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When is an owner obliged to commence the approach voyage to the loadport?

CSSA Chartering and Shipping Services SA v. Mitsui OSK Lines Ltd (Pacific Voyager) [2018] EWCA Civ 2413

The Court of Appeal has recently given its decision in this case, which will be of interest to all those involved in the chartering of vessels on a voyage basis. The Court of Appeal upheld the Commercial Court decision and found that the Owners' failure to commence the approach voyage to the loadport by a particular date was a breach of the charterparty, notwithstanding that the charterparty did not give an ETA or Expected Ready to Load date.

The background facts

The vessel was under a voyage charter on the Shellvoy 5 form dated 5 January 2015 to the Claimant Charterers (“the Charterers”) for a voyage from Rotterdam to the Far East.

At the time of the fixture, the vessel was laden with cargo under a previous charter, pursuant to which final discharge was due to take place at the port of Le Havre/ Antifer. While under the previous charter, the vessel suffered damage attributed to contact with a submerged object. There was no suggestion that the vessel or the Owners were in any way at fault.

The charterparty terms

The charter was on an amended Shellvoy 5 form, including the following:

Clause 3

"...the vessel shall perform her service with utmost despatch and shall proceed to Rotterdam and ... load a full cargo..."

The fixture recap also provided details of the anticipated timetable for completion of the previous charterparty:

“ETA SUEZ CANAL 10 JAN, 2015 (TRANSIT) 
ETA SIDI KERIR 12 JAN, 2015 (RE-LOADING) 
ETA ANTIFER 25 JAN, 2015 (DISCHARGING) 
ALL ABOVE BSS IAGW/ WP”

The charterparty did not give an ETA or Expected Ready to Load (“ERTL”) date at the loadport, Rotterdam.

The issue

In summary, the dispute was whether the Owners’ failure to commence the approach voyage by a particular date was a breach of the charterparty.

It is well established that, where a voyage charter contains both an “utmost despatch” provision and an ETA or ERTL, there is an absolute obligation on the owners to commence the approach voyage by a date when it is reasonably certain that the vessel will arrive at the loadport on or around the ETA or ERTL. It has not previously been clear whether there is such an obligation where, as here, a charter contains no ETA or ERTL.

The Commercial Court decision

The Court found in favour of the Charterers, stating that there was an obligation on the Owners in this context to proceed to the loadport at a particular time. That obligation was an absolute one, not a due diligence obligation. The exact time at which the
obligation arose was to be determined by looking at the charterparty as a whole. Here, the ETA at Antifer could be used to derive a time at which the vessel would be expected to commence the approach voyage.

The Court also expressed the view that, even if the ETA Antifer had not been present, it would have been possible to look at the cancelling date under the charterparty and then work backwards from there to establish when the obligation to begin the approach voyage arose.

The Court of Appeal decision
The Court of Appeal upheld this decision and rejected the Owners’ appeal.

The Court of Appeal identified the utmost despatch obligation as an important one, which is intended to give comfort to charterers. Without a particular time at which the obligation attaches, it would be meaningless. From there, the only issue is how exactly one establishes that time, in circumstances where no ETA or ERTL at the loadport has been stated. In that regard, the Court of Appeal approved the judge’s approach of looking at the itinerary given for the previous voyage and working forwards from there. The Court of Appeal emphasised that there would be little other reason for this itinerary to be included – it would not otherwise be of interest to the Charterers.

The Court of Appeal echoed a point made in previous cases that owners will need to use very clear words indeed if the risk of problems such as that which occurred is to be shifted onto charterers.

Finally in this respect, the Court of Appeal cast doubt on the idea, referred to above, that it would be permissible to take the cancelling date and work backwards if no itinerary for the previous voyage were included. These comments are not binding, but would clearly be relevant if this issue were to arise in future.

Comment
The Owners have sought leave to appeal this decision to the Supreme Court. If leave is granted, we will report on the Supreme Court decision in due course. Pending that, charterers can still best protect themselves by including an ETA at the loadport or ERTL date, rather than relying on an itinerary from a previous voyage.

From owners’ perspective, the decision emphasises that they bear the risk of things going wrong in the time between a fixture being concluded and the approach voyage beginning. As mentioned above, shifting this risk onto charterers will require very clear words. However, such clear words would be unusual and very possibly commercially unacceptable.

Max Cross
Partner, Hong Kong
max.cross@incelaw.com

Ruaridh Guy
Senior Registered Foreign Lawyer (England & Wales), Hong Kong
ruaridh.guy@incelaw.com
Exceptions clause or contractual frustration provision? Not the same thing

*Classic Maritime Inc v. Limbungan Makmur SDN BHD [2018] EWHC 2389 (Comm)*

In this case, the Charterer failed in its attempt to excuse its non-performance under a contract of affreightment on the basis that a force majeure event – a burst dam that halted production at a Brazilian mine - had prevented it from shipping the relevant cargoes under the contract. However, the Owner could only recover nominal damages because even if the Charterer had been willing and able to perform its contractual obligations, the burst dam would have prevented its performance.

**The background facts**

The dispute arose in relation to a long term Contract of Affreightment (the “COA”) entered into between the Shipowner, Classic Maritime Inc (“Classic”), and the Charterer, Limbungan Makmur Sdn Bhd (“Limbungan”), for the carriage of iron ore pellets from Brazil to Malaysia. Limbungan and its related companies had long term supply contracts in place with two Brazilian mining companies, Samarco and Vale, with the Samarco pellets being shipped through Ponta Ubu and the Vale pellets shipped through Tubarao. The contracts with Vale were described as being idle, such that from August 2011 Samarco was the sole supplier of iron ore pellets shipped under the COA.

On 5 November 2015, the Fundao dam burst, causing widespread devastation and loss of life. It also stopped production at the mine operated by Samarco and meant that it ceased to be an available source of cargo for Limbungan. The mining operations at the Vale mine were unaffected. Classic brought a claim for damages in respect of five shipments which they said should have taken place following the dam burst between November 2015 and June 2016.

It was Limbungan’s case that they were unable to supply cargoes for shipment under the COA from either Ponta Ubu due to the dam burst, or Tubarao due to Vale’s inability or unwillingness to supply the cargo to the Charterer and their related companies respectively. Classic argued that the collapse of the dam had no causative effect on Limbungan because the five shipments would not have been performed even if the dam had not burst. Limbungan had already defaulted on two shipments before the dam burst because of the weak market and a lack of demand from its related companies for the iron ore pellets.
Clause 32 of the CoA provided as follows:

“Exceptions

Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God,... floods... accidents at the mine or Production facility... or any other causes beyond the Owners’ Charterers’ Shippers’ or Receivers’ control; always provided that such events directly affect the performance of either party under this Charter Party.”

The issue was whether Limbungan could be excused from its failure to perform the five fixtures under the CoA and, if not, whether Classic should be awarded substantial damages.

The Commercial Court decision

Three specific issues of interest arose:

No arrangements vs. alternative modes of performance

Classic argued that Limbungan had undertaken an absolute and non-delegable duty to provide cargo, but had made no arrangements to do so. At the relevant time, Vale was the only available supplier (Samarco having given notice of force majeure and having suspended all deliveries) and it was not willing to supply cargo to Limbungan: such arrangements did not enable Limbungan to fulfil its contractual obligations.

Limbungan argued that it had alternative modes of performance available: it could ship either from Ponta Ubu or from Tubarao. In circumstances where its ‘arrangements’ or normal practice was to ship out of Ponta Ubu and that was prevented by force majeure, all it had to do was to make all reasonable efforts to ship out of Tubarao instead. If it took reasonable steps to provide cargo but still failed, then force majeure was the cause of Limbungan’s failure to perform.

The Court accepted Limbungan’s argument on this point. Limbungan had alternative modes of performance available to it. Once shipment from Ponta Ubu was prevented, Limbungan’s obligation was only to make all reasonable efforts to ship out of Tubarao instead.

Frustration clause vs. exceptions clause

There was a disagreement as to whether clause 32 was a frustration clause (which would bring the contract to an end) or an exceptions clause (which would not bring the contract to an end, but would excuse a party for non-performance of its obligations in certain circumstances). The distinction was important as, in order to rely on an exceptions clause, Limbungan would have to show that, but for the dam burst, the cargo would have been supplied. If clause 32 was a frustration clause, then Limbungan could rely on it without needing to show it could have otherwise shipped the cargoes.

The Court held that clause 32 was an exceptions clause: it imported a causation requirement by the use of the words “resulting from” and by the requirement that the force majeure must “directly affect” the performance of Limbungan’s obligations.

As such, Limbungan was required to show that, if the dam had not burst, it was more likely than not that it would have performed its obligations under the CoA. It was unable to do so. When its related companies had no need for the iron ore pellets, Limbungan was forced to default on its obligations under the CoA, as had previously happened. On the evidence, it was not clear that Limbungan would not have defaulted again under the CoA.
The Court concluded that Limbungan could not rely on clause 32 to excuse its failure to ship cargoes. In circumstances where it was found that, but for the dam burst, it was more likely than not that Limbungan would not have shipped the cargoes in any event, Limbungan could not show that its failure to supply cargoes brought it within the clause 32 exceptions clause.

Limbungan was, therefore, liable to Classic for damages for breach of the COA.

**Damages**

The final question was the level of damages that Classic could recover. The recovery of damages depended on the application of the compensatory principle – i.e. putting Classic in the same financial position it would have been in had Limbungan not breached the COA. This required a comparison between the position of Classic as a result of the breach and the position it would have been in had Limbungan been able and willing to provide cargoes to Classic.

Crucially, such comparison could not ignore the dam burst. On this point, the Court held that had Limbungan otherwise been able to ship the cargoes, the dam burst would in any event have prevented performance.

In that situation, the dam burst would have excused Limbungan’s failure to ship the cargoes under clause 32. Given the dam burst, Classic did not actually suffer substantial losses as a result of Limbungan’s breach of the COA – the cargoes would not have been shipped in any event. As a result, awarding substantial damages would place Classic in a better position than if the contract had been performed by Limbungan. This was contrary to the compensatory principle of damages and Classic could not, therefore, recover substantial damages from Limbungan.

**Comment**

This case highlights a distinction between exceptions and frustration clauses and their treatment by the Court. A party seeking to rely on an exceptions clause to excuse liability for non-performance must show that it would have performed but for that excusing event. A party seeking to rely on a frustration clause does not face this burden.

The case also reiterates the primacy of the compensatory principle in assessing damages. The Court will award damages only to place an innocent party in the position it would have been in had the contract been performed.
**Could or would standard sanctions wordings leave underwriters exposed?**

*Mamancochet Mining v. Aegis Managing Agency [2018] EWHC 2643*

The Court has recently held that underwriters were obliged to pay a claim under a marine cargo insurance policy in respect of a cargo of steel sold to an Iranian national. This was the case notwithstanding the sanctions provision in the policy and President Trump’s decision to withdraw from the international agreement to ease economic sanctions against Iran, the Joint Comprehensive Plan of Action (commonly referred to as the “JCPOA”). In determining the case, the Court was required to interpret the sanctions exclusion clause developed by the London market Joint Hull Committee and adopted by the Joint Cargo Committee.

**The background facts**

The cargo policy was issued in respect of two cargoes of steel billets, carried from Russia to Iran in 2012. The billets were stolen from bonded storage in Iran in the autumn of 2012 and the assured claimed under the policy in March 2013. The defendant insurers (being 11 of the 30 insurers on the slip) resisted payment of the claim on the basis of the standard form ‘Sanction Limitation and Exclusion Clause’ in the policy, which provided that no insurer:

> “shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America.”

At the time that the insurance claim was made, payment was prohibited by virtue of both US and EU sanctions preventing the sale or supply of goods or services to Iran. The parties agreed that this prohibition extended to the provision of insurance in respect of the relevant goods or services. With effect from 16 January 2016, by implementation of the JCPOA, the US, UK, China, Russia, France, Germany and the EU agreed to lift certain sanctions against Iran. However, on 8 May 2018, President Trump announced the US withdrawal from the JCPOA, with a wind down period ceasing on 4 November 2018.

The Claimant commenced an expedited action in the Commercial Court on 22 May 2018, seeking payment of the insurance claim before 4 November 2018, after which US-owned or controlled foreign entities (such as nine of the UK-based defendant insurers) could be caught by the US sanctions.
The Commercial Court decision

The insurers argued that, by virtue of the sanctions clause, they had no liability to pay the otherwise valid claim because there was a risk that the authorities applying the sanctions might conclude that payment of the claim was ‘prohibited conduct’. However, the Court concluded that this was not sufficient and that the sanctions exclusion clause was effective only where payment would be prohibited under one of the named systems of law and thus would “expose” the insurer to a sanction. The insurer, therefore, had to show that the payment would, more likely than not, in fact be prohibited by an applicable law. The Court added that if the parties had intended it to be sufficient for the insurer to show that there was a risk that an authority might conclude that there was prohibited conduct, then this intention needed to be made clear in the clause, which it was not.

As regards whether it would, in fact, have been a breach of US sanctions to pay the claim, the Court found that the insurers could have paid the claim in sterling after 16 January 2016 and until 4 November 2018, without being in breach.

In relation to the EU sanctions, where it was common ground that there was no prohibition on paying the claim in question, the Court stated that the failure by the relevant authorities to confirm that the claim could safely be paid could not of itself “expose [the] (re) insurer to any sanction” within the proper meaning of the sanctions clause. Therefore, the insurers could not rely on the clause to deny the claim.

The Court further held that there was nothing in the sanctions clause that purported to extinguish a claim. The sanctions clause only suspended the insurers’ liability to pay for as long as the sanctions prohibited payment. When the sanctions were lifted, the insurer was again liable to pay the claim under the policy. The Court, therefore, found that the assured was entitled to payment of its claim and that the insurers would not be exposed to a sanction if they made payment before 11:59 EST on 4 November 2018.

Comment

The international sanctions position is constantly changing as political situations develop across the world. It is now commonplace for insurance policies and other contracts to have sanctions clauses included to mitigate against the effect of sanctions. This decision shows that the English Court will take the same approach to interpreting a sanctions clause as it would to any other contractual provision, considering the ordinary meaning of the words used, in the context of the contract as a whole and taking into account the wider commercial context.

As far as the standard form JHC and JCC sanctions clause is concerned, this decision should provide greater clarity to the insurance market as to the ambit of the protection afforded by the clause. Other market standard clauses may also need to be revisited in light of this decision.

For further information on sanctions and how they may impact on your business, please contact Fionna Gavin or James Rose or your usual contact at Ince & Co.

Carrie Radford
Partner, London
carrie.radford@incelaw.com

James Rose
Managing Associate, London
james.rose@incelaw.com
Court dismisses appeal on whether vessel’s deviation was for a reasonable purpose

_Troy Maritime SA v. Clearlake Shipping Pte Ltd (MV Andreas) [2018] EWHC 2310 (Comm)_

The Court has recently dismissed an appeal by Owners on whether the arbitral Tribunal had made a mistake in law in finding that the vessel’s deviation had not been for a reasonable purpose. The Court agreed with the Charterers that this was a finding of fact and could not be appealed as a point of law.

The background facts

The Owners chartered their vessel to the Charterers for a voyage from Tuapse, Russia, to the Antwerp, Rotterdam, Amsterdam, Hamburg range. The cargo was loaded and the vessel set sail on 10 July 2016.

On 11 July, the second engineer asked to disembark at Istanbul, Turkey, for urgent repatriation due to “serious family problems”. Based on the vessel's estimated arrival date in Hamburg of 20 July, dispensation was sought, and granted, from the vessel’s Flag State to sail from Istanbul to Hamburg without a second engineer.

When it became clear that the vessel would not reach Hamburg by 20 July, the Owners ordered the vessel to deviate from its course and call at Gibraltar to take on a replacement second engineer and an additional technician. The Owners’ position was that they had to embark a replacement second engineer in order to remain compliant with their safe manning certificate.

Having deviated, the vessel then collided with a submerged nuclear submarine that led to the vessel’s hull being damaged. As a result, the vessel was required to proceed to Setubal, Portugal, for inspection and repairs before being allowed to continue to Rotterdam to complete its voyage and discharge the cargo.

The Owners subsequently brought a claim against the Charterers for demurrage and port dues incurred at Rotterdam. The Charterers counterclaimed for damages incurred as a result of the deviation.

The Tribunal considered whether the vessel was entitled to deviate to Gibraltar to embark a replacement engineer. Clause 26 of the charterparty provided as follows:

"...the Vessel...to deviate for the purposes of saving life and property, or for any other reasonable purpose."

Whilst not referred to by the Owners, the Tribunal also noted that the Owners might have sought to rely on Article IV Rule 4 of the Hague-Visby Rules, which had been expressly incorporated into the charterparty. This provides that:

"...Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

The Tribunal found in favour of the Charterers and held that the deviation was not permitted by the terms of the charterparty on the basis that, whilst it was reasonable for the vessel to deviate to disembark the second engineer, it was unreasonable for the Owners to request a dispensation letter for a period that was insufficient to permit the vessel to complete the contractual voyage.

The Owners appealed, arguing that the Tribunal had asked the wrong question and should have asked:
"Whether, in light of the dispensation which had been obtained by the Owners from the Flag State Authority, which was only valid until 20 July 2016, it was reasonable to deviate to Gibraltar?"

The Owners submitted that the Tribunal had applied the incorrect legal approach in considering whether the deviation was reasonable. Specifically, the Owners argued that the question was whether the deviation was reasonable, rather than whether the dispensation period was unreasonably short. The Court stated that the question of reasonableness was a factual one and, accordingly, fell outside the scope of an appeal under section 69 of the Arbitration Act 1996. A decision on whether a deviation was reasonable was, in general, a factual question, and findings of fact were matters for the arbitral tribunal. The Court added that the Tribunal was entitled to take into account the fact that the dispensation period was insufficient for the vessel to proceed to the discharge port. The starting point as to what constitutes a "reasonable deviation" was a wide one and, in any event, was not capable of being considered an error of law for the purposes of a section 69 appeal.

The Court also thought that the question of law identified by the Owners did not arise out of the Tribunal's award as the Tribunal had not made a finding that the purpose of the deviation was to comply with Flag State requirements for safe manning. Finally, the Court stated that the Tribunal was entitled to consider the Owners' failure to seek a longer dispensation period and that its finding was within a reasonable range of conclusions in the event that it had properly identified the correct question of law.

Consequently, the Owners' appeal was dismissed.

**Comment**

This case highlights the English Court's unwillingness to allow parties making section 69 applications to dress up a tribunal's findings of fact as an appeal on a point of law. In circumstances where the parties have chosen to refer their disputes to arbitration, rather than to litigate them in the courts, the Court will not interfere with the arbitrators' factual findings, nor lightly overturn their decisions.

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**Rania Tadros**
Managing Partner, Dubai
rania.tadros@incelaw.com

**Sheridan Steiger**
Senior Associate, Dubai
sheridan.steiger@incelaw.com
Supreme Court considers limitation under the Athens Convention


The Supreme Court has clarified the scope, as a matter of UK law, of the time-bar provided for by Article 16 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the “Athens Convention”). The effect of section 18 of the Prescription and Limitation (Scotland) Act 1973 (the “1973 Act”), if the claim is brought on behalf of an individual who is a minor at the time of the incident giving rise to the claim, is to suspend the running of time for commencing an action until the claimant becomes an adult. Although a different limitation statute applies in England and Wales, the decision gives a strong indication of how similar cases might be decided here. There is considerable potential for this decision to prolong the period during which claims may emerge and be brought against the operators of ferries, cruise ships and other passenger vessels following fatal accidents.

The background facts

In August 2012, the Claimant’s husband, Lex Warner, chartered a vessel from Scapa Flow Charters (“SFC”), as part of a diving expedition off the coast of Scotland. On 14 August 2012, Mr Warner had a fall on the deck of the vessel while dressed in diving gear and preparing to dive. He was helped to his feet and then began the planned dive, but encountered difficulties while under water and was pronounced dead after being brought back to the surface.

The Claimant, Debbie Warner, alleged that Mr Warner’s death was the result of SFC’s negligence and she sought damages from SFC on her own behalf and that of their son. Her claim was made on 14 May 2015. SFC lodged a defence stating that the claim was time-barred as a result of the Athens Convention, which applies a time-bar of two years from the date on which the passenger would have disembarked. It was agreed between the parties that Mr Warner would have disembarked on 18 August 2012 at the latest and that the Athens Convention applied to the claim.

The Court of first instance in Scotland upheld SFC’s time-bar defence. On appeal, the time-bar was held to apply to Mrs Warner’s claim, but not to the claim brought on her son’s behalf. SFC appealed to the UK Supreme Court.
The Supreme Court decision

Article 16(3) of the Athens Convention provides that:

“The law of the court first seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.”

The Claimant’s argument was that section 18(3) of the 1973 Act acted to preserve her son’s claim. The relevant parts read:

“Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the … [three year period for cases of death of a person from personal injuries specified by the 1973 Act] ... any time during which the relative was under legal disability by reason of non-age or unsoundness of mind.” (emphasis added).

SFC’s key argument made a subtle distinction between:
(a) the words “suspension” and “interruption” and; (b) the effect of the 1973 Act, which was to postpone the running of the time period. They argued that the 1973 Act did not apply in this case, because it did not give the Claimant a ground of suspension or interruption as referred to in the Athens Convention. In making this argument, they pointed to the fact that suspension and interruption of time have technical meanings in many civil law jurisdictions.

The Supreme Court criticised SFC’s arguments, finding first that it would not be appropriate, when interpreting the meaning of an international convention, to apply a technical meaning used in some civil law systems. Second, they found that in any case there was “no international consensus” as to the meaning of suspension — the term on which the discussion focused. Third, they found that excluding legal incapacity as a ground of suspension when it was present at the start of a time period would “give rise to serious anomalies”. The example was given that, following SFC’s interpretation of the Athens Convention, time would not be suspended for a person suffering from a legal incapacity at the start of the period for bringing a claim, but it would be suspended for a person who became subject to exactly the same legal incapacity part way through the period.

The Supreme Court’s conclusion was, therefore, that the wording of article 16(3) of the Athens Convention was “sufficiently wide to cover domestic rules which postpone the start of a limitation period” and that the legal disability acting on the late Mr Warner’s son under Scottish law was effective to suspend the running of time in relation to the two-year time limit.

Comment

The Supreme Court has usefully considered the interaction between domestic time limits and those under international conventions. Based on this decision, a provision in a domestic limitation statute that suspends the limitation periods in that statute — whether due, for example, to minority or legal incapacity or indeed for fraud, concealment or mistake or any other reason — may be sufficient to bring article 16(3) into operation and extend the article 16 time bar by one year.

Fionna Gavin
Partner, London
fionna.gavin@incelaw.com

Martin Laughton
Associate, London
martin.laughton@incelaw.com
Unnecessary strapping of cargo: Charterers pay for Master’s negligence

Clearlake Shipping Pte Limited v. Privocean Shipping Limited (M/V Privocean) [2018] EWHC 2460 (Comm)

In this case, the master was negligent in insisting that the only safe stowage plan for the ship was one where cargo was part loaded in two holds and strapped, thereby incurring additional time and expense. In fact, the Master had been presented with an alternative stowage plan, which did not require strapping and this would have been perfectly safe, but the Master refused to use it.

In this case, the Master was negligent in insisting that the only safe stowage plan for the ship was one where cargo was part loaded in two holds and strapped, thereby incurring additional time and expense. In fact, the Master had been presented with an alternative stowage plan, which did not require strapping and this would have been perfectly safe, but the Master refused to use it.

Although clause 2 of the NYPE form requires the charterers to pay for necessary and requisite cargo fittings, this does not in itself mean that the owners must pay for unnecessary and non-requisite cargo fittings. The Court found that the Master’s actions constituted a neglect in the management of the ship, thereby falling within section 4(2)(a) of US CoGSA, because the Master’s review of the stowage plans was with reference to the stability and safety of the ship and so not an act in the management of the cargo.

The background facts

The vessel, a Kamsarmax bulk carrier with seven holds and hatches, was time-chartered on an amended NYPE form, containing the following clauses:

Clause 2: “...Charterers are to provide necessary dunnage and shifting boards and also any extra fittings requisite for a special trade or unusual cargo...”

Clause 8: “...Charterers are to load, stow trim and discharge the cargo at their expense and under the supervision of the Captain...”

Clause 83: “...Charterers shall instruct the terminal operators to load/discharge/shift the vessel in accordance with the loading/discharging plan which shall be approved by the Master with due regard to the vessel’s draft, trim, stability, stress or any other factor which may affect the safety of the vessel.”

The charterparty also incorporated the terms of US COGSA, section 4(2) of which is identical to Article 4, Rule 2 of the Hague/Hague Visby Rules:

“(a) Act, neglect or default of the Master, ... in the navigation or in the management of the Ship.”

The Charterers ordered the vessel to load a cargo of soya beans at New Orleans for discharge in China. At the loadport, the Master was asked to approve the cargo stowage plans. Four stowage plans were shown to him. One of the plans involved hold 4 being empty, but the Master considered that this was unsafe. The Master would only accept a plan where holds 2 and 6 were partly loaded and the cargo in hold 2 was strapped. This incurred extra time and increased costs which were the subject of the dispute.

In the arbitration proceedings, the Tribunal found that the Master had been negligent as he should have accepted the plan involving hold 4 being empty and that this was perfectly safe for the vessel. Accordingly, the strapping had been unnecessary. The Master’s negligence was a breach of clauses 8 and 83 but, due to section 4(2) of US COGSA, the Owners were not liable as this was an act, neglect or default of the Master in the management of the ship.
The Commercial Court decision

On appeal by the Charterers, the Court was asked to consider two questions.

1. **Under Clause 2 of the NYPE form, can it be said that unnecessary and non-requisite cargo fittings are for the owners’ account?**

   The findings of the Tribunal meant that the strapping of hold 2 constituted unnecessary and non-requisite cargo fittings. The Charterers argued that clause 2 stated that they were to provide and pay for necessary and requisite cargo fittings. This meant that the Owners had to pay for unnecessary and non-requisite cargo fittings.

   The Court disagreed. As the fittings were unnecessary and non-requisite, clause 2 was irrelevant. The applicable provision was clause 8, which made cargo operations the Charterers’ responsibility and at their expense, including unnecessary and non-requisite cargo fittings.

2. **Was the Master’s act negligence in the management of the ship or negligence in the management of the cargo?**

   The Charterers pointed out that the subject matter of the case was cargo stowage plans and that the expense under dispute was the expense of strapping the cargo. The Charterers argued that the Master’s negligence was in the management of the cargo, not the ship, and so the Owners could not claim the protection of US COGSA section 4(2)(a).

   The Court found in favour of the Owners, who argued that it was necessary to look at what the specific act, neglect or default was that caused the loss. In this case, the Master was negligent in carrying out his clause 8 and 83 obligations. Both clauses required the Master to act in a supervisory role over cargo operations in order to maintain the safety of the vessel. Accordingly, the Master’s negligence was in the management of the ship, not the management of the cargo.

   The Charterers’ appeal was dismissed.

**Comment**

The Court’s decision regarding clause 2 is a welcome reiteration of a basic principle of contract interpretation, namely that a positive obligation on one party does not necessarily mean a negative corollary obligation on the other party.

The distinction between when an act, neglect or default is in the management of the ship or in the management of the cargo is a common point of dispute when an owner invokes the article 4, rule 2(a) defence of the Hague/Hague-Visby Rules or equivalent provisions. The Court reviewed the relevant authorities and highlighted that, as each case is very fact-specific, the principles put forward in the authorities are not entirely consistent. However, the decision clarifies that it is necessary to look at the specific act, neglect or default which caused the loss and consider whether this relates to management of the ship or cargo.

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Jamila Khan
Partner, Piraeus
jamila.khan@incelaw.com

Natalie Nielsen
Senior Associate, Piraeus
natalie.nielsen@incelaw.com
Charterers awarded lucrative damages despite weak market

A v. B [2018] EWHC 2325 (Comm)

This appeal from an LMAA arbitration award raised two questions in relation to the calculation of damages – can charterers claim for the loss of lucrative profits in an otherwise weak market, and can they claim wasted expenditure at the same time? The Court answered both questions with a clear yes.

The background facts

In July 2011, the Charterers time-chartered the Owners’ VLCC and sub-chartered her into a pool of similar tankers. Under the head charterparty, the Owners were obliged to ensure that a valid SIRE report would be registered at all times, and that the vessel would always be eligible for the business of at least three named oil majors. The sub-charterparty obliged the Charterers to ensure that, at all times, the vessel had a SIRE report that was not more than six months old. It also incorporated the terms of a separate pool agreement, which replicated the six-month requirement and also required that the vessel must maintain eligibility with at least four oil majors.

The following spring, Statoil inspected the vessel when she was discharging at Yingkou in China, and produced an unfavourable SIRE report. As a result, BP refused to allow the vessel to discharge at one of its terminals, with the result that the cargo in question had to be discharged elsewhere. The vessel was subsequently rejected by ExxonMobil, Total, and Petrobras.

The Charterers put the vessel off-hire on 26 October 2012, citing breach of the charterparty’s oil majors clause.

In the subsequent LMAA arbitration, the Charterers claimed damages for: (1) loss of profits, calculated with reference to two hypothetical voyages during the period from 26 September 2012 to 31 January 2013, which they said the vessel would have made but for the breach; and (2) wasted expenditure for hire and bunkers incurred between 22 July and 26 October. That amounted to US$3.5m in total.

The Tribunal found that the Owners had breached the oil majors clause because the vessel was not acceptable to at least four of the named oil majors, and because the SIRE report became more than six months old. The Charterers’ damages claim succeeded – both for lost profits and wasted expenditure – in the amount of US$3.3m.
The Commercial Court decision

The Owners challenged the award for serious irregularity on various grounds. All of these arguments failed to convince the Court, which typically sets a very high threshold for such challenges.

More importantly, the Court had to consider two questions of law in relation to the calculation of damages. The first concerned the scope of the compensatory principle, that is the basic rule that the party suffering the breach must be placed in the same financial position that they would have been in had the contract been performed properly.

Generally, a claimant cannot claim loss of profits and also claw back expenses that it incurred in reliance on the contract being performed. So it is often said that the compensatory principle gives the claimant a choice: it may claim wasted expenditure or lost profits, but not both.

The Court confirmed that as long as the wasted expenditure does not overlap with the lost profits, both can be claimed. In this case, the Tribunal had taken the time-charter-equivalent (“TCE”) rates for the two hypothetical voyages relied on by the Charterers as the basis for calculating lost profits.

The TCEs were net amounts because they took into account bunkers and other expenses. The Tribunal then subtracted the cost of bunkers from 22 July to 26 September 2012, and the cost of hire from 22 July 2012 to 31 January 2013 from the total profit figure. Accordingly, the lost profits did not overlap with the wasted expenditure for bunkers and hire from 22 July to 26 October, and both heads were awarded.

The second question regarding damages was as follows: if the available market is generally weak and loss-making, must damages be calculated with reference to that market – such that only nominal damages can be awarded? Or can damages be assessed with reference to certain lucrative transactions that probably would have occurred but for the breach?

The manager of the pool acknowledged that the market rate had been low at the relevant time, such that if the vessel had operated at the same daily rate as comparable vessels in the pool, the Charterers would have made a loss. However, given the factual finding that it was reasonable to assume that the particularly lucrative fixtures could have been made, the Tribunal was content to take those as the basis for the lost profits. The Court agreed, holding that where there was a relevant market and certain lucrative fixtures “would probably have been performed”, there was no reason to reduce the damages below those likely profits, or on the basis of loss of chance principles.

Comment

This decision confirms that claimants can successfully claim for wasted expenditure and loss of profits arising out of the same facts, as long as the two do not overlap and the loss of profits is calculated as a net amount. The Court was also willing, in this case, to take into account the likelihood of particularly lucrative fixtures being performed, even though the market at the time was generally flat.

Carl Walker
Partner, London
carl.walker@incelaw.com

Iain Preston
Claims Executive, Hamburg
iain.preston@incelaw.com
Will an arresting party ever have to produce a cross undertaking to the ship-owner?

Natwest Markets plc (formerly RBS PLC) v. Stallion Eight Shipping Co. SA (MV Alkyon) [2018] EWHC 2033 (Admlty)

In this case, the Owners of an arrested ship applied to the Admiralty Court for a cross undertaking against the Bank (the arresting party) to pay damages arising as a result of the arrest. The Court rejected the application on the basis that it would cut across and negate the Claimant Bank's right to obtain a warrant of arrest.

The background facts

The Claimant Bank lent US$15.7m to the Owner of the MV Alkyon, a 36,056dwt bulk carrier, on which the loan was secured by mortgage. The Bank obtained a valuation showing that the market value of the vessel had fallen to US$15.25m, meaning that the Owners were in breach of the mortgage's Value to Loan (VTL) ratio of 125%. The Bank notified the Owners that further security of US$1.75m was required.

The Owners did not provide security and disputed the valuation obtained by the Bank and, in due course, the Bank notified the Owners that an event of default had occurred. The Bank called in the loan and issued an in rem claim form against the Vessel, which was arrested in Newcastle in June 2018.

The Owners alleged that no event of default had occurred and that the Bank had acted in bad faith. The arrest was costing the Owners between US$3,500 to US$4,000 a day in lost profits and the Vessel was the Owners' only income-producing asset.

The Owners were unable to produce security either by way of a P&I Club Letter of Undertaking (because P&I cover does not extend to a disputed claim under a loan agreement) or by a bond (because the Owners' only asset was the vessel and that was already mortgaged).

The Owners applied to the Court for an order that the vessel be released from arrest unless the Bank provided a cross-undertaking in damages in the form usually given in freezing orders. This meant that if the Court later found that the arrest had caused loss to the Owners, the Owners could recover damages from the Bank without having to demonstrate wrongful arrest of the vessel.

The Admiralty Court decision

After having conducted a wide-ranging review of the relevant case-law, the Court rejected the Owners’ application. It concluded that there was no past authority that supported the Owners’ position. Under English law, there is no right to damages in circumstances where an arresting party acts in good faith and without gross negligence, but is later unsuccessful in pursuing a claim.

Whilst the Court has the right to order a release of a vessel at its discretion, the power is normally exercised where alternative security is provided by the owner or where a second arrest is an abuse of process. There were few other instances of a vessel being released from arrest and, based on the authorities, it was not the practice of the Admiralty Court to require security in respect of the damages recoverable for a wrongful arrest. Furthermore, while the Court’s discretion was not restricted to these circumstances alone, the discretion to release had to be exercised in a principled manner.
One of the fundamental principles was that a claimant in rem can obtain a warrant of arrest as of right. When the Court receives an application for arrest that complies with the relevant procedural rules, then the rules dictate that "the court will issue an arrest warrant" – it is not within the Court’s discretion to refuse. To require a claimant to provide a cross undertaking was at odds with this right.

The Court also rejected the argument that arrest was analogous to a freezing order. Unlike an arrest, a freezing injunction was not obtainable “as of right” – it required the active order of a court. Furthermore, owners can avoid arrest by posting bail, whereas a defendant cannot protect itself in this way when a freezing order is made against him that may affect all his assets, not just one.

The Court acknowledged that the Owners would suffer a loss of profits due to the arrest, and a loss as a result of putting up security, but this was the case with every arrest. The circumstances of this case were unexceptional and did not justify any change in the Court’s traditional approach.

The Court also rejected the Owners’ argument that, because the Bank already had a mortgage over the vessel and various personal guarantees, an arrest was unjustified. Arrest was a way of realising the security and selling the vessel through the Court, the benefit of which was selling the ship on without any prior encumbrances.

The Court also found that the Owners had not provided sufficient evidence to establish that they were unable to provide alternative security. The Court could not, therefore, exercise the discretion it had to release a vessel where continued arrest would constitute an injustice.

On a more general note, the Court indicated that widespread cross undertakings of the type sought by the Owners would discourage parties from exercising their right of arrest. In addition, insurers might not as readily provide security for arrested ships because there would be greater uncertainty about whether an arrest would be maintained. Given these potentially far-reaching consequences, the Court thought that this was a policy matter for Parliament rather than the Court.

Comment
The case illustrates the vulnerability of ship-owners when faced with the arrest of their vessel. It is difficult for owners to demonstrate that an arrest is wrongful, nor is it usually possible to recover losses where the arresting party’s claim is unsuccessful. In the Court’s view, ships are mobile assets that may be within a jurisdiction for only a short period of time, and the right of arrest may be essential to claimants obtaining justice.

This case has been appealed. We will report on the appeal decision in due course.

Victor Fenwick
Partner, London
victor.fenwick@incelaw.com

Theo Hall
Associate, London
theo.hall@incelaw.com
‘What’s aught but as ‘tis valued?’: Mortgagee’s duties on sale of vessel

Close Brothers Limited v. (1) AIS (Marine) 2 Limited (in liquidation) and (2) Mr Paul Simon Chandler [2018] EWHC B14 (Admlty)

The Commercial Court has recently, in the context of the sale of a vessel, given helpful guidance on the extent of the duties owed by the mortgagee to the mortgagor when selling re-possessed property.

The background facts

Close Brothers, a bank, provided AIS with a marine loan of €2.247 million to assist them in purchasing a wind farm support vessel for €3.21 million. To secure the loan, AIS entered into a ship mortgage whereby all shares in the vessel were mortgaged to the bank. Mr Chandler, a director of AIS, also provided a personal guarantee in respect of the obligations of AIS under the mortgage.

The loan agreement provided that the loan was to be repaid by monthly instalments. It also provided that, in the event of default, the bank was entitled to take possession of the vessel and to sell her.

AIS failed to pay instalments under the mortgage as they fell due, and the vessel was repossessed and sold by the bank (through Braemar ACM Shipbroking) for a gross price of £1.7 million. The sale proceeds were insufficient to discharge the outstanding account and there was a shortfall of £215,813.07.

The bank sought to recover the shortfall from AIS and Mr Chandler. In response to the bank’s claim, the Defendants contended that, in breach of its duty, the bank had failed to sell the vessel for the best price reasonably obtainable. Amongst other things, they alleged that the value of the vessel (in comparison with other vessels on the market at the time) was no less than €2.5 million and that the bank had chosen to sell the vessel to a connected person (i.e. one of its own clients), below the true value of the vessel and without properly advertising the vessel, so that the burden of proof rested on the bank to show that they had sold at the best price obtainable.

The Commercial Court decision

The Court found in favour of the bank. In giving its judgment, the Court provided a summary of the relevant principles governing the relationship between a mortgagee and mortgagor with respect to the sale of property of which a mortgagee has taken possession:

> The mortgagee owes the mortgagor a duty to take reasonable care to obtain the best price reasonably obtainable at the time (i.e. the “true market value”). The standard that the mortgagee must reach is that of a reasonable man realising his own property.

> The timing and manner of the sale is a matter for the mortgagee, but the property must be fairly and properly exposed to the market absent “real urgency”.

> A true market value can have an acceptable margin of error, and the mortgagee will not be in default unless plainly on the wrong side of the line.

> Generally, the burden of proof will rest on the mortgagor. To establish a breach of duty on the part of the mortgagee, the mortgagor must prove that the property was sold at a price below the “true market value” because of the way in which the mortgagee had conducted the sale.

> However, where a mortgagee sells to a “connected person”, the burden of proof is reversed and the mortgagee must prove that he took care to obtain the best price.
As a matter of fact, the Court was not convinced that the purchaser was a “connected person”. As such, the burden of proof remained with the Defendants to show that the bank had breached its duty to obtain the best price reasonably obtainable for the vessel at the time of the sale. The Defendants were unable to do so.

While the Defendants put forward expert evidence to the effect that the true market value of the vessel was €2.8 to €2.9 million, the Court considered that there was such “an aura of vagueness and uncertainty” about this evidence that they could not place any reliance on it. Conversely, the Court found the evidence of the bank’s expert – to the effect that the sale price was reasonable - to be “helpful and persuasive”, and accordingly found that the vessel had not been sold at an undervalue.

**Comment**

This case gives a useful summary of the key principles and previous authorities that a mortgagee will need to consider when selling property of which they have taken possession (and conversely, the principles that a mortgagor will wish to keep in mind when challenging any such sale).

It is also a demonstration of how important it is to find the ‘right’ expert witness: that is, one with the appropriate background and experience to advise authoritatively. As the bank’s and the Defendants’ differing fortunes show, an expert can be enough to make (or break) a case.

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Christian Dwyer
Global Head of Admiralty, London
christian.dwyer@incelaw.com

Rebecca Cawley
Associate, London
rebecca.cawley@incelaw.com

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**SHIPPING**
Firm news

**Ince & Co announces merger with legal and professional services company, Gordon Dadds LLP**

Last month, it was announced that Ince & Co and Gordon Dadds have approved the terms of a merger to create the UK’s largest listed law firm on the UK Stock Market (AIM listing), Ince Gordon Dadds LLP. This cutting-edge merger will build upon our complementary strengths in terms of industry expertise and range of services and enable us to extend our client offering. The merger recognises the strength of the Ince brand around the world and will enable further growth of the firm by extending our offering to a wider range of clients.

[Click here for more information.]

**Rania Tadros and Paul Katsouris win DIFC Academy of Law awards**

Rania Tadros (Managing Partner) and Paul Katsouris (Associate) from our Dubai office have both won prestigious awards. Rania has been awarded “Lawyer of the year” and Paul was named “Young Lawyer of the Year” by the DIFC Academy of Law. The team nominated Rania for the award because she is a truly inspirational leader and a great advocate of gender diversity and in particular in the maritime sector.

This is an amazing recognition for their hard work, devotion and commitment. Rania, a mother of two young children, is very supportive of women in the workforce and currently manages a team of 16 male and 20 female members. She ensures equal opportunities and supports women in their careers with and without families. She is a perfect example of keeping a balance between managing a stressful job, and even excelling at it, and spending time with her family. Since moving to Ince & Co, Paul immediately became an integral part of the team here. He has a strong background on both the litigation and transactional side. In July, he undertook a three-month secondment at one of the firm’s client’s offices and, while on secondment, his commercial and legal input was instrumental in helping a small team deliver an aggressive expansion programme. Outside the office, as an active member of the UAE maritime community, and an alumnus of the City University, London, he has been actively assisting the university with the launch of their new LLM Maritime Law program (offered in cooperation with the DIFC Academy of Law) in the UAE.

[Click here for more information.]

**Ince & Co named in ‘The Times Best Law Firms 2019’**

The firm is proud to have been named in ‘The Times Best Law Firms 2019’ top 200 legal practices, with the firm’s renowned maritime practice ranked second in the top three maritime law firms.

[Click here for more information.]

**Ince & Co augments marine insurance offering with double promotion**

The firm is delighted to announce that it has promoted Carrie Radford and Elle Young to the partnership, effective 1 November 2018. As part of their promotion, they will co-lead Ince & Co’s marine insurance practice in London, an area of specialism for both Carrie and Elle.

The marine insurance practice provides contentious and advisory services to Lloyd’s and London marine (re)insurance companies, international and specialist insurance providers, international broking houses and intermediaries, captives, ship-owners, charterers and cargo owners. With a team of lawyers spanning Europe, Asia and the Middle East, it advises clients around the world on the full spectrum of marine insurance matters.

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**Ince & Co Dubai office wins Maritime Service Award**

In October 2018, the firm’s Dubai office won the prestigious Maritime Services Award at the Seatrade Maritime Awards dinner in recognition for the debt collection services we offer our clients in the UAE to recover their outstanding debts as quickly as possible. 

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**Ince & Co appoints new partner in Monaco**

Marco Crusafio, a member of the Monaco office and a highly experienced dispute resolution lawyer, was promoted to the Partnership on 1 October 2018. Marco specialises in dispute resolution, with a particular focus on shipping litigation and international trade. He has experience handling high value claims in court and arbitration proceedings, both in London and abroad.

[Click here for more information.](#)