

CLAIMS AND LEGAL is a supplement for Members' claims handlers and legal departments

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TIME BARS: ICA ARBITRATION CLAUSE

M H PROGRESS LINES SA V ORIENT SHIPPING
 ROTTERDAM BV ('THE GENIUS STAR 1') [2001]
 EWHC 3083 (Comm.)

Sub-charterers settled a cargo claim and then sought to recover from charterers under the Inter-Club Agreement (ICA) 1996. Charterers in turn sought to recover from owners up the charter party chain. Both sub-charterers' and charterers' claims were submitted more than one year but less than two years after final discharge.

Owners alleged that sub-charterers' and charterers' recovery claims were time-barred because the charter party arbitration clause provided that 'any claim' would be time-barred unless an arbitrator was appointed within one year of final discharge.

The charter party also contained a clause saying that 'all cargo claims' were to be settled in accordance with the Inter-Club Agreement (ICA) 1996.

Clause (6) of the ICA 1996 provides that claims will be time-barred if written notice is not given within two years of discharge. Clause (2) of the ICA 1996 provides that this time bar clause will apply 'notwithstanding any provision of the charter party or rule of law to the contrary'.

The Court, on appeal from an arbitration award, found that sub-charterers' and charterers' claims were not time-barred. The effect of clauses (2) and (6) of the ICA 1996 meant that cargo claims subject to the ICA 1996 were not bound by the one year time bar period in the arbitration clause of the charter party.

This decision is in line with a previous English Court judgement (The Strathnewton) confirming that the one year time bar under the Hague Rules does not apply to claims made under the ICA 1996.

However claims handlers should keep in mind that cargo or other claims falling outside of the scope of the ICA might still be subject to a shorter time bar period under a term of the charter party or by operation of law.

TIME BARS: CONSECUTIVE VOYAGES

X – and – Y [2001] EWHC 152

Charterers alleged that owners' demurrage claim was time barred because it was submitted to arbitration more than 12 months after discharge of the cargo.

Under the applicable arbitration clause, all claims would be time-barred unless the claimants appointed an arbitrator 'within 12 months of final discharge or termination of this charter party'.

The arbitration tribunal found owners' claim to be in time and charterers appealed to the English High Court.

The Court confirmed that the words 'final discharge' in a consecutive voyage charter party refer to the completion of discharge of the cargo carried on the voyage in respect of which the demurrage claim is made. In this case, the demurrage claim arose in respect of the first of three voyages, so charterers were correct to count twelve months from completion of date of discharge under that first voyage.

'Termination of this charter party' was agreed by the parties to refer to the date when the balance of the freight for the last of the three consecutive voyages became due.

The Court decided that the additional words 'or termination of this charter party' gave owners the option to appoint an arbitrator either within twelve months of final discharge (on the voyage in respect of which the demurrage claim was made) or within twelve months of termination of the charter. The arbitration clause did not require owners to submit their claim within the earlier of the two dates.

Although in this case owners' claim was in time, claims handlers should pay careful attention to the wording of the time bar clause. If the words 'whichever is the earlier' had been expressly added to the arbitration clause, then owners would have been out of time by fifteen days. Owners would also have been out of time if the words 'or termination of this charter party' had not been included.



BAGGED RICE FOR BANGLADESH – THE EXTENT OF SHIPPERS' CONTROL

Ships are frequently detained in Bangladesh for alleged shortages of bagged rice. Often the ship is detained due to the actions of the agents in refusing to clear the ship outwards and/or retaining ship's documents, rather than as a result of any formal arrest proceedings. Ultimately the unfortunate result is that owners have to resign themselves to a cash settlement. The agents' position is often unassailable in practical terms. However, it may be wrong to assume that the agents are acting solely in their own interests.

Recent advice from surveyors in Bangladesh (Henderson Marine) intimated that the cargo is often purchased on C.F.R. liner out terms whereby the receivers (usually Government departments) stipulate that they will pay only for cargo received. The credit terms provide for 95% payment with the remaining to be paid after all cargo has been delivered. The suppliers, however, charter on F.I.O. terms. This allows them to keep control of both the loading and, importantly, the discharge. In one sense, therefore, they are both the shipper and the receiver, and any routine shortage below 5% would not fall as a loss upon the receiver but upon the shipper. Indications are that some Bangladeshi agents may be acting under the instructions, if not liaising closely with, the shippers. It is the shippers/charterers who normally nominate the agents.

Bearing in mind that it is the shipper/charterer who often dictates the loaded quantity shown on the Bills of Lading, fairness would demand that the shipper/charterer does not benefit from any inaccuracy in his own figures.

There are many other practical aspects to avoiding such shortage claims but in legal terms consideration might be given to determining whether the shippers/charterers have a hand in the ship agents' actions and assessing whether an indemnity might be obtained from the shippers/charterers.

OFFER MADE UNDER ENGLISH CIVIL PROCEDURE RULES ('CPR') PART 36

The amendment to CPR 36 in 2007 changed the mechanics of settlement offers that a court will consider when deciding the question of costs. Recent case law seems to suggest that parties and their legal advisers are still adapting to the changes and making offers that do not comply with CPR 36 – see for example *C -v- D* [2011] EWCA Civ 646 and *Gibbon v Manchester City Council* [2010] EWCA Civ 726.

For an offer to be compliant with CPR 36, the basic principles can be summarised as follows:

- 1) The offer can be made by either the Claimant or Defendant.
- 2) The offer can be made before proceedings are started.
- 3) The offer must be expressed as an offer made under CPR 36.
- 4) If an offer is accepted or withdrawn it must be in writing.
- 5) The offer can be made in respect of all of the claim or only certain aspects of it.
- 6) The offer must be to pay a single sum of money i.e. inclusive of interest but must not be a global sum of money i.e. it cannot be inclusive of costs.
- 7) The offer must state whether it takes into account any Counterclaim.
- 8) The offer should avoid referring to recovery of costs on an indemnity basis.
- 9) The offer must be open for acceptance for at least 21 days unless a hearing/trial commences before the expiry of 21 days. It is no longer acceptable to say that the offer expires and is automatically withdrawn after the expiry of 21 days i.e. that it is open for acceptance for a limited period of time.
- 10) If the hearing/trial commences before the expiry of 21 days then the offer should be open until the end of the hearing/trial.

11) The offer must state that the Defendant or Claimant, as the case may be, will be liable for the other party's costs up to at least 21 days after the date of the offer.

Court's permission to withdraw the offer will be required in certain circumstances:

- a) If the party making the offer wishes to withdraw it within the 21 days from when it was made.
- b) If the offer was made within 21 days before the trial commences.
- c) During the course of the trial.

Given that parties are still struggling to comply with CPR 36, the provisions of which are quite technical, legal advice might be appropriate when making an offer under CPR 36.

Although the CPR is not directly relevant to Arbitration proceedings, an offer made in compliance with the CPR may be quite persuasive before a Tribunal when it comes to the question of costs.

CARGO DAMAGE CLAIM: DOES BRINGING THE SHIPPERS INTO LOCAL (DISCHARGE PORT) PROCEEDINGS BREACH A LONDON ARBITRATION CLAUSE IN THE BILL OF LADING ?

A recent judgment of the English Commercial Court, *Louis Dreyfus Commodities Kenya Ltd v Bolster Shipping Company Ltd (GIORGIS CARRAS)* [2010] EWHC 1732 (Comm), shows that in certain circumstances owners, ostensibly bound by the London arbitration clause, may involve a party in foreign proceedings and thereby stand a greater chance of deflecting liability away from themselves. The facts and judgment are outlined below.

The claimants in the London proceedings, Louis Dreyfus Commodities Kenya Ltd ('LDCK'), were the shippers of a cargo of 5,000mt South African white corn under a bill of lading dated 10 March 2007. The bill of lading was issued by the defendants Bolster Shipping Company Ltd ('Owners'), who were the registered owners of the ship *GIORGIS CARRAS*. The Consignee of the cargo named in the bill of lading was a Mexican company, Suminitros de Maiz del Mayab S.A. de CV ('Suminitros').

The ship was chartered from the Owners by a company in the same group as LDCK on an amended New York Produce Exchange Form. The charter party contained an arbitration provision as follows:

'17. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to arbitration in London in accordance with Arbitration Act 1994 (sic) and any subsequent alterations (see Clause No.64)...'

Clause 64. With reference to Clause 17, it is agreed that all disputes or differences arising out of this contract which cannot be amicably resolved should be referred to arbitration in London...'

It was common ground between the parties that the bill of lading successfully incorporated the charterparty arbitration clause as set out above.

When the cargo was discharged from the *GIORGIS CARRAS* in Mexico, the receivers alleged that the cargo was damaged by a 'brown germ' and thus was not fit for human consumption. The Owners denied that they

were liable and the receivers consequently brought proceedings in the Mexican City Federal Court against (1) the Owners and managers of the *GIORGIS CARRAS*, (2) the sellers directly above them in the trade chain (who were not LDCK) and (3) the insurers of the cargo.

On 28th February 2007 the Owners made an application to the Mexican court setting out their defence on the merits. The Owners asserted that they were not liable under the bill of lading contract because the damage had been caused during storage prior to shipment (presumably Owners also asserted that the damage was not apparent at the time of loading). The shippers LDCK had stored the cargo pre-shipment, thus the Owners sought the joinder of LDCK to the action.

LDCK applied to the English court for an anti-suit injunction to restrain Owners from taking any steps to join them as a party to proceedings taking place before the Mexican court. LDCK filed the application on the grounds that such joinder constituted a breach of the arbitration clause contained in the bill of lading. They argued that London arbitration was the correct forum for the relevant disputes arising out of the bill of lading.

The question is whether the Owners' conduct amounted to a breach of the bill of lading arbitration clause.

Mr Justice Tomlinson looked in some detail at the purpose of the Mexican proceedings and the joinder. He found that: (1) the Owners did not invite the Mexican court to resolve a dispute between themselves and LDCK, (2) they did not assert a claim against LDCK, (3) they did not identify any dispute between themselves and LDCK arising out of the contract and (4) they did not identify any issue arising between themselves and LDCK 'as to which the judgment of the Mexican court could in any real sense be binding as between them'. He stated that by the arbitration provisions the Owners had not undertaken to LDCK that they would not, if sued by a third party, apply for a joinder to the action of the latter with the purpose of deflecting responsibility.

Mr Justice Tomlinson concluded that he did not consider the joinder application filed by the Owners in the Mexican court amounted to a breach of the arbitration clause under the bill of lading. Although the joinder may have exposed LDCK to potential liabilities vis-à-vis the claimants in the Mexican proceedings (the Consignee Suminitros), LDCK could not prove a breach of the arbitration clause and their anti-suit injunction application was dismissed by the English Commercial Court.

Claims handlers defending damage claims (and perhaps shortage claims on the basis that shippers had warranted the bill of lading quantities) may want to consider a joinder action against shippers.





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COLLISION CASES IN THE PHILIPPINES

It is a generally accepted principle in collision cases that the division of liability should reflect the degree of fault. The principle is accepted without question in the majority of settlement negotiations undertaken between lawyers and Clubs. However, the principle does not apply in all circumstances e.g. personal injury claims, nor does it apply in all jurisdictions. Indeed, the principle only applied in English law following the enactment of the 1911 Maritime Conventions Act.

Collisions are treated in a very different way under the law of the Philippines than under English law. Given the high density of traffic in certain areas of South East Asia and the related high number of collisions, the Philippines may be a relevant jurisdiction in many collision cases.

In the Philippines, recovery of an inter-ship claim i.e. between the ships themselves in respect of the ship's own damages, is only possible where the other ship is 100% to blame. Accordingly, in the vast majority of collisions, where both ships are underway, and where in the normal course of events, claims handlers will be looking to negotiate an apportionment of blame e.g. 70/30, under the law of the Philippines there would be no recovery whatsoever. It appears that this is the case even where one of the ships is merely 1% to blame. Where a collision has some connection with the Philippines, geographically or by virtue of a ship's registration or ownership, claims handlers should take note of the aforesaid before agreeing jurisdiction.

FAILING HOLD CLEANLINESS INSPECTION: AUTOMATICALLY OFF-HIRE?

The question of how long a ship is off-hire when an off-hire event arises gives rise to many disputes between owners and charterers. A recent London arbitration (London Arbitration 05/11 (2011) 826 LMLN) reaffirms the well established point of law that it is not sufficient for there to be an off-hire event for the ship to be off-hire under a NYPE charter, the charterers must also suffer a loss of time.

In this case the ship was chartered on the NYPE form to load a cargo of grain and failed a holds inspection on 21 October. The ship did not pass the inspection until 26 October after further cleaning work had been carried out and the ship berthed on 30 October. The question posed was for how much of this time should charterers pay hire?

The tribunal found that the berth to which she was bound was occupied by other ships so that even if she had passed first time, she could not have berthed until 24 October in any event. Accordingly, charterers should pay hire until 24 October because the ship would still have been waiting to berth in any event. The charterers had not lost any time.

However owners contended that the ship could not get into berth until 30 October even though her holds were finally passed on 26 October because the terminal was giving priority to other ships. The tribunal reviewed the evidence and found that she would have berthed on 27 October in normal circumstances i.e. the day after her holds were passed. They also accepted

owners' evidence, finding that the reason for the delay until 30 October was indeed because the terminal had given preference to other ships. This meant that this last period of delay did not result from the holds' failure on 21 October but from the decision of the terminal to give preference to other ships – a decision for which owners were not accountable.

Accordingly, the Court decided that the ship should be off-hire from 24 to 27 October but that she remained on hire for the periods before and after these dates.