MARITIME DISPUTES NEWSLETTER – JULY 2020: MARITIME DECISIONS

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SCROLL DOWN FOR THE LATEST MARITIME DECISIONS MADE BY THE ENGLISH COURTS.

How do you determine who the parties to a contract of carriage are? (The Nortrader)

Although the starting point for determining the identity of parties to a contract of carriage evidenced by a bill of lading will be the persons named in the bill of lading as shipper and carrier, the Commercial Court has emphasised that such a presumption is just that – a starting point. Where a claimant had been erroneously named as shipper in a bill of lading and had given neither express, nor implied authority for a shipping agent to enter into the contract on its behalf, an arbitral tribunal had no jurisdiction over it. The fact that the claimant had been erroneously named in over 30 previous bills of lading and had taken no active steps to correct the error did not amount to authority without more.

MVV Environment Devonport Ltd v NTO Shipping GmbH & Co KG MS 'Nortrader' [2020] EWHC 1371 (Comm)

> "The ordinary meaning of "the operator of a ship" in … the 1976 Limitation Convention embraces not only the manager of the ship but also the entity which, with the permission of the owner, directs its employees to board the ship and operate her in the ordinary course of the ship's business."
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> Splitt Chartering APS & Ors v Saga Shipholding Norway AS & Ors

The meaning of "manager" and "operator" under the 1976 Limitation Convention (The Stema Barge II)

The Admiralty Court has addressed the meaning of "manager" and "operator" under the 1976 Limitation Convention for the first time. In the context of claims for damage to undersea cables allegedly caused by the anchor of an unmanned barge, Mr Justice Teare noted that in ordinary usage the terms of "manager" and "operator" may often be used interchangeably. However, he considered that a "manager" is the person entrusted by the owner with sufficient of the tasks involved in ensuring a vessel is safely operated, properly manned and maintained and profitably employed to justify describing that person as the manager. The "operator", at least in the context of a dumb barge, could extend beyond the manager and include an entity which, with the permission of the owner, directs its employees to board the unmanned ship and operate her in the ordinary course of the ship's business. Such a person was therefore also entitled to limit their liability pursuant to the Limitation Convention.

Splitt Chartering APS & Ors v Saga Shipholding Norway AS & Ors [2020] EWHC 1294 (Admlty)

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Were marine insurance claims governed by English or Italian jurisdiction clauses? (The Kapitan Veselkov)

In a case regarding the liability of Hull and Machinery and Increased Value insurers in relation to the sinking of a pelagic freezer stern trawler, the English Commercial Court has highlighted the issues can arise from apparently conflicting jurisdiction provisions. Although the relevant policies made reference to the 1988 edition Camogli Policy, a form of marine insurance policy prepared for use in the Italian market which provides for Italian jurisdiction, it was held that there was a good arguable case that in fact the English court had exclusive jurisdiction. The court considered that a provision in the Hull and Machinery cover which provided for English jurisdiction (which was also incorporated into the Increased Value cover), was intended to operate on a standalone basis, rather than be read together with the jurisdiction provision in the Camogli Policy.

Generali Italia SpA & Ors v Pelagic Fisheries Corp & Anr [2020] EWHC 1228 (Comm)

Mandatory anti-suit injunction requiring discontinuance of claims brought in breach of arbitration agreement (The Southern Explorer)

The English court has granted an anti-suit injunction requiring the insurer of cargo said to have been damaged in the course of a vessel collision in 2014 to discontinue contractual claims brought against the vessel managers, time charterers and voyage charterers in Brazil in breach of London arbitration clauses. Although the insurer argued that the anti-suit application was a “last minute bid” to halt the Brazilian proceedings and that it should have been brought earlier, the court disagreed, holding the applicants had been entitled to rely on an undertaking previously given by the insurer not to pursue the claims in Brazil.

Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil SA (formerly Ace Seguradora SA) [2020] EWHC 1223 (Comm)

Anti-suit injunction restraining pursuit of misdelivery claims in Singapore made conditional on agreement not to rely on time bar arguments in London arbitration (Archagelos Gabriel)

Suggesting a need for consistency in a party’s approach to cross-border cases, the English court has granted a conditional anti-suit injunction restraining the holder of bills of lading from continuing misdelivery proceedings against an alleged carrier in Singapore on the basis that such proceedings constituted a breach of an arbitration clause. The bill holder had brought a contractual claim against the alleged carrier in Singapore on a “belt and braces” basis, but denied the existence of that contract in the English proceedings – an approach criticised by the judge as “somewhat Janus-faced”. However, when considering balance of convenience (discretionary) arguments, although the fact that the bill holder might be prevented from bringing the action in England pursuant to the time bar under Article III Rule 6 of the Hague Rules was not enough to constitute a strong reason not to make the injunction, the judge considered that an injunction would only be just and convenient if the applicant agreed not to rely on any time bar argument in the London arbitration.

Times Trading Corp v National Bank of Fujairah (Dubai Branch) [2020] EWHC 1078 (Comm)

Cancellation, notices and the prevention principle in shipbuilding contracts

In a case where WFW acted for the successful buyer, the English court has upheld the award of an LMAA arbitration tribunal on key questions concerning SAJ form shipbuilding contracts, holding that the relevant contracts contained a complete code for extensions of time and cancellation and thus the prevention principle did not apply. The decision also provides welcome clarity on points covering notices, modifications and non-payment of instalments.

Jiangsu Guoxin Corporation Ltd (formerly known as Sainty Marine Corporation Ltd) v Precious Shipping Public Co Ltd [2020] EWHC 1030 (Comm)

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"In normal circumstances an Admiralty Court, faced with an application to release a valuable vessel from arrest, would determine whether the security offered was such as to allow the release of the vessel from arrest without delay."

Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd & Ors

Making demands of parents – interpreting see-to-it and on-demand guarantees

Providing helpful guidance on the correct approach to determining whether an instrument is a “see to it” guarantee or a demand bond, and arguably raising the bar for establishing that an instrument issued outside the banking context is an on-demand guarantee the Commercial Court has found that a shipbuilding guarantee given by a parent company was a “see to it” guarantee. This was notwithstanding the fact that it was couched in language indicative of a primary obligation and described as an “irrevocable payment guarantee”.

Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited & Anr [2020] EWHC 803 (Comm)

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Ship mortgagee was not bound by exclusive jurisdiction clause in hull and machinery risks policy (The Atlantik Confidence)

In a significant case for ship financiers, the Supreme Court has rejected arguments that a bank which had taken an assignment of a hull and machinery risks insurance policy was bound by the exclusive jurisdiction clause in the policy. Insurers had paid out under the policy after the vessel sank off the coast of Oman, but in separate proceedings the Admiralty Court subsequently found the vessel had been scuttled. Insurers therefore brought claims against the owners, managers and the bank on the basis of misrepresentation or restitution to recover the money paid. However, the Supreme Court held that while the bank could not, as an assignee, act in a way which was inconsistent with the terms of the policy, it had not done so in this case because it had never asserted its rights under the policy. The Supreme Court also considered that the rules of jurisdiction in respect of matters relating to insurance set out in the Brussels Recast Regulation applied and the insurers had to sue the bank in its place of domicile. In doing so the court rejected the suggestion that there is any “weaker party” exception to such rules.

Aspen Underwriting Ltd & Ors v Credit Europe Bank NV [2020] UKSC 11

Security in respect of release of vessel arrested in Singapore (The Miracle Hope)

In two cases concerning the same charterparty chain and charterparty indemnity clauses for discharge of cargo without presentation of bills of lading, the Commercial Court made mandatory injunctions requiring the defendants to each provide security to ensure the release of a vessel that had been arrested by the bill of lading holders in Singapore following discharge of cargo to another party. The court subsequently clarified the terms of its order, holding that it was for the Singapore court to determine whether the security offered would be adequate, and since it would take some time for the Singapore court to make such a determination due to the Covid-19 pandemic, a payment into court should be made.

Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd & Ors [2020] EWHC 726 (Comm)

Clearlake Chartering USA Inc & Anr v Petroleo Brasileiro SA [2020] EWHC 805 (Comm)

Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd & Ors [2020] EWHC 995 (Comm)

"It is to be expected that applications for an order setting aside a sale will be rare because in the usual case where it has been necessary for the claimant to seek an order for sale that will because the sale of the vessel is the only means by which his claim can be satisfied."

Qatar National Bank (QPSC) v The Owners of the Yacht Force India

An unusual case where an order for sale was set aside (The Force India)

In a rare, perhaps even exceptional case, the Admiralty Court has taken the decision to set aside an order for the sale of a super yacht after the claimant mortgagee had obtained judgment in rem but the judgment debt had subsequently been discharged by a third party. Noting that, if it became the practice for orders for sale to be set aside, those willing to incur the time and expense of making a bid might become disinclined to do so in future, the court reassured the maritime community that, in order to protect the service provided by the Admiralty Court, the court should generally be reluctant to set aside a sale.

Qatar National Bank (QPSC) v The Owners of the Yacht Force India [2020] EWHC 719 (Admlty)

Preservation of assets in support of arbitration (The DL Carnation)

In a case concerning monies agreed in a settlement agreement to be payable as between owners, charterers and sub charterers following the early termination of charterparties, the Commercial Court, in overturning earlier orders, has emphasised the importance of demonstrating necessity when seeking orders to preserve assets in support of arbitration under section 44(3) Arbitration Act 1996.

Daelim Corp v Bonita Co Ltd & Ors [2020] EWHC 697 (Comm)

Documentary obligation in time bar clause required bills of lading to be provided (The MTM Hong Kong)

The English courts have once again considered the interpretation of charterparty time bar clauses, noting that the commercial intention of such clauses is to ensure claims are made promptly so they can be investigated and, if possible, resolved while the facts are fresh. However, while the obligation to provide "all supporting documents" is not meant to be onerous, the court considered that in this case it did extend to a requirement to provide copies of the relevant bills of lading in relation to a claim for demurrage.

Tricon Energy Ltd v MTM Trading LLC [2020] EWHC 700 (Comm)

Owners liable for repair contract as undisclosed principals, enabling in rem claim to be brought against vessel (The November)

In a decision which will be welcomed by shipyards, the Admiralty Court has found that a contract for the drydocking, conversion and painting of a swim end barge built in the 1940s was entered into on behalf of the vessel's owners as undisclosed principals. They were therefore liable on a claim for the cost of the works *in personam*, and under the Senior Courts Act 1981 a claim could be brought *in rem* against the vessel.

Turks Shipyard Limited v The Owners of the Vessel November [2020] EWHC 661 (Admlty)

The need for demands under guarantees to be clearly identified as demands

Providing an important reminder to parties seeking payment under guarantees of the need for demands to clearly intimate that payment is required, the English courts have held that emails sent by shipyards which were described as notices for non-payment did not constitute sufficiently clear demands for payment. While the word demand need not be used, mere notice of a debtor's default will not constitute a sufficient demand by implication. In this case the shipyards were, however, able to rely on subsequent demands which were sufficiently clear.

Korea Shipbuilding & Offshore Engineering Co Ltd & Anr v F Whale Corp & Ors [2020] EWHC 631 (Comm)

Arbitration provisions in voyage charter incorporated by reference into bills of lading (The Joker)

Emphasising the key principle of freedom to contract, the English court has held that an arbitration provision in a voyage charter had been incorporated by reference into bills of lading, and accordingly an anti-suit injunction should be made restraining cargo claims brought by the bill holder in a foreign court in breach of that provision. The court emphasised that the bill holder, as buyer, had been free to specify the terms upon which it entitled and required the seller to cause it to become privy to a contract with the carrier, and the bills of lading could be taken to have conformed to the bill holder's contractual requirements. If it had not wished to be obliged to arbitrate in London, then it had been free to contract on that basis.

Seniority Shipping Corp SA v City Seed Crushing Industries Ltd [2019] EWHC 3541 (Comm)

> "I do not accept that it is open to a claimant to simply assert a right to a recovery based upon quantum meruit as an alternative claim if he fails to establish that the circumstances are such as to render the case one of salvage."
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> Keynvor Morlift Ltd & Ors v The Vessel "Kuzman Minin" & Ors

Salvage operations under the Salvage Convention 1989 (The Kuzma Minin)

Holding that the actions of three claimants in relation to the grounding of a bulk carrier were undoubtedly salvage operations within the meaning of the Salvage Convention 1989, given that the casualty was on any view in danger and the operations undertaken by the claimants were successful, the High Court considered they were entitled to an award of £450,000. However, the court commented that it would have rejected their alternative argument that, if the services rendered were not recognised as salvage under the Convention, the claimants would have been entitled to an alternative award based upon equitable principles of restitution or quantum meruit. Such a claim was possible, but only if a claimant could establish an express or implied contract for the provision of some other service, such as towage. The case is also noteworthy for the judge's decision to admit in evidence an MAIB report, contrary to the decision in *Ocean Prefect Shipping Limited v Dampskibsselskabet Norden AS* (2019) which was handed down just a few weeks earlier. The different approaches may, in part, be attributable to the fact that in this case the proceedings solely dealt with issues of salvage, and not the apportionment of fault or blame.

Keynvor Morlift Ltd & Ors v The Vessel "Kuzman Minin" & Ors [2019] EWHC 3557 (Admlty)

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KEY CONTACTS

ANDREW WARD
PARTNER • LONDON
T: +44 20 7863 8950
award@wfw.com