July 2012
to
December
2012

MARINE INSURANCE CASE UPDATE

High Court, Court of Appeal and Supreme Court Cases
July 2012 to December 2012
Update 2

Toby Stephens, Geoffrey Conlin and Alex Kemp

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HFW Marine Insurance Case Update No 2

Welcome to the second of our HFW Marine Insurance Case Updates which are now produced on a six monthly basis. The Marine Insurance Case Update aims to provide you with regular summaries of English Court cases relevant to the law of marine insurance including hull, war and cargo risks. We will also seek to include other cases which may be of interest in terms of procedural decisions, for example service out of the jurisdiction or anti-suit injunctions.

This Marine Insurance Case Update forms the basis of a presentation and we have already been to many of you to discuss these cases.

This second update includes issues of coverage, non-disclosure, the importance of carefully worded arbitration agreements and binding settlement agreements.

We hope you find the update useful and should you have any questions, then please do not hesitate to contact us.

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Valiant Insurance Company v (1) Sealion Shipping Ltd & (2) Toisa Horizon Inc ("The Toisa Pisces") [2012] EWCA Civ 1625

Court of Appeal: Lord Justice Pill, Lord Justice Tomlinson and Lord Justice Gross

Mr Robert Bright QC and Mr Richard Sarll (instructed by Swinnerton Moore LLP) for the Appellant

Mr Steven Berry QC and Mr Nathan Pillow (instructed by Law & Co LLP) for the Respondents

This case at first instance was reported in our Case Update No. 1. At first instance the Owners of the specialist well-drilling vessel "TOISA PISCES" (the "Vessel") were successful before the Commercial Court in their claim against their loss of hire insurers. The case centered on issues of non-disclosure and misrepresentation. The unsuccessful Underwriters appealed to the Court of Appeal.

Facts

The loss of hire insurance was on ABS 1/10/83 wording which provided:

"If in consequence of [...] breakdown of machinery [...] occurring during the period of this insurance the Vessel is prevented from earning hire for a period in excess of [21] days in respect of any accident, then this insurance shall pay [US$70,000] for each 24 hours after the expiration of the said days [...] not exceeding a further [30] days in respect of any one accident or occurrence and not exceeding [30] days in all during the currency of this Insurance..."

Owners were claiming the maximum $2,100,000 indemnity under the policy, which represented 30 days loss of hire at the insured amount of US$70,000 per day.

The Vessel was propelled by two azimuth thrusters, each of which was driven by an electrical motor. These two motors were referred to in the judgment as the PAM (the port azimuth motor) and the SAM (the starboard azimuth motor). The first and primary incident was the breakdown of the PAM, which occurred on 25 February 2009. The Vessel was put off-hire as a result of the breakdown. The PAM did not return to service until 19 May 2009, and it was this period of off-hire which formed the basis of the Owners' claim.

The Owners attempted to mitigate their losses by installing the SAM in place of the PAM and using a Louis Allis motor where the SAM would ordinarily have been. This work enabled easier access for maintenance in areas that were usually difficult to reach. During this maintenance, a hydraulics failure occurred (the second occurrence), with the result that the vessel had to go to drydock for repair. The vessel was in drydock for just over a month.

Held

If the second occurrence broke the chain of causation then the Owners' claim would be reduced from US$2,000,000 to just over US$1,940,000. However, the Court of Appeal held that the chain of causation had not been broken. Both the reasonableness of the Owners' decision to undertake the maintenance work which was underway at the time of the second occurrence and the close relationship between that maintenance work and Owners' attempts to mitigate their loss pointed against a break in the causal chain. Agreeing with Gross LJ's judgment on the point, Tomlinson LJ noted that the decision to carry out the repairs which gave rise to the second occurrence could be regarded as itself caused by the first occurrence.

However, less than a week after departure from drydock following the second occurrence, the SAM failed (the third occurrence). The Vessel proceeded to port for further repairs, during which time the now repaired PAM was reinstalled and the Louis Allis motor installed on the starboard side in place of the SAM. The Vessel then went back into charterers' service.

The third occurrence was relevant to the question of whether one, two or three deductibles should be applied. The Court looked on this as a question of construction of the loss of hire policy, and held that after the application of the 21 day deductible, the first occurrence gave rise to a claim to the policy maximum. There was no need to consider whether further deductibles would have been applied if the Owners' claim had hinged on the second and/or third occurrences. It was irrelevant that H&M cover, which was closely linked to the loss of hire cover, had treated the three occurrences as three separate events. Tomlinson LJ concluded his judgment by describing the Underwriters' attempt to suggest that a claim based upon the occurrence of a single insured peril should attract the application of multiple excess periods as *"to say the least unorthodox"*.

This judgment has re-emphasised that, where multiple insured perils occur, it will be necessary to examine the factual circumstances of the claim carefully to determine whether the chain of causation has been broken by one or more of the perils which followed the first. The parties will also need to take a careful look at the policy wording to determine how many deductibles should apply. In this case, as the Owners' claim was successfully established on the basis of the first occurrence, the fact that two insured perils occurred after the first was ultimately irrelevant to the claim. In such cases, and subject always to the policy wording, it would seem unlikely that multiple deductibles and/ or excess periods could be applied.

Amlin Corporate Member and Others v Oriental Assurance Corporation ("Princess of the Stars") [2012] EWCA Civ 1341

Court of Appeal: Lord Justice Longmore, Lord Justice Rimer and Lord Justice Tomlinson

Mr Roger ter Haar QC (instructed by Brown Jacobson LLP) for the Appellant

Mr Peter MacDonald Eggers QC (instructed by Norton Rose LLP) for the Respondent

Facts

The "PRINCESS OF THE STARS" (the "Vessel") was a roll-on roll-off passenger cargo vessel operating in the Philippine Islands. On 21 June 2008, she sank with the tragic loss of more than 500 passengers and crew having headed into the pathway of typhoon “Frank”. The incident was all the more tragic because the Philippine government had issued a typhoon warning on the evening the Vessel left her port of departure. The warning encompassed the port of departure, the port of destination and the Vessel’s planned route.

Over 40 cargo claims have been brought in the Philippines against the owners of the Vessel ("Owners"). Further claims in respect of the lost cargo have been brought directly against Owners’ cargo liability insurer, Oriental. By the underlying cargo liability policy (the "Original Policy"), Oriental would indemnify Owners *“for all sums which the insured [Owners] shall become legally obligated to pay as damages for loss or damage of merchandise or goods under his custody.”*

Oriental reinsured their potential liability in the London market with reinsurers led by Amlin (the "Reinsurance Policy"). The Reinsurance Policy contained an English law and jurisdiction clause, and a “follow the settlements” clause. Importantly, both the Original Policy and the Reinsurance Policy contained a typhoon warranty which stated:

“[...] it is expressly warranted that the carrying vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port nor when her destination or intended route may be within the possible path of the typhoon or storm announced at the port of sailing, port of destination or any intervening point. Violation of this warranty shall render this policy void”.

Reinsurers commenced proceedings in the High Court in England for a declaration of non-liability under the Reinsurance Policy on the grounds that there had been a breach of the typhoon warranty. Reinsurers further sought a declaration that Oriental were not liable under the Original Policy by reason of the breach of the typhoon warranty as it appeared in the Original Policy.

Held at First Instance

It was against this background that Oriental applied for the English High Court proceedings to be stayed pending the outcome of the various cargo claims commenced in the Philippine Courts. In the Commercial Court, Andrew Smith J had refused to grant a stay. Oriental therefore appealed to the Court of Appeal.

The legal starting point was that English law had established that a stay of proceedings would only be granted in a *"rare and compelling case"*. Oriental argued that, in order to protect their claim in England under the Reinsurance Policy, they had to argue in the Philippines that there had been a breach of the typhoon warranty in the Original Policy. However, at the same time, in order to make good their reinsurance claim, they had to argue the opposite case under the Reinsurance Policy in the English courts (i.e. that there had been no breach of warranty).

Oriental further argued that the circumstances of this case were sufficiently rare and compelling because, without a stay, the Philippine court and the English court might reach inconsistent verdicts.

Held in the Court of Appeal

In his leading judgment rejecting Oriental's application, Longmore LJ held that the Commercial Court had given sufficient weight to the risk of inconsistent verdicts. It was within the Commercial Court judge's discretion to hold that the risk of different evidence and inconsistent decisions in the two sets of proceedings was *"a relatively modest one"*, particularly because evidence relevant to the reinsurance proceedings would come out in the Philippine proceedings well in advance of the English trial. It had been legitimate to take into account as a factor mitigating against a stay that the Philippine proceedings might not be concluded for 10 years.

The other members of the Court of Appeal agreed with Longmore LJ's judgment, but not without expressing some sympathy for Oriental. Rimer LJ noted that it was legally correct to refuse the stay but commented on the *"apparent unfairness"* of Oriental's position. Tomlinson LJ went even further, commenting that, by commencing declaratory proceedings in London *"[t]hese giants of the London insurance market have placed their reinsured Philippine minnow in a hopeless and invidious position."*

In summary, each application for a stay will be considered on its own merits to determine whether the *"rare and compelling"* case test has been satisfied. The Court of Appeal's decision makes clear that there can be no argument that reinsurance claims automatically satisfy that test. However, the Court of Appeal also indicated in their judgment that long delay in foreign underlying proceedings (such as the potential 10 year delay in this case) can be one of the factors that would mitigate against a stay. The threshold to satisfy the test therefore remains high, and is one which the Philippine insurer was unable to meet in this case, despite the considerable difficulties they face in arguing contradictory cases in England and the Philippines at the same time. Nevertheless, as Tomlinson LJ noted in reaching his verdict *"[a] conclusion does not have to be reached with enthusiasm in order to be right"*.

Barbara Parker & Michael Parker v The National Farmers Union Mutual Insurance Society Limited [2012] EWHC 2156 (Comm)

Commercial Court: Mr. Justice Teare

Clive Blackwood (instructed by Shoosmiths) for the Claimants

David Turner QC (instructed by Clyde and Co.) for the Defendant

Facts

Mrs Parker owned a house which suffered substantial damage by fire. The house was insured by NFU pursuant to a policy dated 6 July 2006 which named Mrs Parker as an insured and insured the property against damage by fire. From 22 September 2009 Mr Parker was added as an insured. At the time of the fire they were living together and married in April 2010.

After the fire Mr and Mrs Parker claimed on the policy for damage by fire, loss of contents and loss of rent. It was common ground that the house was damaged by an insured peril (i.e. fire) however the NFU denied liability on the following grounds:

1. Avoidance of the policy on account of the failure by Mr and Mrs Parker to disclose two earlier fraudulent insurance claims:

    (a) one by Mr Parker in 2002 in respect of the alleged theft of an expensive watch; and

    (b) another by both Mr Parker and the future Mrs Parker in 2007 in respect of the alleged theft of two expensive watches.

2. Mr Parker was responsible for the arson which destroyed the house.

3. Mr and Mrs Parker relied on fraudulent means in support of their claim, namely false documents relating to the alleged lease of the house and in response to the investigation of the claim.

4. Mr and Mrs Parker had failed, in breach of terms of the policy, to provide documents requested by NFU and were therefore not entitled to payment.

After a careful review of the evidence the judge held that one of the earlier claims was not fraudulent (2002) but the other was (2007). The judge also held that the fire was set by one or more people acting on the direction of Mr Parker. The judge was not persuaded that an agreement leasing the property at £3,500 per month was a sham.

A schedule to the policy of insurance described Mr Parker as *"joint policyholder"*. However, the judge held that there can be no joint insurance where the different interests of several persons are insured under the same policy. Such a policy is a composite policy. On the facts of this case Mrs Parker owned the house and although Mr Parker had had an ownership interest in it, he had sold this back to Mrs Parker in 2007. Although Mr Parker may have had an equitable interest in the house, or an interest in some of its

contents, or an insurable interest in the rent legally payable, the interests of Mr and Mrs Parker were different and the policy was therefore a composite policy.

Against this background, the judge held that the NFU was entitled to avoid its obligation to indemnify Mr Parker. Furthermore, since the destruction of the house was caused by his wilful misconduct he could not in any event make any recovery in respect of the loss. However, since Mrs Parker had not been aware that Mr Parker had made a dishonest claim in 2007, the NFU was not entitled to avoid its obligation to indemnify Mrs Parker. The NFU did not allege that Mrs Parker was part of any conspiracy to the arson and since the policy was a composite policy her right to claim was not affected by the wilful misconduct of Mr Parker.

It followed that unless the NFU could take advantage of another defence, Mrs Parker was entitled to indemnity. The General Conditions of the Policy provided that:

"Your rights to policy benefit

To qualify for benefit YOU and any other person seeking benefit under this POLICY must keep to the terms and conditions of the POLICY

How to claim

If anything happens which might result in a claim, YOU must do the following:-

... provide all written details and documents WE ask for".

It was common ground that this clause was a condition precedent to recovery under the policy. NFU requested that Mr and Mrs Parker provide copies of their bank statements for the period October 2009 to March 2010 to evidence the availability of funds for the rebuild. Mr and Mrs Parker's solicitors responded saying that *"Our clients see no reason to supply you with complete bank statements"* and attached a letter from their bank providing some assurance that Mr Parker could generate the money. During the course of disclosure, the Parkers disclosed certain bank and credit card statements, respectively for October and November 2009 for the period October 2009 to February 2010.

Mrs Parker sought to avoid the consequences of the breach of condition by saying that:

1. The provision was not fair and not binding pursuant to the Unfair Terms in Consumer Contract Regulations 1999 (UTCCR 1999); and

2. The NFU unreasonably rejected the claim in breach of Insurance Conduct of Business Sourcebook (ICOBS).

The judge held that the general condition was not unfair as it did not cause a *"significant imbalance"* in the parties' rights and obligations as required by the UTCCR.

Rule 8.1.2 of ICOBS (applicable only to consumer insurance) provides that, except where there is evidence of fraud, a rejection of a consumer policyholder's claims is unreasonable, unless it is for breach

of warranty or condition unless the circumstances of the claim are connected to the breach. The judge held that this was a case where the breach of condition was connected with the breach since the NFU considered that Mr Parker was involved in the arson and the bank statements were relevant to the question of motive.

It followed that Mrs Parker's failure to comply with the terms and conditions under the policy meant that she was not able to *"qualify for benefit"* under the policy.

Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG and Others ("Alexandros T") [2012] EWCA Civ 1714

Court of Appeal: The Right Honourable Lord Justice Longmore the Right Honourable Lord Justice Toulson and the Right Honourable Lord Justice Rimer

Mr Iain Milligan QC, Mr Michael Ashcroft QC & Mr Luke Pearce (instructed by Thomas Cooper) for the Appellants

Mr Michael Swainston QC & Mr Tony Singla (instructed by Clyde & Co LLP) for the 1st – 4th Respondents

Mr Steven Gee QC & Mr Tom Whitehead (instructed by Norton Rose) for the 5th — 7th Respondents

Mr David Bailey QC & Mr Jocelin Gale (instructed by Mayer Brown International LLP) a watching brief for the 8th-9th Respondents

Facts

In May 2006 "ALEXANDROS T" became a total loss (the "Vessel"). Following the loss, the owner of the vessel, Starlight Shipping Company (the "Owner"), sued its insurers in the Commercial Court for an indemnity in respect of the loss. The case settled shortly before trial, with the insurers paying 100% of the claim, but without interest and costs. The proceedings were stayed pursuant to Tomlin orders i.e. a court order under which a court action is stayed, on terms which have been agreed in advance between the parties and which are included in a schedule to the order which remains confidential. The order permits either party to apply to court to enforce the terms of the order, avoiding the need to start fresh proceedings.

In April 2011 - more than 3 years later - the Owner and various connected individuals commenced proceedings in Greece against insurers (among others) in which they claimed substantial damages from the insurers arising out of the manner in which the insurers had defended the claims under the policies. It was said the insurers had spread malicious falsehoods in the market relating to the circumstances in which the Vessel had been lost, which had caused the Owner and the other Greek claimants to suffer substantial losses. In particular, it was alleged that the Owner had missed the opportunity to use the policy proceeds to invest in three vessels, and that as a result of insurers' actions in acquiring false evidence, Owners were not able to insure the vessels and without insurance they would not have been able to trade them and could not purchase them.

The insurers responded to the Greek proceedings by issuing applications in the original Commercial Court proceedings (which remained stayed pursuant to the Tomlin orders) claiming relief against Owners, including damages for breach of settlement agreement and damages for breach of jurisdiction clause. In addition, the insurers issued new proceedings against Owners claiming similar relief. Owners in turn applied for the English proceedings to be stayed in favour of the Greek proceedings under either Article 27 or Article 28 of the Brussels Regulation (44/2001).

Article 27 provides that:-

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised of the action is established ...." [our emphasis]

Decision

The Court of Appeal, reversing the decision of first instance court (before whom no application had been made under Article 27 of the Regulation, and who had dismissed the application under Article 28 and granted summary judgment in favour of the insurers) held that the English proceedings involved the same cause of action and the same parties as the Greek proceedings, and that the Greek court had been seised first in relation to them. It followed that the English applications/actions were stayed in favour of the Greek proceedings under Article 27 of the Regulation.

Comment

In this case the Greek claimants (i.e. the Owners) were careful to abandon any reliance on the contract of insurance in the Greek proceedings and to delete any reference to late claims under the policy. On this basis, the Court of Appeal held that the claimants in Greece have claims akin to the torts of defamation and malicious falsehood. Since article 27 has regard to *"causes of action"* and not proceedings, the Court of Appeal found it impossible to regard the proceedings in Greece as the same as the original claim brought in England. Furthermore, the English court was not seised in relation to these claims at any time before the applications were issued i.e. after the date of the Greek proceedings.

This case is of interest for two further reasons.

1. Firstly, two judges made specific reference to the fact that as a matter of English law, an insurer commits no breach of contract or duty sounding in damages for failure to promptly pay an insurance claim as the law deems interest on sums due under a policy to be adequate compensation for late payment, and that this is so even if an insurer deliberately withholds sums which he knows to be due under a policy. Lord Justice Rimer also pointed out that the Law Commission has proposed that the law be reformed in this area.

2. Secondly, the case shows how a claimant can go behind a settlement agreement and bring separate causes of action - e.g. for defamation or malicious falsehood, as in this case - in another jurisdiction and the English Courts may be unable to assist (if they were minded to) in bringing the claim back to the jurisdiction of the contract of insurance or settlement agreement because of the provisions of European law. This case therefore underscores the importance of drafting settlement agreements providing for a fully comprehensive release and discharge of liability and which protect the parties from any unanticipated proceedings in foreign jurisdictions.

Bunge SA v Kyla Shipping Co Ltd [2012] EWHC 3522 (Comm)

Commercial Court : Mr Justice Flaux

Dominic Kendrick QC and Noel Casey (instructed by Reed Smith) for the Appellants

Steven Berry QC and James Turner (instructed by Holman Fenwick Willan LLP) for the Respondents

Facts

On 4 May 2009, the 27 year old MV "KYLA" (the "Vessel") was struck by another vessel while berthed at Santos, Brazil. The Vessel was not at fault for the collision. At the time of the collision, the Vessel was just over 3 months into a 12 - 15 month time charter to Bunge. The Vessel's Owners obtained surveyors' reports following the collision which indicated that the cost of repairing the Vessel would be in excess of both her sound repaired value and her insured value.

On 3 July 2009, Owners notified Bunge that the charterparty had been frustrated as a result of the collision. Owners also declared the Vessel a constructive total loss and abandoned the vessel to hull and machinery underwriters. The Vessel's hull and machinery insured value was US$16 million. Bunge disputed that the charterparty was frustrated and claimed against Owners for the losses they had suffered as a result of Owners declaring the charterparty to be frustrated.

The claim went to arbitration in London in February 2011. The arbitrator (Mr Simon Rainey QC) held that the damage to the Vessel caused by the collision would have taken approximately 180 days to repair, and that this was insufficient to frustrate the charterparty. In relation to cost of repair, the arbitrator held repairs would have cost US$9 million. The parties agreed for the purposes of the arbitration that the Vessel's sound market value at the date of the collision was US$5.75 million. The arbitrator held that, in circumstances such as these, where the cost of repair far exceeded the value of the Vessel, no prudent Owner would repair the Vessel. Performance of the charterparty after the casualty had become radically different to that which the Owners had agreed, and the charterparty was frustrated as a result of the collision.

Charterers appealed the arbitrator's decision to the English High Court.

High Court Appeal

The charterparty between Owners and Bunge was on an amended NYPE 1946 form, which included the usual obligation on Owners at Clause 1 to *"keep the vessel in a thoroughly efficient state"*. The charterparty also included an express term at Clause 41 which provided:

"41.1 Owners warrant that throughout the currency of this Charter Party the vessel shall be fully covered by leading insurance companies/International P&I Clubs acceptable to the Charterers against Hull and Machinery, War and Protection and Indemnity Risk.

[...]
41.3 Insurance full style and value

Hull and machinery: USD16,000,000 London, Norway and USA Markets"

Charterers argued before the High Court that Clause 41 formed part of a scheme in the charterparty requiring Owners to repair any damage to the Vessel during the currency of the charterparty which would cost less than or up to the Vessel's insured value of US$16 million. In this case, Charterers argued, given the US$16 million valuation the charterparty obliged Owners to carry out the US$9 million repairs to the Vessel and the arbitrator had been wrong to say that the charterparty had been frustrated.

Owners asserted that Clause 41 was not intended as an allocation of risk which would displace the principles of frustration. Rather, the insured value was stated in the charterparty for charterers' information to allow them to calculate the likely cost of any additional insurance premiums for which they were responsible.

Decision

The Court held that Clause 1 NYPE 1946 and Clause 41 of the "KYLA" charterparty amounted to an allocation of the risk of damage up to the Vessel's insured value to Owners. The Court held that the presence of the warranty at Clause 41 made it impossible for Owners to say that what had occurred (namely a casualty giving rise to repair costs US$7 million less than the Vessel's insured value) amounted to something radically different to the performance of the contract which had been contemplated when the contract had been concluded. The usual principle that insurance is irrelevant to the charterparty contract had been displaced by Clause 41.

In reaching this decision, the Court said that the numerous practical difficulties which such an allocation of risk would cause to Owners (such as having to fund the repairs themselves if insurers were slow to pay or if the Vessel's mortgagee bank were loss payee) were to be disregarded.

Comment

It is likely to come as a surprise to shipowners that reference to a chartered vessel's hull and machinery insured value in the charterparty could affect their obligations to charterers in case of serious damage to the vessel. Clauses containing a continuing warranty to insure at a specified insured value (like Clause 41 of the "KYLA" charterparty) are common. The Court's decision in this case makes clear that, where a charterparty contains such a clause, an Owner cannot declare a charterparty frustrated where the cost of repair will be less than the vessel's insured value. Instead, the shipowner must repair the vessel and continue to perform the balance of the charterparty, even if the repairs cost more than the repaired vessel will be worth such that no prudent owner would otherwise undertake the repairs.

The Owners of the "KYLA" are seeking to appeal the decision.

Yilport Konteyner Terminali Ve Liman Isletmeleri AS v Buxcliff KG & Ors "The CMA CGM Verlaine" [2012] EWHC 3289 (Comm)

Commercial Court: Mr C Edelman QC

David Lewis and Rupert Hamilton (instructed by Swinnerton Moore LLP) for the Claimant

Christopher Smith (instructed by Keates Ferris) for the Defendants

Facts

Due to a collision with the "**ODESSA STAR**", some containers on board "CMA CGM VERLAINE" (the "Vessel") had become submerged in their holds and some had fallen overboard. Arrangements had to be made for the discharge of the Vessel. It was difficult to find a port that would accept the Vessel. An agreement in principle was reached between all interests that the Vessel would proceed to Yilport in Turkey and there discharge about 1,300 containers and any damaged deck cargo.

The Claimant is the operator of the port of Yilport. The First Defendant had chartered the Vessel to CMA CGM, the Second Defendant was the manager of the Vessel, and she was at the time of the accident entered for hull and machinery, loss of hire, and protection and indemnity cover with the third defendant, the Swedish Club.

The First and Second Defendants provided a Letter of Undertaking ("LOU") and the Third Defendant provided a Letter of Indemnity ("LOI") to the Claimant port in consideration for allowing the Vessel to discharge at Yilport. There was no discussion about the costs of discharge save in the LOU the first and second defendants did agree *to "remain responsible for payment to you of all … charges … levied in accordance with the terms and conditions of Yilport*". These terms and conditions in turn provided that the *"… tariff for damaged containers and/or vessels handling from the vessel* ***will be determined by Yilport depending on the type of operations****. …"* Thus on the face of it the Claimant could set their own charges entirely in their discretion.

A dispute arose about sums due to the Claimant for the discharge of containers. The Claimant advanced a claim under the LOU and LOI for US$1,380,977, representing a total charge of US$3,380,977 less US$2 million paid on account. The amounts charged represented a significant mark-up on their standard tariff.
The Defendants all denied liability for the sum claimed and sought repayment of any sum due in the event that the payment on account made to the Claimant was an overpayment. The Club's defence was that the LOI did not apply (see comments below) and the First and Second Defendants defended the claim on the basis that the reference to *"the terms and conditions of Yilport"* in the LOU was a reference to the Claimant's standard tariff. Alternatively, if the Claimant was entitled to rely on its General Terms and Conditions, the sums charged had to be reasonable, and the Claimant had failed to provide adequate proof for certain of the sums claimed.

The Judge heard both witness and expert evidence with John Pugh the Claimant's expert and Neil Gardiner the Defendants' expert.

Club LOI wording

"… we hereby agree to indemnify you … in respect of any and all consequences, liability, loss or damage that you may incur and which may arise, including but not limited to, damage to the port or its personnel and facilities, oil pollution, wreck removal and loss and damage to any cargo, its containers and from handling the damaged cargo and its containers including any delays, penalties or fines caused by or raised by the customs authorities and all reasonably and properly incurred legal costs and expenses. …"

The Club denied liability on the basis that all the sums claimed fell outside the scope of the LOI. The LOI merely operated, in effect, as an insurance against fortuitous loss or liability that the Claimant might suffer as a result of the discharge and did not extend to the cost of the discharge itself.

Decision

Mr C Edelman QC sitting as a Deputy Judge of the High Court had to determine the applicable rates for discharge in the absence of a specific agreement between the parties and whether these were properly recoverable under the LOU and/or LOI. He held as follows:

Claim under LOU

1. The LOU issued by the First and Second Defendants did include the terms and conditions of the Claimant but this did not include a reference to rates.

2. The rates had not been determined at the time it was agreed to send the Vessel to Yilport for discharge. This was normal commercial practice as the extent of the damage was unknown at the time the agreement was made.

3. On the construction of the LOU the Judge rejected the argument that the Claimant was limited to its standard tariff of charges for discharge of undamaged containers/normal discharge operations.

4. The Judge rejected the Claimant's argument that its rates could only be challenged by reference to *"Wednesbury"* unreasonableness. The Judge held the charges made by the Claimant must satisfy an implied term that they should be reasonable. That said the Judge noted that especially given the emergency nature of the situation, the Claimant was not under any obligation to prove the reasonableness of its charges on an item-by-item basis.

5. The Judge reviewed the invoiced items individually and the Claimant was for the most part entitled to judgment against the first and second defendant under the LOU.

6. The Judge preferred Mr Pugh's expert evidence and was critical of Mr Gardiner's lack of relevant experience in port operations.

Claim under LOI

1. The Judge held the LOU issued by the Club was not capable of imposing on the Club either a direct liability for the Claimant's charges or a liability as guarantor of the First and Second Defendants' liability to pay those charges. The fact that commercial expedience might point to another solution did not allow rewriting the parties' express bargain.

2. Part of the invoiced items did fall under the Club LOI and the Claimant was entitled to judgment to that extent also against the Club.

3. The Judge held the Claimant was entitled to make charges against the First and Second Defendants in the sum of US$3,059,955, which meant that after deduction of US$2,000,000 paid on account, there was a balance of US$1,059,955 due from the First and Second Defendants to the Claimant. The Club did not have a general liability for the Claimant's charges, however there were some items which fell within the ambit of the LOI and the Club was liable to pay US$113,250.

Sulamerica Cia Nacional de Seguros S.A. & Ors v Enesa Engenharia S.A. & Ors [2012] EWCA Civ 638

Court of Appeal: The Master of the Rolls Lord Justice Moore-Bick and Lady Justice Hallett

Mr David Wolfson QC and Miss Nehali Shah (instructed by White & Case LLP) for the Appellants

Mr Michael Crane QC, Mr Stephen Houseman and Mr Damien Walker (instructed by Clyde & Co. LLP) for the Respondents

Facts

The dispute arose in connection with the construction of a hydro-electric generating plant in Brazil known as the Greenfield Hydro Project. In March 2011 certain incidents occurred which led the insured, Enesa, to make claims under two substantially similar policies ("the Policy"). The insurers declined liability on the grounds that the losses were uninsured or excluded by express terms of the Policy and there had been a material alteration in the circumstances disclosed to them at inception of which they had not been notified as required by one of the conditions.

The Policy contained the following clauses:

1. A law and jurisdiction clause providing that the Policy will be governed exclusively by the laws of Brazil and that any disputes arising under, out of or in connection with the Policy shall be subject to the exclusive jurisdiction of the Courts of Brazil (condition 7).

2. A mediation clause providing, inter alia, that if any dispute or difference of whatsoever nature arises out of or in connection with the Policy including any question regarding its existence, validity or termination, the parties undertake that prior to a reference to arbitration, they *"will seek to have the Dispute resolved amicably by mediation"* (condition 11).

3. An arbitration clause providing, inter alia, that in case the insured and the insurer shall fail to agree as to the *"amount"* to paid under the Policy through mediation, such dispute shall be referred to arbitration under ARIAS arbitration rules and that the seat of the arbitration shall be London, England (condition 12).

The following sequence of events unfolded:

1. The insurer gave notice of arbitration in accordance with condition 12 of the Policy.

2. The insured started proceedings in Brazil contesting the efficacy of the arbitration agreement on the grounds that the Policy was an *"adhesion"* contract under Brazilian law and, pursuant to Article 4 of the Brazilian Arbitration Act (inter alia), could only be invoked with their consent.

3. The insurers made an application without notice to the Commercial Court in London seeking an injunction to restrain the insured from pursuing the proceedings in Brazil. The without notice injunction was granted and later upheld by the Court after hearing arguments from both sides.

4. In the context of the proceedings in Brazil, the insured applied for and eventually obtained from the court in São Paulo an injunction restraining the insurers from resorting to arbitration in order to pursue a claim for a declaration that they were not liable under the Policy.

5. The insurers tried to overturn the anti-arbitration injunction before the Appellate Court of São Paulo. The Appellate Court upheld the injunction ordering insurers to refrain from continuing the arbitration proceedings in London.

Decision

The insured then appealed to the Court of Appeal in London against the order continuing the anti-suit injunction. The Court of Appeal decided on the following inter-connected issues:

1. What is the proper law of the arbitration agreement? The parties' express agreement that the Policy was to be governed by the laws of Brazil supported an argument that the proper law governing the arbitration agreement was, impliedly, the law of Brazil. However the Court of Appeal held the implied law of the arbitration agreement to be English law on the basis of *"two powerful"* factors which pointed the other way:

    (a) As the parties must have been aware, the choice of another country as the seat of arbitration inevitably imports an acceptance that the arbitration law of that country will apply to the proceedings. Therefore the parties must have foreseen and intended that the provisions of the Arbitration Act 1996 would apply to any arbitration under the policies. This suggested that the parties intended English law to govern all aspects of the arbitration agreement.

    (b) The *"possible existence"* of a rule under Brazilian law that arbitration could only be invoked with the consent of the insured would significantly undermine the arbitration agreement and, in the absence of evidence to the contrary, suggested that the parties did not intend the arbitration agreement to be governed by Brazilian law.

2. Is Mediation a condition precedent to arbitration? The insured argued that it was and since the condition precedent had not been satisfied, insurers had not validly commenced an arbitration which called for protection by an injunction. The court held that condition 11 did not constitute a legally effective pre-condition to arbitration, principally because it was too uncertain as it did not set out a defined mediation process or refer to any specific procedure.

3. What is the scope of the arbitration agreement i.e. does the reference to *"amount"* limit the scope of the agreement to disputes about the amount to be paid as opposed to liability? The court held that a failure to agree as to the *"amount"* to be paid under a policy included a dispute about whether any sum was due under the policies as all, and therefore included matters of liability and coverage.

Comments

Having invested a very considerable amount of time and cost in attempting to clarify the law applicable to the agreement to arbitrate, the irreconcilable decisions of the Courts in England and in Brazil left the parties in this case in the invidious position of being unable to proceed in either jurisdiction without being in contempt of court in the other country. If the insured were to proceed with its case in Brazil, it would be in contempt of the English Court and if insurers were to proceed with their case in England, they would be in contempt of the Brazilian Court.

In order to avoid the type of problem encountered by the parties in this case, policy drafters should pay attention to include an express choice of law governing their arbitration agreements. Also, clear and unambiguous language must be used to ensure that the agreed procedure for resolving disputes remains effective, including in relation to the separability of the arbitration agreement, if applicable. It is also important to ensure that escalating dispute resolution clauses are carefully drafted and clearly prescribed to ensure that each stage is certain, effective and enforceable.

Te Hsing Maritime S.A. & Anr v CertAsig S.A. [2012] EWHC 2577 (Comm)

Commercial Court: Mr Stephen Males QC (sitting as a Judge of the High Court)

Mr James Watthey appeared on behalf of the Claimants

Miss Sarah Cowey appeared on behalf of the First Defendant

Facts

This was an application for security for costs in an action concerning a claim under a marine hull insurance policy for what is said to be a CTL as a result of a fire on a vessel in 2009. The CTL was for the sum of US$1.3 million and there was also a claim of US$240,000 in respect of general salvage and average.

Before the start of the hearing in the case, the Defendants applied for security for costs from the Claimants on the basis that the claimants are resident out of the jurisdiction in Taiwan (and are not resident in a Brussels or Lugano state). The judge directed himself to the following issues.

Decision

1. Would a cost judgment be available in Taiwan?

    (a) Security will only be ordered against a person resident out of the jurisdiction if a costs judgment from the English Court will not be enforceable at all in the claimant's own state, or if enforcement there will involve additional obstacles or burdens in addition to the obstacles and burdens applicable in a Brussels or Lugano state.

    (b) Where the costs judgment is not enforceable at all, there is in principle no reason why security should not be ordered for the full amount. Where the costs judgment is enforceable but there are additional obstacles to overcome, the security will be limited to the additional costs or the consequences of delay in overcoming such obstacles.

    (c) Although there is no reciprocal convention or treaty between the UK and Taiwan regarding the enforcement of cost judgments, the Claimants could show evidence that the English Courts have enforced judgments from Taiwan and the Taiwanese Courts have enforced judgments from England. On the evidence, a judgment would be enforceable in Taiwan.

    (d) While there would be additional delays and expenses involved in seeking enforcement, these would amount to no more than £20,000 and enforcement could alternatively be sought against the second defendant's vessels in Singapore and it would therefore not be just to order security.

2. Was it relevant that the first claimant had been dissolved?

    (a) Although the first claimant had been dissolved, the second claimant was a company with substantial assets - including the beneficial ownership of five vessels - and had expressly accepted that any costs order made in the defendant's favour would be made against claimants jointly. There was also no evidence the second claimant would dispose of the vessels or manipulate their trading pattern to avoid those vessels being arrested in any enforcement procedure.

3. What is the significance of the GA claim, including whether the defendant's liability for general average is sufficiently certain to stand effectively as security for their costs?

    (a) Although the GA claim has not yet been adjusted, the Judge held that it may well be that the Defendants in effect already had security in the form of their potential GA liability in a sum which would cover any order for security.

4. What is the significance of the claimant's ATE policy?

    (a) Unfortunately, since the judge dismissed the application for the reasons outlined above, it was unnecessary to consider this matter.

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