RS SHIPPING BULLETIN

NOVEMBER 2010

REED SMITH

RS SHIPPING BULLETIN

1 ARBITRATION

1.1 COURT OF APPEAL CONFIRMS THAT SECTION 72 ARBITRATION ACT 1996 IS NOT RESTRICTED TO PROCEEDINGS CONCERNING THE TRIBUNAL'S SUBSTANTIVE JURISDICTION

Section 72 of the Arbitration Act 1996 provides that "a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement by proceedings in the court for a declaration or injunction or other appropriate relief". It also provides that this party has "the same right as a party to the arbitral proceedings to challenge an award (a) by an application under s.67 on the ground of lack of substantive jurisdiction in relation to him, or (b) by an application under s.68 on the ground of serious irregularity…".

The Court of Appeal considered the scope of s.72 in *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100, a case which originated in a GAFTA arbitration. The Respondent in the arbitration had disputed the tribunal's jurisdiction, however the tribunal ruled that it did have jurisdiction and ordered the parties to file submissions on the substantive dispute, which they proceeded to do. The Claimant was awarded damages and was given permission by the court to enforce this award. The Respondent made an application under s.72 for a declaration that there was no valid arbitration agreement, and argued that making submissions on the merits did not amount to "taking part" in the arbitration for the purposes of s.72. The High Court disagreed with this argument and rejected the application.

The Court of Appeal agreed, holding that there was no basis for limiting s.72, and that it applied to arbitral proceedings concerning the tribunal's substantive jurisdiction and to proceedings relating to the merits of the substantive dispute. A party who participates in an arbitration but is disappointed with the result cannot rely on s.72, however he can challenge the award under s.67 for lack of substantive jurisdiction. Such a challenge will be subject to the relevant time limit, which may only be extended if the court thinks it appropriate. The court did not consider it to be so in this case.

1.2 ONLY THE AWARD AND THE RELEVANT CONTRACT MAY BE PUT BEFORE THE COURT IN AN APPEAL FROM AN ARBITRATION AWARD ON A POINT OF LAW

In *Dolphin Tanker Srl v Westport Petroleum Inc (The MT "Savina Caylyn")* [2010] EWHC 2617 (Comm) (for more detail on which, see Shipping item 11.1, below), the Appellant sought to rely on a number of documents, apart from the charterparty and the arbitration award, in support of their arguments in an appeal on a question of law.

The Court did not agree with the Appellant that there had been a loosening of the general rule that only the award and relevant contract should be put before the court in an appeal on a question of law. Such an appeal was confined to the facts found by the award, and the only

admissible findings in relation to the commercial background of the matter were those in the award. The Court noted that the same vigilance to this rule must be applied under the Arbitration Act 1996 as under the 1979 Act.

1.3 HIGH COURT REFUSES TO REMOVE AN ARBITRATOR FOLLOWING ALLEGATIONS OF BIAS

In *Goel v Amegal Ltd* [2010] EWHC 2454 (TCC), the Claimant applied under s.24 Arbitration Act 1996 for the removal of an arbitrator in respect of a construction dispute. It was alleged that the arbitrator had acted with bias by failing to adjourn meetings which the Claimant had said it could not attend, by refusing to stay the proceedings and by issuing a peremptory order requiring the Claimant to file a proper defence and counterclaim.

The application was refused. In his judgment, Coulson J noted the exceptional nature of the court's jurisdiction to intervene in arbitration proceedings. The arbitrator had done no more than make appropriate case management decisions in the face of conduct by the Claimant which had amounted to "a deliberate course to create the maximum disruption and difficulty in the arbitration, of which this application [was] simply the most recent manifestation".

2 CONTRACT

2.1 IS A GUARANTOR'S LIABILITY TRIGGERED ON PROOF OF A BREACH OF CONTRACT OR BY DEMAND ALONE?

In *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), the Claimant had guaranteed the Defendant's obligations to a number of beneficiaries under a contract. The Claimant brought an action for a declaration as to the circumstances under which its liability to these beneficiaries would arise, arguing that such liability was triggered upon proof of a breach of contract by any one or more of the entities who could be identified as a guaranteed party. The Defendant argued that the Claimant's liability was triggered by demand alone.

The court agreed with the Claimant and granted the declaration sought. As the guarantee was not given in a banking context, there was a strong presumption that the payment obligations undertaken by the Claimant did not constitute a "demand bond" and it was for the beneficiary to displace this presumption. On an analysis of the language of the contract, the liability assumed by the Claimant was not triggered merely by a demand on the part of a beneficiary.

Further, it was necessary to demonstrate the existence of a breach or failure of obligation. The contract incorporated what the court referred to as a "pay now, argue later" clause and this pointed to the existence of a secondary, rather than a primary, liability. It assumed that the guarantor could raise defences which the guaranteed party could have raised if the demand had been addressed to it, and postponed the exercise of that right until after the demand had been fully met. Such defences would be immaterial in relation to a primary liability.

Finally, the court referred to the conclusive evidence provision in the guarantee which required a certificate "setting forth the amount". Even when taken together with other provisions in the guarantee, this did not have the effect of transforming the contract into a demand bond.

2.2 HOW LONG DOES A PARTY HAVE TO ACCEPT A REPUDIATORY BREACH BEFORE THAT PARTY'S INACTION IS TAKEN TO AFFIRM THE CONTRACT?

The Court of Appeal considered this question in *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051. The Respondent, a Formula One team, fell out with its primary sponsors, the Appellant. The team changed its name to exclude the Appellant's name and began to promote a rival business. These changes were neither discussed with nor communicated clearly to the Appellant, who was left to pick up pieces of information as and when it could. However by 13 November 2007, the Appellant knew about all of the matters which it would later rely on as amounting to a repudiatory breach of contract by the Respondent. A meeting between the parties took place in mid-December 2007, at which the Respondent promised that it would follow up with some proposals. These proposals did not reach the Appellant until mid-January 2008. The Appellant eventually wrote to the Respondent terminating the contract on 27 January 2008.

The Respondent denied that its conduct amounted to a repudiatory breach, and also asserted that the Appellant had waited too long to communicate its acceptance of any repudiation. The contract had, the Respondent argued, been affirmed by the Appellant's delay and inactivity. The judge at first instance agreed with the Respondent.

The Court of Appeal found in favour of the Appellant: its conduct did not amount to an affirmation of the contract. Two main categories of case were identified by the Court where any delay could well amount to an affirmation:

1. where the timing of the transaction is of the essence, for example in a sale of goods or a share transaction; and

2. where silence is misleading. To save the party in breach from being misled, immediate, firm protest may be required.

In this case, the Appellant had gradually learned of the Respondent's breaches over time, and had required time to consider its position. The Respondent must have known that this was what the Appellant was doing. Further, the delay took place during the break between racing seasons and so there was no urgency to the matter. The three months' delay did not therefore, in this case, amount to affirmation of the contract.

3 COSTS

3.1 CAN A COSTS ORDER BE SET OFF AGAINST A DAMAGES AWARD?

In *Fearns v Anglo-Dutch Paint & Chemical Company Ltd* [2010] EWHC 2366 (Ch) (for further details on which see item 9.3 below), the court considered whether a costs order can be set off against the liability in damages of the party in whose favour that costs order is made.

In this case, although a net award was made in the Claimant's favour, the court considered that the Defendant had ultimately been the successful party. The Claimant was ordered to pay 70% of the Defendant's costs, and to make an interim payment on account of these costs. It was held that this interim payment should be set off against the Defendant's net liability to the Claimant. This resulted in there being a substantial sum payable by the Claimant to the Defendant. It was held that the court had a discretionary jurisdiction to order a set-off between different liabilities for which judgment had been given, when the court considered it just in the specific circumstances.

In this case, the Claimant was insolvent and the litigation had been maintained largely for the benefit of its creditors. Under the terms of the IVA to which the Claimant was subject, the benefit of any damages recovered would go to the creditors, while any liability for costs would lie with the Claimant who was, of course, unable to meet any such liability. The judge found that it would be "manifestly unjust" for the creditors to receive a share of the damages free of the liability to make a payment on account of the Defendant's costs. It was therefore considered just that the costs order and damages award be set off against each other.

4 DISCLOSURE

4.1 LEGAL PROFESSIONAL PRIVILEGE DOES NOT APPLY TO ANY PROFESSIONAL OTHER THAN A QUALIFIED LAWYER

The case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* [2010] EWCA Civ 1094 dealt with Section 20 Notices, served under s.20 Taxes Management Act 1970. Such notices required a taxpayer or third party to deliver documents which contained, or might contain, information relevant to the taxpayer's tax liability. It had previously been established by the court that a Section 20 Notice does not require a person to disclose documents to which legal professional privilege ("LPP") applies.

When such notices were served on Prudential, they argued that LPP applied to the material of which disclosure was sought. Where skilled professional advice on tax law is obtained from accountants, they argued, the common law rules of privilege apply to that advice. These arguments were dismissed by the court, and Prudential brought proceedings for judicial review of this decision. Prudential's application was dismissed at first instance, and they appealed.

The Court of Appeal dismissed Prudential's appeal and confirmed that LPP does not apply to any professional other than a qualified lawyer. The court did not have the ability to hold that LPP applies outside the legal profession, except as a result of relevant statutory provisions.

LPP is an absolute rule, and so should be clear and certain in its application. This is the case when it is applied to members of the legal profession, however extending it to other professionals who give advice on points of law would raise serious questions of uncertainty as to the scope of the rule. To which professional advisors, exactly, would it apply? The court held that this was not an issue for the court, rather it was for Parliament to deal with by way of primary legislation.

4.2 THE COMMERCIAL COURT CONSIDERS THE ISSUES RELEVANT TO MAKING A DISCLOSURE ORDER IN THE CONTEXT OF AN APPLICATION UNDER S.51 SENIOR COURTS ACT 1981, IN A SITUATION WHERE THE APPLICANT HAS BEEN THE VICTIM OF FRAUD

In *Owners and/or Demise Charterers of the Dredger Kamal XXVI & the Barge Kamal XXIV (Claimants) v Owners of the Ship Ariela (Defendants) & Catlin (Five) Ltd (on its own behalf and on behalf of Syndicate 2020 at Lloyds for the 2003 year or account) & anor (Third Parties)* [2010] EWHC 2531 Comm., the Applicant shipowner applied for disclosure by the Respondent underwriters in relation to an application for a third party costs order.

The Applicant had been held liable for a collision between its vessel and two vessels owned by the Claimants. The Claimants were only awarded minimal damages, as the court had concluded that the claim was fraudulent and resulted from both fraudulent statements made by the Claimants as to the extent of the loss, and fraudulent concealment by them of the true nature of the claim. The Claimants were ordered to pay the Applicant's costs on the indemnity basis, and

to pay back a sum which the Applicant had paid on account of costs. The Applicant sought an order under s.51(3) Senior Courts Act 1981 for the Respondent to pay the costs incurred by the Applicant but not recovered from the Claimants. The basis for this was that the Respondent had supported and funded the claim, and instructed the solicitors who acted in pursuing recovery against the Applicant of both the insured claim, and in respect of the Claimant's uninsured losses.

The Court held that if the disclosure sought was relevant to the issues in the s.51 application, and was not protected by privilege, it was in this case appropriate to make the order. It would not be disproportionate, unnecessary or unjust. There would have been the need for some further disclosure in any event, and the interests of justice required the issues between the Applicant and Respondent to be properly dealt with by the Court, so there ought to be an order for disclosure.

It was stated that the documents were disclosable on the basis that they were relevant to the issues of how the Respondent determined that the claim should be fought, how it controlled and conducted the litigation and whether it did so exclusively or predominantly for its own interests.

The Court decided that it was arguable that the issue as to whether the Respondent could and should have discovered the fraud, and if so when, would go to the question of whether it was just and equitable to make an order under s.51. Other relevant issues were the fact that the Respondent itself had been the victim of fraud, and had paid out monies that it was unlikely to recover. As there was such an arguable issue, disclosure should be given.

The Respondent and the solicitors, instructed partly by the Respondent and partly by the fraudulent client, were used as the mechanism for the Claimant to achieve its fraud. As a result, neither legal advice nor litigation privilege was available to the Respondent or the solicitors.

4.3 THE COURT DOES NOT HAVE JURISDICTION TO ORDER PRE-ACTION DISCLOSURE WHERE THE PARTIES HAVE ENTERED INTO AN ARBITRATION AGREEMENT

In *Travelers Insurance Company Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC), the Technology and Construction Court dealt with an application for pre-action disclosure in a situation where the parties had already entered into an arbitration agreement.

The Claimant was the lead underwriter on the Defendant's professional indemnity insurance policy, the Defendant being a firm of surveyors. Various claims had been brought against the Defendant for allegedly fraudulent valuations. The Claimant was considering invoking an exclusion clause and avoiding the policy for misrepresentation and/or non-disclosure. The Claimant therefore requested documents from the Defendant relating to the extent to which the Defendant was aware of the possibility of fraud at the time the policy was taken out. While the Defendant supplied several documents, the Claimant believed that more existed and so applied to the court for pre-action disclosure.

The Defendant resisted this application, arguing that as there was an arbitration agreement in place, the court had no jurisdiction to order such disclosure. The Defendant argued in the alternative that even if the court did have such jurisdiction, the requirements of CPR 31.16

(which deals with the requirements for pre-action disclosure) had not been met on the facts of this case. The Claimant argued that the dispute between the parties would inevitably be litigated, and that even though there was an arbitration agreement in place the court still had the statutory jurisdiction to order the disclosure applied for.

The court found in the Defendant's favour, holding that the dispute was subject to a binding arbitration agreement, and therefore under section 33(2) of the Senior Courts Act 1981 (which gives the High Court its powers to order pre-action disclosure) the court had no jurisdiction to order pre-action disclosure. As a matter of construction, it is clear from this section that the court's power to order pre-action disclosure may only be invoked by an applicant who, in the court's opinion, would be a likely party to subsequent proceedings in that court.

The Claimant had also based one strand of its argument on section 44(3) Arbitration Act 1996, which provides that "if the case is one of urgency the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets". Coulson J stated that this section was only to be invoked in exceptional circumstances, for example where crucial evidence could be irretrievably lost, and there were no such exceptional circumstances in this case.

The court's decision is consistent with one of the stated aims of the Arbitration Act 1996, i.e. to minimise the level of court intervention in arbitration. Generally the tribunal should make all necessary procedural orders, and the court should only intervene where the tribunal is unable to act effectively.

5 EU

5.1 COUNCIL REGULATION 961/2010, DEALING WITH SANCTIONS AGAINST IRAN, COMES INTO FORCE

This Regulation, the purpose of which is to enable the sanctions currently in place to take effect against corporate bodies and individuals, was published on 27 October 2010 and came into force with immediate effect. It replaced Regulation 423/2007.

For further information on this Regulation please see the Client Alert issued on 27 October 2010, which is available on the firm's external website.

The full text of the Regulation is available on EUR-Lex: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:281:SOM:EN:HTML

5.2 IRAN (EUROPEAN COMMUNITY FINANCIAL SANCTIONS) (AMENDMENT) REGULATIONS 2010 COME INTO FORCE

The Regulations came into force on 27 October 2010, their purpose being to ensure that the penalties under UK law for a breach of the European asset freezing measures in relation to Iran remain in force. The EU has repealed and replaced the Council Regulation containing the asset freezing measures (see above), although the measures themselves remain the same.

The full text of the Regulations, together with an explanatory memorandum, can be found on Lawtel.

6 GAFTA

6.1 HOW IS THE PHRASE "READINESS TO LOAD" TO BE INTERPRETED IN GAFTA FORM 49?

In *Soufflet Negoce SA v Bunge SA* [2010] EWCA Civ 1102, the Court of Appeal was required to consider whether GAFTA form 49 required a vessel to be fit to give notice of readiness under an associated voyage charterparty, or simply to be physically and legally read to load cargo.

The parties had entered into a FOB sale contract on GAFTA form 49 terms. The laytime provisions within the contract expressly required the valid tender of a notice of readiness, and a further provision stated "all other terms and conditions as per relevant C/P". In order to perform the sale contract, the Buyer needed to enter into a charterparty. The sale contract entitled the Buyer to recover demurrage incurred under the charterparty from the Seller if loading exceeded the time stated in the charterparty.

The vessel gave notice of readiness on the last day of the specified delivery period. The Seller stated that on that day the holds were unclean and so were not presented "in readiness to load" during the delivery period. The Buyer disputed this and called upon the Seller to load. The Seller's refusal to do so was treated as repudiatory by the Buyer, who brought a claim in arbitration for damages for failure to load the cargo.

The Seller argued that the degree of readiness required was that the vessel should be ready to load as would permit a valid notice of readiness by a shipowner to a charterer for the commencement of laytime. The Buyer, however, argued that it simply had to be physically and legally possible for a seller to load even if the circumstances would not justify a shipowner giving such notice. The matter was heard by a tribunal and then by the GAFTA Board of Appeal who both found in the Buyers' favour. The Seller appealed to the High Court, where their appeal was dismissed, and then to the Court of Appeal.

The question for the Court of Appeal to decide was whether the GAFTA form requirement that the seller was entitled to complete loading, provided it had presented a ship ready to load within the contractual delivery period, implied that the ship must be ready to load (a) as per the common law requirement that she be physically and legally ready to load, or (b) as per the charterparty, namely that she was fit to give notice of readiness.

The Seller's appeal was dismissed. The court held that very clear words were needed to incorporate existing shipping law on laytime and demurrage into the contract of sale: implication would not suffice. The use of the expression "readiness to load" did not necessarily imply the technical and complex concept of the notice of readiness. Even though the technical rules relating to the notice of readiness had been incorporated into the sale contract as regards calculating laytime and demurrage, this did not mean that they had been incorporated for all purposes merely by the use of the phrase "readiness to load".

7 INSURANCE

7.1 COMMERCIAL COURT REJECTS ATTEMPT BY AN INSURER TO AVOID A POLICY ON THE GROUNDS OF FAILURE ON THE PART OF THE INSURED TO DISCLOSE MATERIAL FACTS

In *Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corporation* [2010] EWHC 2578 (Comm), the Defendant Insurers alleged that the Claimant Insured was not entitled to claim under the policy due to (a) material non-disclosure and (b) a breach of the implied warranty of seaworthiness in s.39 Marine Insurance Act 1906.

The Claimant insured a floating dock with the Defendant for a voyage from Russia to Vietnam. Sixteen days after the voyage commenced, the dock encountered a force 6 typhoon, but after repairs to the lashings tying the pontoon to the deck were carried out it was able to continue. Four days later, the dock encountered a tropical storm and was seriously damaged. As a result, the Claimant served a notice of abandonment on the Defendant. The Defendant subsequently purported to avoid the policy for the reasons set out above. The document which was the subject of the non-disclosure allegation formed part of the towage plan and showed the maximum wave height that the dock could withstand.

As regards the allegation of material non-disclosure, the Court rejected this on the facts. Even if the document in question had not been disclosed, the Defendant could not avoid the policy for three reasons:

1. disclosure had been waived by the Defendant's agreement that it would insure without seeing the towage plan as long as it was approved by a Classification Society;

2. earlier drafts of the policy had contained the towage plan warranty, which although did not render disclosure unnecessary under s.18(3)(d) Marine Insurance Act 1906, rendered it superfluous given the short period of time between the deletion of the warranty and the issuing of the policy; and

3. the Defendant was not induced by any failure to disclose, as the evidence was that they would in any event have insured on the terms that were actually agreed.

As regards the alleged breach of the implied warranty of seaworthiness, the most significant allegation was the deficiency of the pontoon securing arrangements. The Court held that the Defendant had not established by either factual or expert evidence that the dock was unseaworthy at the commencement of any part of the voyage.

7.2 WHERE AN INSURANCE POLICY PROVIDES FOR ARBITRATION WITHIN A CERTAIN TIME LIMIT, DOES THE EXPIRY OF THIS TIME LIMIT TERMINATE THE RIGHT TO BRING A CLAIM UNDER THE POLICY?

In *(1) William McIlroy Swindon Ltd (2) Rannoch Investments Ltd v Quinn Insurance Ltd* [2010] EWHC 2488 (TCC), the Court considered preliminary issues in two claims brought against an insurer

under the Third Parties (Rights Against Insurers) Act 1930. The Defendant insurer denied liability on the grounds that the insured, a building contractor, was in breach of certain policy conditions. The insured had been found liable to the Claimant following a fire. Neither judgment had been satisfied, and the insured went into voluntary liquidation.

The insurance policy contained an arbitration clause which provided that any dispute in respect of the Defendant's liability as regards a claim was to be referred to arbitration within nine months of the dispute arising. If it was not referred to arbitration within that period, then the claim was deemed to have been abandoned. In this case, there had been no reference to arbitration of any dispute within nine months of the insured becoming aware of the repudiation.

The Defendant applied for summary judgment in one of the claims brought against it. In considering the application, the Court dealt with four principle issues:

1. If properly construed, did the arbitration clause exclude the right to pursue a claim by litigation? The Court held that the wording of the clause was clear. It prescribed a mandatory mode of dispute resolution, within a specified time limit, failing which a claim in respect of that dispute was no longer recoverable. The clause provided an exclusive remedy.

2. If the clause did exclude the right to pursue a claim by litigation and terminated the right to bring a claim in arbitration after nine months, was the clause unusual and onerous? On this issue the Court held that a requirement to solve disputes by arbitration could not be regarded as onerous simply because it was unusual. In addition, was the clause incorporated into the policy given that the Defendant had failed to bring it to the attention of the insured? The Court held that the clause was incorporated into the policy. The insured had the wording in its possession for around two years, and had been told by the Defendant to read it carefully. The insurance was also arranged by brokers, who would have given advice to the insured.

3. If the clause was incorporated, and the right to pursue a claim by litigation was excluded, had the time for referring the matter to arbitration expired? The Court held that it had. A dispute within the meaning of the clause arose once the insured had notified the Defendant of a claim under the policy in respect of a potential liability to any third party, and the Defendant had notified the insured that it was refusing indemnity. No such dispute was referred within the specified time, and so it was no longer open to either the insured or the Claimants to pursue a claim under the 1930 Act.

4. If time had expired, should an extension of time for referring the dispute to arbitration be granted? The Court was not satisfied that it had jurisdiction in this case to extend time under s.12 Arbitration Act 1996. Even if it had the power, it would not grant the extension: the Defendant was not under any obligation to advise the insured of the existence of the time limit, and had acted within its rights.

The Defendant's application for summary judgment was dismissed.

7.3 COURT OF APPEAL RULES ON THE LAW APPLICABLE TO REINSURANCE CONTRACTS UNDER THE LUGANO CONVENTION

In *Glacier Reinsurance Co AG v Gard Marine & Energy Ltd* [2010] EWCA Civ 1052, the Court of Appeal upheld a first instance decision that the English courts had jurisdiction under article 6(1) of the Lugano Convention to hear a claim brought against a Swiss reinsurer.

The Respondent accepted 12.5% of the risk of a property and business interruption reinsurance issued to a US company, Devon. The Respondent's brokers, AHP, reinsured the entire risk under two excess of loss reinsurance slips, one subscribed to by four London market reinsurers (7.5%) and the other subscribed to by the Appellant, a Swiss reinsurer (5%). Devon sustained hurricane damage to its insured interests, and the Respondent settled up to the policy limits. The Respondent subsequently commenced court proceedings in London against one of the London reinsurers (the others having paid), the Appellant and AHP. The Appellant contested the jurisdiction of the English courts to hear the claim, arguing that under Article 2 of the Lugano Convention it could only be sued in Switzerland, its country of domicile.

At first instance, it was held that the English courts had jurisdiction under Article 6(1) of the Lugano Convention, which provides that "a person domiciled in a Contracting State may also be sued … where he is one of a number of defendants, in the courts for the place where any one of them is domiciled". It was appropriate in this case for all of the defendants to be sued in the same action, because the issues were the same and otherwise there would be a risk of conflicting judgments. The Appellant appealed against the court's ruling on Article 6(1).

The Court of Appeal, however, upheld the first instance judge's conclusion. The correct approach under Article 6 was for the court to assess the connection between the claims to see whether there was a risk of judgments arising out of separate proceedings being irreconcilable, such that there might be a divergent outcome where there was the same situation in both law and fact. In this case, the contract was governed by English law, as there had been a choice of English law with reasonable certainty. The Swiss placement, rather than being separate, was part of the London market placement and it made no sense for the two reinsurance contracts to be governed by different laws. Further, the underlying policy was governed by English law and it would be usual for the parties to an excess of loss reinsurance contract to choose the same applicable law.

On the facts of this case, it was expedient for the claim against the Appellant to be heard in England. The same issues arose as in the cases against the other defendants, and there was nothing in the placements to suggest that any different interpretation was required. Crucially, there was also a risk of irreconcilable judgments if the cases were heard in different jurisdictions.

8 JURISDICTION

8.1 ACCEPTANCE BY CONDUCT OF A COUNTEROFFER INCORPORATING AN EXCLUSIVE ENGLISH LAW AND JURISDICTION CLAUSE

In *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2010] EWHC 2567 (Comm), the Court was required to decide on the correct jurisdiction for a claim brought by an English claimant against a Hungarian defendant, where the contract was made on the latter's standard terms and conditions which contained a Hungarian arbitration clause but which were amended by subsequent agreement to delete that clause and incorporate an English jurisdiction clause.

The Claimant, a manufacturer of specialist engineering equipment, claimed in England against the Defendant for the balance due on invoices issued by the Claimant for goods ordered by and manufactured for the Defendant. The Defendant contested the jurisdiction and applied for a stay of the proceedings, arguing that the contract incorporated a Hungarian arbitration clause set out in its standard terms and conditions. Alternatively, under Article 2 of the Brussels Regulation the Defendant had to be sued in its country of domicile, i.e. Hungary. The Claimant argued that, as a result of exchanges between the parties, amendments to the standard terms and conditions proposed by the Claimant were accepted. These amendments deleted the arbitration clause and incorporated an English exclusive jurisdiction clause. The Defendant submitted that each contract was formed on the basis of the Claimant's acceptance of the standard terms and conditions containing the agreement to Hungarian arbitration, and a waiver by the Claimant of its own terms and conditions.

The Court decided that in the circumstances, where the Claimant was arguing that the contract was subject to an English jurisdiction clause and the Defendant that it was subject to a Hungarian arbitration agreement, and where both parties agreed that the matter was capable of being determined on written evidence alone, it was appropriate for the English court to resolve the threshold issue of whether an arbitration agreement was reached between the parties.

The conduct of the parties indicated that the contract for each order was concluded when the Claimant received the Defendant's written instructions to proceed with manufacture (as per the Claimant's earlier quote) or, at the latest, when the Claimant confirmed that manufacture had commenced. Formation of the contract did not depend on the Claimant's receipt of the Defendant's purchase orders, and the signing and returning by the Claimant of two such purchase orders did not mean that the Claimant was agreeing to the Defendant's terms for the future.

When the Claimant, for the first time, reviewed the Defendant's terms and conditions and put forward modifications, including the deletion of the Hungarian arbitration clause and incorporation of an English jurisdiction clause, this constituted a counteroffer. That the Defendant continued to trade with the Claimant, without rejecting this counteroffer, amounted to acceptance of it. The correct analysis was therefore that the Defendant accepted the Claimant's counteroffer of English law and jurisdiction by its subsequent performance.

The Defendant's application for a stay of proceedings was therefore refused.

RS SHIPPING BULLETIN

9 PRACTICE AND PROCEDURE

9.1 SUPREME COURT RECOGNISES NEW EXCEPTION TO THE WITHOUT PREJUDICE RULE

In *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, the Supreme Court has recognised a new exception to the rule that communications made in a genuine attempt to reach a settlement are protected from being used as evidence by either party to proceedings.

The Appellants had appealed against a decision of the Court of Appeal which stated that evidence of without prejudice communications could not be given in a dispute about the true construction of one of the terms of a written settlement agreement between the parties. The key question was whether, by way of an exception to the without prejudice rule, one party could rely on facts communicated between the parties as part of without prejudice negotiations which would, were it not for the rule, be admissible as part of the "factual matrix or surrounding circumstances" in order to assist with the construction of the resulting agreement.

The Supreme Court allowed the appeal and answered this question in the affirmative. The usual principles governing the interpretation of a settlement agreement should not be amended simply because the negotiations which led to it were without prejudice. The language should be construed in the same way, and the central question should be the same: what would a reasonable person, having all the background knowledge which would have been available to the parties, have understood the parties to be using the language in the contract to mean? The relevant background knowledge may well include objective facts communicated in the course of negotiations, and the process of interpretation should be the same whether or not the negotiations were conducted without prejudice. In either case, the reason for admitting the evidence was to assist the court in making an objective assessment of the parties' intentions.

The court noted that if a party to negotiations knew that, in the event of a dispute about what the resulting settlement agreement meant, objective facts communicated during negotiations would be submitted to assist the court in interpreting the parties' true intentions, settlement was likely to be encouraged.

An important issue to arise from this case is that parties should ensure that any settlement agreement is drafted as clearly and tightly as possible, in order to avoid or at least minimise any future problems with interpretation.

9.2 IT IS WITHIN THE COURT'S DISCRETION TO DISPENSE WITH SERVICE OF A PENAL NOTICE WHERE THE FAILURE TO SERVE CORRECTLY HAS CAUSED NO PREJUDICE

In *Gill and others v Darrock and others* [2010] EWHC 2347 (Ch) the High Court was faced with a situation where a freezing order had been served without the penal notice being endorsed on the front page, as required. As a result the court considered whether it had a discretion to dispense with service and, therefore, with the endorsement requirement.

The Claimant had alleged that payments due to it under a trust had been, or might be, diverted to the Defendant and so had applied for and been granted a without notice freezing order, which incorporated the usual form of penal notice. Under this order the Defendant was also required to provide certain information regarding its assets. When the Claimant's solicitors were unable to serve the order on the Defendant, they sent an email enclosing various documents including the freezing order, the penal notice on which was on the second page, rather than the first as required. The Defendant was notified in this communication that if it failed to comply with the requirements of the order, it would be at risk of an application for committal for contempt of court. The Defendant did not provide any of the information requested by the time specified in the order, and so the Claimant issued a committal application. The Defendant subsequently provided some of the information, and the Claimant offered to discontinue the committal application on payment of a contribution to its costs. The Defendant refused this offer. The Claimant accepted that committing the Defendant to prison would not be appropriate in the circumstances, but it continued with the application on the basis that there had been a contempt and a suitable penalty should be imposed.

One of the main issues for the court to consider was whether the failure to put the penal notice on the front page of the order meant that there should be no finding of contempt and, if so, whether the court could and should exercise its discretion to dispense with service.

The judge waived and dispensed with the requirement for service of the penal notice, leaving it open to the Claimant to commence committal proceedings. It was, the judge said, within the court's discretion to dispense with service of an order on a defendant, which would have the effect of dispensing with the requirement for the endorsement of the penal notice. In this case, it was appropriate to dispense with service because the breach by the Claimant was a technical one which caused no prejudice, and indeed the Defendant did not suggest that he had suffered any prejudice as a result of the penal notice being on the second page of the order.

It should be noted that this case is at odds with the notes to the White Book, which state that the court has no discretion to dispense with the requirement to display a penal notice on the front page of an order.

9.3 WHEN JUDGMENT SUMS IN DIFFERENT CURRENCIES ARE TO BE SET OFF AGAINST EACH OTHER, WHAT IS THE APPROPRIATE DATE FOR CONVERSION OF THESE SUMS INTO THE SAME CURRENCY?

In *Fearns v Anglo-Dutch Paint & Chemical Company Ltd* [2010] EWHC 2366 (Ch), the High Court considered the date on which judgment sums should be converted into sterling and set off against each other, in a situation where the claimant had been awarded damages in sterling and was also liable to the defendant for a debt in Euros.

The Claimant, trading as Autopaint International, supplied paint for cars through both its own shops and through franchises. The Defendant supplied paint to the Claimant in the UK. The Claimant brought a claim for damages, alleging that the Defendant had been supplying paint direct to the Claimant's franchisees, using the Autopaint brand. The Defendant brought a

counterclaim for monies owed in respect of goods supplied to the Claimant. At trial, the Claimant was awarded damages in sterling and was also ordered to pay an amount in Euros to the Defendant in respect of the debt owed.

The judge had to decide when the damages payable by the Defendant and the debt payable by the Claimant should be converted into a common currency and set off against each other. The sterling/euro rate had fallen during the course of the proceedings, and so the date of the currency conversion would make a significant difference to the net liability. Judgment was given on 28 July 2010, but the written reasons for the decision were not handed down until 23 September 2010.

The date at which any equitable set-off should be effected is the date on which the existence and amount of the two liabilities is established. It was therefore held that the Euro sum should be converted into sterling at the exchange rate as at the date of judgment. Due to the currency loss, this decision operated to the Claimant's disadvantage: what would have been a net liability owed to the Claimant at the exchange rate at the date the claim was brought became a net liability that the Claimant owed to the Defendant as at the judgment date.

However, the judge did not believe that this result showed that the law was defective. When a party brings a claim for damages, it is open to that party to include a claim for loss arising from currency fluctuations. The claimant would in principle be entitled to such loss if he could show that he would have paid the debt he owed to the defendant, but for the existence of the cross-claim on which he relied by way of set-off. However, if the claimant would not have paid the debt in any case (for example, if he disputed that the debt was owed in the first place) and only relied on set-off as an alternative basis for non-payment, then there was no injustice in the claimant bearing the loss resulting from the fluctuation in exchange rates. In this particular case, the judge held that the Claimant would not have used any money received from the Defendant to pay the monies owed to the Defendant. The Defendant should therefore not be held responsible for the Claimant's currency loss.

The judgment contains a useful analysis of the current legal position on equitable set-off. Further, it confirms that a right of equitable set-off does not extinguish or reduce a claim or counterclaim. Set-off will generally only discharge a party's liability when the court makes an order to this effect.

10 SALE OF GOODS

10.1 WHEN GOODS CONFORM TO SPECIFICATION ON LOADING, BUT NO LONGER CONFORM ON DISCHARGE, IS THE SELLER IN BREACH OF ITS IMPLIED DUTY UNDER THE SALE OF GOODS ACT 1979?

In *KG Bominflot Bunkergesellschaft Fur Mineraloele MBH & Co v Petroplus Marketing AG (The "Mercini Lady")*, the Claimant buyers claimed against the Defendant sellers for damages arising from a FOB sale of gasoil. Under the sale contract, quality and quantity of the goods were to be determined by independent inspection at the loadport, the results of which were to be final and binding for both parties. Further, the contract contained an exclusion clause which stated that "there are no guarantees, warranties or representations, express or implied, of merchantability, fitness or suitability of the oil for any particular purpose or otherwise which extend beyond the description of the oil set forth in this agreement".

The goods conformed to specification at the loadport, but on arrival at the discharge port the Claimant rejected them, alleging that they no longer conformed to the sediment specifications in the contract. The Claimant commenced proceedings in the High Court, alleging that the Defendant was in breach of contract terms implied by the Sale of Goods Act 1979 (the "Act"). In particular, the Claimant alleged that because the gasoil had been on-specification, but no longer was upon arrival at the discharge port, it was not capable of remaining of satisfactory quality, meaning that the Defendant was in breach of s.14(2) and (3) of the Act. Further, the Claimant argued that the Defendant was also in breach of an implied term at common law that the gasoil would be capable of enduring a reasonable voyage and for a reasonable time thereafter, so that it would still then be of satisfactory quality and/or in accordance with the contractual specification.

The Court of Appeal dealt with two issues. The first was whether, in addition to the statutory implied term of satisfactory quality, there was to be implied a further common law term extending the quality clause beyond the point of loading. The second issue was whether the basic statutory implied term could survive the existence of the exclusion clause in the contract, which did not specifically refer to "conditions".

On the first issue, the Court held that nothing in this case required the implication of this common law term. The clear intention of the contract was that the specification should be determined conclusively at the loadport, and such a clause replaced or at least redefined the implied terms as to quality. On the second issue, the Court stated that there was a well-established line of authority establishing the point that exclusion clauses needed to be in very clear terms in order to exclude conditions implied by the Act. The clause in this case was not clear enough.

11 SHIPPING

11.1 TRIBUNAL CONSIDERS OWNERS' ENTITLEMENT TO DEMURRAGE OR DAMAGES ARISING OUT OF PERIODS OF DELAY

The tribunal in a recent London arbitration (20/10) considered Owners' entitlement to demurrage or damages for two periods of delay. The vessel (chartered on the Asbatankvoy form) was first arrested by the Indonesian Navy at the loadport. It then suffered further delay when complying with Charterers' instructions to proceed to an intermediate port for cargo sampling.

In reaching its decision, the tribunal also considered Articles IV rule 3 and IV rule 6 of the Hague Visby Rules.

A detailed summary of the tribunal's conclusions is available on i-law.

11.2 COMMERCIAL COURT CONSIDERS VARIOUS POINTS ARISING FROM THE CLAUSE IN SHELLTIME 4 DEALING WITH OIL MAJOR APPROVALS

Claimant Owners chartered the vessel "SAVINA CAYLYN" to the Defendant Charterers on an amended Shelltime 4 form, clause 50 of which allowed Charterers to place the vessel off-hire or alternatively terminate the charter, if the vessel failed three consecutive oil major vetting inspections or reviews. Charterers gave notice of cancellation after ten consecutive rejections, and a sole arbitrator held that they were entitled to do so. *Dolphin Tanker Srl v Westport Petroleum Inc (The MT "Savina Caylyn")* [2010] EWHC 2617 (Comm) was the hearing of Owners' appeal.

In dismissing the appeal, the Court commented on three of the major concepts which the arbitrator had been required to interpret:

1. The meaning of the term "oil major". The Court held that this was to be given its natural and ordinary meaning, in that it referred to the six main international oil majors, and not just to the five listed in the relevant charter clause.

2. The meaning of "three consecutive inspections". This was at issue because BP had given the vessel a "pass" inspection not following a nomination by Charterers to BP, but at Owners' initiative. The Court held that the definition of "inspection" under the charterparty meant one that had been initiated by Charterers' nomination of the vessel to the oil major in question.

3. The charterparty defined an inspection as a review by an oil major by either physical inspection, or inspection of the latest SIRE Report. The judge disagreed with Owners that Charterers must prove that the latest SIRE Report was either the effective cause of or an effective cause of rejection. As the reasons for rejection were not usually clear, it was sufficient to show that the SIRE Report was considered as part of the nomination process.

11.3 TRIBUNAL CONSIDERS THE POINT AT WHICH A VESSEL BECOMES AN "ARRIVED SHIP" FOR THE PURPOSES OF TENDERING NOTICE OF READINESS

In the arbitration in question, the vessel was chartered on the Vegoil form to carry a cargo from "one safe port / one safe berth Dumai or Lubuk Gaung, Indonesia, to one safe port / one safe berth Chittagong, Bangladesh". Owners argued that the vessel had earned demurrage at Lubuk Gaung, while Charterers argued that they had earned despatch.

The vessel tendered notice of readiness when it arrived at the Morong Pilot Station, but the vessel did not actually berth until over two days later. Owners argued that laytime began to run six hours after notice of readiness was tendered at the pilot station, while Charterers argued that it began to run when the vessel arrived in berth. The issue for the tribunal to consider was whether the vessel was an "arrived ship" at the pilot station.

The structure and organisation of the ports was an important consideration. Dumai and Lubuk Gaung were different ports, but Owners submitted that Lubuk Gaung was considered as being within the area of Dumai Port, and therefore part of that port, with both ports being controlled by the Dumai Port Authority. The authority exercised full control over vessels there with sea pilots being taken on board for passage up river to both Dumai and Lubuk Gaung. Owners said that because Morong Pilot Station was where ships usually lie while waiting to proceed to these ports, it therefore satisfied the requirements set down in *The Johanna Oldendorff* [1973] 2 Lloyd's Rep 285 for being an "arrived ship" for the purposes of tendering notice of readiness.

Charterers argued that the organisation and structure of the ports was purely administrative, and had no bearing on the jurisdiction and powers of the port authority, and in particular on the commencement of laytime. Lubuk Gaung was acknowledged as a separate port, and so there was no basis for saying that arrival at the pilot station equated to arrival at Lubuk Gaung. *The Johanna Oldendorff* required the term "arrival" to be interpreted with regard to both the commercial purposes of the parties and the facts and features of each port. Both ports referred to in the charterparty were river ports, and the fact that vessels had to wait at the pilot station for sea pilots to board to guide them to either port did not make the vessels "arrived" for both ports at the pilot station.

Charterers referred to the Admiralty Guide to Port Entry, where Morong Pilot Station was seen to be some way beyond the locations recommended for vessels to anchor if not immediately taken into berth. It was clear, Charterers submitted, that vessels did not move directly from the pilot station to a berth or dock, but first needed to be piloted to the inner anchorage areas for clearance and to obtain free pratique. The pilot station was also several hours from both ports: this made it improbable that it might be considered as a usual waiting place.

The tribunal decided that, looking at the charts, the pilot station could not be regarded as the point where the carrying voyage came to an end: it was merely a staging point. That the Dumai Port Authority had authority over the pilot station did not obscure the fact that the authority it exercised was merely for the purposes of bringing vessels into the river, with the assistance of a sea pilot. The vessel could not be considered to have been more than on its way to Lubuk Gaung when it tendered notice of readiness. The notice of readiness was therefore premature and invalid, and so did not trigger the commencement of laytime. An invalid notice of readiness does

not become validated when the vessel becomes an "arrived ship", and as in this case no further notice of readiness was tendered, laytime only began to count when the vessel berthed.

11.4 WHEN CARGO HOLDS ARE REJECTED, IS THE VESSEL OFF-HIRE ON A "NET LOSS OF TIME" OR "PERIOD OFF-HIRE" BASIS UNTIL THEY ARE ACCEPTED? IS THERE AN IMPLIED OBLIGATION ON THE CHARTERER TO ENSURE RE-INSPECTION AS SOON AS POSSIBLE?

This question was considered in a recent London arbitration. Clause 45 of the time charterparty in question provided that "vessel's holds … to be clean swept/washed down and dried up so as to receive Charterers' intended cargoes in all respects … to the satisfaction of the independent surveyor … if the vessel fails to pass hold inspection/test as above, the vessel should be placed off-hire from the time of rejection until the vessel passed the same inspection/test again and any time/proven directly related expense incurred thereby to be for Owners' account…".

When the vessel arrived to load cargo, a surveyor rejected the holds at 1620 on the day of arrival (19 September). By 1900 the same day, the master advised the agents that the holds had been cleaned and were ready to receive cargo. However, the surveyor had left the ship. He did not return until 1100 the following day, and only accepted the holds at 1620 that day.

Charterers relied on clause 45 and withheld hire for the 24hour period from 1620 on 19 September to 1620 on 20 September. Owners argued that Charterers were not entitled to do so because (a) the clause was a "net loss of time clause" rather than a "period off-hire clause", and as the intended berth was occupied until 26 September no time was lost, and (b) there was an implied duty on Charterers to ensure that any re-inspection of the holds happened as soon as possible. The defects were quickly remedied, but the surveyor did not attend until the next day and even then it was around five hours before he passed the holds. If Charterers were to be allowed time off-hire, it was only between 1620 and 1900 on 19 September.

It was held that clause 45 was a "period" off-hire clause and that the ship was off-hire "from the time of rejection … until passed again". The words "any time/proven directly related expenses incurred thereby" allowed Charterers to claim the right to deduct in respect of any "additional" time that might result directly from the original failure. On the face of it, therefore, Charterers' deduction was justified.

As to the implied term, it seemed to the tribunal both reasonable and necessary that, in circumstances such as the present case, Charterers should be under some duty to act reasonably in ensuring that their surveyor did not delay any re-inspection. Further, there was no doubt that, if asked at the time of entering into the charterparty, the parties would have agreed that some such term should be implied. However, the tribunal could not accept that, in this case, the surveyor should have remained on the ship until she was ready and then passed her. It may have been that little cleaning was required, but the tribunal was not satisfied that the surveyor should have appreciated that and remained on board. On the facts, it was reasonable for the surveyor not to return until 1100 the next day. However, no explanation was given for why he did not pass the holds until 1620 of that day. The tribunal concluded that he should have passed the holds by

no later than 1130 on 20 September. To that extent, therefore, Charterers were in breach of the implied term.

Owners were awarded damages for this breach, such damages being measured by reference to the extent of off-hire to which Charterers became entitled as a result of their breach. Owners were therefore entitled to recover hire from 1130 to 1620 on 20 September, and Charterers were entitled to withhold hire between 1620 on 19 September and 1130 on 20 September.

11.5 CARGO CLAIMS : ISSUES OF LIABILITY AND THE CAUSE OF THE ARREST AND DETENTION OF THE VESSEL

The vessel was chartered on the Sugar Charter Party 1999 for the carriage of "a full and complete" cargo of sugar. At the discharge port, it was found that there were a large number of bags of short-delivered or damaged cargo. Of these bags, some were damaged, some torn and empty, some wet, and some short-delivered. As a consequence, the vessel was arrested by the receivers, who claimed US$150,000 in cash or a bank guarantee for US$540,000 in respect of the shortage and damage. The invoice value of the goods was around US$73,000, and the vessel was eventually released on payment by Owners to the receivers of US$100,000.

Owners claimed US$81,455.12, alternatively US$65,000, in respect of the cargo damage. They conceded that the wet damage, amounting to 35% of the damage, was for their own account. They argued that Charterers were liable for 65% of the invoice value of the cargo, plus the excess paid to achieve settlement, together with a customs fine. This totalled US$81,483.12. The alternative claim of US$65,000 was for an indemnity, being the proportion of the settlement figure not attributable to wet damage. Owners also claimed for damages for detention while the vessel was under arrest. They argued that the detention was caused by the receivers' insistence on receiving a bank guarantee rather than a P&I Club letter of undertaking, in breach of clause 62 of the charterparty.

Charterers did not admit liability for the cargo claim or the customs fine and challenged the quantum. They argued that Owners were responsible for the torn or torn empty bags, as such damage was caused by the stevedores who were Owners' agents pursuant to clause 14 of the charterparty. Charterers also denied liability for the detention claim and challenged quantum. They denied that clause 62 had been breached and argued that Owners had failed to establish either that a Club letter was ever offered to the receivers, or that the receivers had refused to accept it.

It was held that the cargo damage, other than the wet damage, was caused by the stevedores for whom Charterers were responsible. Each party should contribute proportionately to the settlement based on their respective liabilities, i.e. Charterers to pay US$65,000 and Owners to pay US$35,000.

Regarding the detention claim, there was no evidence that Owners' P&I Club had offered the receivers a letter of undertaking at any stage or that receivers had refused to accept such a letter. The burden of proof of establishing a breach of clause 62 was on Owners: they had to show a positive case that their Club had offered a letter to the receivers, which the receivers had refused.

Owners had not established this. The cause of the arrest and detention, and the primary reason for the detention, was the damage to the cargo, the major part of which Charterers were responsible for. But for the stevedore damage, the whole situation may have been very different. The parties should therefore contribute to the detention claim in the same proportion as their respective liabilities for the cargo damage (35% Owners, 65% Charterers).

RS SHIPPING BULLETIN

This Briefing is a summary of developments in the last month and is produced for the benefit of clients. It does not purport to be comprehensive or to give specific legal advice. Before action is taken on matters covered by this Briefing, reference should be made to the appropriate adviser.

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

Reed Smith LLP
The Broadgate Tower
20 Primrose Street
London EC2A 2RS
Phone: +44 (0)20 3116 3000
Fax: +44 (0)20 3116 3999
DX 1066 City / DX18 London
reedsmith.com

Email: sunderhill@reedsmith.com
aeallan@reedsmith.com

This Bulletin was compiled up to and including September 2010.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Richards Butler in association with Reed Smith LLP of Delaware, USA. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website www.reedsmith.com.