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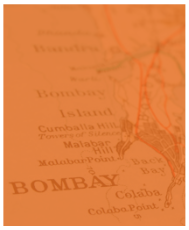

Welcome to the March edition of our India Bulletin.

We begin this edition by analysing the positive signs of growth and development in India's ports sector. We look at the prognosis for 2014 and examine the challenging structural problems currently facing the sector along with how these may be addressed.

While an estimated 20 vessels are currently acting as floating armouries in the Red Sea, Gulf of Aden and Indian Ocean, there is no international law governing their operation. In light of the detention of operator supply vessel *SEAMAN GUARD OHIO* and the imprisonment of her crew, we look at the rise of floating armouries and the call for regulation in an Indian context.

We then review a recent English High Court decision on dispute resolution clauses in bills of lading, which has clarified that where specific words of incorporation are used to import a law and dispute resolution clause, a mistake in this wording can be corrected by the courts so as to carry out the parties' intentions.

Our final article looks at the status of 'Part 36 offers' in arbitration.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin or your usual contact at HFW.

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Development of Indian ports

Introduction

There are positive signs of progress in India's port sector as some big ticket deals are expected to take place in 2014.

According to the press, Adani Ports and Special Economic Zone Ltd (APSEZ) agreed in early 2013 to buy Dhamra Port Company Limited, a joint venture between Larsen & Toubro Limited and Tata Steel Limited, in Odisha, provided that the current operator gets environmental and coastal zone approvals. Paradip Port Trust is also planning to develop containerised cargo handling infrastructure at Paradip Port to cater for growing box cargo exports, and Container Corporation of India and Warehousing Corporation of India have shown interest in the project.

This is welcome news for players in India's port sector, which has seen M&A deal volumes decline from their levels in FY11 due to sluggish economic trends, slowdown in reforms, rising interest rates, high inflation and the depreciating Indian rupee.

Indian ports at a glance

Ports play an important role in India's overall economic development. At present, 95% by volume and 70% by value of international trade in India is carried on through maritime transport[1]. There are currently 12 major ports and 187 non-major ports in India[2]. Major ports fall under the control of Ministry of Shipping and non-major ports are operated under concession from State Maritime Boards (SMB). As one of Asia's growth engines, and a lower cost manufacturing and outsourcing hub for advanced economies, India's port sector has witnessed significant growth over the past decade with total traffic handled increasing from nearly 380 million tonnes in FY01-02, to approximately 934 million tonnes in FY12-13[3]. The increase in demand in maritime transport has exerted pressure on India to expand and improve its port facilities.

The "Maritime Agenda 2010-2020" replaced the previous National Maritime Development Plan, which was launched in 2005 and was to end in March 2012. Both documents focus on the development of port infrastructure with significant involvement from the private sector.

Public Private Partnership (PPP)

The Indian Government has recognised the importance of privatisation to increase capacity and to improve the performance standards in the ports sector.

In January 2011, the Ministry of Shipping introduced its policies for the maritime sector of India for the next 10 years. The "Maritime Agenda 2010-2020" replaced the previous National Maritime Development Plan, which was launched in 2005 and was to end in March 2012. Both documents focus on the development of port infrastructure with significant involvement from the private sector.

There are now a total of 72 PPP projects[4] in India's port sector in different stages of implementation, 30 of which are under operation. The well known ones include the Nhava Sheva International Container Terminal at JN Port (completed in 1999), the third container terminal at JN Port (completed in 2006) and the second container terminal at Chennai Port (completed in 2009).

These PPP projects are dominated by major global port operators, including APM Terminals (Mumbai and Pipavav), DP World (Chennai, Mundra, Nhava Sheva, Visakhapatnam, Cocohin) and PSA Singapore (Tuticorin, Chennai and Kolkata).

Issues in PPPs

Despite the importance of PPP projects for India's port sector, the progress has been protracted.

At the bidding stage, the process has been slow due to slow bureaucratic procedures at most major ports. At the post award stage, projects have been delayed due to the time taken to obtain environmental and other government approvals. It is estimated that around 5 years is needed to obtain all governmental approvals. It then takes another 3–4 years for construction of the port.

1 Government of India, the Ministry of Shipping, "Maritime Agenda 2010-2020" (January 2011), page 1.

2 "Ports Wing", Government of India, the Ministry of Shipping website, http://www.shipping.gov.in/index1.php?lang=1&level=0&linkid=16&lid=64, accessed on 10 January 2014

3 Indian Ports Association, "E-Magazine" (November 2013), page 3.

4 "PPP Projects", Government of India, Ministry of Shipping website, http://www.shipping.gov.in/index1.php?lang=1&level=0&linkid=2&lid=4), accessed on 10 January 2014

The new Land Acquisition Act arguably will add further delay to the PPP projects. This new legislation was passed by the Indian Parliament in September 2013 and came into force on 1 January 2014. Under this landowner-favouring legislation, PPP project proponents will be required to obtain consent from 70% of the landowners for acquiring land for a greenfield port project.

Inadequate infrastructure has also contributed to the low performance standards at Indian ports. The design of the current port infrastructure is out of date. A large number of ports are not equipped with dedicated and efficient cargo-handling facilities. The future generation of large vessels requires a draft of 13 to 15.5m, whereas several Indian ports cannot handle vessels that have a draft requirement of more than 12.5m. The roads within most ports are narrow. The connectivity between hinterland and road, which accounts for 60% of cargo traffic in India, is poor.

The way forward

Despite some continuing challenges, there are positive signs in India's ports sector and the potential for growth and development is enormous. However, India's port sector is currently facing structural problems which require innovative solutions from all stakeholders involved in the sector. Policy reforms to improve connectivity between ports and other modes of transport, including increasing rail shares, expediting government approval processes and upgrading infrastructure, are key to addressing the capacity constraints facing the industry.

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Despite some continuing challenges, there are positive signs in India's ports sector and the potential for growth and development is enormous.

CONNIE CHEN

Any port in a storm for floating armouries?

India's troubled past with anti-piracy operations in the Indian Ocean has reared its head again recently, with the detention of operator supply vessel *SEAMAN GUARD OHIO* and the imprisonment of her 35 crew since October 2013.

The rise of the floating armoury

The *SEAMAN GUARD OHIO* is one of an estimated 20 ships that serve the same purpose in the Red Sea, Gulf of Aden and Indian Ocean. Managed by US private maritime security firm AdvanFort, the vessel provides an accommodation platform for AdvanFort's maritime security personnel between commercial vessel transits through the high risk area of the Indian Ocean. At the time of the incident in October 2013, the vessel was also carrying firearms and ammunition, as well as other security equipment, for deployment in counter-piracy operations – effectively, it is what is known in the trade as a "floating armoury".

The transfer and storage of weapons and ammunition for operations in the high risk area has long been a headache for private maritime security firms. Political instability in a number of coastal states, arms embargoes and local bans on the transfer of weapons have led many private maritime security firms to resort to the use of floating armouries in international waters as the only viable option for storing weapons and conducting transfers from one commercial vessel to another.

Save for the few floating armouries operating with the express approval of a coastal state, most floating armouries must remain in international waters at all times in order to avoid an

infringement of coastal state regulation and the possibility of intervention from a coastal state. In the event that floating armouries operating without local approval do have to call at port, or otherwise come into territorial waters, arrangements are made for their weapons and ammunition to be discharged. They are stored securely either in international waters onboard another floating armoury, or onshore in accordance with local regulations for the duration of the vessel's stay in port.

However, operating in international waters but within a coastal state's Exclusive Economic Zone (EEZ) is no guarantee that a coastal state will not take steps to try and close floating armouries down.

Any port in a storm?

In October 2013, the *SEAMAN GUARD OHIO* was within the Indian EEZ in international waters when, as a result of adverse weather conditions caused by Typhoon Phailin, she was forced close to Indian territorial waters during planned bunkering operations. The Indian Coast Guard approached the vessel but were unable to board as a result of adverse sea conditions and accordingly the vessel was required by the coastguard to make a rare, unplanned, port call with all weapons and security personnel still on board.

The Ministry of Shipping is clear on the formalities required before calling at ports – those formalities could not be followed in the circumstances. There was initial local press speculation that AdvanFort did hold the requisite licenses and permits for the firearms on board. Whatever the truth of the matter might be, the presence of a large cache of weapons on board certainly served to heighten tensions initially, with the Indian chief judicial magistrate reportedly saying that the incident posed a threat to national security.

A trend materialising in India?

The 10 seafarers and 25 security personnel on board the *SEAMAN GUARD OHIO* have since been charged with the illegal purchasing of subsidised bunkers, a charge not related to the carriage of weapons at all. It might be concluded from these proceedings that, even where companies do hold all requisite licenses on operator supply vessels, there are alternative ways to discourage the operation of floating armouries off the Indian coast.

This case appears to indicate a trend materialising in India, whereby the authorities intervene to prevent the operation of private maritime security companies and their support services near the Indian coast.

The earlier case involving the *ENRICA LEXIE*, in which two Italian marines serving on an Italian flagged oil tanker allegedly shot and killed two Indian fishermen they mistook for pirates 20 miles off the coast of India, continues to sour relations between India and Italy and could be said to have sparked the tensions between the Indian authorities and those offering counter-piracy services operating offshore India.

The Indian authorities' desire to intervene where they can to prevent large caches of privately controlled weapons (entirely unregulated or controlled by Indian interests) being held within their EEZ is understandable, albeit such anxieties should be kept in check as a matter of law when operations are taking place in international waters.

Unfortunately, whilst this dispute is ongoing, all 35 men have been imprisoned in India since October 2013 and the most recent bail application was refused on 7 January 2014.

The call for regulation

There is no international law governing the operation of floating armouries. They must comply with the complex web of those laws, rules and regulations applicable to them, including those of the flag state of the floating armoury, the coastal states in which they call (or are likely to call) and the place of incorporation of the operator of the floating armoury. It is not enough for their private maritime security company clients to hold a valid licence from the country in which they are incorporated.

For example, in August 2013, the UK Department of Business Innovation and Skills began approving certain floating armouries operating in the Indian Ocean and Gulf of Aden for use by those private maritime security companies holding valid trade control licences. However, such approval does not equate to confirmation that such armouries are operated in compliance with all applicable laws. It remains up to the private maritime security companies and shipowners using the armouries to conduct their own due diligence and confirm for themselves that they are operated in compliance with all applicable laws.

There is, as yet, no uniform guidance from the International Maritime Organization on floating armouries, although calls are being made for this. As is often the case in the maritime security industry, the commercial response has evolved in the absence of a regulatory framework and regulation needs to catch up with floating armories, as it is doing in the area of armed guards.

Until addressed at an international level, as well as by port and flag states, costal states such as India will continue to be wary of an "unregulated" industry operating so close to their territorial waters.



In the absence of regulation, the private maritime security companies and the individual operators of the floating armouries will continue to set their own standards and regulations to cover the safe and secure operation of floating armouries. No doubt they too would welcome the certainty which comes with regulation if it meant avoiding the indefinite detention of their vessels and crews.

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The transfer and storage of weapons and ammunition for operations in the High Risk Area has long been a headache for private maritime security firms.

SALLY BUCKLEY

Dispute resolution clauses in bills of lading: the lessons of the CHANNEL RANGER

The English High Court has recently held that, where a bill of lading incorporated the "law and arbitration clause" of an identified charterparty, but the dispute resolution clause in that charterparty provided not for English law and arbitration, but for English law and court jurisdiction, the words "law and arbitration" were effective to incorporate the English law and court jurisdiction clause.

The facts

In the recent *CHANNEL RANGER* case[1], a cargo of coal carried from the Netherlands to Morocco on the *MV CHANNEL RANGER* was alleged to be damaged on outturn in Morocco. Cargo receivers and their insurers sought to hold the vessel owners responsible for the damage.

The bill of lading under which the cargo was carried was on the CONGEN 1994 form. On the reverse, clause 1 of the conditions of carriage provided that *"all terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated"*. A similar provision was typed on the front of the bill of lading.

The charterparty incorporated by reference was a voyage charter on the Americanised Welsh Coal Charter (Amwelsh) form 1979, clause 5 of which provided:

"This Charter Party shall be governed by English law, and any dispute arising out of or in connection with this Charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales".

There was no other clause in the incorporated charterparty dealing with applicable law or with dispute resolution.

The Owners commenced proceedings in England in June 2011 for a declaration that they were not liable for any damage to the cargo. In March 2013, cargo insurers commenced proceedings in Morocco against the Owners and stevedores, and issued an application in England challenging the jurisdiction of the English High Court. They argued that the reference in the bill of lading to the "law and arbitration clause" in the charterparty did not incorporate the law and English High Court jurisdiction clause from that charterparty into the bill of lading.

The arguments

Owners relied on two separate jurisdictional gateways as the basis on which the English court should accept jurisdiction. First, that the bill of lading was a contract *"governed by English law"* and, second, that the bill *"contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract"*.

In relation to the choice of English law, the Court held that general words of incorporation were sufficient to incorporate a clause providing for English law. Further, in this case, whatever the effect of the words *"and arbitration"* in the bill of lading, the Court held that the express references to the governing law of the charterparty amounted to an irrefutable case that

1 Caresse Navigation Ltd v Office National de l'Electricité & Ors [2013] EWHC 3081.

the parties to the bill of lading intended it to be governed by the same law that governed the charterparty, at any rate so long as the chosen law was usual and proper for the trade.

As for the words *"... and arbitration clause"*, Owners argued that the specific incorporating words of the bill of lading demonstrated an intention to incorporate the charterparty dispute resolution clause, and could only refer to clause 5 of the charterparty which provided for court jurisdiction. Where a bill contains specific words of incorporation, Owners contended, there is no need to interpret those words strictly. Here, it was clear that the parties had made a mistake by referring to *"arbitration"* when they meant *"jurisdiction"*, and the bill of lading should be construed so as to give effect to the parties' intentions[2].

For their part, cargo interests submitted that the longstanding rules about incorporation of charterparty terms into bills of lading establish the need for clarity and certainty, particularly considering that bills of lading may come into the hands of other parties (such as consignees) who are unaware of the terms of the relevant charterparty. There was no reason to suppose that the original parties to the bill of lading made a mistake in referring to arbitration. Instead, cargo interests argued, effect could be given to the words of incorporation by construing them to mean that the charterparty arbitration clause "if any" was incorporated into the bill.

Owners relied on two separate jurisdictional gateways as the basis on which the English court should accept jurisdiction.

DAVID MORRISS

The judgment

The Court held that the charterparty law and English High Court jurisdiction clause was incorporated into the bill of lading. In giving his judgment, Mr Justice Males agreed with Owners that the question was one of construction rather than incorporation, and that the Court had to consider what the parties meant by the words *"law and arbitration clause"* in the bill of lading. In the Court's view, the only clause in the charterparty to which the parties could have intended to refer was clause 5, the law and jurisdiction clause.

Mr Justice Males stressed that none of this offended against the need for clarity and certainty. The consignee would know from the specific words of incorporation that the charterparty terms incorporated were not confined to those germane to the shipment, carriage and delivery of the goods, but extended to ancillary clauses including those concerned with choice of law and dispute resolution.

Before commencing any proceedings the consignee would need to see the charterparty to know where the arbitration was to be held, whether the tribunal was to be a sole arbitrator or three arbitrators, and so on. For all of these reasons the Court concluded that consignees are equally bound by a clause in a charterparty which the original parties to the bill of lading clearly had in mind when referring to the charterparty "arbitration" clause, provided that the clause in question is usual in the trade.

Comment

The Court has confirmed that where specific words of incorporation are used to incorporate a law and dispute resolution clause and a mistake has clearly been made in the words of incorporation used, the mistake can be corrected so as to give effect to the parties' intentions. In this case, the result was that the law and jurisdiction clause in the charterparty was incorporated in the bill of lading even though the words of incorporation referred to the charterparty "law and arbitration clause".

The decision is currently being appealed.

HFW's David Morriss and Jenny Salmon acted for the vessel owner, Caresse Navigation Ltd. A version of this article first appeared in the Steamship Mutual publication, Sea Venture.

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2 (Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38).

Part 36 offers in English arbitration proceedings

We are aware of cases in which tribunals have refused to countenance that Part 36 offers may have a place in English arbitration. A recent London arbitration decision indicates that some tribunals may be prepared to accept that they do, subject to all parties' agreement. It also highlights the risks involved in deploying a Part 36 offer and subsequently failing to ensure it has been validly withdrawn.

Background

In recent years, legislators in England have developed a regime set out in Part 36 of the Civil Procedure Rules (CPR) aimed at incentivising parties to litigation to resolve disputes before they reach court if possible. An offer made in accordance with Part 36 carries with it costs consequences designed to encourage a party to court proceedings to consider seriously accepting another party's Part 36 offer.

CPR Part 36 prescribes that, should a defendant fail to accept a claimant's Part 36 offer which the claimant then betters at the outcome of the case, he faces being ordered to pay interest on the sum awarded at up to ten per cent, costs on an indemnity basis, interest on the costs awarded, and (in respect of offers made on or after 1 April 2013) an additional amount, which shall not exceed £75,000. A claimant who fails to improve on a defendant's Part 36 offer risks paying the defendant's costs on a standard basis, together with interest on those costs.

Part 36 offers have become widely used to place a party in court proceedings under pressure to consider settlement to avoid the costs consequences that may follow, albeit the regime has faced criticism. Further reforms are expected in 2014.

Part 36 in arbitration

Given the potential costs implications and tactical significance, parties to arbitration proceedings also seek to invoke the Part 36 regime by making offers purporting to be, or analogous to, Part 36 offers.

These offers are made without any certainty that the Part 36 costs consequences will be taken into account by the tribunal, or whether they fall within the tribunal's general discretion to award costs under Section 61 of the Arbitration Act 1996.

Given the potential costs implications and tactical significance, parties to arbitration proceedings also seek to invoke the Part 36 regime by making offers purporting to be, or analogous to, Part 36 offers.

NICHOLAS KAZAZ

The decision in *London Arbitration 17/13*

In *London Arbitration 17/13* the tribunal decided that the Part 36 regime may apply to arbitration proceedings where the parties agree that it should do so by including appropriate wording in the offer. In this case the defendant, who had made an offer to settle, had specified an expiry date of 21 days from the date of the offer.

The offer was described as *"analogous so far as possible, to a Part 36 offer under the CPR"*. The offer stated:

"The Charterer [Defendant] *draws the Owner's attention to the consequences of non-acceptance of a Part 36 offer, including the possibility that if the Owner [Claimant] obtains a detrimental result with respect to its Claim in the Arbitration, the Charterer will be entitled to seek interest on any sum found to be due to it at 10% above the base rate, together with indemnity costs from the Expiry Date and interest at 10% above the base rate on those costs"*

In reply, the claimants denied that the offer was an effective Part 36 offer since it was expressed to be open for a limited period (which is not permitted under the Part 36 regime), and made their own offer expressed "to have the equivalent effect of an offer made under Part 36 of the Civil Procedure Rules". Over six months later the defendants sought to accept the claimants' offer.

The tribunal held that there had been an implicit agreement to apply the rules governing withdrawal of Part 36 offers, such that the acceptance by the defendants settled the case.

Lessons learned

The decision in *London Arbitration 17/13* – that parties may either expressly, or by implication, agree to the application of the Part 36 regime in arbitration – is not binding on other arbitral tribunals considering the status of a Part 36 offer. However, it may be persuasive.

Parties should be careful to comply fully with the requirements of Part 36 to ensure the benefits of enhanced recovery remain available. When faced with a Part 36 offer, a party should consider carefully whether to make a Part 36 offer in reply in light of the possible cost consequences. All parties should remember that any offer made under the regime will remain open until it is withdrawn.

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hfw Conferences and events

13th Coaltrans India

Goa
6–7 March 2014
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