Issue 2 2024

Newsletter

waterson hicks

In a series of progressive developments within the firm we are delighted to announce that Edward Bayliss has become Partner in the firm and Sofia Xylouri has become a Senior Associate. We also congratulate Tom Hughes on having qualified as a solicitor.

NO OBLIGATION TO ACCEPT PAYMENT FROM SANCTIONED ENTITY IN NON-CONTRACTUAL CURRENCY

In June 2016, MUR Shipping BV and RTI Ltd entered into a freight contract where RTI agreed to ship bauxite from Guinea to Ukraine, and MUR agreed to carry it. The contract explicitly stipulated that freight payments would be made in USD. It also included a force majeure clause that suspended performance obligations during a force majeure event and exempted both parties from liability for any loss, damage, delay, or failure in performance caused by such an event.

The Force Majeure Clause stipulated:
'36.3 A Force Majeure Event is an event or state of affairs which meets all of the following criteria:

a) It is outside the immediate control of the Party giving the Force Majeure Notice;

b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port;

c) It is caused by one or more of acts of God, extreme weather conditions, war, lockout, strikes or other labour disturbances, explosions, fire, invasion, insurrection, blockade, embargo, riot, flood, earthquake, including all accidents to piers, shiploaders, and/or mills, factories, barges, or machinery, railway and canal stoppage by ice or frost, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges;

d) It cannot be overcome by reasonable endeavours from the Party affected.'

In April 2018, RTI's parent company was added to the OFAC SDN List, which subjected RTI to the same restrictions as a majority-owned subsidiary. MUR declared a force majeure event, stating that sanctions prevented it from accepting USD payments under the Agreement. RTI offered to make payments in EUR, agreeing to bear any additional costs or exchange rate losses and ensuring that its obligations under the COA remained unaffected.

MUR refused to accept EUR payments and declined to perform its contractual obligations. RTI commenced LMAA arbitration to recover the costs incurred in securing alternative carriage during MUR's non-performance. RTI contended that MUR could have overcome the force majeure event by taking reasonable endeavours and accepting payments in EUR.

The Tribunal ruled in favour of RTI, determining that MUR could not invoke the force majeure clause since the event could have been mitigated by the exercise of reasonable endeavours by accepting EUR payments.

MUR appealed to the High Court. The Commercial Court upheld MUR's appeal. RTI further appealed to the Court of Appeal, which ruled that a 'state of affairs' is 'overcome' when adverse consequences are entirely avoided and by a majority found that no detriment would have been caused to MUR by accepting payment in Euros and therefore it was unable to rely on the force majeure clause to suspend its obligations.

Before the Supreme Court, the issue was whether accepting non-contractual without detrimental performance aligned with the reasonable endeavours provision in a force majeure clause. The Supreme Court granted MUR's appeal based on the following reasons:

1. A reasonable endeavours clause in a force majeure provision does not require a party to accept non-contractual performance unless explicitly stated. The purpose of such a provision is to require reasonable steps to enable the continuation of the contract's performance, not to secure a different, non-contractual performance.

2. The fundamental principle of freedom of contract includes the freedom not to accept non-contractual performance.

3. The wording within the COA was clear. MUR had a clear contractual right to require payment to be made in USD.

4. Certainty and predictability are of paramount importance in English commercial law.

The Supreme Court ruled that if parties have agreed on specific contractual obligations, they are not required to accept performance outside those parameters, even when taking reasonable steps to avoid a force majeure event. The Supreme Court recognised that parties can explicitly agree reasonable endeavours to accept non-contractual performance. However, this was not stipulated in the clause before the Court, a common force majeure clause. The entitlement to rely on contractual rights can only be overridden if the contract expressly provides such a provision.

NO OBLIGATION TO ACCEPT REDELIVERY WITH LSMGO IN PLACE OF LSFO; BOTTOM CLEANING OBLIGATIONS ARISING DUE TO TRADE OF VESSEL

A fixture for a time charter trip provided "bunkers on redelivery were to be the same as actually on board on delivery. The vessel was delivered with 337.64 m/t of LSFO and 285.75 m/t of LSMGO on board.

During the course of the voyage Charterers advised Owners they intended to supply bunkers at the redelivery port of Townsville. Shortly before the vessel arrived at Townsville Charterers sent a further message to Owners in which they advised that no LSFO was available at Townsville and asked Owners to instruct the Master and Chief Engineer to allow LSMGO to be supplied in the vessel's LSFO tanks instead. The Owners took advice from their technical department who raised concerns and in the event Charterers' request was rejected.

There were further exchanges between the parties with the Charterers ultimately advising Owners that they would redeliver the vessel without replenishing the LSFO.

During the course of the ensuing arbitration Charterers admitted they were in breach of charterparty by not redelivering with the same quantity of LSFO as upon delivery but argued that Owners were under a duty to mitigate any alleged loss arising out of that breach and breached that duty by refusing to agree to Charterers' proposal to replace LSFO with LSMGO.

Owners argued they had an unqualified right to have the vessel redelivered with 337.64 m/t of LSFO. They were, they said, contractually entitled to refuse Charterers' request for any reason or no reason at all but they had in fact refused Charterers' proposal in good faith in the belief that there would be technical complications accommodating LSMGO in a LSFO tank.

The Tribunal held that Owners were not obliged to accept non-contractual performance and that the workaround proposal made by the Charterers to supply LSMGO instead of LSFO was a variation of the Charterparty. Whilst the Charterers' proposal might have appeared to be a reasonable solution to the lack of LSFO at Townsville Owners were under no obligation to accept a variation to the Charterparty and at the time the proposal was communicated Owners were under no duty to mitigate. Accordingly Owners were entitled to be compensated for Charterers' breach.

The Tribunal also considered an issue relating to the cost of underwater cleaning that had been conducted en route at Panama. The fixture was for discharge in New Zealand which the Charterers said had strict bio fouling regulations requiring a vessel's hull to be clean prior to a call at one of the country's ports.

Clause 81 of the Charterparty indicated that the vessel's hull had last been cleaned more than a year before the charter commenced.

There was a warranty in the Charterparty Recap that the vessel was eligible for trading to ports / countries specified in the Charterparty. Owners' obligation pursuant to Clause 1 was to keep the vessel in a thoroughly efficient state in hull to comply with requirements at all ports of call. Charterers claimed as a deduction from hire the sum of USD 3,083.88 incurred as anchorage dues and pilotage expenses which were for Owners' account as they were incurred because of the need to perform underwater cleaning at Panama.

Charterers' case was that cleaning was performed at Panama in Owners' own time and at their expense and that the need for cleaning did not arise out of the Charterers' employment orders. Alternatively, the expenses were incurred in order to enable Owners to comply with their obligations pursuant to the eligibility warranty in the Recap and were an ordinary disbursement advanced by Charterers for Owners' matters.

The Tribunal decided that Charterers' analysis was correct.

INTERNAL HEDGING IRRELEVANT TO LOSS

At the first load port under a voyage Charterparty the bunkers on board "Djilah" were arrested by third parties in respect of a claim against the bareboat Charterer. The vessel arrived late at the second load port as a result.

The Charterer Vitol brought a claim against the Owners for the extra price it was obliged to pay the cargo Shippers at the second load port. The Owners disputed part of the claim on the basis that Vitol had not suffered the loss claimed because of their internal hedging arrangements.

The Court of Appeal upheld the Commercial Court decision that Vitol's internal risk management system was not intended to mitigate or manage the specific price risk on any individual trade and therefore did not affect Vitol's recoverable costs.

SUMMARY JUDGMENT NOT DEFAULT JUDGMENT

A common problem which arises in cross-border litigation is whether an English (or other) judgment obtained in default of appearance by a defendant will be enforceable in a foreign jurisdiction.

The High Court recently addressed this problem in Nederlandse Financierings v Bengaz and accepted the application of the Claimant bank to have its application for judgment heard as an application for summary judgment.

The Court held that the bank sought declaratory and injunctive relief for which default judgment would not be an appropriate remedy, that a default judgment might not be enforceable in the likely jurisdictions envisaged and that enforcement might also need to be effected in other, as yet undetermined, jurisdictions. The Court therefore granted the application for summary judgment.

SOVEREIGN IMMUNITY FOR STATE-OWNED CARGO CARRIED ON MERCHANT SHIP

In Agentum Exploration v Republic of South Africa a cargo intended for sovereign purposes (in the particular case silver on board a vessel which had been sunk by enemy actions) had been carried on board a merchant vessel as part of a commercial contract.

The Supreme Court, overturning the Court of Appeal, held that the Republic of South Africa was entitled to assert state immunity against an in rem claim against the cargo.

EVER GIVEN – SALVAGE CONTRACT NEVER GIVEN

Following the infamous grounding of the Ever Given in the Suez Canal on 23 March 2021, Owners engaged SMIT to provide salvage assistance. The Vessel was refloated on 29 March 2021 with the assistance of SMIT who provided a team which boarded the vessel, technical support from their base in Holland and two tugs chartered by SMIT.

SMIT claimed salvage from Owners under the terms of the International Convention on Salvage 1989 and at common law. Under the Convention, the right of salvage is only available in the absence of a separate contract for salvage services. Owners contended there was a contract for salvage services between them and SMIT which was concluded on 26 March in the form of an exchange of emails and accordingly SMIT could not rely upon the Convention.

On 26 March, Owners wrote to SMIT as follows:
As agreed over phone, I am pleased to confirm as below on behalf of Owners of Ever Given. Owners agree to the following:
The tugs, dredgers, equipment engaged by SCA and their subsequent salvage claim are separate to the Smit's offer of assistance.

a) *SMIT personnel and equipment to be paid on Scopic 2020 rates*
b) *Any hired personnel and equipment, out of pocket expenses of SMIT to be paid on scopic 2020 rate + 15% uplift*
c) *Refloatation Bonus of 35% of Gross invoice value irrespective of the type of assistance rendered.*
   ci) Refloatation bonus not to be calculated on amounts chargeable for quarantine or isolation waiting period.
   cii) Refloatation bonus to SMIT will be applicable if refloatation attempt by SCA on 26 March 2021 is unsuccessful.

We look forward to your confirmation. We can then start ironing out the wreck hire draft agreement so that the same can be signed at the earliest.

SMIT replied stating:

Thank you Captain and confirmed which is very much appreciated. I shall inform our teams accordingly and we shall follow up with the drafting of the contract upon receipt of your/ your client's feedback to our draft as sent last night.

The draft SMIT referred to was a commercial proposal, a draft wreckhire contract with additional clauses and a draft salvage plan.

At first instance, Andrew Baker J held in favour of SMIT that there was no concluded binding contract. He found the tenor of the subsequent correspondence revealed that, although agreement on remuneration had been reached as above, the parties were still negotiating the other main terms. He rejected Owners' argument based on earlier cases that it was common practice in the salvage industry for the main terms to be agreed at a time of urgency and for a binding contract to be formed at that stage, with a full detailed contract to follow when the urgency had receded. There was no such principle to be derived from the cases.

Owners appealed to the Court of Appeal. Central to Owners' argument was that SMIT gave three ultimata on the morning of 26 March that they were not prepared to incur the cost of hiring tugs without there being assurances in place for their services:- if SMIT hired tugs and the vessel was refloated before they arrived, SMIT risked not being paid by Owners. Owners submitted that since SMIT hired the tugs on the back of the agreement reached regarding remuneration, SMIT had accepted there was a binding contract in place.

SMIT argued that the Judge's finding that there was no concluded contract was a finding of fact which could not be interfered with by the Appeal Court. Without prejudice to this, SMIT argued they mobilised tugs on speculation before a binding contract was concluded. SMIT's correspondence made clear they required a complete detailed contract. Only the most basic term as to the level of remuneration had been agreed. This left many other terms unresolved including the identification of the services to be provided and the terms of payment. The remuneration terms alone did not oblige SMIT to do anything at all. There was no pressure on SMIT to conclude a binding interim contract - at that stage refloating attempts had failed and it was accordingly even more likely that SMIT's assistance would be required and they would likely be entitled to some form of salvage Award.

The Court of Appeal dismissed Owners' appeal. Owners failed to discharge the burden upon them to show that there had been a binding contract. The ultimata relied upon by Owners did not prove that SMIT accepted that upon agreement as to remuneration they concluded a binding contract with full terms to be agreed when the urgency had receded. While the urgency receded upon agreement or remuneration, the 26 March refloating attempt by the Suez Canal Authority had failed and the situation was as urgent as ever for Owners. SMIT were in a strong commercial position. Using SMIT was the only realistic means of refloating the vessel and SMIT were aware they would be entitled to some form of salvage Award. Finally the Court noted as an aside that it was as well placed as the trial judge to conduct an analysis of the written exchanges between the parties.

TOTAL LOSS OF ILLEGALLY PARKED VESSEL

The vessel "WIN WIN" was described by Mrs Justice Dias as "illegally parked" inside Indonesia territorial waters off Singapore in February 2019 which led to her detention

by the Indonesia authorities for 18 months and the Master to be prosecuted and eventually convicted under Indonesian Law.

The Claimants brought a CTL claim under the hull war risks policy following the Vessel's detention for more than 6 months which period amounted to a CTL under the relevant Detainment Clause. The Defendant insurers broadly accepted that the requirements for CTL were met but nevertheless denied the claim on the following four grounds, all of which were rejected by the Judge: -

1. The detainment was not fortuitous as the Master and/or the Claimants knew or should have known that the Vessel had anchored in Indonesian territorial waters and the arrest was the consequence of their voluntary conduct in so doing. It was held that these allegations were not proven on the facts and that the Vessel's arrest and subsequent detention were not the ordinary consequence of voluntary conduct arising out of the ordinary incidents of trading.

2. The claim fell within an exclusion to the policy. The Judge rejected this defence and found in favour of the Claimant's construction of the relevant exclusion.

3. The delay was caused by the Claimant's unreasonable conduct in breach of their duty to sue and labour. The Judge rejected the allegation concluding that the Claimants "cannot be criticised for pursuing all lines of enquiry".

4. Insurers were entitled to avoid the policy for material non-disclosure – which in this case was that the Claimant did not disclose that the sole nominee director of the registered owner of the Vessel was subject to criminal charges in Greece. This defence was also rejected by the Judge who found that the Claimant did not have actual or constructive knowledge of same and that the director was not "senior management" for the purposes of s.4(3) of the Insurance Act 2015.

The Claimants also pursued a separate claim for damages for late payment under s.13 of the Insurance Act 2015 which was dismissed on the basis there was no evidence of loss suffered as a result of the late payment.

DATE FOR END OF VOYAGE MEANS DATE OF CANCELLATION

Owners chartered their vessel to the Charterers pursuant to a booking note which contained the following provision:

"Any disputes arising under this Charter … shall be referred to arbitration in England under English law. Any possible alleged claim against the Operator shall be instituted by lawsuit before latest within one year after the end of the voyage. Otherwise, the claim or claims to be null and void".

The vessel began sailing to the first load port on 28 February 2022 but the need arose for the vessel to drydock to repair damage to the propellor. The Owners claimed force majeure and the contract was cancelled on about 31 March 2022 before the vessel reached the load port.

The Charterers commenced arbitration against the Owners on 27 April 2023, over a year after the date on which the contract was cancelled by giving notice of the appointment of an arbitrator.

The Tribunal dealt with the Owners' submission that the Charterers were time barred by way of a preliminary issue. The Charterers contended that the time bar did not apply to the present dispute, arguing that:

(i) the time bar applied only to breaches of obligations on the voyage which had not commenced by the time the contract was terminated,

(ii) the use of the word "lawsuit" in the sentence prescribing the time limit could not, without doing harm to the meaning of that sentence, be reconciled with the prior sentence which required disputes to be referred to arbitration and

(iii) on an objective reading the parties could not have intended that only the Owners should have the benefit of the time bar since the clause imposed mutual rights and obligations

The Tribunal held

(i) the words "any possible alleged claim" were wide enough to cover any possible claim howsoever framed;

(ii) in a clause not drafted by lawyers, a reasonable reader would almost certainly assume that the word "lawsuit" referred to the arbitration proceedings in the preceding sentence and

(iii) while the Tribunal agreed that an arbitration clause imposed mutual rights and obligations on both parties there was no reason why the parties could not be taken to have agreed that certain rights and obligations such as the time bar were to be unilateral.

Accordingly the Charterers' claim was time barred. The Tribunal awarded the Owners the costs of the Award and their costs in the arbitration with 7% interest on those costs compounded at three monthly rests from the date of the award.

The above are only intended to be short summaries.
If you require any further information please feel free to contact us.