Issue 1 2021

wh Newsletter

waterson hicks

The year 2020 was a year like no other and we earnestly hope as 2021 advances that the detrimental effects of Coronavirus will recede. With an eye on a return to normality we are pleased to resume publication of our newsletter.

Within the firm we congratulate Danae Fasois upon having qualified as a solicitor and are delighted to welcome Sofia Xylouri to the firm as a trainee solicitor.

CLAIMS IN ADDITION TO DEMURRAGE

One of the most common questions asked of maritime solicitors is whether claims can be raised by Owners against Charterers under voyage charterparties for anything other than demurrage. The perceived wisdom is that demurrage is the exclusive remedy except in the most limited circumstances. This has now changed.

Owners K Line voyage chartered the Vessel "Eternal Bliss" to Charterers Priminds who failed to discharge the cargo of soyabeans at Longhou, China within the agreed laytime under the Charterparty. Priminds paid K Line demurrage at the contractual rate: there was no dispute between the parties as to demurrage.

However, the delay in discharging the cargo of soyabeans was said to have caused it to deteriorate. Owners had to arrange security for USD 6 million and paid claims brought by cargo interests in the amount of $1.1 million.

Owners brought a claim against Charterers for compensation or an implied indemnity for the loss they had suffered by reason of Charterers' prolonged retention of the cargo on board the Vessel on the basis the cargo would not have been damaged had it been discharged during the agreed laytime.

Charterers argued demurrage was a form of liquidated damages and represented Owners' exclusive remedy for their breach of charter for late discharge of the cargo and accordingly Owners' loss had been met by the payment of demurrage.

Owners argued in response that their claim was unrelated to the demurrage payment which represented the loss of ability to earn freight elsewhere, and that the relevant loss in the present case was liability for damage to the cargo caused by Charterers' detention of the Vessel for a prolonged period.

Charterers argued that this was not a case of a different kind of loss because the loss flowed from their detention of the Vessel. They relied on the authority in the Bonde [1991] in which it was held that: *"where a charter-party contained a demurrage clause, then in order to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it was a requirement that the plaintiff demonstrate that such additional loss was not only different in character from the loss of use but stemmed from breach of an additional and/or independent obligation."*

Following an extensive review of the authorities, Andrew Baker J held that the Bonde was wrongly decided. The Judge found that damage to cargo was distinct from and additional to the detention as a type of loss. Agreeing demurrage at a set rate quantified Owners' loss for their loss of use of the vessel to earn freight elsewhere, the Judge found it did not extend to cover different kinds of loss.

In conclusion, the Court held that Owners were entitled to recover damages as an indemnity for the cargo deterioration in addition to demurrage.

SOYABEANS AND BILLS OF LADING

In an earlier case involving soyabeans and the same ultimate Charterers, HHJ Pelling QC absolved voyage Charterers from liability for a cargo description in Bills of Lading.

By a voyage charterparty dated 29 June 2012, the Defendant Disponent Owners, Noble Chartering, agreed to subcharter the vessel "TAI PRIZE" to the Claimant Charterers, Priminds Shipping, for the carriage of a cargo of soyabeans from Brazil to China.

A Congenbill 1994 Bill of Lading was drafted by the shipper and signed by the Master. The cargo was described as "63,366.150 metric tons Brazilian Soyabeans Clean on Board." Further, the B/L stated that the Cargo had been "SHIPPED… in apparent good order and condition...". The B/L incorporated the Hague Rules.

At the discharge port, the cargo receivers discovered that the cargo had suffered heat and mould damage and commenced proceedings in the Chinese courts against the Owners. The Owners were ordered to pay US$1,086,564.70 to the receivers.

The Owners subsequently brought a claim against the Disponent Owners for 50% of the sum they had to pay to the receivers. This claim was settled for USD$500,000. The Disponent Owners in turn commenced London arbitration proceedings against the Voyage Charterers seeking to recover the US$500,000 and the costs of defending the claim.

The Tribunal found that the cargo was damaged by heating, caking and mould and that the damage was pre-existing.

WATERSON HICKS • SOLICITORS • 11 BOLT COURT • LONDON EC4A 3DQ
Telephone: +44 (0)20 7929 6060 Fax: +44 (0)20 3004 0997 E-Mail: law@watersonhicks.com www.watersonhicks.com

However, the arbitrator concluded that even though the damage would not have been visible to the Master on loading; it would have been visible upon reasonable examination by the shippers. It followed therefore that the cargo was not in apparent good order and condition when shipped.

Hence the Charterers were held liable because the shipper was acting as the Charterers' agent and the Charterers had impliedly represented with the clean B/L that the cargo was in good order when loaded and/or had agreed to indemnify the Disponent Owners against the consequences of the inaccuracy of any such statement. The voyage Charterers appealed to the High Court.

It was held that when a Charterer or Shipper acting on his behalf tenders a Bill of Lading containing a statement of the apparent good order and condition of the cargo for signature by the Master, the Master is invited to make his own assessment of the cargo to verify the above statement.

The Hague Rules draw a distinction between information provided by the Charterers or Shippers on the Charterers' behalf that can be taken at face value by the Master, and representations as to the apparent condition of the cargo. Article III, rule 3 provides that any B/L to which the Hague Rules apply should include "the leading marks necessary for identification of the goods" and "the number of packages or pieces or the quantity or weight" of the goods constituting the cargo to which the bill related, as information that must be "furnished in writing by the shipper". The Rules also refer to "the apparent good order and condition of the goods". However, that is information not required to be "furnished by the shipper". That assessment is to be made by the Carrier or the Master on its behalf at the point of shipment.

In light of the Tribunal's finding that the damage would not have been reasonably visible to the Master, the B/L was not found to be inaccurate. As to the Tribunal's concern that the Disponent Owners would be left without recourse, the Hague Rules deliberately did not provide an express indemnity obligation in respect of information supplied as to apparent good order and condition.

Further, the Disponent Owners elected to pay the shipowners rather than defend the claim by reference to the true condition of the cargo. Their liability therefore did not arise due to any fault of the Charterers. The appeal was allowed.

SOYABEANS AND CHINA AGAIN

In a third case involving soyabeans discharged in China the Owners of "Bulk Poland" discharged the cargo under "to order" Bills of Lading containing English law and London arbitration provisions.

The Receivers demanded security and commenced proceedings in China. The Owners commenced arbitration in London. Upon review Bryan J found the Owners were entitled to maintain the anti-suit injunction since the Receivers' proceedings had been commenced in breach of the arbitration clause. Although time for commencement of proceedings by the Receivers had expired the Owners gave an undertaking to the Court to submit to arbitration if it was commenced within 60 days of the injunction.

DUTIES OF MORTGAGEES WHEN SETTLING ASSIGNED CLAIMS

This firm acted for Aegean Baltic Bank in litigation involving the vessel "Starlet". The Bank had entered into a loan agreement with the Owners on terms including the usual assignment of the Vessel's insurances. In July 2015 the Vessel suffered water ingress to its engine room whilst at Yemen. There being no possibility to salvage the Vessel (in part due to the ongoing conflict in Yemen) Owners served a Notice of Abandonment on hull insurance leaders Generali. Generali rejected the Notice on the basis it was timebarred under Italian law. The Bank concluded a settlement agreement with Generali on a partial loss basis (being about half the amount of Generali's potential liability under a constructive total loss claim).

The Bank brought a claim for the balance of the loan under the loan agreement and security in the amount of US$ 9,979,972.21. The Defendants did not challenge the quantum of the Bank's claim, but raised various defences questioning the Bank's duty to the insured when exercising its rights under assignments of insurance.

The basis of the Defence was the contention that the Bank acted negligently or in breach of duty in its conduct of the insurance claims following damage to the Vessel and that claims against the Bank for such provided a defence of circuity of action or set-off in favour of the Owner so that the Guarantees had been discharged under Greek law.

The Defendants contended the Bank's settlement with Generali was unreasonable in that the Bank should have settled on the basis of a constructive total loss or should have sued on the basis the Notice was not timebarred as a matter of Italian law. The Defendants also contended that the Bank had failed to recover sums under the London market policy.

The Defendants also argued as a matter of Greek law that as guarantors they were relieved from liability because the Bank

(a) by its own gross misconduct caused the Owners' inability to repay the debt; and
(b) dealt with the H&M insurance claims in a manner contrary to good faith, morality, and/or the purpose for which such rights had been granted.

The Defendants were debarred from adducing witness evidence or expert evidence in support of their case by reason of their failure to comply with an unless order to provide disclosure of documents, and the judgment provides a helpful illustration of the considerations the Court will take into account to ensure gaps in evidence by reason of the sanctions imposed on the Defendants do not inure to their benefit.

Adrian Beltrami QC, sitting as a deputy High Court judge found against the Defendants and gave judgment in favour of the Bank. In doing so the Judge held that in exercising its rights under the assignment of the insurance policies in settling claims, the Bank owed to the Defendants a duty of good faith and a duty of reasonable care to obtain a proper recovery. There was no evidence the Bank was in breach of these duties in the present case. There was no obligation to exercise rights under the assignment within a certain time frame even if the non-exercise of rights resulted in a reduction in the amount recovered. Such duties could be further restricted in their scope by contractual provisions in the assignment, for example curtailing the duty not to engage in wilful misconduct.

The Greek law defences also failed.

ARBITRAL BIAS

Perceptions of bias on the part of arbitrators will linger at least as long as parties are allowed to choose their own arbitrators in references.

The Supreme Court was asked to consider the issue in Halliburton v. Chubb, an insurance coverage arbitration arising out of the Deepwater Horizon incident. The major arbitral bodies were permitted to intervene. Disappointingly the points for determination were relatively narrow but certain principles emerged.

Chubb had appointed the highly respected Kenneth Rokison QC as its arbitrator in a number of references and was then appointed by the High Court to preside over the arbitration between Halliburton and Chubb. Following this Chubb also appointed him on further references. Halliburton asked him to resign.

Halliburton considered there was unconscious bias on the part of Mr Rokison accepting appointment in multiple arbitrations relating to the same or overlapping matters with one common party and questioned whether an arbitrator could accept multiple appointments in this way without giving disclosure.

The Supreme Court confirmed that an arbitrator has a duty to disclose facts and noted that an arbitrator may have a financial interest in obtaining further appointments as arbitrator and circumstances which might give rise to the appearance of bias. In reaching this conclusion the Court also noted that some (but not all) of the intervening arbitral bodies sought recognition of a legal duty of disclosure.

The Supreme Court found that an arbitrator may have to disclose acceptance of appointments in multiple overlapping references with only one common party. The time for disclosure is when the duty to disclose arises; the time for assessment of apparent bias is at the time of hearing the challenge to the arbitrator.

On the specific facts of the case there was no finding of the possibility of bias against Mr Rokison.

WHERE AN ARBITRATION HAS NO EXPRESS CHOICE OF LAW

In Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb, the Supreme Court has finally clarified the position regarding which law governs the scope and validity of an arbitration agreement when there is no express choice of law for the arbitration agreement and the law of the contract and the law of the seat differ.

The Supreme Court applied the common law rules, and upheld the decision of the Court of Appeal, although not with the same reasoning, concluding that the arbitration agreement should be governed by the express or implied choice of the parties. In the absence of such choice, the arbitration agreement is governed by the law with which it is most closely connected. When there is no express choice of law for the arbitration agreement, there is a presumption that the parties intended the law of the contract containing the arbitration agreement to govern the arbitration agreement. The choice of seat does not affect this presumption. When however there is neither an express nor an implied choice of law, the law of the seat will generally be the law to govern the arbitration agreement, being the one most closely connected with it. The majority of the Court disagreed with the Court of Appeal's decision that there is a strong presumption that the parties have chosen the law of the seat to govern the arbitration agreement.

Two exceptions were identified which depart from this principle:

1) Situations where applying the principle would amount to a serious risk of the arbitration agreement being ineffective, referred to as the "validation principle";
2) When there is a provision of the law of the seat indicating that the arbitration agreement should be governed by that country's law.

This case highlights the importance of the parties deciding which law should govern the actual arbitration agreement itself, as well as which law should govern the main contract and the choice of the seat.

SUBJECT TO SUPPLIERS' APPROVAL

In Nautica Marine Ltd v Trafigura Trading LLC the Commercial Court had to determine whether a fixture of the "Leonidas" had become legally binding. Negotiations had taken place in two distinct stages. At first the parties had reached what was agreed to be a non-binding agreement which was stated to be on subjects. There were four distinct "subjects". At the second stage Trafigura lifted three of the four subjects in return for Nautica agreeing to reduce the demurrage rate. The one outstanding subject was suppliers' approval. Thereafter Trafigura did not obtain suppliers' approval and made no attempt to do so. Trafigura contended that the fixture had never become binding. Nautica contended that the fixture became binding at the second stage and claimed damages for non-performance by Trafigura. Whether there was a binding contract depended upon whether the suppliers' approval subject was properly to be treated as a pre-condition or as a performance condition. If the latter the contract was binding and Trafigura would only be excused

performance if the subject were not satisfied for reasons other than its own breach of contract. The Court noted that subjects is an expression which usually signals that there are preconditions to contract which remain outstanding rather than a performance condition. The Court also noted that there was uncertainty as to what suppliers' approval meant. This uncertainty suggested the subject was more likely to be a precondition than a performance condition. The Court concluded that the suppliers' approval was a pre-condition and that a binding charterparty had not come into existence. The discussions at the second stage had not changed the nature of the suppliers' approval required. Nautica's claim failed.

PARTIES TO THE BILL OF LADING

In the "Nortrader" the Claimant's business was converting waste products into energy at Plymouth. A by-product of this process is 'incinerator bottom ash' (IBA). The Claimant entered into a contract with a Dutch company RockSolid whereby it paid RockSolid to collect IBA from the Claimant's plant and dispose of it. Under the contract risk in the IBA passed to RockSolid and the Claimant had no commercial or proprietary interest in the IBA as soon as it was loaded onto RockSolid's vehicles.

Under a separate contract between RockSolid and a wharfing company in Plymouth, RockSolid arranged shipment of the IBA to Holland. RockSolid appointed a shipping agent (SS) for this purpose. SS arranged shipment using various vessels and would state the Claimant as the shipper on the Bill of Lading and RockSolid as the consignee. This was done on 33 separate shipments. On each occasion the Claimant and other parties would be emailed a copy of the Bill of Lading by SS. The Bill of Lading incorporated the terms of the voyage charterparty between the Owners of the vessels used to carry the cargo and RockSolid.

On the 34th shipment, there was an explosion on board the Vessel and the Defendant Owners brought arbitration proceedings against the Claimant on the basis of the Bill of Lading. The Claimant challenged the Tribunal's jurisdiction in an appeal under s.67 of the Arbitration Act.

The Court held that while the parties to a contract of carriage are the named Shipper and Carrier on the Bill of Lading, it is open to someone who is ostensibly a party to contend that it has wrongly been identified as a party on the Bill of Lading.

The question arose whether RockSolid or its agents SS had actual express, implied or ostensible authority on behalf of the Claimant to enter into a contract of carriage on the Claimant's behalf.

There was no evidence the Claimant expressly or impliedly authorised RockSolid or its agent SS to enter it into the contract of carriage. The contract between the Claimant and RockSolid was simply a contract for RockSolid to collect and dispose of the IBA. How this was done was no business of the Claimant. Indeed the risk passed to RockSolid upon collection.

The only evidence of an implied authority was the Claimant's lack of reaction to having been named as shipper on 33 previous occasions. The Court held that assent was not to be inferred from silence and more was required to show that the Claimant had authorised RockSolid or SS to enter it into a contract.

As to ostensible authority, the Defendant argued that the 33 previous emails sent out attaching bills of lading naming the Claimant as the shipper were evidence the Claimant had held out to the Defendant that RockSolid and or SS were authorised to act on its behalf. The Court rejected this argument, this particular carrier had no knowledge of the previous emails when it entered into the contract of carriage.

ONE VESSEL LIABLE FOR ALL COLLISIONS

On 15 July 2018 a southbound convoy of 8 vessels was proceeding through the southern section of the Suez Canal. The vessel at the head of the convoy suffered engine problems and was forced to anchor in the canal. Vessels following the lead vessel took steps to anchor or moor.

The eighth vessel in the convoy collided with the seventh vessel which was at anchor and together they both collided with the sixth vessel in the convoy which was moored at the Canal side. Each vessel alleged causative fault against the other.

Vessel eight alleged negligence against vessel six saying she ought to have advised vessels eight and seven of her intention to moor.

Vessel eight also alleged negligence against vessel seven in relation to her failure to give notice of an intention to moor. Vessel eight also suggested that the way in which vessel seven attempted to moor prevented her from sailing past in safety.

The Court dismissed the allegations by vessel eight against vessels seven and six and held that the collision between vessels eight and seven was caused by the negligence of vessel eight.

As to the later collisions between those two vessels and the moored vessel six, the Court had to consider whether the effect of the first collision was continuing in such a way as not merely to provide the opportunity for the later collision but as to constitute the cause of them in line with the ruling in the Calliope [1970].

On the facts of the case the Court held that the first collision remained a real and effective cause of the later collisions and the Court held vessel eight alone to blame for all of the collisions.

The above are only intended to be short summaries.

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

WATERSON HICKS • SOLICITORS • 11 BOLT COURT • LONDON EC4A 3DQ

Telephone: +44 (0)20 7929 6060 Fax: +44 (0)20 3004 0997 E-Mail: law@watersonhicks.com www.watersonhicks.com