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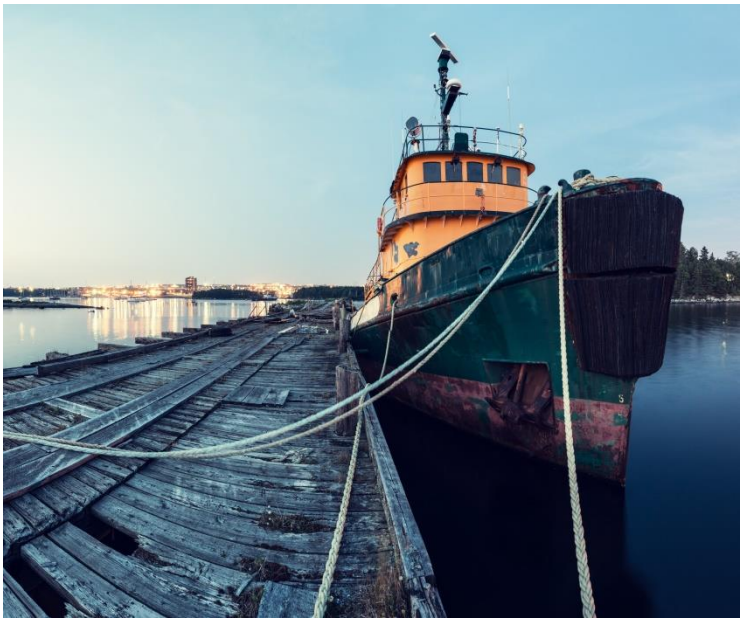

Quarterly Case Update

June 2017

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Gard Marine & Energy Limited v China National Chartering Co Ltd and another [2017] UKSC 35

Background

The OCEAN VICTORY (the "**Vessel**") was owned by Ocean Victory Maritime Inc. (the "**Owners**").

Owners demise-chartered the Vessel to Ocean Line Holdings Ltd ("**OLH**") on a Barecon89 form. OLH time-chartered the Vessel to China National Chartering Co Ltd ("**CNC**") who, in turn, sub-time-chartered to Daiichi Chuo Kisen Kaisha (the "**Charterers**").

The Barecon89 form required OLH to insure the Vessel for themselves and Owners for the agreed value of US$70million.

Each charterparty contained an undertaking to trade the Vessel between safe ports.

The incident

Pursuant to Charterers' orders the Vessel arrived at Kashima, Japan (the "**Disport**") on 20 October 2006 and berthed on the same day. Due to strong winds and heavy rain, discharge operations were stopped on 23 October 2006.

The particular berth where the Vessel lay was affected by a meteorological phenomenon known as 'long waves'; furthermore, the port was also subject to severe northerly gales (reaching force 9).

In the event, on 24 October 2006 the master took the decision to leave berth for open water; however, during the transit he lost control of the Vessel and she was driven back onto the breakwater wall, becoming a total loss.

Losses amounted to some US$170million.

The claim

Hull insurers paid out US$70million to Owners (being the agreed value of the Vessel).

One of the hull insurers (Gard) took an assignment of Owners' and OLH's rights in respect of the grounding and total loss, and brought a claim against CNC for damages for Charterers' breach of safe port warranty, alleging the Disport was unsafe. CNC passed this claim down the charter chain to the Charterers.

Charterers denied that the Disport was unsafe, arguing that the combination of the adverse weather conditions amounted to an *"abnormal occurrence"*. Alternatively, even if the Disport was unsafe, the cause of the loss was navigational due to the master's decision to leave the port.

Charterers also argued that Gard had no right to recover down the chartering chain. In particular, the joint insurance regime under the demise-charter amounted to an agreement that the parties would look to insurance for recovery. In essence, therefore, having no liability to Owners for the loss OLH had no liability to pass on to CNC / Charterers.

First instance decision

Held, Charterers were liable to CNC who were, in turn, liable to OLH for breach of the safe port warranty in each of the charters.

The court also rejected Charterers' arguments in respect of the joint insurance regime and found in Gard's favour that liability could be passed down the charterparty chain.

Charterers appealed.

Court of Appeal decision

Whether Kashima was safe turned on whether the combination of the two weather conditions, namely: (i) the long waves; and (ii) the severe gale, amounted to an *"abnormal occurrence"*.

Held, the occurrence of (i) or (ii) in isolation did not render the port unsafe; however, in combination, these conditions amounted to an *"abnormal occurrence"*.

Accordingly, there was no breach of the safe port warranties.

With regard to the right to recover; where loss was covered by marine insurance (for Owners' and OLH's benefit) Owners were excluded from claiming against OLH for the loss. This remains so even if OLH were in breach of the safe port warranty, as Owners, by way of the joint insurance regime in the demise-charter, had agreed to look to the insurance proceeds for compensation.

Therefore, OLH had no liability to Owners nor could they show any loss/damage as a consequence of CNC's breach of safe port warranty. As such there was no liability to pass down the chain.

Gard appealed to the Supreme Court.

Supreme Court decision

The issues that came before the court were:

(1) Was there a breach of the safe port warranty?

(2) If so, did the provisions for joint insurance under the demise-charter preclude rights of subrogation of Gard and the right of Owners to recover in respect of losses covered by hull insurers against OLH for breach of an express safe port undertaking?

(3) If there was a breach of the safe port undertaking, were Charterers entitled to limit their liability for Owners'/Gard's losses as against CNC (and CNC, in turn, against Gard)?

Breach of safe port warranty?

Held, there was no breach of the safe port warranties.

It is well-known that the test for an unsafe port is, when nominated, that the port must be prospectively safe for the duration of the Vessel's visit. In the event, the court could not find that the Disport was unsafe for the Vessel.

In determining what may amount to an *"abnormal occurrence"*, the court established that this was an event that was out of the ordinary course and unexpected; something that the notional charterer would not have in mind.

In making an assessment in this regard, the court will look to evidence relating to the past frequency and regularity of the conditions (in isolation and in combination), as well as the likelihood of them occurring again.

The Supreme Court agreed that the Court of Appeal was right to conclude that the conditions experienced at Kashima in combination amounted to an *"abnormal occurrence"*.

Right of recovery?

Held, even if there had been a breach of the safe port warranties Owners' rights of recovery in respect of losses covered by hull insurers against OLH were precluded.

The effect of the joint insurance regime was that Owners had agreed to exclude claims between the parties in respect of its losses.

Accordingly, the rights of subrogation of Gard to recover were also precluded.

Charterers' right to limit liability?

Held, even if there had been a breach of the safe port warranty Charterers would not have been entitled to limit their liability for loss of the Vessel (and consequential losses) against Gard (as assignee of Owners' rights under the insurance policy).

Charterers sought to rely on art 2(1)(a) of the 1976 Limitation Convention to limit their liability in respect of matters:

"occurring on board or in direct connexion with the operation of the ship"

In rejecting Charterers' argument, the Supreme Court followed the decision in the *CMA DJAKARTA* ([2004] 1 Lloyd's Rep 460). Charterers would have been entitled to limit their liability for maritime casualties against third parties from claims arising from the operation of the Vessel but they could not limit their liability against Gard as regards claims pertaining to the loss of the Vessel itself.

Summary

The Supreme Court's decision as regards safe port matters confirms the status quo and provides useful guidance on the approach to be adopted when deciding whether a port is safe or not; in particular, what amounts to an *"abnormal occurrence"*.

In respect of the insurance issue; the decision may preclude insurers from pursuing subrogated claims in respect of a demise-charter. This will be of relief to a demise-charterer who has agreed to pay for the insurance for the joint benefit of themselves and the owners; however, the decision will inevitably lead to a reassessment of the risk profile of bareboat charterparties which include joint insurance provisions.

The Supreme Court's unanimous decision as to Charterers' inability to limit liability against Gard (as assignee of Owners' rights under the insurance policy) also reconfirms the status quo.

Kyokuyo Co Ltd v AP Moller-Maersk A/S trading as "Maersk Line" [2017] EWHC 654

Background

A dispute arose out of the damage to three container loads of frozen tuna.

Each container comprised of frozen Bluefin tuna loins and bags of frozen Bluefin tuna parts, stuffed into the containers as individual items of cargo without any wrapping, packaging or consolidation.

The three loads were made up as follows:

(i) Container A – 206 frozen loins and 460 bags;
(ii) Container B – 520 frozen loins; and
(iii) Container C – 500 frozen loins.

The contract of carriage provided that it was *"to be covered by a bill of lading"* incorporating either the *Hague* or *Hague-Visby Rules*; however, the latter would only apply where the Rules were compulsorily applicable.

In the event, pursuant to an agreement between the claimant and defendant, waybills were issued in lieu of bills of lading.

Upon receipt of the containers, the claimant discovered the cargo had been damaged and sought to recover damages, in the amount of JPY121million (GBP£858,000), from the defendant.

The limitations

The defendant's liability was governed by article IV rule 5 of either the *Hague* or *Hague-Visby Rules*.

Where the *Hague Rules* applied, the defendant's liability would be limited to £100 *"per package or unit"*.

Where the *Hague-Visby Rules* applied, the defendant's liability would be limited to the greater of 666.67 units *"per package or unit"* or 2 units of account "*per kilogramme of gross weight of the goods lost of damaged"*.

The dispute

The parties disagreed as to which set of Rules applied and how the limit of liability thereunder would apply.

In particular, there was a disagreement as to whether the material *"package or unit"* was the container or the individual tuna loins/bags.

Matters in issue

The following issues came before the court for determination:

(1) Which liability regime applied (*Hague* or *Hague-Visby*)?

The defendant argued that *Hague-Visby* should not apply as the contract of carriage was not *"covered by a bill of lading or…similar document of title"* within the meaning of article I(b).

The court disagreed. It did not matter that a bill of lading was not issued, it was only necessary for the parties to contemplate that a bill of lading be issued in order to satisfy article I(b).

In the premises, as the port of shipment was a *Hague-Visby* contracting state (Spain), *Hague-Visby* was compulsorily applicable.

(2) Were the containers or the individual pieces of tuna the relevant *"packages or units"*?

In the strictest sense what is shipped is, in fact, the container. Therefore, in order to make an assessment the court must look at the containers as if its walls were transparent (*The River Gurara* [1998] 1 Lloyd's Rep 225).

In adopting this approach the court held that the natural and correct conclusion was that the cargo was a mixture of *"packages"* (the individual bags) and *"units"* (the unpackaged tuna loins).

Accordingly, the cargo comprised of:

(i) 206 *"units"* of frozen loins and 460 *"packages*" of frozen tuna parts;
(ii) 520 *"units"* of frozen loins; and
(iii) 500 *units"* of frozen loins.

(3) Given that Hague-Visby applied; whether all or any of the individual pieces of tuna, packages or units were enumerated in the relevant document as packed in each container for the purposes of article IV rule 5(c)?

Article IV rule 5(c) provides:

"Where a container ... is used to consolidate goods, the ***number of packages or units enumerated in the bill of lading as packed in such [container] shall be deemed the number of packages or units*** *for the purpose of this paragraph as far as these packages or units are concerned.* ***Except as aforesaid such [container] shall be considered the package or unit****."* [***emphasis added***]

The effect of rule 5(c) makes the container the *"package or unit"* for the purpose of rule 5(a) unless there was a sufficient specification of how the cargo inside compromised *"packages or units"*.

As regards Container A: the waybill made no mention of bags of tuna; therefore, the limit applicable to the bagged tuna was 666.67 units of account as the container was deemed to be the relevant *"package or unit"* (irrespective as to whether there were, in fact, 460 'packages' of frozen tuna parts).

As to the individual frozen tuna loins, the claimant argued: (i) each was a *"unit"* within article IV rule 5; (ii) the waybills stated that the containers were *"said to contain 206/520/500 pcs frozen Bluefin tuna loins"*; and therefore (iii) that amounted to an enumeration under rule 5(c).

The court agreed with the claimant and held that the wording used in the waybills was sufficient. Accordingly, the individual frozen loins were the *"packages or units"* since they were identified and enumerated in the waybills as being the cargo.

(4) Whether the limit fell to be calculated by reference to the cargo in all three containers collectively, or should be calculated by separate treatment of the cargo in each container individually?

This point was important as the extent of damage varied significantly between the containers.

The claimant submitted that article IV rule 5 created a single limit of liability, calculated by reference to the total number of packages or units which had been damaged.

The court disagreed, holding that there was a separate limit for each *"package or unit"*.

In the premises, the defendant's limit of liability was for up to 666.67 units of account for each frozen tuna loin and a single limit of liability of 666.67 units for the bagged tuna due to art 5(c). The court noted that, had the *Hague Rules* applied the defendant would have been liable for up to £100 for each bag.

In considering the weight-based limit, the court held that this was only relevant to the bagged tuna as each frozen loin weighed much less than the 333.34kg needed for the weight-based limit to be greater.

Comment

This case gives certainty in an area that previous authorities had not addressed: the legal implications of substituting a bill of lading with a waybill where the contract of carriage provides otherwise.

In short, it appears settled that, in cases where no bill of lading has been issued for cargo, as long as the contract of carriage contemplates the issuance of a bills of lading, that is sufficient to satisfy article I(b) and therefore sufficient for the *Hague-Visby Rules* to have the force of law (where compulsorily applicable).

Navalmar UK Limited v Kale Maden Hammaddeler Sanayi Ve Ticaret AS (MV "ARUNDEL CASTLE") [2017] EWHC 116 (Comm)

Whilst the Commercial Court has provided no definitive definition of 'port limits', their recent decision has provided much needed guidance as to the manner in which such a term will be interpreted by the Courts. This case acts as a helpful reminder to parties of the importance of ensuring any specific terms in a charterparty reflect the parties true intentions.

Background Facts

Navalmar UK Limited ("Owners"), chartered the "ARUNDEL CASTLE" (the "Vessel") to charterers on an amended Gencon 94 form. Clause 15 of the fixture recap provided:

> "[NOR] *to be tendered at both ends by cable/telex/telefax on vessels arrival at load/disch ports within port limits.* [NOR] *not to be tendered before commencement of laydays.*"

Gencon 94 Clause 6(c) stated:

> "*If the loading/discharging berth is not available on the Vessel's arrival at or off the port of loading/discharging, the*

> *Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there….*"

The Vessel was unable to proceed straight to berth at the loading port (Krishnapatnam, India) due to congestion and was directed to a location by the port authority to wait.

Owners issued the notice of readiness and a demurrage claim followed.

At arbitration, it was held that the NOR was invalid as the Vessel was outside '*port limits' as* defined by the relevant admiralty chart.

High Court

Owners appealed to the High Court arguing that the NOR was valid as '*port limits'* included any area that vessels were customarily asked to wait by port authorities or where the port authorities exercised authority or control and/or the definition of 'port' as per *Laytime Definitions for Charterparties 2013*:

> "[which included] *any area where vessels loaded or discharged cargo including berths, wharves, anchorages, buoys and offshore facilities as well as places outside the legal, fiscal or administrative area where vessels were ordered to wait for their turn no matter the distance from that area.*"

Owners' appeal was dismissed.

The Court, stated that the test for an 'arrived ship' was whether the vessel was within the limits as defined by any national or local law where applicable *The Johanna Oldenfdorff [1973]*.

In the event that no such law applied, it would then be considered whether or not the vessel was within the area where the relevant port had authority to regulate the movement and conduct of ships.

They noted that, whilst there was no authority to base a port limit on the area evidenced by an admiralty chart, the arbitrators were not incorrect to make such a conclusion of fact on the basis of the admiralty chart as they had been provided with limited material.

Comment

Following this judgment, a range of relevant factors may be considered when assessing whether or not a vessel would be deemed within port limits; there is no fixed or closed list.

In addition, it clarified that the definition of 'port' in *Laytime Definitions for Charterparties 2013,* which included places outside the legal, fiscal or administrative area where vessels are ordered to wait their turn, is only applicable when such definition is expressly incorporated by the parties.

This case acts as a reminder of the importance of ensuring that any contractual terms are carefully defined to ensure that the intentions of the parties are accurately represented.

London Arbitration 3/17 (2017) 969 LMLN 2

Background

The matter before the tribunal concerned the owners' claim for demurrage, or alternatively, damages for detention at the disport.

Owners of the subject vessel fixed her to charterers for the carriage of sawn timber in bundles.

There were specific provisions for laytime at the loadport.

The below was agreed for the disport:

"*COP [custom of the port] DISCHARGE AT [name of discharge port]"*

"1 GSB [good and safe berth] ALWAYS AFLOAT ALWAYS ACCESSIBLE BENDS AT ALL PORTS"

"DEMURRAGE USD 3800 PD OR PR FREE DESPATCH BENDS. ONCE IN DEMM IS ALWAYS IN DEMM CLAUSE TO BE APPLICABLE TO THIS C/P."

The vessel arrived at the disport at 07.30 on 14 January and tendered NOR.

The vessel did not reach berth until 20.00 on 31 January because of a strike of port workers and the port authority giving priority to vessels whose cargo was pre-slung. Discharging commenced at 21.30 on the same day and finished at 02.51 on 2 February.

Owners accepted that the time used in actual discharging (two days, five hours 21 minutes), was within *"COP"*.

Owners' claim and argument

Owners argued that the charterers were in breach of their obligation to provide a berth *"always accessible"* and were therefore liable in damages in the amount of US$62,779.17. Alternatively, Owners were entitled to claim demurrage of US$51,162.77.

Charterers' position and argument

Charterers denied liability, arguing that, by not having agreed specific laytime at the discharge port (rather for *"COP"*); the parties agreed that there would be no demurrage payable in respect of that port.

As regards breach of the *"always accessible"* provision, Charterers contended that this was the same as *"reachable on arrival"*. In any event, had the parties intended that the berth was to be available at the time NOR was tendered, such a provision would have been included in the charterparty.

Charterers suggested that (i) Owners should have pre-slung the cargo so that the port authority would have given the vessel priority; and (ii) Owners should have told them of the strike.

Finally, Charterers maintained that the berth was accessible for the vessel's ETA and only became inaccessible prior to her arrival. As such, no fault or liability could be attributed to Charterers.

Decision

The tribunal dismissed Charterers' argument because there was an agreement that there might be demurrage *"BENDS"* (both ends).

The tribunal had no hesitation in finding that, when the vessel arrived there was no berth that was accessible for her until 30 January. This was a clear breach of the *"always accessible"* provision.

Under the terms of the Charterparty, responsibility for loading, stowing and lashing the cargo lay with Charterers. Therefore, had Charterers wanted to pre-sling the cargo, they should have done so themselves.

The tribunal also refused to accept that it was Owners' responsibility to tell Charterers of the strike. On the contrary, if anyone should have known of the strike it was the Charterers themselves.

The tribunal accepted that Charterers were not to blame for the delay; however, that was not the issue. The issue was where legal responsibility lay under the terms of the contract. The answer to that question was that

Charterers had undertaken to provide a berth that would be accessible on arrival. Charterers were in clear breach of this.

The tribunal also rejected Charterers' submission that *"COP"* itself excluded the possibility of demurrage. It did not. All it meant was that the time allowed for an operation was to be assessed by reference not to some formula, but by what was reasonable according to the custom of the port. If more time was used than what was ascertained on that basis, demurrage might be payable.

The final issue for the tribunal to decide was the extent of the Owners' recovery – *demurrage or damages for detention*?

The tribunal's view was that Owners were entitled to damages for the breach and that those should put them in the position they would have been in had the contract been performed (i.e. had the berth been accessible to the vessel when she arrived).

Had a berth been available, she would have berthed and started discharging. However, she would have been subject to certain obstacles that were apparent from the statement of facts and that were taken into account in the Owners' laytime/demurrage statement.

As such, the true measure of the Owners' loss was the time which they calculated the ship was on demurrage. They were not entitled to demurrage as such, but as the rate of demurrage was to be taken as the *prima facie* measure of damages, the Owners were entitled to recover the smaller amount they claimed, i.e. US$51,162.77.

Comment

It seems clear that breach of an *"accessible on arrival"* provision is one in the same as a breach of *"reachable on arrival"*.

Accordingly, where there is an express undertaking that the berth is accessible / reachable, Charterers will not be absolved of liability for delay in reaching the berth notwithstanding the cause being beyond the control of Charterers (unless the particular event causing the delay is excluded).

London Arbitration 12/17 (2017) 974 LMLN 4

This arbitration concerned a conflict between two clauses in a charterparty.

The facts

The subject vessel was chartered for a period of about 210 days.

Disputes arose between the parties and owners claimed US$1,186,727.70 for, *inter alia*; outstanding for hire, meals and accommodation.

The key clauses

"31. LAW AND ARBITRAITON

Mediation The Company and the contractor undertake that all disputes, differences or questions at any time between the parties as to the construction to this Contract or as to any matter or thing arising out of it or in any way connected therewith shall be resolved between the parties in good faith by having the discussion between the Project Manager / Contract Manager level and if required may be taken up to the CEO/MD level to resolve the issues/disputes in the interest of the work and

at least three attempts shall be made by the both the parties in this direction.

Should any dispute cannot be resolved between the parties within sixty (60) days or any agreed extension thereof, any Party may refer the dispute to the arbitration by a single arbitrator. Unless otherwise agreed in writing, the arbitration shall be held at London, UK and shall be conducted in accordance with relevant acts and rules there under excluding any laws, opinions, or regulations that would require application of the laws of any other jurisdiction."

"21. APPLICABLE LAW

This Contract and the relationship of the parties hereunder shall be governed by and interpreted in accordance with the laws of Egypt and parties hereby agree to submit to the jurisdiction of the Egyptian Courts in Cairo."

Notwithstanding the sole arbitrator provision in clause 31, each party appointed its own arbitrator. Charterers said they needed a third arbitrator to be appointed before they served Defence submissions. This was agreed by Owners, and the President of the LMAA appointed a third arbitrator.

After this, the tribunal sent an email ordering the Respondent to serve its Defence submissions by a certain date. Charterers responded saying they would "…*provide all therequests* (sic) *of defence, documents and the memorandums of Defence*…*"* at the first *"…actual procedural session of the tribunal which must be held at the tribunal in front of all parties not at internet ...".*

In response, the Tribunal stated that in accordance with the LMAA Terms 2012 they did not have to have a "*first procedural session*", and went further explaining that the LMAA Terms gave the Tribunal wide ranging power to conduct the proceedings.

The email also included a peremptory order for the service of the Defence submissions and set out that failure to comply may risk that the Respondent would, under section 41(7) of the Arbitration Act 1996, be prohibited from putting forward a Defence or Counterclaim.

The Charterers responded and said they would provide their submissions at the "first actual hearing". The Tribunal wrote back stating that the arbitration would be conducted "*…in what is the absolutely normal way, which is to say that communications between the parties and the tribunal will be conducted in writing, and in practice that will almost always mean by email*".

Charterers then wrote to the Tribunal in a manner purporting to be submissions, stating that the contract was actually subject to Egyptian law and jurisdiction and not London arbitration.

Decision

Clause 31 was clear; it provided arbitration in London in accordance with English law. It also expressly excluded the laws of other jurisdictions from applying. The Tribunal, under its own jurisdiction, had to look at the conflict between clause 21 and 31 and it was a matter of construction as to which was applicable.

1. Clause 21 was headed "Applicable law". No reference was made in the heading to "Jurisdiction".
2. Clause 31 was had a more "all-embracing" heading – "Law and Arbitration".
3. The Tribunal also decided that is was difficult to imagine that where attempts to settle were provided for in clause 31 as a precursor to arbitration, that the parties intended for jurisdiction to be subject to the Egyptian Courts.
4. As such, the parties must have intended for the application of English law.
5. As well as this, the Charterers also appointed an arbitrator and demanded the appointment of a third arbitrator. This meant Charterers had waived their right to challenge the Tribunal's jurisdiction.

Also note the following:

6. Charterers had not argued that attempts to settle had not taken place pursuant to clause 31.
7. The Tribunal took that view that attempts to settle must have taken place, and if they had not, then the parties were content to proceed to arbitration (*presumably because they both appointed arbitrators*).
8. The only other matter put forward by Charterers related to Egyptian tax laws. Charterers had not put in any further evidence regarding this. On the assumption that Egyptian law was the same as English law, the failure to produce any evidence meant that it had to fail.
9. Finally, the Charterers had made an application in the Egyptian Courts and asked that there be a suspension to the arbitration proceedings. The Tribunal decided that there would be no suspension and that the proceedings had been brought properly and that there was jurisdiction under the Charterparty.

Comment

(a) This is a clear example of the parties and/or their brokers not taking enough care at the negotiating stage of the Charterparty. Clauses which have different terms regarding the same issue are a real problem and can give one party the chance to try and disrupt legal proceedings.

(b) It also shows the importance of obtaining early legal advice from a Club or solicitor regarding the importance of challenging jurisdiction or risking that a party may waive its right to mount a challenge. The initial steps taken by Charterers meant that challenging jurisdiction was not possible later on.

Sinocore International Co. Ltd. v RBRG Trading (UK) Ltd [2017] EWHC 251 (Comm)

Question of law

Could a foreign arbitration award, in which the successful Claimants had issued forged bills of lading to attempt to trigger payment under a letter of credit, survive the "fraud unravels all" principle and be enforceable in England?

Facts

Claimant Sellers (Sinocore) entered into a sales contract in April 2010 to sell 14,500 mt of cold rolled steel coils to Buyers (RBRG) at a price of $870/mt. An additional clause was added to the contract in May providing the Buyers a right to inspect the goods prior to loading.

The sales contract required the Buyers to open a letter of credit to allow shipment by 31 July 2010 at the latest, and a letter of credit was duly provided on this basis.

Later in June however, the Buyers purported to change this date in the letter of credit to "*20th to 30th July 2010*" in order to prevent early shipment and allow for inspection prior to loading. That change was never agreed by the Sellers and was ineffective.

The coils were loaded and genuine bills were issued, at Xinjang port on 5th and 6th July. Sellers informed Buyers of this. On 22 July 2010, Sellers' bank requested payment from Buyers' bank under the letter of credit, presenting bills of lading dated 20th and 21st July 2010. These bills were forgeries, issued in order to comply with the (ineffective) amended date in the letter of credit.

Buyers initially obtained a temporary injunction preventing payment from their bank in relation to the forged bills of lading. As a result of this, Sellers ultimately sold the coils to another buyer at a lower price.

Dispute

The sale contract was subject to the China International Economic and Trade Arbitration Commission (CIETAC) and Chinese law. The Buyers initially commenced arbitration proceedings claiming damages arising from Sellers' breach in preventing inspection, as per the additional clause. Buyers argued that Sellers had deliberately shipped the coils early to prevent inspection and then forged bills with false loading dates to hide this.

Sellers counterclaimed for Buyers' repudiatory breach in not paying for the goods, and claimed the difference between the contract price and the price Sellers subsequently resold the cargo for.

The Chinese arbitrators found in favour of the Sellers. The arbitrators held that the relevant breach which had caused the Sellers' loss had been Buyer's breach in procuring an amended letter of credit which was inconsistent with the sales contract. Whilst the forged bills were submitted to deceive Buyers' bank, they had not deceived Buyers who had been aware of the true loading and shipment dates. The Buyers' attempt to amend the letter of credit had been akin to a '*trap set by the buyer for the seller*'.

The Sellers sought leave to enforce the Chinese arbitration award, by issuing an application to the Commercial Court for judgment to be entered in the terms of the Chinese arbitration award under the New York convention. Buyers opposed this under section 103 Arbitration Act, contending that enforcement of an award in favour of a party who had committed fraud would be contrary to public policy as *ex turpi causa non oritur actio* or in the words of Lord Diplock '*fraud unravels all*'.

High Court Decision

The High Court upheld the Sellers' claim, and permitted the enforcement of the Chinese arbitration award. The Chinese arbitration award did not uphold a claim for payment against forged bills of lading, but rather damages for breach of contract committed by the Buyers before the forgery of the bills of lading. The Chinese arbitrators were aware of the forgery and the Buyers did not allege that the tribunal had been misled or had acted improperly in any way.

The court held that public policy defences are to be treated with extreme caution, and restated the principles that a court will not void a contract which may have been "tainted" by fraudulent practices, but which was otherwise legal. To permit such an approach would introduce uncertainty and undermine party autonomy. Even if it were correct to consider a wider approach of a contract being "tainted" by illegality, the public interest in the finality of an international arbitration award would outweigh any broad objection on the grounds that the transaction was "tainted" by fraud.

Comment

This case represents another example (similar to that set in the recent insurance case considering 'fraudulent device') of the court taking a restrictive approach to invalidating contracts where fraud or deceit is involved. Firstly, the fraud must constitute an essential part of the Claimant's claim in order for the fraud to 'unravel all'. If it does not, it seems the court will likely let the contract stand. This is also a victory for enforcement under the New York Convention. Awards should be readily enforceable without further litigation over the original findings. In that regard, it was made clear that there was a greater public interest in upholding the certainty of arbitration awards over any public interest in voiding contracts which had been tainted by fraud.

Sam Purpose AS v Transnav Purpose Navigation Ltd (The "Sam Purpose") – QBD (Comm Ct) (HHJ Waksman QC sitting as a High Court Judge) [2017] EWHC 719 (Comm)

Facts

Sam Purpose (the "Vessel"), owned by Sam Purpose AS (the "Claimant"), was arrested on 19 January 2017 by Transnav (the "Defendant") in Lagos, Nigeria, following the commencement of substantive proceedings in Nigeria on 10 January 2017, on account of sums owed by the Claimant following termination of the charterparty between the parties. The charterparty contained a London arbitration clause.

An *ex parte* on notice anti-suit injunction was subsequently applied for and granted by the Commercial Court in favour of the Claimant on 1 February 2017, although the Court had been provided with a skeleton argument by the Defendant. On 8 February 2017, the Defendant applied for judgment in default on its substantive claim in the Nigerian Court, but this was withdrawn by the Defendant, after being informed by the Claimant that this would result in a breach of the anti-suit injunction and the threat of contempt of court proceedings.

On 23 February, the Defendant applied to the Nigerian Court for a stay of its substantive proceedings, on the condition that the arrest should remain in place, pursuant to section 10(1) and (2) of the Nigerian Admiralty Jurisdiction Act 1991. This Nigerian law provision had not been referred to before or at the anti-suit injunction hearing in the Commercial Court on 1 February 2017.

The decision in this case was in relation to the return date hearing for the *ex parte* injunction granted on 1 February, as well as the hearing of the Claimant's claim for permanent injunctive relief. The Claimant sought that the Defendant not only be restrained from continuing the foreign proceedings, but should also take positive steps to discontinue the Nigerian proceedings. The Defendant unsurprisingly argued that no further injunctive relief be granted, on the basis that as the Nigerian law provision was plainly relevant to the future conduct of the matter, the Claimant's failure to refer to it previously, amounted to material non-disclosure.

The Claimant argued instead that the Nigerian provision, as well as the Defendant's belated application on 23 February to the Nigerian Court relying on the Nigerian provision to stay proceedings but maintain the arrest, was irrelevant. The Claimant argued that the Defendant had clearly commenced proceedings in breach of the relevant arbitration clause, and this was not done solely for the purpose of arresting the Vessel.

Decision

The judge referred to the decision in *Kallang Shipping v AXA (Kallang No 2)* [2009] 1 Ll Rep 124, where it was held that English courts *"…will not restrain a party to an English arbitration clause from arresting a vessel in another jurisdiction where the sole purpose of the arrest is to obtain reasonable security for the claim to be arbitrated in England… Where, however, the Claimants' actions go beyond simply seeking reasonable security for the arbitration proceedings, there is a breach of the arbitration clause which the English Court will restrain."*

The analysis will turn on the facts of each case. In addition, a decision on whether or not injunctive relief is necessary is to be assessed based on the facts at the time of the hearing, and as a matter of principle, injunctions should not be granted simply to punish the foreign party for earlier misconduct.

The judge rejected the Claimant's argument that the very commencement of the substantive claim in the Nigerian courts was a breach of the arbitration clause which tainted the rest of that action including the arrest, holding that the question of breach is separate from the question of an injunction. Although there was undoubtedly a breach of the arbitration clause, the proceedings were not commenced exclusively to obtain to obtain an arrest to secure an arbitration claim; there was a historic breach which the Defendant argued had been/was being cured, as the only steps they were taking in the Nigerian proceedings was to stay them, leaving only the arrest in place.

The judge also considered whether there was any risk of the Defendant going further than simply seeking the continuation of the arrest/or reasonable security. Having rejected the Claimant's argument that the rest of the Nigerian court action was tainted, the judge refused to grant a mandatory injunction forcing the Defendant to discontinue the Nigerian Court proceedings as a whole.

In relation to non-disclosure, the judge felt that the existence of the Nigerian law provision was clearly material and would have been relevant to his decision on the injunction, even though he would probably still have granted a negative order. However the Nigerian law provision would have had an impact on the decision whether or not to grant continued relief going forward, as happened in reality. The Claimant had relied on the advice of their Nigerian lawyer that substantive proceedings had to be commenced to obtain an arrest and who had surprisingly not made reference to the Nigerian law provision, and the Claimant was entitled to do so and take it at face value.

On whether to exercise the court's discretion where there is material non-disclosure leading to the discharge of the original order, the judge mentioned a number of factors that favoured the Claimant, such as the fact that the Defendant had also not referred to the Nigerian law provision in its skeleton argument in relation to the 1 February 2017 hearing. The judge therefore declined to discharge the original order (or make a new order as a result), despite there being material non-disclosure. In addition however, the judge refused to grant the Claimant the final relief sought to force the Defendant to discontinue the Nigerian proceedings.

Comment

Although this case does not break new ground, reaffirming the law on injunctive relief and non-disclosure, it is worth bearing in mind that the Court made a distinction between whether there has been a breach of an arbitration clause - which is to be assessed at the time, and is a matter of fact; and whether injunctive relief is to be granted - which is to be assessed at the time of the hearing.

In addition, arresting parties need to be aware that where arrest proceedings are commenced in foreign jurisdictions, in breach of English arbitration clauses, and the sole purpose is not to obtain reasonable security for an arbitration claim, English law will intervene to restrain such a party.

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