Commodities

February 2014

## Formation of contract and the correct measure of damages – a recent decision

**A recent decision by the English Commercial Court, *Glencore Energy UK Ltd v Cirrus Oil Services Ltd (24 January 2014)*, considered two important issues for commodities traders: the first relating to whether a sale contract is formed; the second relating to what damages can be claimed when a buyer refuses to accept delivery and the effect of a loss of profit exclusion clause on that claim.**

On 4 April 2012, Cirrus agreed an email recap sent by Glencore setting out the terms under which Cirrus would buy 630,000 barrels of Ebok crude oil CFR Tema. Soon afterwards it became clear that the refinery to which Cirrus planned to sell the oil would not accept it because it was a blend. Cirrus refused delivery of the cargo from Glencore, citing misrepresentation. In response, Glencore started proceedings against Cirrus for its losses, claiming the difference between the market price of the oil and the price that they would have obtained under the contract.

Cirrus dropped their misrepresentation claim at the trial and instead relied on two technical defences. The first was an argument that no contract had been formed in the first place because the email recap confirming the deal had left out key information, including the entity in the Cirrus group that was party to the contract. The second was that a clause excluding damages for 'loss of profit' meant that damages calculated as the difference between contract and market price could not be recovered.

### Contractual formation

The issues in relation to contractual formation were similar to those in *Proton v Orlen (24 September 2013)*, reported in the October edition of the Commodities Bulletin. In both cases, oil traders sent email recaps setting out the key terms of a deal which were accepted by the other party. One of the parties later argued that the exchange had not created a legally binding contract.

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In the *Proton* case, the claimant (represented by HFW) successfully showed that looked at objectively, the acceptance of the recap was intended to be binding. The judge found that *"the speed of the market requires that the parties agree the main terms and leave the details, some of which may be important, to be discussed and agreed later"* and that because the language used in the emails was *"that of commitment"* the parties were bound.

The judge in *Cirrus v Glencore* came to the same conclusion, commenting: *"In my judgment it is clear that the parties intended to conclude a binding contract … the evidence before me established that both parties were keen to "lock into" or "wrap up" the deal".*

There was a significant difference between the cases. In *Cirrus v Glencore*, the email recap had identified the buying entity only as *"Cirrus… (Full trading name)"*. Cirrus used this to argue that no contract had been formed with the defendant, Cirrus Oil Services Limited. The Court found that the omission of the full name of the buyer did not cause a difficulty because it was possible to identify the entity the parties had in mind from their previous dealings and the name used, so that a contract had been formed with that entity.

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## Damages

Glencore calculated their claim for damages using the standard measure for non-acceptance under s50(2) and (3) of the Sale of Goods Act 1979, being the difference between the price that they were promised for the oil under the contract and its market value. Cirrus argued that the damages were not recoverable because of a clause in the contract excluding damages for loss of profit.

The contract incorporated BP's 2007 General Terms and Conditions for FC Sales, which are widely used in the market. Clause 32.1 of these terms provides that "in no event … shall either party be liable to the other … *in respect of any indirect or consequential losses or expenses including … loss of anticipated profits*".

Cirrus argued that Glencore's measure of damages meant that they were trying to claim for the 'anticipated profits' they would have made had the deal gone ahead. The Court did not agree, finding that *"The contract price/market price differential is not a computation of lost profit. Lost profit is the difference between the total net cost to the seller of acquiring the goods and bringing them to market on the one hand and the net sale price that would have been achieved on the other."* Glencore's claim was not for loss of profit but for loss of its bargain with Cirrus and would therefore succeed.

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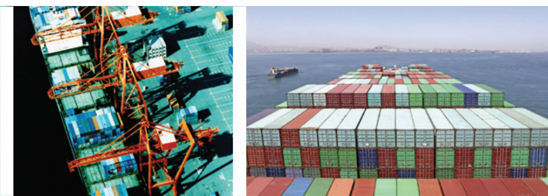

## “In transit loss” clauses – protection for stolen cargo?

**The English Commercial Court has recently considered the meaning of an “in transit loss” (ITL) clause in a voyage charterparty and whether this will afford protection to cargo owning charterers in circumstances where pirates steal part of a vessel’s cargo.**

The issue is a topical one because, as we reported in the January edition of our Shipping Bulletin, there have been an increasing number of thefts of oil cargoes by pirates operating out of West Africa. The thefts are usually carried out by way of a ship-to-ship (STS) transfer from the hijacked vessel onto a smaller barge or other lightering vessel. The issue affects cargo owners and shippers in particular because it is the cargo – not the vessel – that is the pirates’ intended target.

CLARE CHYB

In the case of *Trafigura Beheer BV v. Navigazione Montanari Spa (30 January 2014)*, the Court considered whether cargo owning charterers who had lost cargo in these circumstances could rely on an ITL clause in the charterparty to bring a claim against the vessel owners.

Trafigura had chartered a vessel owned by the defendants for the carriage of a consignment of premium motor oil. On 14 December 2010, the vessel loaded its cargo at Abidjan, Côte d’Ivoire for intended discharge at Lagos, Nigeria. Having arrived and tendered Notice of Readiness at the discharge port, she sailed to a position about 55 nautical miles off Lagos to await orders from Trafigura.

On 24 December 2010, armed pirates attacked the vessel and took control of it. Two days later, they transferred approximately 5,300 MT of the cargo from the vessel into a smaller lightering ship. The vessel was released by the pirates the following day.

Having lost a portion of its cargo, Trafigura brought a claim against the shipowner under the ITL clause of the charterparty. The charterparty was on the BPVOY 3 form, amended by the addition of the Trafigura Chartering Terms 2005. Clause 4 of the Trafigura terms had itself been amended in the fixture recap as follows:

*“In addition to any other rights which Charterers may have, Owners will be responsible for the full amount of any in-transit loss if in-transit loss exceeds 0.5% and Charterers shall have the right to claim an amount equal to the FOB port of loading value of such lost cargo plus freight and insurance due with respect thereto. In-transit loss is defined as the difference between net vessel volumes after loading at the loading port and before unloading at the discharge port.”*

In deciding whether Trafigura could claim for the lost cargo, the Court examined the commercial purpose behind ITL clauses. It found that they are intended to deal with loss that is incidental to the carriage of oil products. They excuse shipowners from liability for inevitable very minor differences between discharging and loading quantities as a result of differences in volumetric measurements made at two separate times. Above any such minor difference however, they make shipowners strictly liable for in transit loss of cargo on the voyage, without the charterer having to prove fault.

Against this established commercial background, the Court held that the theft of part of the cargo did not fall within the type of loss intended to be covered by the ITL clause. “In transit loss” connotes loss incidental to the carriage of oil products and theft by pirates is not loss of that kind. Indeed, the actions of pirates were so far removed from potential definitions of “in transit loss” that the Court decided it did not have to consider those definitions further.

One of the reasons given by the Court for rejecting Trafigura’s interpretation of the ITL clause is that it would give rise to some surprising results. In particular, it would make shipowners strictly liable

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for any loss of the cargo during the voyage, instead of just loss incidental to the carriage of oil products as intended.

The charterparty also contained an exceptions clause, which stated that the provisions of Articles III (apart from rule 8) and IV of the Hague-Visby Rules would apply and that owners would have the protection of those articles in respect of *any claim* made under the charterparty. Significantly, the words “deduct from freight” in the ITL clause had been replaced with the word “claim”.

The Court decided that as the exceptions clause had been specifically referred to in the recap as *“maintain as printed”*, it should give equal weight to both the exceptions clause and the ITL clause. Even if it was wrong to find that the theft of the cargo by pirates was not an “in transit loss”, the Court held that the shipowner was in any event protected from Trafigura’s claim under the ITL clause because of the language in the exceptions clause.

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## News

Global Arbitration Review has just released the 7th edition of its GAR 100 report, and we are delighted that HFW has again been listed as a leading firm. The GAR 100 is a guide to specialist arbitration firms around the world and offers extensive qualitative analysis of those arbitration practices. HFW’s review can be found at http://globalarbitrationreview.com/journal/article/32193/holman-fenwick-willan/

## Conferences and events

**13th Coaltrans India**
Goa
6–7 March 2014
Attending: Simon Cartwright and Hari Krishna

**Australia Grain Industry Conference**
Singapore
10 March 2014
Attending: Chris Swart, Stephen Thompson and Peter Murphy

**Global Grain Asia**
Singapore
11–13 March 2014
Presenting: Chris Swart

**Trade finance risk mitigation in EMEA**
Geneva
11 March 2014
Presenting: Janet Butterworth, Carol-Ann Burton, John Barlow and Ian Chung

**LNG Seminar**
Perth
13 March 2014
Presenting: Nick Longley and Matthew Blycha

**HFW Commodities Breakfast Seminars**
HFW London
18 March, 1 April and 23 April 2014

**Cereals Europe 2014**
Geneva
20 March 2014
Presenting: Brian Perrott

**LNG Seminar**
Singapore
10 April 2014
Presenting: Chanaka Kumarasinghe and Matthew Blycha

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