a review of the arbitrator's decision) and that the jurisdictional matters capable of review under s.67 are those matters set out in s.30 Arbitration Act 1996. Accordingly, even though the arbitrator's findings on issues of foreign law would be categorised under English law as findings of fact it was open to the Commercial Court to rehear those issues. The Commercial Court heard evidence of foreign law and determined that HH had ceased to exist by the time of the purported notice of arbitration. The consequence was that the arbitrator lacked jurisdiction and his award had been a nullity.

PAYING PARTY BEARS RISK OF CYBER FRAUD

In K v. A (2019) EWHC 1118, Buyers K agreed to purchase from Sellers A 5,000 mt of sunflower meal. The contract was drawn up by intermediary broker V.

The contract payment provision required K to make payment in "100% net cash within 2 banking days to Sellers' bank upon presentation of scan/fax copies of the following original documents to [Buyers]… Commercial Invoice…"

The contract incorporated GAFTA Form 119 which at clause 18 provides "All notices required to be served on the parties pursuant to this contract shall be communicated rapidly in legible form… A notice to the Brokers or the Agent shall be deemed a notice under this contract"

A loaded the sunflower meal on board a vessel and sent the commercial invoice by email to K via V. The invoice contained payment details directing payment to be made via A's Citibank account, New York branch. However, it appeared that a fraudster had intercepted the email and invoice forwarded by V to K and as a result K made payment of the purchase price to London Citibank account which A did not receive.

The money was eventually repatriated to A's account around 6 weeks later. However due to exchange rate changes there was a shortfall in the purchase price and A referred the matter to arbitration to recover the shortfall.

The GAFTA Board of Appeal held that K's payment of the contract price to the fraudster's account did not satisfy their payment obligations under the sales contract. A had provided the correct bank details to V, good notice of the correct payment terms had been provided because V was acting as broker and accordingly K bore the risk of receiving the incorrect bank details.

K appealed to the High Court under section 69 of the Arbitration Act 1996 on the ground that the Board had made an error of law in holding that K was required to pay into the precise account stipulated by A. K argued that as a matter of law its contractual obligation was to pay to A's bank which it had done (albeit to the wrong account).

The Court held that the term "payment in cash" meant K's obligation was to pay into A's account and not just to its bank. That appeal failed.

K also appealed under s.68 that there was a serious procedural irregularity in that the Board held notice to V constituted valid notice to K in accordance with GAFTA Form 119 Clause 18 when A had not made arguments in reliance upon Clause 18 and as such K did not have the opportunity to address that point.

On this point the Court agreed, and referred the Award back to the Tribunal for consideration.

The Court confirmed that where an appeal is lodged in respect of points adopted by the tribunal of its own motion as part of the reasons for their conclusions, section 68 is the preferred route of appeal to take, for it is more appropriate for the Court to refer the matter back to the Tribunal, as opposed to having the Court address the merits of the case.

FORCE MAJEURE AND CAUSATION

Classic Maritime Inc (Owners/Appellants) entered into a long-term contract of affreightment with Limbungan Makmur SDN BHN (Charterers/ Respondents) for the carriage of iron ore from Brazil to Malaysia. Charterers failed to deliver 5 shipments between November 2015 and June 2016 and claimed this was due to the bursting of the Fundao dam which caused flooding and halted operations at the mine.

Charterers contended that they were protected by a force majeure clause in the contract which provided:

“32.Exceptions

… the Charterers … shall [not] be responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: … accidents at the mine or Production facility… always provided that such events directly affect the performance of either party under this Charter Party…”

The Owners argued the clause did not apply as the collapse of the dam had no causative effect on the failure to deliver the shipments, since the Charterers’ would have defaulted anyway having failed to make suitable arrangements with suppliers of iron ore. Charterers were not able to demonstrate that but for the dam burst, they would have performed their obligations.

At first instance, Teare J found that the clause required Charterers to prove that they could and would have performed if the dam had not burst but only nominal damages were awarded on the basis that he assessed damages by reference to the position if the Charterer had been willing and able to ship the cargoes. The damages were nominal because the Judge took into account the exclusion clause.

The Owners appealed to the Court of Appeal on the issue of damages, and the Charterers cross-appealed on liability. The Court of Appeal allowed the appeal and dismissed the cross-appeal and found the reason the Charterers failed to perform was irrelevant to the assessment of damages. The correct test was simply to determine the loss to the Claimant caused by the Defendant’s failure to perform.

On causation, the Court decided that even though clause 32 possessed some of the features of a typical force majeure clause, it had to be construed in its particular context, which suggested the wording imported a “but for” requirement. Males LJ therefore, agreeing with Teare J, held the Charterers’ failure to perform did not result from the dam burst, and that the burst could not fairly be said to have directly affected the performance of their obligations.

INSPECTION OF FOULING AT NEXT CONVENIENT PORT AFTER REDELIVERY

In London Arbitration 15/19 a Charterparty for a time charter trip from China to India included the following prolonged stay clause:

“104. Prolonged Port Stays

… If the vessel is encountering prolonged stay, minimum twenty-five (25) days in port and/or at anchorage, and there is strong reason to believe that the vessel’s hull has acquired excessive marine growth affecting vessel’s speed/consumption due to the stay at the specific port and/or anchorage, Owners are to arrange for a diver inspection. Should the result of this diver inspection indicate that there is excessive marine growth on the hull, which is directly related to this specific port/anchorage stay, Owners to arrange underwater scrubbing of the hull in Charterers time and at Charterers expense, prior to vessels departure from the port or anchorage, if same can be done without unreasonable delay.

If the underwater scrubbing is not available or cannot be carried out at the port in question, same to be carried out in Charterers time/expense in the next convenient port.”

The vessel discharged her cargo at Hazira, India. She remained at Hazira for 36 days, before being redelivered to Owners, therefore triggering Clause 104.

Charterers acknowledged that Clause 104 applied and requested Owners to investigate the extent of fouling and obtain a quote for underwater inspection and underwater cleaning. However, Charterers’ agents advised that neither underwater inspection nor hull cleaning were possible at Hazira due to the monsoon season, poor water visibility and currents.

There was some above-water photographic evidence of fouling which Owners provided to Charterers, but Charterers redelivered the vessel without an underwater inspection or cleaning having taken place. Charterers gave Owners credit for US$8,000 in lieu of hull cleaning.

Owners arranged for underwater inspection and cleaning whilst the vessel transited to its next fixture and brought a claim against Charterers to recover US$ 28,690.88 in time and expense incurred in respect of the cleaning.

At arbitration, Owners argued that, in order to give effect to the obvious intention of the parties, it was an implied term that Charterers would indemnify Owners for the loss, damage and expense suffered in circumstances where the vessel was redelivered and Charterers had not carried out cleaning at the next convenient port or at all.

Charterers argued for a strict interpretation of Clause 104, contending that an inspection at Hazira was a prerequisite to liability and no inspection had taken place and that there must have been excessive marine growth which itself was directly attributable to the prolonged stay at that port.

The Tribunal held that Charterers’ literal interpretation that inspection could only take place at Hazira was unrealistic in circumstances where they had acknowledged conditions did not permit such an inspection to take place. There was an implied term to give effect to the intention of the parties that where inspection was not possible prior to redelivery, such inspection may take place at the next convenient port thereafter.

The Tribunal held that the most appropriate construction of the term “excessive marine growth” was any growth which has a “measurable impact on the performance of the vessel and/or which significantly shortens the period until the next cleaning.” Owners had produced evidence that the effect of the fouling reduced the vessel’s speed by 0.33 of a knot. This was a measurable impact and therefore Owners were entitled to recover under the clause.

PERSONAL LIABILITY OF SHADOW DIRECTOR

In Palmer Birch v Lloyd a construction partnership was able to recover monies from a director and shadow director of a limited company, even though the limited company had been wound up, the individuals were not personally party to the contract (one party was not even formally a director of the company) and they had not provided any personal guarantees.

Palmer Birch had contracted with the limited company to undertake extensive refurbishment works to a manor home. The limited company was run by two brothers, only one of whom was a named director. The Court found the shadow director was in fact the main decision maker and had historically been providing monies to the limited company to pay the contractors’ fees.

When the shadow director stopped providing money to the limited company it could not pay the construction partnership for a substantial

amount of work that it had already done and a significant debt became due. The shadow director sought to terminate the agreement between the limited company and the contractor on grounds that the limited company was insolvent.

The shadow director did later advance monies but this was only provided to the shadow director's successor company with the intention to complete works to the property.

Palmer Birch brought a claim against the director and shadow director, alleging various economic torts against them, including that they had induced their own limited company to breach the contract. They also alleged unlawful means conspiracy and unlawful interference as an economic tort. i.e. that the brothers had purposefully intended to cause them loss.

The Court found there was no requirement for the shadow director to fund the limited company personally if he did not want to do so; the company was a separate legal entity and the shadow director had not guaranteed or indemnified performance of the company. The Court indicated that if the shadow director had simply not provided money to the company and cut it off, that would have not given rise to personal liability.

The issue was with the fact that monies later acquired that could have been used to pay the construction company were instead diverted to the shadow director's successor company. The Court found that this was deliberately engineered to ensure that the limited company took the benefit of the contractor's work.

The shadow director's decision to place the limited company in liquidation induced the company to commit a repudiatory breach of the contract as there was no express right to terminate upon liquidation, furthermore liquidating the company was not in the company's own commercial interests.

The argument that the liquidation was justified on financial grounds, and that the contractor was trying unfairly to pierce the corporate veil was rejected by the Court and the Court found that the shadow director's liquidation of the limited company, whilst diverting monies elsewhere, constituted an abuse of the limited company's separate corporate personality.

Both the shadow director and director were found to have intentionally caused loss to the contractors, and unlawful means conspiracy was upheld against both of them. The claim for unlawful interference failed, as the lack of funding provided by the shadow director was not in of itself unlawful.

SECURITY FOR COSTS ORDERED EVEN WHERE CLAIMANT HAD ASSETS IN CONVENTION COUNTRIES

In PJSC Tatneft v Bogolybov the Court granted the Defendants' application for security for costs against a Russian domiciled Claimant in circumstances where the Claimant had assets available in Switzerland and Cyprus, both of which were jurisdictions in which a costs award would be enforceable.

CPR 25.13 provides that the Court will make an order for security for costs against a Claimant if the Claimant is resident out of the jurisdiction and does not fall within a convention country (i.e. a Brussels Convention, Lugano Convention or Hague Convention state) and where, having regard to all the circumstances, it is just to make an order.

In determining whether the Claimant was required to provide security for costs by reason of being a non-convention domiciled entity, the Court considered the authority in Nasser v United Bank of Kuwait [2001] EWCA Civ 1454 which provides that the Claimant has the right not to be discriminated against on the basis of nationality and thus prevented from the right to a fair trial (ECHR Arts 6 and 14).

In order to determine whether the condition in Nasser was met the relevant test is whether there is a "real risk" of substantial obstacles to enforcement of an English costs order in the jurisdiction in question (in the present case, Russia). The threshold therefore was higher than one of a balance of probabilities.

The Court held there were obstacles to enforcement of a costs award against the Claimant in Russia, evidenced by a recent decline in successful enforcements of English Court judgments in Russia, the lack of a mutual enforcement treaty between the two countries, the lack of reciprocity (there was no evidence of an English court having enforced a Russian court's costs award), the current tension between Ukraine and Russia (the Defendants were Ukrainian) and that sanctions were imposed by Russia on the Defendants.

The Court held in respect of the available potential alternative enforcement routes against assets in convention countries (Switzerland and Cyprus), that assets there were potentially insufficient and may be unavailable for legitimate reasons and moreover there was no reason to believe the Claimant would not take steps to diminish those assets given how hotly contested the proceedings had already been.

Further, there was no rule which provided that where assets were available in a convention country, the Court must refuse to order security for costs absent evidence of a lack of probity on behalf of the Claimant (Texuna International Ltd v Cairn Energy plc [2004] EWHC 1102 (Comm)).

Finally, the Court had to decide whether it was just to order security for costs in the circumstances. Given that the condition in Nasser had been met, all that remained was to determine whether the Claimant was able to put up security and whether it would suffer any other prejudice as a result of an order.

The Claimant was solvent and made no arguments in respect of prejudice and, recognising the Defendants would potentially be prejudiced without security, the Court ordered security for costs to be arranged by the Claimant.

SCOPIC COSTS NOT ALLOWED FOR CTL CALCULATION

In the recent case of the "Renos", the Supreme Court considered whether expenditure incurred prior to serving Notice of Abandonment and SCOPIC expenses incurred under Lloyds Open Form 2011 were to be admitted as costs of repair for the purposes of determining whether a vessel was a CTL.

The Court held that the cost of repairing damage was in no way to be restricted because part of it had already been incurred at the time when NOA was given. Such costs were to be taken into account as "cost of repairing damage" for the purposes of Section 60(2)(ii) of the Marine Insurance Act.

As to SCOPIC costs the Court held it was necessary first to identify the purpose of such expenditure and to apply the prudent uninsured Owner test only to expenditure incurred with the purpose of repairing the ship.

The Court observed salvage expenditure is incurred for the protection of the property at risk i.e. in this case the ship. SCOPIC expenditure on the other hand is incurred for the prevention of environmental pollution.

The two heads of expenditure had quite different purposes only the first of which was related to reinstatement of the vessel.

SCOPIC charges are not therefore part of the "cost of repairing the damage" for the purposes of Section 60(2)(ii) of the Marine Insurance Act and are not to be taken in account when assessing whether a vessel is a CTL.

JURISDICTION OVER ENGLISH PARENT FOR ACTS OF ZAMBIAN SUBSIDIARY

In Vedanta Resources plc v Lungowe an appeal was brought to the Supreme Court by Zambian citizens who alleged that they had suffered damage as a result of toxic discharges from one of the world's largest copper mines. The mine is owned and operated by a Zambian company, the second defendant, Konkola Copper Mines plc ("KCM"). The first defendant, an English company, Vedanta Resources plc ("Vedanta"), is KCM's ultimate parent company.

The Claimants alleged that both Vedanta and KCM are liable under Zambian law for negligence and breach of statutory duty, Vedanta's alleged negligence being based on an alleged failure to exercise reasonable care in monitoring and controlling KCM. Proceedings were served on Vedanta within the UK, relying on Vedanta's English domicile and article 4 of the Recast Brussels Regulation. Permission was obtained to serve on KCM out of the jurisdiction, on the basis that it was a necessary or proper party to the proceedings against Vedanta. KCM and Vedanta challenged the jurisdiction of the English courts. Before the Supreme Court, they contended:

i) the Claimants' reliance on article 4 to establish jurisdiction over Vedanta as defendant constituted an abuse of EU law;
ii) there was no triable issue against Vedanta, primarily on the basis that Vedanta would not owe the claimants an arguable duty of care under English law (it had been found at first instance that it is arguable that the principles of the Zambian law of negligence correspond to those of English law);
iii) Zambia, not England, was the proper place in which to bring the claims; and
iv) the Judge had been wrong to find that even if Zambia would otherwise be the proper place, there was a real risk that that the Claimants would not be able to obtain substantial justice there.

The Supreme Court dismissed KCM's and Vedanta's appeals. It held:

i) there was no abuse of EU law and the Claimants are entitled to rely on article 4 to establish jurisdiction against Vedanta;
ii) Vedanta would arguably owe the Claimants a duty of care, on the basis of the principles articulated in Dorset Yacht Co Ltd v Home Office [1970] and the breach of statutory duty claims were also arguable;
iii) Zambia would be the proper place for the hearing of the claims, Vedanta having offered to submit to the jurisdiction of the Zambian courts; but
iv) the Judge had been entitled to find that there was a real risk that the claimants would not be able to obtain substantial justice in Zambia, since (i) the claimants were too poor to fund legal representation, conditional fee agreements being illegal and legal aid unavailable; and (ii) Zambia lacks legal teams of sufficient size and experience to pursue mass claims of this nature effectively.

The effect of the judgment is that the Claimants' claims against both Vedanta and KCM can proceed in England. The judgment has significant wider implications, in view of the large number of English-domiciled companies which operate through overseas subsidiaries around the world.

BAREBOAT CHARTERS AND CLASS OBLIGATIONS

We previously reported the first instance decision in the "Arctic". In 2012, the "Arctic" was bareboat chartered for a period of 15 years. Clause 9(A) of the charterparty provided;

"9. Maintenance and Operation

A. …The Charterers shall maintain the Vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair, in efficient operating condition and in accordance with good commercial maintenance practice and, they shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times. The Charterers to take immediate steps to have the necessary repairs done within a reasonable time failing which the Owners shall have the right of withdrawing the Vessel from service of the Charterers without noting any protest and without prejudice to any claim the Owners may otherwise have against the Charterers under the Charter."

In 2017 Owners terminated the charterparty and demanded the return of the vessel, inter alia because the Vessel's classification certificates had expired so that Charterers were in breach of Clause 9(A). Arbitrators found in favour of Charterers, holding that the Charterers' obligation to maintain classification was an innominate term, not a condition.

The Commercial Court on appeal found the classification obligation was a condition of the contract breach of which entitled Owners to end it.

The Charterers appealed to the Court of Appeal which overturned the Commercial Court's decision.

The Court of Appeal's reasoning was as follows;

a. Even though the term related to the vessel's classification that did not suffice to make it a condition.
b. The language of the term was not that of a condition. The BARECON 89 is an industry standard form drafted by an industry drafting committee who could have chosen to make their position plain otherwise.
c. The term is found in the middle of Clause 9A, dealing with Charterers maintenance obligations, which is a surprising location if the term was intended as a condition. Furthermore, the obligations as to the maintenance of the physical condition of the vessel, which are not conditions, and its class status are closely connected. In any event, it would be exceptional for a term as to physical maintenance extending over the entirety of the charter period to constitute a condition.
d. Clause 13b of the Charterparty which required Charterers to keep the vessel insured against P&I risks was not a condition. Thus the court decided that if leaving the vessel uninsured did not constitute breach of a condition, putting the vessel at risk of being uninsured could not either.
e. The consequences of breach of the term could result in trivial, minor or very grave consequences, thus suggesting that the term is innominate rather than a condition.

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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