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1. ARBITRATION

1.1 COURT HAS JURISDICTION TO GRANT DECLARATORY AND INJUNCTIVE RELIEF WHEN THERE IS NO INTENDED ARBITRATION

In the case of [*AES - UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* \[2010\] EWHC 772 \(Comm\)](#), the parties were both companies carrying on business in Kazakhstan. In 1997 the Republic (which subsequently transferred its rights to JSC) granted to AES-UST's predecessor in title, Tau, a 20-year concession to operate hydroelectric plant and equipment for the production of hydroelectric energy in Kazakhstan. The Concession Agreement, governed by Kazhakstan law, contained an arbitration clause governed by English law under which disputes arising out of, or in connection with, the Concession Agreement were to be resolved in London under the rules of the International Chamber of Commerce. Subsequently, the parties entered into an Amended Concession Agreement. Disputes broke out between the parties. JSC commenced proceedings against AES-UST in Kazakhstan. AES-UST applied to have the claim dismissed on the ground that it fell within the arbitration clause, but the court ruled that the arbitration clause was void. AES-UST then applied to the English court for declaratory and injunctive relief, and sought permission to serve the claim form outside the jurisdiction. Burton J held as follows.

(1) The court had no jurisdiction to grant relief under section 44 of the [Arbitration Act 1996](#) where there was no existing or pending arbitration (AES-UST having no reason to commence arbitration because the claim was against it) and so the court had no jurisdiction to give permission for service abroad under [CPR Part 62.5](#).

(2) The court did, however, have jurisdiction to grant relief under section 37 of the [Senior Courts Act 1981](#), because the parties had agreed to submit their dispute to arbitration and the proceedings in Kazakhstan were in breach of contract. Relief would be granted to restrain JSC from pursuing its claim in Kazakhstan. The power of the court to give permission for service out in respect of relief under section 37 was conferred by CPR 62.5(c).

(3) Although AES-UST was not a party to the arbitration clause, the Amended Concession Agreement conferred upon AES-UST the right to enforce the arbitration clause, and it thus had the benefit of the clause under the [Contracts \(Rights of Third Parties\) Act 1999](#), sections 1 and 8.

(4) The English court was not required to recognise the judgment of the Kazakhstan court, because it was given in breach of the arbitration clause: [Civil Jurisdiction and Judgments Act 1982](#), section 32.

(5) AES-USK had not submitted to the jurisdiction of the Kazakh courts and was entitled to challenge the ruling: [Civil Jurisdiction and Judgments Act 1982](#), section 33.

This decision will be welcomed by parties who do not want to commence arbitration themselves, but do not wish to be sued otherwise than in arbitration. The judgment makes it clear that they do not necessarily need to commence an arbitration to obtain a declaration as to the existence or validity of an arbitration clause.

1.2 WHETHER ENGLISH COURT SHOULD REFUSE ENFORCEMENT OF ARBITRATION AWARD WHERE APPEAL PENDING IN FOREIGN COURT

In the case of [*Continental Transfert Technique Limited v Federal Government of Nigeria*](#) unreported, the applicant obtained an arbitration award in Nigeria against the respondent, in the sum of £140 million. The applicant obtained a judgment in terms of the award under section 101(3) of the [Arbitration Act 1996](#) and sought permission to enforce the judgment. The respondent then belatedly appealed to the Nigerian courts against the award, and at the time of the present application the appeal was pending. Teare J granted a stay on condition that the respondent provided security of £100 million. The court held as follows.

(1) The power of the court to refuse enforcement under section 103(2)(f) of the 1996 Act (award not yet binding on the parties) did not provide a defence to enforcement, because it applied automatically only where a foreign court had suspended the award - it was not enough that there had been a challenge to the award.

(2) The respondent could not rely upon state immunity, as section 2 of the [State Immunity Act 1978](#) did not give immunity in respect of a commercial transaction.

(3) A stay would, however, be granted under section 103(5) of the Arbitration Act 1996. The court had a discretion as to whether or not to enforce the award under RSC Order 47 rule 1(1) (not replaced by the Civil Procedure Rules), and section 103(5) of the 1996 Act conferred upon the court a discretion, where there was a pending application to a foreign court for the award to be set aside, to adjourn enforcement proceedings. In the present case the application to the Nigerian courts did not have a real prospect of success and there was evidence of delaying tactics by the respondent. The appropriate remedy was to grant a stay but subject to the provision of substantial security by the respondent.

1.3 ICC REVISES ITS ARBITRATION COSTS AND FEES

The International Chamber of Commerce (ICC) has revised its arbitration costs and fees which will increase with effect from 1 May 2010. The ICC has a sliding scale of fees depending on the amount in dispute. The amendment adjusts the rates applicable to each “slice” of the amount in dispute, with an average of 0.14% being added to most slices. Further, a new slice has been added to distinguish between cases valued at US\$100-500 million and those over US\$500 million (for the second category, a flat rate of US\$113,215 will be charged for administrative expenses and arbitrators’ fees will be calculated using rates that are the same, or slightly less, than before). The advance payment required when filing a Request for Arbitration has also increased from US\$2,500 to US\$3,000.

The changes will apply to all arbitrations commenced on and after 1 May 2010.

1.4 LCIA INDIA LAUNCHES NEW ARBITRATION RULES

LCIA India has launched its arbitration rules at a conference held on 17 April 2010 at the Taj Mahal Palace and Towers in Mumbai. The conference, which marked the first anniversary of the launch of LCIA India, saw participation from about 150 delegates, including senior arbitration practitioners and leading in-house counsel from the sub-continent and beyond.

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The LCIA India Arbitration Rules are, to a large extent, based on the LCIA’s own arbitration rules, but with certain provisions reworked to reflect the interface with the Indian Arbitration Act 1996, and to address the recurring issues of delay and cost inherent in many ad hoc arbitrations. The rules include several new provisions aimed specifically at expediting proceedings, including an express requirement that all prospective arbitrators confirm their ability to devote sufficient time to ensure the expeditious conduct of the arbitration. Another new Article provides expressly that the tribunal may take into account the conduct and co-operation, or non-co-operation, of the parties during the arbitration when determining the allocation of costs.

LCIA India has also produced a set of Notes for Arbitrators which provide guidance to arbitrators conducting arbitrations under the LCIA India Rules, on issues relating to independence, impartiality, confidentiality and the management of time and costs.

The LCIA India Rules came into force with effect from 17 April 2010.

2. COSTS

2.1 KEEPING YOUR CLIENT INFORMED OF COSTS

The case of [*Eversheds LLP v Michael and Simone Cuddy \[2009\] EWHC 90154 \(Costs\)*](#), provides a cogent reminder of the importance of keeping clients informed of the costs position on their cases. It emphasises the need for solicitors to comply both with the requirements of the relevant professional conduct rules and with their own terms of business. The Solicitors' Costs Information and Client Care Code 1999, considered in this judgment, was replaced by the Solicitors' Code of Conduct with effect from 1 July 2007. However, both contain similar requirements in terms of keeping clients informed about costs so this judgment sounds a cautionary reminder to be heeded by practitioners.

The judgment also highlights the importance for solicitors of keeping detailed attendance notes of any discussions about costs, plus a written record of the costs information that has been provided to the client. In this case, the absence of such contemporaneous records were met with some criticism from the judge and influenced his findings on the facts.

Costs management by judges is something that looks set to increase in line with Jackson LJ's recommendations following his Civil Litigation Costs Review and costs management pilot schemes which are already under way. Practitioners are advised to ensure that they have good working practices in place that comply with professional requirements and their own terms of business.

3. EU

3.1 SWITZERLAND TO RATIFY THE NEW LUGANO CONVENTION

The new Lugano Convention was signed in 2007 (2007 Lugano Convention). Following a decision of the Swiss Federal Council on 31 March 2010, the 2007 Lugano Convention will be ratified by Switzerland with effect from 1 January 2011. The effect of this is that issues of jurisdiction and enforcement of judgments as between EU member states and Switzerland will continue to be governed by the 1988 Lugano Convention until that date, but from that date they will be governed by the 2007 Lugano Convention.

3.2 ECHR HOLDS THAT INSTITUTING PROCEEDINGS FOR RECOGNITION OF A FOREIGN JUDGMENT INTERRUPTS LIMITATION PERIOD

In [Vrbica v Croatia \(32540/05\) \[2010\] ECHR 424](#), the European Court of Human Rights (ECHR) considered whether there had been a breach of Article 1 of Protocol 1 (protection of property) and Article 6 (right to a fair hearing) of the European Convention on Human Rights (the Convention), because of the refusal of the Croatian courts to enforce a judgment, given by a court in Montenegro and judicially recognised in Croatia, on the grounds that it was time-barred.

The ECHR held that instituting proceedings for the recognition of a foreign judgment would interrupt the running of the statutory limitation period and it was untenable to hold otherwise. Croatia had violated Article 1 of Protocol 1 and Article 6. It should be noted that, although the judges came to a unanimous conclusion, their reasoning on Article 6 was different.

3.3 EUROPEAN UNION COMMITTEE REPORTS ON COMBATING SOMALI PIRACY

In its twelfth report of Session 2009/10, the European Union Committee notes that piracy in the Gulf of Aden and the Indian Ocean is a serious and ongoing threat to UK and EU interests. States the EU's Operation Atalanta has made a strong contribution to combating piracy, however there are a number of areas that require action. The Committee recommends: more surveillance aircraft for the Atalanta fleet; provision of a tanker so Atalanta vessels do not have to return to port to refuel; that the EU should insist that the World Food Programme (WFP) charter faster, larger and more modern vessels; that it should be a condition of the award of a WFP contract that, when requested, the flag state allow these vessels to carry Atalanta military forces on board; military personnel placed on commercial shipping should be given specialised training; and the insurance industry do more to ensure that commercial shipping transiting the area complies with tried and tested procedures to reduce the risk of capture by pirates, and that it should impose increased insurance premiums on ship operators who do not comply. The Committee agrees with the increasingly robust action taken against pirates by Atalanta forces and welcomes the EU's agreements and ongoing negotiations with countries to prosecute pirates. States there will be no solution to the problem of piracy without a solution to the root causes of the conflict on land in Somalia, and expresses support for the EU's efforts to deal with Somalia's problems by building up the security sector, providing humanitarian assistance and assisting the authorities to strengthen their coastguards. Concludes that if the piracy problems is not robustly tackled, there will be copy-cat piracy elsewhere on the world's shipping lanes adjacent to failed states or regions where a government's writ fails to reach.

4. INSURANCE

4.1 THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010

The above is a new Act to make provision about the rights of third parties against insurers of liabilities to third parties in the case where the insured is insolvent, and in certain other cases.

The Act was intended to update the law to reflect changes in insolvency law since the 1930s. This includes providing for rights to be transferred to a third party where an insured is facing financial difficulties and enters into certain alternatives to insolvency such as voluntary procedures between the insured and the insured's creditors. The Act continues the underlying policy of the [1930 Act](#), which is to ensure that on insolvency the proceeds of insurance policies go to the purpose for which they were intended, and are not swallowed up in the general funds available to creditors. The key innovations introduced by the new Act relate, first, to the procedure by which the third party's rights can be established and, secondly, to the process by which the third party can obtain information about the insurance policy.

Under the 1930 Act, a third party could not issue proceedings against an insurer without first establishing the existence and amount of the insured's liability. This could involve expensive and time-consuming legal proceedings. The Act removes the need for multiple sets of proceedings by allowing the third party to issue proceedings directly against the insurer and resolving all issues (including the insured's liability) within those proceedings. Further, under the 1930 Act, if the insured was a defunct body which had been struck off the register of companies, the third party would first have had to institute proceedings to restore it to the register in order to be able to sue it. In removing the need for the third party to sue the insured, the Act also removes the need for such restoration.

The Act improves the third party's rights to information about the insurance policy, allowing the third party to obtain information at an early stage about the rights transferred to him or her in order to enable an informed decision to be taken about whether or not to commence or continue litigation.

4.2 WHETHER NEGLIGENCE OF BROKER CAUSATIVE OF AVOIDANCE OF POLICY

In the case of [Jones v Environcom \[2010\] EWHC 759 \(Comm\)](#), the defendants were engaged in the business of recycling electrical goods waste, including refrigerators. Most of the refrigerators at the plant were chlorofluorocarbon (CFC) refrigerators. CFC's were considered damaging to the environment and the defendant had equipment designed to extract and destroy CFC's present in disused refrigerators. About 15% were of the refrigerators processed were 'pentane' fridges. Pentane was an alternative chemical used as a refrigerant in more modern refrigerators. Whilst pentane was not ozone-depleting, it was highly flammable. Part of the process of recycling involved the removal of bolts from the refrigerator. On occasions that was done with the use of a plasma gun. Plasma cutting was considered a hot burning technique by the industry and the health and safety executive. Several fires had occurred at the defendants' plant, possibly as a result of use of the plasma gun in the presence of pentane. As a result of a major fire at the plant the defendants sought to claim on the insurance policy that they had with the claimant insurers. The policy had been brokered through a third party, Miles Smith (the broker). In discharging its services the broker had sent out documents to the defendants in order to help them to understand their obligations regarding material non-disclosure. The insurer declined the claim on the basis of

material non-disclosure. The non-disclosure asserted related to, inter alia, the use of the plasma guns and the occurrence of previous fires. The insurers commenced proceedings seeking a declaration of non-liability. The defendants counterclaimed for an indemnity under the policy and joined the broker as a third party alleging negligence in the broking of the policy. In the event the insurers and the defendants settled their disputes. The defendants continued to pursue their claim against the broker which was in the region of £6 million.

The issues were, inter alia; (i) whether the broker had been negligent in advising the defendants regarding material non-disclosure; (ii) whether the broker had been negligent in failing to elicit the fact of the use of plasma guns and the previous fires; (iii) whether the defendants in processing pentane refrigerators were acting in breach of their management licence; and (iv) whether the brokers' negligence was causative of the insurers' failure to pay on the policy.

The claim was dismissed.

(1) A broker had to take reasonable steps to ensure that a proposed policy was suitable for the insured's needs. By definition a policy which was voidable for non-disclosure was not suitable. In order to ensure a policy was suitable, a broker had an obligation to advise the insured of the duty to disclose all material circumstances and the consequences of not doing so, he had to indicate the sort of matters which ought to be disclosed as being material and had to take reasonable care to elicit matters which ought to be disclosed but which the insured might not think necessary to mention. In order to discharge the duty to disclose, it was not sufficient to rely upon written standard form explanations and warnings annexed to proposals or policy documents. The broker had to satisfy himself that the position was in fact understood by the insured and that would usually require a specific oral or written exchange on the topic, both at the time of the original placement and at the renewal, particularly if a new person had become the client's representative.

Where a change in personnel led to a new person being responsible for insurance matters in the insured's organisation, the broker had to ensure that an appropriate understanding of questions of materiality was held by that person. In case the insured did not appreciate what might be material, he needed to be advised to err on the side of caution so as to disclose anything that might impinge on the judgment of a competent underwriter in assessing the risk, and be helped to unearth such matters.

In the instant case, the documents sent out by the broker afforded little or no help on understanding the obligations to disclose material facts, the nature of material facts or the consequences of failing to disclose them, accordingly the broker in all the circumstances was in breach of his duty of care.

(2) Where an inappropriate and incomplete explanation was afforded to the insured by its broker as to its obligations, it followed that there was a higher standard of care on the part of the broker in eliciting possible material information for disclosure.

In regard to detailed processes requiring technical expertise, a broker could not be expected to comprehend any more than a general knowledge of the process involved. Albeit the insured had to be properly advised it remained the insured's task to identify detailed processes. For yet more information the underwriter could be expected to ask for further detail or to rely upon his own appointed surveyors. Reasonable inquiries would primarily

involve site inspections in the company of representatives of the insured able to provide information about the processes required.

In the instant case, the use of plasma guns for the purpose of removing bolts was a unique feature of the processes of the defendants as compared with the whole of the remainder of the specialist fridge recycling industry. The question was not one which had to be posed in every manufacturing or de-manufacturing process. Questions had to be tailored to the specific process. Accordingly it would never have occurred to a reasonably competent broker to ask specifically whether plasma guns, or similar hot work, were being used in the defendants' recycling process. In relation to fires the broker should have made it absolutely clear that all outbreaks of fire were material and should be disclosed. If questions relating to the occurrence of fire had been asked, the broker would have received a full and frank response, and disclosure of the intermittent fires would itself also have led to the emergence of the use of plasma guns.

(3) In the instant case, the defendants were operating in breach of their management license and had they obtained insurance following the disclosure of the use of plasma guns and the further fires, the policy would have been vulnerable to avoidance for non-disclosure of that fact. A further obstacle to the defendants' claim was that even if pleaded the loss claimed was not of the kind or type which the broker ought fairly to be taken to have accepted liability on. The loss sustained was not within the reasonable contemplation of the parties as likely to result from the breach of retainer. The fire was attributable to the defendants' failure to identify and enforce appropriate fire precautions by way of changes to the whole working process without which the process was effectively uninsurable.

4.3 INSURING IRANIAN SHIPS

The [Financial Restrictions \(Iran\) Order 2009 no 2725 \(Prevention of Nuclear Proliferation, Terrorist Financing and Money Laundering\)](#) issued on 12 October 2009 by HM Treasury prohibits all persons operating in the UK financial sector from entering into new transactions or business relationships with either Bank Mellat or the Islamic Republic of Iran Shipping Lines (IRISL). This has done a very uncommon thing, that is to say it has effectively removed the provision of insurance to either Bank Mellat or IRISL by any insurer in the UK. Commentators have noted that it is rare that political sanctions bite so deep that ocean ships cannot in some way or other acquire the property and liability insurances they need to operate in the world.

4.4 WHETHER ON PROPER CONSTRUCTION ONLY ONE INSURANCE POLICY OR WHETHER DOUBLE INSURANCE

In the case of [The National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance \(UK\) Ltd \[2010\] EWHC 773 \(Comm\)](#), the defendants, HSBC, were the insurers of a property owned by the vendor. The vendor exchanged written contracts with the purchasers for the sale of the property. Shortly before contracts were exchanged the purchasers took out their own buildings insurance with the claimant, The National Farmers Union Mutual Insurance Society Ltd (NFU). A fire occurred between the dates of exchange of contracts for sale and completion, at a time when the property was at the risk of the purchasers and was the subject matter of buildings insurance taken out independently by each of the vendor and purchaser in respect of their respective interests with different insurers.

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After the fire, the purchasers completed at the full purchase price. Having been paid the full purchase price the vendors ultimately suffered no loss as a result of the fire and made no claim under their policy with HSBC. The purchasers made a claim on their buildings cover with NFU and were paid by NFU in settlement of the claim. NFU sought a contribution from HSBC on the basis of a term in that policy to the effect that ‘anyone buying your home will have the benefit of the buildings insurance until the sale is completed’. HSBC resisted the claim on the basis that since the buyers were insured in respect of the property by another insurer, on the proper construction of the HSBC policy, they were not covered by HSBC at all. A trial of preliminary issues was ordered.

The issue concerned whether on a proper construction of the HSBC and the NFU policies, HSBC provided insurance cover to the vendors in respect of fire damage to the property, in circumstances where NFU did likewise, with the result that there was a double insurance by the two policies which entitled NFU to a contribution from HSBC towards the indemnity it had paid the purchasers.

The court ruled:

Double insurance arose where the same party was insured with two (or more) insurers in respect of the same interest on the same subject-matter against the same risks. If a loss by a peril insured against occurred, the general rule was that, subject to any particular modifying terms and to the limits of indemnity provided under each insurance contract, the insured might recover for the whole of the loss from either insurer. Upon such indemnity being paid to the insured by either one of the two insurers, that insurer was, in general, entitled to recover a contribution from the other.

In the instant case, when construed, the HSBC policy granted buildings cover to the vendors and to the purchasers. The grant of insurance to the purchasers was subject to the proviso that cover would not be provided if those purchasers had themselves taken out buildings insurance for their own account which covered the same buildings risks. Both the grant of buildings cover to otherwise uninsured buyers and the denial of an indemnity to buyers enjoying the benefit of other buildings insurance covering the same risks, was for the benefit of the insured in order to enable or encourage the purchasers to complete. As the purchasers had taken out buildings insurance covering the same risks as those in HSBC policy, the HSBC policy did not provide cover to the purchasers in respect of the fire damage to the property.

Accordingly the only policy covering the purchasers was the NFU policy and in all the circumstances the instant case was not one of double insurance. NFU was not entitled to an indemnity from HSBC.

5. JURISDICTION

5.1 WHETHER GERMAN COURT HAD EXCLUSIVE JURISDICTION AND WHETHER ENGLISH COURT TO DECLINE JURISDICTION

In the case of [JP Morgan Chase Bank NA v Berliner Verkehrsbetriebe \(BVG\) \[2010\] EWCA Civ 390](#), the appellant (B) appealed against a decision dismissing its application for an order that the English court had no jurisdiction in respect of the claims of the respondents (J). J were part of a well known international banking group. B was a German public law institution which operated the Berlin public transport system and its seat was in Germany. B entered into a credit swap arrangement after discussions with J. B said that the decisions of its management and supervisory boards to enter into the transaction were ultra vires as a matter of German law and accordingly void. B contended that it had been given incorrect advice by J about the transaction and its effect. The swap transaction documentation contained English law and jurisdiction clauses. J began English proceedings for declarations and for the sums said to be due under the swap. B applied unsuccessfully to the English court for an order that it had no jurisdiction, on the ground that the proceedings brought by J had "as their object ... the validity of the decisions" of the organs of a legal person, B, whose seat was in Germany, so that under Regulation 44/2001 art.22(2) the German courts had exclusive jurisdiction and the English court had to decline jurisdiction under art.25.

J submitted that the judge correctly interpreted art.22(2) in holding that the court had to look at the proceedings overall; he had rightly assessed the issues involved in the case and had properly concluded that it was a multi-issue case where more than one issue would be of importance; he correctly found that the ultra vires issue was not the "principal matter" with which the English court would be concerned in the proceedings. B submitted that since the ultra vires issue might be dispositive of J's claim altogether, that was sufficient to bring the proceedings within the ambit of art.22(2); alternatively, if it was necessary to carry out an evaluation of the issues overall, the judge should have given decisive weight to the ultra vires issue.

Appeal was dismissed.

(1) The court was bound by authority to interpret the words "proceedings which have as their object" in art.22(2) as "proceedings which are principally concerned with". If proceedings raised an issue within art.22(2), that did not mean that those proceedings were "principally concerned with" that issue. If proceedings raised a number of issues and one of them was within the terms of art.22(2) and the resolution of that issue might be dispositive of the proceedings as a whole, that did not mean that the proceedings were "principally concerned with" an issue within art.22(2). The correct approach required the court to undertake an exercise in "overall classification" and make an "overall judgment" as to whether the proceedings were "principally concerned" with one of the matters set out in art.22(2). If an issue within art.22(2) was not merely a "preliminary" or "incidental" matter, that did not mean that, looking at the proceedings overall, they were proceedings which were "principally concerned" with art.22(2) matters. It followed that the judge reached the right conclusion on the interpretation of art.22(2) in posing the question whether the English proceedings were principally concerned with the ultra vires issue raised by B by way of defence to J's claim.

(2) The ultra vires issue was important because it might be dispositive of the proceedings, but the proceedings were not "principally concerned with" the ultra vires issue. They were principally concerned with the validity of the swap and whether J could enforce its rights

under it. As a part of that overall issue, the court would have to consider various defences put forward by B, of which an important one, which could be decisive, was the ultra vires issue. The judge was right that the proceedings were not so likely to be connected with the German law of ultra vires that they should only be tried in Germany.

(3) In the circumstances the English proceedings should not be stayed to await the judgment of the European Court of Justice on questions referred to it by the German court in proceedings brought by B against J. Nor should the English court refer any questions to the ECJ.

5.2 WHETHER CLAIMANT DEMONSTRATED THAT CORRECT CHOICE OF LAW WAS ENGLISH LAW

In the case of [*FR Lurssen Werft GmbH & Co V Halle \[2010\] All ER \(D\) 159 \(Apr\)*](#), the claimant was a German shipbuilding company. The defendant was an American citizen and a resident of the State of Florida. In April 2005, the parties entered into vessel construction contracts (the VCCs) for the construction of a yacht named 'Nemo' and another named 'Shark'. The arbitration clause of the VCCs provided that disputes were to be settled under the rules of arbitration of the London Maritime Arbitrators Association. The VCCs were stated to be construed in accordance with English law, except in relation to certain specified instances where German law mandatorily applied. Subsequently, in May 2008, the parties entered into a commission agreement which provided that if the Nemo were purchased by a client introduced by the claimant, then a commission of five per cent of the sale price would be payable by the defendant to the claimant. The commission agreement did not address dispute resolution or jurisdiction/ choice of law. The defendant granted the claimant the exclusive right to sell the Nemo. A third party buyer was found and the Nemo was sold. In February 2009, the claimant commenced proceedings seeking payment of sums it claimed were owed to it under the commission agreement. Leave to serve the claim form out of the jurisdiction was granted, pursuant to CPR 6.36, on the basis that the claim had been made in respect of a contract which was governed by English law. In July, the defendant challenged the jurisdiction of the court.

The judge held, inter alia, that the claimant had demonstrated a good arguable case that the commission agreement was governed by English law.

The defendant appealed. He contended that on a proper understanding the application of the law regarding art 3 of the Rome Convention to all material evidence would result in the conclusion that the claimant did not have the better argument that a choice of English law had been clearly demonstrated and that the judge's analysis had placed excessive weight on the express choice of law provisions in the VCCs.

The appeal was dismissed.

In the circumstances of the instant case, no fault could be derived from the judge's conclusion that the claimant had succeeded in demonstrating, to the required standard, that the correct choice of law was English law. The VCCs had made a clear and express choice of English law and were closely related to the commission agreement as they governed the parties' prior commercial relationship and their performance formed the factual background to the relationship created by the commission agreement. The commission agreement was,

therefore, at the very least part of a series of contracts. Further, as the termination agreement was explicitly governed by English law, it was another indicator as to the choice of law that would have been chosen by the parties to govern the commission agreement had they considered that issue. The claimant had demonstrated a good arguable case that the agreement was governed by English law which had impelled the judge to decide that the clear choice was English law.

6. MISCELLANEOUS

6.1 NO EXTENSION OF LIMITATION PERIOD ON BASIS THERE HAD BEEN AN EARLIER CONCEALED LOSS

In *Williams v Lishman and Others* [2010] EWCA Civ 418, the Court of Appeal rejected the appellants' appeal and held that in a negligent advice claim regarding the transfer of pension funds, all loss occurred at the same time, when the funds were transferred from one type of pension plan to another. As the transfer when loss occurred was over six years from the date of the claim, and the claim was more than three years from the claimants' date of knowledge of the facts relating to their claim under section 14A of the Limitation Act 1980 (1980 Act) (that they had swapped a secure scheme for a riskier one), the claim was statute-barred. The claimants could not argue that the limitation period be extended under section 32 of the 1980 Act, on the ground that there had been a concealed earlier loss, namely an early surrender charge, which they were not aware of until during the proceedings.

Although the factual premise for an argument about section 32 of the 1980 Act did not arise, the Court nevertheless considered (*obiter*) the appropriate approach when there are concealed and unconcealed losses but the concealed loss occurs first. The Court concluded that a defendant who had deliberately concealed something which marked the original accrual of a right of action may also be liable for a second unconcealed loss even if the primary limitation period for the second unconcealed loss has expired.

The case confirms the approach to be taken in such claims regarding the question of knowledge under section 14A of the 1980 Act and how to ascertain the time when loss is suffered. Although *obiter*, the Court's conclusions on the meaning of "any relevant fact" in section 32(1)(b) of the 1980 Act also provide a useful clarification of when concealed facts may be used by a claimant to avail himself of this section. The case also emphasises the active participation required by a claimant in such cases. It is not enough to rely on ongoing advice from financial advisers to avoid limitation consequences.

6.2 CIRCUMSTANCES IN WHICH ATE INSURANCE CAN BE USED FOR SECURITY FOR COSTS

In [*Michael Phillips Architects Ltd v Riklin and Another* \[2010\] EWHC 834 \(TCC\)](#), Mr and Mrs Riklin retained MPA to provide architectural and other services in respect of a property which was being renovated and refurbished. MPA issued proceedings seeking payment. The defendants denied that there was any agreement that such sum would be payable, and they put forward a counterclaim for damages. MPA entered into a conditional fee agreement with its solicitors. The defendants sought security for their costs under [CPR Part 25.13](#) on the basis that there was ground for believing that MPA would be unable to meet a costs order, and MPA responded by saying that it had applied for after the event insurance to fund the litigation costs. The question for the court was whether the existence of ATE insurance justified a refusal by the court to refuse to order security for costs in favour of the defendants, on the basis that the ATE insurance provided the necessary security that if the claim was dismissed the ATE insurers would pay the defendants' costs.

Akenhead J considered three authorities on whether and in what circumstances ATE insurance can be considered as providing security for costs, and drew the following principles from them:

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- There is no reason why an ATE insurance policy which covers the claimant's liability to pay the defendant's costs cannot provide some security for the defendant's costs.
- It will be rare for such a policy to provide the same level of security as a payment into court, bank bond or guarantee because insurance policies are voidable and subject to cancellation by the insurers and because the promise to pay under the policy is made to the claimant, not the defendant.
- Where a claimant relies on such a policy to avoid or limit a security for costs application, it must be demonstrated that the policy actually does provide some security in that the insurer cannot "readily but legitimately and contractually avoid liability to pay out for the defendant's costs".
- There is no reason why the amount fixed by a security for costs order cannot be reduced to take into account a realistic probability that the ATE insurance will cover the defendant's costs.

On the facts, the ATE policy was held not to be sufficient security for the defendants: the policy was ambiguous as to whether it would cover costs awarded in respect of a successful counterclaim; the sum insured could be eroded by first party costs; the policy applied only where there was a reasonable prospect of success, so the insurers could withdraw cover once it had seen the witness statements from the defendants; the policy would not respond if any of its conditions were broken; the insurers were off risk in the event of a fraudulent claim; and there were various rights to cancel. The ATE policy thus provided little security to the defendants, and security for costs would be ordered.

This decision makes it clear that while it is possible in principle for a claimant to use an ATE insurance policy to provide security for the defendant's costs, in practice it is highly unlikely that such a policy would ever provide adequate security for all of the defendant's costs. However, a claimant might be able to argue that the existence of an ATE insurance policy should be taken into account and that the amount of the security for costs which is ordered separately should be reduced accordingly.

6.3 RENVOI DOES NOT APPLY TO CHOICE OF LAW RULE ON MOVABLES

In *Blue Sky One Ltd and Others v Mahan Air and another* [EWHC] 631 (Comm), the court had to consider whether the English choice of law rule as to the determination of title to movables refers only to the domestic law of the relevant country, or whether it also includes that country's private international law and its choice of law rules (*renvoi*).

The issue arose in the context of a claim by a mortgagee for delivery up of two aircraft. The mortgages were governed by English law, and at the time the mortgages were signed, one aircraft was in England and the other was alleged to be in Iran. The court concluded that, in the case of title to tangible movables, the reference to the *lex situs* (law of the place where an object is situated at the time of the event said to confer title) is to the domestic law of the place where the object is situated, and not the entire law of that country, including its choice of law rules. Accordingly, the doctrine of *renvoi* does not apply in such cases.

Beatson J's judgment provides a careful and detailed analysis of both the relevant case law and the academic commentary on the application of the doctrine of *renvoi*. Having reviewed the serious criticism of the doctrine, on both principled and practical grounds, he concluded that it is undesirable to adopt a rule which would leave the applicability of the *renvoi* doctrine to a case by case analysis, dependent on the identification of the policy behind the private international law of another country: this would produce a "very uncertain legal regime". The case is a robust rejection of the doctrine in the case of determination of title to movables.

6.4 WHETHER MARKET PRACTICE ADMISSIBLE AS AID TO CONTRACT CONSTRUCTION

In [*Thomas Crema v Cenkos Securities plc* \[2010\] EWHC 461 \(Comm\)](#), the High Court has stated that evidence of market practice is admissible as part of the factual matrix which the courts use to construe a contract, although on the facts of this case the claim was dismissed without the need to consider it. Where an agreement is entered into between two parties who operate in a particular market, the court needs to understand any general market practice in order to construe the contract, even though such market practice falls short of being a notorious usage. Traditionally, only a notorious usage (meaning that it is so well known in that market as to lead to a term being implied) is considered admissible. This decision appears to extend the law in relation to the admissibility of market practice as evidence, although the judge emphasised that its importance would vary in each case, that it was not determinative of the meaning of the contract, and that in many cases it would be no more than one factor for the court to take into consideration when construing the contract.

7. PRACTICE

7.1 NEW PRACTICE DIRECTION ON E-WORKING COMES INTO FORCE

As reported in the March bulletin, pursuant to the 51st update of the CPR, the pilot scheme for electronic working came to an end on 31 March 2010 and PD 51C. On 1 April 2010, a new Practice Direction ([PD 5C](#)) came into force for the Electronic Working Scheme. It applies in the Admiralty, Commercial and London Mercantile Courts, the Technology and Construction Court and the Chancery Division of the High Court at the Royal Courts of Justice (including the Patents Court and the Bankruptcy and Companies Courts) and allows for the issuing of claim forms and other documents which attract a fee electronically.

7.2 APPLICATION TO SET ASIDE SERVICE OUT OF THE JURISDICTION

In the case of [Lord Michael Cecil and others v Ehsanollah Bayat and others \[2010\] EWHC 641 \(Comm\)](#), the Commercial Court dismissed the majority of the defendants' applications to set aside service of the proceedings outside the jurisdiction. The applications had been made on the following grounds:

- That the claimants had no sufficiently arguable case on the merits.
- That the claimants had failed to establish any of the jurisdictional gateways for service out of the jurisdiction to the required standard.
- Forum non conveniens.
- Various other grounds relating to service, including that orders for extension of time for service of the proceedings had been wrongly made and because of non-disclosure of material matters.

This judgment contains a thorough analysis of the law relating to service out of the jurisdiction and also about some aspects of service generally. It provides useful commentary on some of the legal issues which arise in disputed applications for service out.

7.3 JURISDICTION TO DISCHARGE FREEZING ORDER AGAINST ASSETS OF A THIRD PARTY

In the case of [Yukos Capital Sarl v OJSC Rosneft Oil Co \[2010\] EWHC 784 \(Comm\)](#) the sixth to twelfth respondents (R) applied to discharge or vary a domestic freezing order obtained by the claimant (Y) against them. Y had obtained an injunction against R on the basis that they had transferred funds to bank accounts within the jurisdiction for onward transmission to the defendant/first respondent (O), a Russian oil company, against which Y sought to enforce four arbitration awards. Y had no claims against R specifically. They had been joined as parties to the dispute on Y's case on the basis that they were controlled by O, they were used by it as vehicles for the purchase and on sale of oil, and held assets on its behalf. After the hearing, but before judgment was handed down, the parties came to terms on the basis of the provision of security. Nevertheless, the parties asked the court to rule on the issues concerning the court's jurisdiction to freeze R's assets, as the assets of a third party, against whom Y had no cause of action. It was common ground that four of R should not be subject to the freezing order. R submitted that no jurisdiction existed to grant the freezing

order over their assets unless O was the beneficiary of those assets under a trust. Y contended that although R were third parties, they had no independent purpose of their own and existed only for the purpose of passing oil sale money from the buyer to O, and that accordingly it was just and convenient for a freezing order to be made otherwise O would take steps to dissipate the assets.

No order was made. Absent any proprietary interest on the part of a defendant in assets held by a third party, it was appropriate to consider the extent to which the defendant had some interest in or control over the asset going beyond an actual or potential cause of action against the third party. That had to be the more where, as in the instant case, it was not suggested that there was any causative link or other connection between Y's claim and the assets in R's hands, [Dadourian Group International Inc v Azuri Ltd \[2005\] EWHC 1768 \(Ch\)](#), [2006] [W.T.L.R. 239](#) and [TSB Private Bank International SA v Chabra \[1992\] 1 W.L.R. 231](#) applied. O's interest in R's funds was formidable. In essence, R were special purpose vehicles with no business or assets of their own. They existed solely to provide a portal for transfer of the purchase price in a manner preserving the bank's security. They had no interest in or control over the monies. Allowing for the bank's security, the money was O's in all but name. But for the parties' agreement as to security, the court would have refused R's application to discharge the freezing orders.

Mr Justice Steel:

- Rejected the suggestion that an equitable interest under English trust law had to be established before the court could grant a freezing order against a third party.
- Rejected any requirement for a rigid causative link between the claim against the principal defendant and the assets of the third party. He preferred to treat the question of connection or causation as pertinent to the general question of discretion.
- In considering what was just and convenient, looked at the extent to which the defendant had some interest or control over the asset going beyond an actual or potential cause of action against the third party.

The decision is significant because it extends the outer reaches of the court's jurisdiction outlined in [TSB Private Bank International SA v Chabra \[1992\] 2 All ER 245](#). In [Chabra](#), it was held that, so long as the claimant had a good arguable cause of action against one defendant, there was power to grant an injunction against another defendant against whom no cause of action lay, provided that the claim to the injunction was "ancillary and incidental" to the cause of action against the initial defendant. The defendants in this case proposed a boundary to the Chabra-type jurisdiction to the effect that, without equitable ownership of an asset under a trust on the part of the defendant, no freezing order could be made against a third party in possession or control of that asset. Steel J refused to be so rigidly bound. Instead, following the lead taken by Deputy High Court Judge Bartley-Jones QC in [Dadourian Group International Inc v Azury Ltd \[2005\] EWHC 1768 \(Ch\)](#) and by Briggs J in [HM Revenue & Customs v Egleton \[2006\] EWHC 2313 \(Ch\)](#), he preferred to follow the dictates of common sense and justice and to consider questions of connection or causation and control as pertinent to the general question of discretion.

7.4 WHETHER REAL PROSPECT OF SUCCESS IN SUMMARY JUDGEMENT APPLICATION

In the case [ACG Acquisition XX LLC v Olympic Airlines SA \[2010\] All ER \(D\)128 \(Apr\)](#), the claimant owner, ACG, agreed to lease a Boeing 737 (the aircraft) to the defendant, Olympic Airlines, for a period of five years. Prior to the lease being signed, Olympic inspected the aircraft externally; however it was refused an internal inspection. The aircraft was delivered with the required documents and Olympic signed a certificate of acceptance in accordance with the terms of the lease. The terms of the lease stipulated that the aircraft was to be delivered in an airworthy and safe condition for the immediate operation of commercial service. The aircraft went into immediate service and the relevant aviation authority issued a certificate of airworthiness. Fifteen days into service the aircraft was grounded. Whilst being repaired Olympic discovered fourteen defects. The certificate of airworthiness was withdrawn and even after months of extensive repair work was not re-issued. Olympic discovered that the cost of the work to make the aircraft operational would exceed the value of the aircraft. It concluded that the defects had to have been present when the aircraft was delivered in breach of the terms of the lease agreement. Olympic asserted that it had no obligation to pay rent as there had been a total failure of consideration. ACG refused to accept Olympic's position contending that the certificate of acceptance precluded Olympic from making a claim. ACG issued proceedings against Olympic for the outstanding amount of rent due. Olympic counter-claimed for damages against ACG for breach of contract. Olympic went into liquidation and the liquidator of the company continued the claims. ACG applied for security for costs on Olympic's counter-claim and applied for summary judgment.

The issues were, inter alia: (i) whether Olympic had a reasonable prospect of establishing a claim in respect of ACG's failure to deliver the aircraft in a usable condition; and (ii) whether Olympic could defeat a claim for rent on the basis of its counter-claim.

The application for summary judgment was dismissed.

HELD, in the instant case, Olympic had a real prospect of establishing a claim for damages for total failure of consideration. The instant was not a case where repairs could put the aircraft into a usable condition, the aircraft had been delivered in a state in which it had been totally incapable of being used, however it took Olympic 14 days to discover that. Further Olympic had a reasonable prospect of defeating the claim for rent on the basis of the counter-claim. It was not appropriate for security for costs to be ordered.

7.5 NEED TO ESTABLISH CLAIM NO STRONGER THAN FANCIFUL TO SUCCEED IN STRIKE OUT APPLICATION

In the case of [Berezovsky v Abramovich \[2010\] EWHC 647 \(Comm\)](#), the parties were both wealthy Russians. The claimant no longer lived in Russia. Various of their business interests overlapped, including, television, oil and aluminium. The claimant commenced proceedings against the defendant in relation to his alleged interests in shares that he claimed to have held the benefit of in the oil and aluminium businesses. The claimant applied for permission to amend his particulars of claim and reply in various distinct respects. The defendant applied to strike out the claimant's claim on the ground that the claimant's statement of case disclosed no reasonable grounds for bringing the claim ([CPR 3.4\(2\)\(a\)](#)) and that the statement of case was an abuse of the court's process ([CPR 3.4\(2\)\(b\)](#)), and/or sought summary judgment

against the claimant under [CPR 24.2](#) on the grounds that the claimant had no real prospect of succeeding on the claim and that there was no other compelling reason why the case should be disposed of at trial.

The claimant's application was partly opposed by the defendant on the grounds that, under s35(2) of the [Limitation Act 1980](#), the claimant sought to introduce new causes of action which were time barred and/or that some of the proposed amendments were intrinsically lacking in any real prospect of success and/or that the attempt to introduce them at such a late stage was an abuse of process.

The court ruled:

(1) It was established law that in analysing whether a new cause of action arose, the court had to distinguish between that component of a factual allegation which was essential to the cause of action in the sense that its absence would have led to the claim being struck out and that component which was no more than particularisation of the essential component which could have been necessary to have enabled the opposing party to have been well-enough informed to have pleaded a meaningful defence. On the evidence, the proposed amendments did not raise a new cause of action. The claimant would be permitted to amend his pleadings.

(2) It was established law that the overall burden of proof rested on the defendant who applied to strike out a claim or for judgment dismissing a claim to establish that the claim was no stronger than fanciful. For the court to have been satisfied that the claim had no real prospect of success it had to entertain such a high degree of confidence that the claim would fail at trial as to amount to substantial certainty. Where factual issues arose, particularly where they were central to the claim, which turned on a combination of disputed accounts of oral discussions that took place many years before and that had not been formally or informally recorded in writing, it would have surprising if any court could have arrived with the necessary high degree of confidence, at the conclusion that, were the matter left for trial the trial judge was bound to prefer the account of one side rather than the other, even following cross examination and disclosure. Further, in a case where it might have been essential for the court to have evaluated the understanding of one party of words spoken by the other, not only would cross-examination normally have been essential but also evidence of the surrounding circumstances to enable the trial judge to evaluate the sense in which the words used would have been understood.

The amendments to the statement of case proposed by the claimant did not demonstrate that the claim was so lacking in substance and veracity that it could have been said to have been palpably hopeless, in the sense that it had no real prospect of success. The circumstances and factual matters would need to be explored at a full trial as speculation as to the true facts in the instant proceedings would have been contrary to the purpose of CPR 3.4(2) or 24.2. The court was not in a position, at the instant stage of proceedings, to conclude the facts of the matter with the requisite level of confidence. The court could not determine, on the evidence before it, whether the claimant's applications to amend were intrinsically improbable or abusive and should have been disallowed as that would have involved a more stringent test than would have been permissible under the general principles developed upon the application of CPR 3.4(2) and 24.2.

In the circumstances, it should have been open to the claimant to pursue his case at trial.

The claimant's case was not so weak that he should not have been prevented from bringing it to trial and the defendant's applications would be dismissed.

7.6 CONSEQUENCES OF NON-DISCLOSURE BY APPLICANT WHEN APPLYING FOR AN INJUNCTION

In the case of [*Sita UK Group Holdings Limited and Another v Serruys and Others* \[2010\] EWHC 869](#) demonstrates the difficult decision the court faces when there is non-disclosure by an applicant for an injunction.

The claimants brought proceedings against the defendants alleging fraudulent misrepresentations inducing a share sale agreement. They obtained a freezing injunction without notice in April 2008 and then accepted undertakings in lieu from the defendants. Subsequently, both parties made applications to court regarding non-disclosure by the claimants of certain factual matters at the time of the injunction application. Some non-disclosure was admitted by the claimants but some they disputed.

Sir Thomas Morrison noted various authorities showing that where non-disclosure was significant, the court had to reconcile the need for disciplinary action with the general duty to do justice. The court had a discretion whether or not to discharge the original order and whether or not to re-grant fresh injunctive relief. Regard was to be given to all the relevant circumstances, including the nature and materiality of the non-disclosure and how it came about. It was exceptional for a court to re-grant an injunction after a deliberate non-disclosure.

He held that the non-disclosure by the claimants here was material and deliberate. However, it was not a deliberate attempt to obtain any forensic advantage. He allowed the injunctive relief to continue because the claimants had a good arguable case for injunctive relief and he considered it facile to conclude that a deliberate non-disclosure would make it wrong for the court to grant equitable relief. He marked his disapproval of the non-disclosure by ordering the claimants to bear the costs of the applications on the indemnity basis.

8. SHIPPING

8.1 WHETHER ON DECK STATEMENT IN BILL OF LADING SUFFICIENT TO EXCLUDE APPLICATION OF HAGUE VISBY RULES

In the case of [*Onego Shipping & Chartering BV v JSC Arcadia Shipping \(the M/V SOCOL 3\)* \[2010\] EWHC 777 \(Comm\)](#), the claimant charterers chartered a multi-purpose general cargo vessel from the defendant owners pursuant to a charterparty. The charterparty was on NYPE 1993 Form and it was common ground that the Hague/Hague-Visby Rules (the Rules) were incorporated. Article I(c) of the Rules exempted, inter alia, deck cargo in such terms: ‘... except cargo which by the contract of carriage was stated as being carried on deck (the on-deck statement) and is so carried’. Pursuant to the charterparty, packs of timber were loaded both under the deck and on deck. There was, however, no on-deck statement. A casualty occurred causing loss of cargo and other additional expense to the charterers. The charterers made deductions from hire charges having regard to the delays to the voyage caused by the casualty. They claimed further expenses of €305,455. The owners in turn counter claimed for hire and expenses totalling €403,931 and sought an indemnity in respect of any cargo claims that might be brought against them arising out of the loss. The matter went to arbitration with the tribunal finding in favour of the owners.

The tribunal held that there were three effective causes of the casualty, namely: an inadequate method of stowage of the deck cargo; unsatisfactory lashing of equipment and the instability of the vessel. On the question of liability it found that generally the charterers were liable for proper loading/stowage and lashing, however, exceptionally, where the loss was attributable to the want of care in relation to the stability characteristics of the vessel, the liability would shift to the owners. In the instant case, since one of the causes of the casualty had been the instability of the vessel, the owners were liable. It then went on to consider, as a matter of law, whether the Rules incorporated into the charterparty could also have rendered the owners responsible. It concluded that the exclusion in art I(c) of the Rules applied as although there had been no on-deck statement with the charterparty, there was one on the bills of lading and that was the relevant ‘contract of carriage’ and therefore the owners would have been liable. It then considered whether the owners were in any event protected by cl 13(b) of the NYPE 1993 Form which stated to the effect that; ‘in the event of deck cargo being carried, the owners are to be indemnified by the charterers for any loss of whatsoever nature caused to the vessel as a result of carriage of deck cargo and which would not have arisen had deck cargo not been loaded’. It found that the wording of cl 13(b) was wide enough to exclude the owner’s liability and provide them with an indemnity. Permission to appeal in respect of two issues of law was granted.

The issues were: (i) Where a charterparty incorporated the Hague/Hague-Visby Rules and the charterparty envisaged carrying deck cargo but did not state how much deck cargo was being carried (‘an on-deck statement’), did the Rules apply to the carriage of deck cargo or was their application excluded by virtue of art 1(c) of the Rules; and (ii) in respect of what loss or damage did cl 13(b) of the NYPE 1993 Form provide an indemnity to the owners. In relation to the first issue: the charterers submitted that the ‘contract of carriage’ referred to in art 1(c) was the charterparty and, since the charterparty did not contain the necessary on-deck statement, the exclusion of deck cargo did not apply. The owners submitted that ‘contract of carriage’ referred to the bills of lading issued for the deck cargo, not the charterparty. In relation to the second question, the owners stressed in their submissions the wide language of the clause and in particular the reference to ‘any loss of whatsoever nature’.

The court ruled:

(1) Where a charterparty incorporated the Hague/Hague-Visby Rules and the charterparty envisaged deck cargo might be carried but had no on-deck statement, the Rules applied to the carriage of deck cargo unless the bill(s) of lading issued for the cargo contained an on-deck statement as required by art 1(c) of the Rules.

In order to make sense of the Rules as incorporated into NYPE 1993 Forms it was generally necessary to read 'bill of lading' or 'contract of carriage' as referring to the governing charterparty, however there was no principal that it always had to be so. Verbal manipulation was a process which should be carried out intelligently rather than mechanically and only in so far as it was necessary to avoid insensible results. Whether 'contract of carriage' in the Rules referred to the bill(s) of lading or the charterparty depended on the context in which it was being used.

In the instant case, when written out in the charterparty, art 1 (c) of the Rules required the bill(s) of lading rather than the charterparty to contain the on-deck statement and that that was the relevant contract of carriage. Accordingly the Rules did not apply to the carriage of the deck cargo.

(2) Clause 13(b) of the NYPE 1993 Form, on its true construction, provided owners with an indemnity in respect of loss and/or damage and/or liability effectively caused by the carriage of deck cargo but not for loss and/or damage and/or liability caused by negligence and/or breach of the obligation of seaworthiness on the part of owners, their servants and agents.

It was established law that the Courts should not ordinarily infer that a contracting party had given up rights which the law conferred upon him to a extent greater than the contract terms indicated he had chosen to do. The Courts' task was to ascertain what the particular parties had intended, in their particular commercial context. If a clause contained language which expressly exempted the person in whose favour it had been made from the consequence of the negligence of his own servants, effect had to be given to that profession. If there had not been express reference to negligence, the court had to consider whether the words used were wide enough, in their ordinary meaning, to cover negligence. If the words used were wide enough to cover negligence the court had to then consider whether the head of damage might realistically be based on some ground other than that of negligence. Such guidance was an aid to construction and not a rigid code to be mechanically applied.

The clause in the instant case was not merely an exclusion clause but an indemnity clause. There was no express reference to negligence or unseaworthiness on the part of the owners being exempted or indemnified. It was therefore a clause which would usually be construed as not covering negligence or unseaworthiness and which needed to make that intent clear if it was to do so. Having regard to the language of cl 13(b), its context, it was clear that it only covered loss, damage or liability effectively caused by the carriage of deck cargo and that it did not cover loss, damage or liability effectively caused by negligence or unseaworthiness. Accordingly the loss, damage and liability was effectively caused the owners' negligence and unseaworthiness of the vessel for which the owners were at fault and contractually responsible.

The Tribunal's conclusion on cl 13(b) therefore could not stand.

8.2 WHETHER DEFENDANT IN BREACH OF CONTRACT BY FAILING TO SECURE APPROPRIATE INSURANCE COVER AND TO EXERCISE REASONABLE SKILL AND CARE IN FREIGHT FORWARDING ARRANGEMENTS

In the case of *Geofizika DD v MMB International Ltd (Greenshields Cowie & Co Ltd, Pt 20 defendant)* [2010] EWCA Civ 459, the claimant was a Croatian geophysical company. It agreed to buy on Carriage Insurance Paid (CIP) terms, three four-wheel drive ambulances from the defendant, a British company which specialised in the provision of such vehicles. The defendant agreed with the Pt 20 defendant, a long established freight forwarder, to arrange the shipment and the insurance. The Pt 20 defendant obtained a quote from B, a carrier, in respect of a ‘roll-on/roll-off’ (RORO) service to Libya, and on the booking confirmation it stated that ‘All vehicles will be shipped with “on deck option” this will be remarked on your original bills of lading ... You will be asked to check and confirm that bills of lading are as per your instructions. Any amendments required after initial confirmation will result in additional charges.’ The Pt 20 defendant did not see or seek copies of the printed terms to go on the back of the bills, although B sent unsigned originals which the Pt 20 defendant returned on 29 November.

The invoice from B stated ‘RORO cargo’. Clause 7 of the bill of lading stated: ‘(1) Goods may be stowed by the Carrier in containers. (2) Goods, whether or not packed in containers, may be carried on deck or under deck without notice to the Merchant...’ The bill of lading further stated that ‘Cargo stored on open area on the quay and, therefore, subject to adverse weather conditions before loading’. On 4 December, the Pt 20 defendant sent the defendant the insurance certificate dated 29 November and an invoice for that cover dated 4 December. The certificate had one ‘additional condition’ which was ‘warranted shipped under deck’ (the warranty). The Pt 20 defendant gave the warranty as it considered that the vehicles had been shipped under deck. It had a facility with the insurers which would have enabled it to insure deck cargo for an additional premium. The evidence was that it would have done so if it thought the ambulances had been shipped on deck. However, as the bills of lading had not been claused on their face to show shipment on deck, it considered that they had been shipped under deck. The vehicles were, in fact, shipped on deck. Two of the three were washed overboard in the course of the voyage in the Bay of Biscay. The claimant settled with the carrier, and then claimed damages for breach of contract against the defendant, who in turn brought a claim under CPR Pt 20 against the Pt 20 defendant.

The following issues fell to be determined: (i) whether the defendant was in breach of its obligations to the claimant to contract on usual terms for the carriage of goods because of the provision in the bills of lading that the vehicles might be carried on deck; (ii) whether the defendant was in breach of its obligations to obtain insurance cover; and (iii) whether the Pt 20 defendant was liable to reimburse the defendant for any liability to the claimant because of a breach of its obligations as a freight forwarder to use reasonable skill and care. The judge found in favour of the claimant in its claim against the defendant and in favour of the defendant against the Pt 20 defendant. He concluded that: First, the contract of carriage would not be on usual terms if it permitted on deck shipment. The contract of carriage did permit on deck shipment, as the terms of the booking confirmation did not preclude the right of the carrier to carry on deck. The sellers were therefore in breach of their obligation under the contract sale, but the Pt 20 defendant had been negligent in procuring the contract of carriage on those terms. Second, that the Pt 20 defendant should not have given the under deck warranty in the contract of insurance merely on the basis that the bills of lading had not

been claused; it should have checked the position before giving the warranty. It had therefore been in breach of the duty of care it had owed to the defendant. Third, that the defendant was liable to the claimant as it had failed to provide a valid contract of insurance and that breach had caused the loss. He duly awarded damages of £37,000 to the claimant. The defendants appealed.

The defendants challenged the judge's conclusions in relation to both carriage and insurance. The claimant contended that the contract had not been on usual terms as it permitted on deck shipment. The defendants contended that, although the usual terms of the trade would contain a clause relating to deck cargo in terms similar to cl 7(2), their obligation had been to procure a contract of carriage which did not permit the option to be exercised in a way that the ambulances would be carried on deck. They concluded they had no obligation to procure a contract that provided for shipment under deck. They contended that they had discharged that obligation, as cl 7(2) had not permitted the carriers to ship the ambulances on deck, as there had been a prior antecedent agreement contained in the booking confirmation. The defendants further submitted that if the Pt 20 defendant had been negligent in giving the warranty, and the defendant had been in breach by not providing a valid insurance, there had in any event, been no loss. They submitted that a valid insurance would not have covered the loss.

The appeal was allowed.

(1) It was long standing practice that if goods were shipped on deck, a statement to that effect would ordinarily be found on the face of the bill of lading. In the instant case, the terms of cl 7(2) had contemplated that. Although the book note could have been drafted in clearer terms, anyone in the trade reading the booking confirmation would have understood it to mean that if the goods were to be placed on deck, the face of the bill of lading would be so claused. Accordingly, there had been a prior antecedent agreement to the effect that if the vehicles were to be carried on deck, that would be noted on the face of the bill of lading and to that extent, therefore, the liberty to ship on deck without notice to the shipper had been circumscribed. Therefore, the defendant had not been in breach of its contract with the claimant.

(2) Given the consequences of breach of warranty, the freight forwarder should not have given a warranty of under-deck shipment without first checking that this was in fact the case. This did not mean that there was any guarantee or supervision by the freight forwarder of the carrier's obligations.

(3) Although the warranty should not have been given and the freight forwarders were negligent, this had caused no loss. A valid insurance would not have covered the loss either because it would have been made on ICC(C) terms not covering washing overboard.

8.3 NO AVAILABLE MARKET AT TIME OF REPUDIATION OF CHARTERPARTY AND NO PRESUMPTION THAT DAMAGES CALCULABLE BY REFERENCE TO ANY SUBSEQUENT AVAILABLE MARKET

In the case of [*Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd \[2010\] EWHC 903 \(Comm\)*](#), the court found that a charterer, having repudiated a five-year consecutive-

voyage charterparty for the carriage of iron ore from Australia to China, was liable to the shipowner in damages in the region of \$80 million.

The claimant shipowner (Z) claimed demurrage and damages arising out of the termination of a consecutive-voyage charterparty entered into with the defendant charterer (F). The charterparty was a five-year consecutive-voyage contract for a vessel for the purpose of carrying iron ore from Australia to China. It had come to an end in January 2009 with almost four and a half years to run. On November 20, 2008, F had indicated that it would not be able to honour its freight commitments and on January 1, 2009, when it failed to load cargo for what should have been the vessel's seventh voyage, the vessel went on demurrage. Essentially, F's position was that because its customers had cancelled their freight agreements with it, it had no choice but to suspend or delay the performance of its obligations under the charterparty. Between November 23, 2008 and January 12, 2009 there were a number of communications between the parties about the situation. On January 9, Z accepted F's communications and conduct as a repudiation of the charterparty, thereby terminating it with effect from that date. F contended that Z's termination of the charterparty was itself a repudiation, which, on January 12, it accepted. The only issue of primary fact was whether, in a telephone conversation between the parties on December 2, 2008, F had said, as Z asserted, that it was terminating the charterparty, or whether it had said that it was merely exercising a contractual right to suspend or delay the performance of its obligations under it. The issues for determination were (i) whether F had repudiated the charterparty between November 23, 2008 and January 12, 2009; (ii) the proper quantum of damages.

Judgment for the claimant.

(1) Z's evidence was to be preferred as to the contents of the telephone conversation. The reasons for that conclusion included the fact that contemporaneous emails from F were consistent with an apparent intention on its part not to perform the charterparty unless more favourable terms could be agreed, and the fact that F had no contractual right to suspend or delay the charterparty. Any fair and objective reading of the exchanges between the parties, including the telephone conversation, was consistent only with F evincing a clear intention not to be bound by the charterparty. The principle in [*Woodar Investment Development Ltd v Wimpey Construction UK Ltd \[1980\] 1 W.L.R. 277*](#) that a party who took action relying simply on the terms of the contract and not manifesting by his conduct an ulterior intention to abandon it was not to be treated as repudiating it, was of no application to the instant case, none of the specific factors required for the application of the principle, identified in [*Dalkia Utilities Services Plc v Celtech International Ltd \[2006\] EWHC 63 \(Comm\), \[2006\] 1 Lloyd's Rep. 599*](#), being present, *Woodar* and *Dalkia* considered. Even if F was under an honest misapprehension as to the legal position, that afforded no excuse from the consequences of its repudiatory breach. F had objectively evinced an intention not to be bound and had thus to be treated as purporting to have renounced the charterparty.

(2) The appropriate quantum of damages was in the region of \$80 million - \$85 million. The vessel would have been trading for 1552.3 days during the remainder of the charterparty, its daily income would have been \$89,875, and there was no available market on which it could have been fixed from January 2009 for the remainder of the charterparty. Rather, Z was left to go to the spot market. While an available market did emerge for a three-year charter from February 2010, that was not to be considered in the equation. The fact that at a later stage a term market emerged for the outstanding balance of the charter period did not mean that a decision not to take advantage of that market at that later stage became a business decision independent of the wrongful termination. The rationale was that acceptance of the market rate at the date of breach is deemed to constitute reasonable mitigation. When the vessel

completed any spot voyages after the termination date was simply a matter of chance. Such spot voyages could, indeed, overrun the emergence of an available market. In short, there was no basis for requiring an owner to go back into the term market at the end of every spot voyage or to disregard short time charters in case the market for longer charters emerged in the meantime.

8.4 WHETHER CHARTERER ENTITLED TO TERMINATE DRILLING CONTRACT FOR CONVENIENCE

In the case of [*BP Exploration Operating Co Ltd v Dolphin Drilling Ltd \(The "Byford Dolphin"\)* \[2010\] EWHC 3119 \(Comm\)](#) the issue was the proper construction of a drilling rig charter. The claimant ("BP") sought a declaration that it was entitled at any time, and to suit its convenience, to terminate a contract relating to the semisubmersible drilling rig *Byford Dolphin*, which was owned and operated by the defendant ("Dolphin"). It was an express term of the contract that BP should have the right, on giving notice, to terminate the contract inter alia "to suit the convenience of [BP]".

Dolphin contended that BP's construction was commercially absurd, and that BP had no contractual entitlement to terminate the agreement for convenience until after the prescribed commencement date for drilling work under the terms of the agreement. The contract incorporated numerous amendments and additions to the standard form of contract known as LOGIC General Conditions of Contract for Drilling Rigs (Ed 1 - December 1997). Further amendments were made by Amendment No. 1 dated 6 May 2009.

Held that, applying the principles of construction laid down in [*Chartbrook v Persimmon Homes Ltd* \[2009\] 3 WLR 267](#), BP was entitled to the declaration sought. That outcome might be highly unattractive from Dolphin's perspective, but it arose from a standard term. It had not been suggested that BP acted other than bona fide in regard to its asserted convenience. Whether the motivation for termination was the fall in the market on the one hand or, possibly, the absence of drilling opportunities in the designated area on the other, it was not made out that the consequences were commercially absurd.

8.5 INTERPRETATION OF CONTRACTS IN SALE AND LEASEBACK OF VESSELS

In the case of [*Parbulk AS v Kristen Marine SA - \[2010\] EWHC 900 \(Comm\)*](#), the claimant was entitled to summary judgment on its claim for its "proven expenses including, but not limited to, legal costs and breakage cost with the Buyer's lenders" following the cancellation of memorandums of agreement for the purchase of four vessels.

The applicant (P) applied for summary judgment against the respondents (K) pursuant to guarantees of the liability of four special purpose vehicles under four memoranda of agreement. K decided to restructure the financing of the acquisition of four bulk carriers from a Chinese shipyard by means of a sale and leaseback transaction with P. The special purpose vehicles (SPVs), of which the second respondent was the holding company, became party by novation to the four shipbuilding contracts with the shipyard. The SPVs entered into four memoranda of agreement to sell the four vessels to P and P entered into four bareboat charters to charter the four vessels back to the SPVs, for a minimum period of five years, with options for a further five years, containing rights for the SPVs to have first refusal to purchase the vessels and options for the SPVs to buy back the vessels. P financed the

transaction by borrowing from a French bank. The charter income payable by the SPVs to P under the charters was fixed, but the loan agreement provided for interest to be payable on a floating basis. Accordingly, the bank required P to hedge the interest rate fluctuation risk for the loans for a period of at least three years by entering into a swap agreement with the bank on ISDA terms. There was substantial delay by the shipyard under the shipbuilding contracts and P exercised its right to cancel the memoranda of agreement. Thereafter P claimed, pursuant to clause 14 of the memoranda, its "proven expenses including, but not limited to, legal costs and breakage cost with the Buyer's lenders". It claimed the costs of terminating the swap transactions of some US\$14 million and other out of pocket expenses. K argued that the swap costs claimed were arguably not "proven expenses" nor "breakage cost with the Buyer's lenders".

The application was granted.

(1) Clause 14 did not constitute an indemnity clause, and P had to establish that the losses and expenses were foreseeable and reasonably incurred. It was reasonably foreseeable that P would enter into a swap agreement which fixed the interest rate exposure in respect of the loan. K knew of and had available to them the loan agreement containing the hedging obligations, which they only had to ask for if indeed they did not have a copy, and were contractually obliged to confirm that they had acquainted themselves with its terms. When that was taken together with the express provision of the charter which further put them on notice, P's entry into the hedging arrangements was reasonably foreseeable, and hence not too remote. Compliance with the hedging obligations could not be characterised even arguably as unreasonable.

(2) The swap losses were "breakage cost" in respect of the financing arrangements by P, being the sums that P had to pay out to the bank as a consequence of the early termination of those arrangements. The use of the word "with" in the phrase "breakage cost with the Buyer's Lenders" was wide enough to cover arrangements of an ancillary kind such as a swap transaction, and was not limited to the breakage cost of the loan made by the bank to P. If that was wrong, the swap costs were sufficiently close to the example given as to be *eiusdem generis*, and thus fell within the definition of "proven expenses".

(3) Thus, all the issues of liability were resolved in favour of P. K were ordered to pay P US\$14,335,647 in relation to the swap costs and US\$721,312 as expenses, but certain further issues in respect of the amount of the swap costs and expenses were left open.

8.6 DEGREE OF DISCLOSURE REQUIRED ON AN APPLICATION FOR A WARRANT OF ARREST

In the case of *The "EAGLE PRESTIGE"* - [2010] SGHC 93, High Court Singapore, This was an appeal against the decision to set aside the arrest of *Eagle Prestige*. The defendant owner of *Eagle Prestige*, EPC (now in provisional liquidation), was also the subcharterer of the vessel *TS Bangkok* at the time it grounded, resulting in hull and propeller damage. The plaintiff was the disponent owner of *TS Bangkok*. Its case under the charterparty was that the subcharterer (EPC) had ordered *TS Bangkok* to an unsafe port/berth in breach of the charterparty. In the proceedings there was also an intervener, CG, who was the new owner of *Eagle Prestige*, that vessel having been sold after the writ was issued. The Assistant Registrar had ordered the setting aside of the arrest.

Belinda Ang Saw Ean J allowed the appeal. The arresting party was not obliged to make out a good arguable case where its case was not put in question. It must show only that the claim

fell within one of the heads of claim in the High Court (Admiralty Jurisdiction) Act. It was not obliged to disclose a defence under the charterparty - a defence on the merits - at the preliminary stage.

8.7 WHETHER CHARTERER ENTITLED TO CLAIM TAX BENEFIT ON TERMINATION OF SHIP FINANCE LEASE

In the case of [*Golden Sunsets Navigation \(UK\) Ltd v Lloyds Portfolio Leasing Ltd \[2010\] EWHC 703 \(Comm\)*](#), where the sale of a ship at the end of a finance lease gave rise to a tax loss for the lessor, there was no provision in the lease on its correct interpretation allowing the charterer to claim the amount of that tax benefit.

The claimant (G) sought payment under the terms of a ship finance lease to which it had become a party by novation. Under the terms of the lease, as novated, the defendant lessor (L) let the vessel to G as charterer for a primary period of 15 years with the possibility of further periods thereafter. Charter hire was payable in accordance with the terms of the lease and the attached financial schedule, with a specified sum payable on the delivery date, followed by a further 29 semi-annual instalments and a final “balloon” payment. The financial schedule provided for adjustments of the rate of hire by reference to certain assumptions and for payment of termination rental under clause 6.2 of the schedule. Just before the end of the primary period G gave notice in accordance with the terms of the lease declining the option to extend the chartering of the vessel for a further 10 year period. That brought the charter of the ship to an end at the expiry of the primary period. The vessel was then sold for £45 million. The sale gave rise to a capital gain by L but that was entirely sheltered by indexation allowance. A balancing charge arose, upon which tax became due to the Revenue, in respect of capital allowances that had previously been given to L, to the extent that the vessel was sold for more than the tax written down value. Under the lease L was bound to pay G 99.5 per cent of the net sale proceeds as a rebate of charter hire. That rebate was tax deductible by L and could be applied by it against the balancing charge and other taxable revenue items and the sheltered capital gain. The overall effect was that L had an unutilised tax loss of some £2.9 million, which, when grossed up, amounted to the figure just in excess of £4 million claimed by G. G contended that it was entitled to payment of the tax benefit under clause 6.2.4 or clause 6.2.6 of the financial schedule as the result of a revised cash flow report which should have been produced on the lease coming to an end and which would have taken account of the tax benefit arising to L leading to a reduction in the net sum payable by G in respect of rental.

HELD: (1) The lease drew a clear distinction between expiry and termination. The notice given by G was not a notice of termination but a notice which brought about the expiry of the lease by effluxion of time at the end of the primary period. Termination rental was only payable where there was a termination. Clause 6 of the financial schedule was only concerned with termination and not with the expiry of the primary period by effluxion of time, as occurred in the instant case as a result of service of notice by G. The clause 6 provisions for calculation of termination rental did not arise therefore, as the very terminology suggested. If rental had been calculated and paid in accordance with clause 2 of the financial schedule, as adjusted by clause 4, there could be no further rental to pay. Termination rental did not arise as there had been no termination.

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(2) What went into the cash flow reports and therefore into the calculation of sums to be paid could only be that for which the lease and financial schedule provided. If the lease by its express terms provided for specified matters to be dealt with outside the terms of the cash flow reports and there was no provision for inclusion of those amounts in the cash flow reports as well, then those matters did not fall to be dealt with in the context of adjustable hire payments or termination rental. On the face of the lease, there was express provision covering the treatment of a sale and proceeds of sale, including the rebate of charter hire in the amount of 99.5 per cent of the net proceeds, whilst there was no express requirement for such matters to be reflected in the cash flow reports or the adjustments of hire under clause 4 of the financial schedule or in the termination rental provided for by clause 6 of the schedule. If the net proceeds of sale exceeded the original cost then G benefited because it received the 99.5 per cent rebate of that figure, but if, for whatever reason, that did not shelter L from a liability for the capital gain, G had to indemnify L against that tax liability under clause 18 of the lease. If, however, L by virtue of an indexation allowance was sheltered from liability for the capital gain, and then made the rebate payment and thus incurred a tax loss, there was no provision in the lease by which G could lay claim to any part of it. L obtained a tax benefit but that fell outside the terms of any of the cash flow reports and nothing in the lease or financial schedule required that benefit to be shared with G under a clause 6.2.4 calculation of termination rental.

Judgment for the defendant.

Should you have any queries on anything mentioned in this Briefing, please get in touch with Sally-Ann Underhill/Jo Cullis or your usual contact at Reed Smith.

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