Shipping

December 2012

SHIPPING BULLETIN

Welcome to the December edition of our Shipping Bulletin.

In this edition, we look at some of the latest key changes to both legislation and case law. We start by looking at a new case which has clarified how the English courts decide what law is to be applied to an arbitration agreement where there is no choice of governing law in the arbitration clause itself. We highlight the importance of careful drafting of dispute resolution clauses, including an express choice of governing law in arbitration clauses and the need to take particular care with drafting of multi-tiered or escalating dispute resolution clauses, to ensure that each stage is effective and enforceable.

We examine the legal issues raised by slow steaming and the more stringent environmental regulations facing the shipping industry. The next article examines the entry into force of the new EU Regulation governing the liability of carriers of passengers by sea and how this will make major changes to the legal regime covering carriage of passengers by sea in France. Finally, we review two recent London arbitrations which have shed light on the key principles governing speed and performance disputes. In addition, we announce the news of two Partner promotions.

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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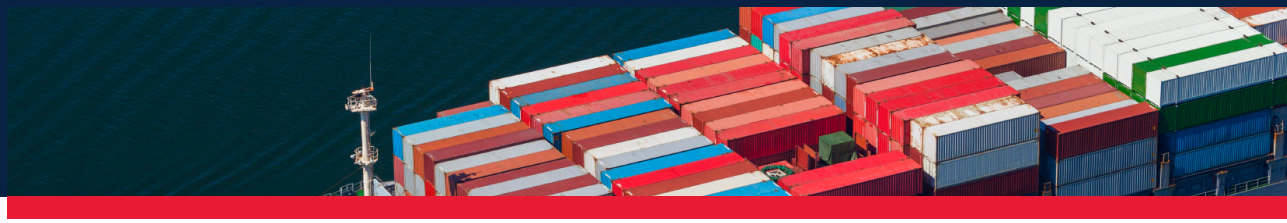


An arbitration mystery tour? Determining the governing arbitral law where the arbitration clause is silent

The English Court of Appeal recently provided some much needed clarity on what law is to be applied to an arbitration agreement where there is no choice of governing law in the arbitration clause itself (*Sulamerica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A. and others* [2012] EWCA Civ 638).

There had previously been some uncertainty as to which law applies to an arbitration where there is no express governing law stipulated in the arbitration clause itself and the seat of the arbitration is in a different country from the governing law stipulated in the general law and jurisdiction clause. In English law, an arbitration agreement is separate and distinct from the underlying contract. This means that it is possible for an arbitration agreement to be governed by a different law to the underlying contract. However, despite this, English courts have in the past been divided as to whether to apply (i) the law governing the underlying contract; or (ii) the law of the seat of the arbitration. The Court of Appeal has now set out some helpful guidelines for ascertaining the relevant law in these circumstances.

Background

The dispute arose in connection with two insurance policies (the Policies), relating to the construction of a hydroelectric generating plant in Brazil. The Insured (*Enesa Engenharia S.A*) made claims under the Policies. However, the insurers (*Sulamerica Cia Nacional De Seguros S.A*) refused to pay out under the insurance policy, denying all liability.

The wording of the Policies included the following:

Clause 7: Law and jurisdiction

"...this Policy will be governed exclusively by the laws of Brazil. And disputes arising under, out of or in connection with this Policy shall be subject to the exclusive jurisdiction of the courts of Brazil".

Clause 11: Mediation

"If any dispute or difference of whatsoever nature arises out of or in connection with this Policy... the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation ... If the Dispute has not been resolved to the satisfaction of either party within 90 days ... or if either party fails or refuses to participate in the mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the Dispute to arbitration ..."

Clause 12: Arbitration

"In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be referred to arbitration under ARIAS Arbitration Rules ... The seat of the arbitration shall be London, England".

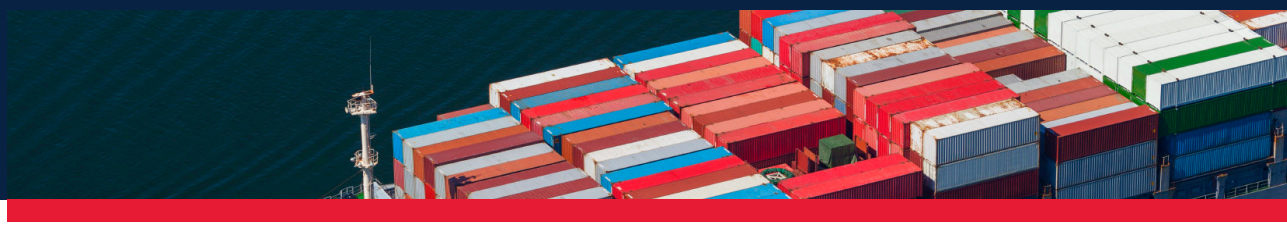
Relying on Clause 12, the insurers commenced arbitration in England seeking, amongst other things, a declaration of non-liability. In response, the insured commenced proceedings in the Brazilian courts pursuant to the exclusive jurisdiction clause (Clause 7). The insurers in turn, initiated an anti-suit injunction in the English High Court in order to halt the Brazilian proceedings.

In the English anti-suit proceedings, the insured argued that the arbitration clause was governed by Brazilian law and was invalid because (1) under Brazilian law, it could only be invoked with their consent; and (2) the requirements of Clause 11 had not been satisfied and this was a condition precedent to any arbitration. The insured also argued that the Policies were more closely connected with Brazil: the Policies were governed by Brazilian law, both parties were Brazilian, the subject of the Policies was situated in Brazil and the incidents leading to the claim occurred in Brazil.

The arbitration law test

The Court of Appeal recognised that the proper law of an arbitration clause within a commercial contract may not be the same as the governing law of the substantive contract itself. The Court held that the proper law of an arbitration agreement must be determined by making a three stage enquiry into:

1. Any express choice of governing law.
2. Any implied choice of governing law.
3. Which system of law has the closest and most real connection with the agreement to arbitrate.



Each of these stages must be considered separately and in the stated order, since any choice made by the parties ought to be recognised. However, the Court emphasised that (1) and (2) would often merge together and the implied law of the arbitration agreement will often be the same as the law of the substantive contract. However, there may be factors that point a different way and so in some cases the law of the arbitration agreement will not be the law of the substantive contract.

Judgment: English governing law applied

The Court of Appeal held that the proper law of the arbitration agreement in this case was English law, despite the fact that the Policies were expressly governed by Brazilian law. This was because, although there were "powerful factors in favour of an implied choice of Brazilian law as the governing law of the arbitration agreement", the Court was persuaded by two important factors that pointed the other way. Firstly, the choice of London as the arbitral seat imported acceptance that the arbitration would be conducted and supervised according to the Arbitration Act 1996. Secondly, the possible existence of a rule of Brazilian law which would undermine the arbitration agreement indicated that the parties did not intend the arbitration agreement to be governed by Brazilian law.

The mediation clause (Clause 11) was too uncertain to give rise to a legal obligation of any kind. In order for a mediation agreement to be regarded as binding:

1. There should be an unequivocal undertaking to enter into mediation.
2. There should be clear provision for the appointment of a mediator.
3. The process of the mediation should be clearly defined.

Clause 11 did not meet these requirements and accordingly, there was no binding agreement to mediate and Clause 11 was not an effective precondition to arbitration. The anti-suit injunction was therefore upheld.

Certainty of arbitration law

The Court of Appeal's decision will generally be welcomed, as it brings greater clarity to the determination of the proper law of an arbitration agreement where there is doubt. Where there is no clear choice of law in the arbitration clause itself, the three stage test must be applied to determine the governing law.

However, while the Court of Appeal has set out a clear test, each case will in practice continue to depend on its own circumstances and how each particular judge interprets the test. A substantial uncertainty, and therefore litigation risk, will always remain where there is no express choice of law in the arbitration clause.

Consequences for enforcement

Enforcement difficulties are also more likely where there is no express choice of governing law in the arbitration clause itself. In particular, one common ground for refusing to recognise or enforce an award under the New York Convention is where the arbitration agreement was not valid "under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made".

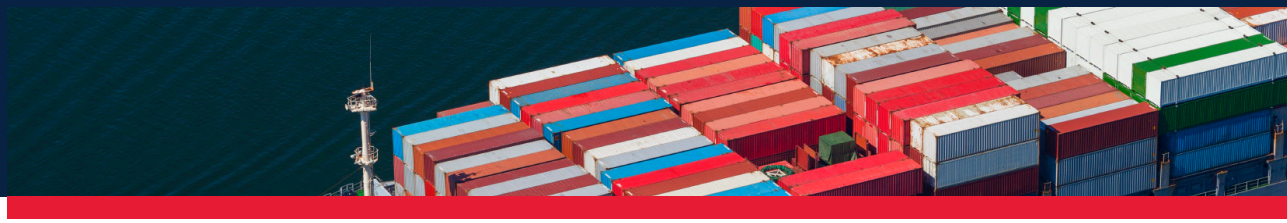
Where there is no express choice of arbitral law, and consequently uncertainty about the law governing the arbitration agreement, the respondent is more likely to challenge jurisdiction not only in the substantive proceedings themselves, but also in any enforcement proceedings. This Court of Appeal decision is unlikely to prevent such challenges, which will remain an issue.

A different seat?

In the majority of arbitration clauses, the seat will be in the country of the chosen governing legal system. For most contracts, this is the best choice and it reduces cost and removes one potential cause of inconsistency.

However, for some contracts and/or contracting parties, the selection of the law of one country and a different seat may be commercially advantageous. For example, some contracts for projects in the Middle East stipulate English law (to take advantage of well developed English construction law, for example) but provide for DIFC-LCIA arbitration in Dubai. This allows local companies to arbitrate close to home if they are in a dispute.

This Court of Appeal decision will not interfere with such arrangements, which remain valid. However, clauses stating a different



seat should be carefully drafted and appropriate local law advice taken to ensure that they are valid under the law of the seat and the governing law.

Conclusion

Contractual negotiations between parties naturally concentrate on the key commercial terms, which means that the wording of the dispute resolution clauses can often be an afterthought. This Court of Appeal decision has highlighted the importance of including an express choice of governing law in arbitration clauses. The decision also demonstrates the importance of careful drafting of multi-tiered or escalating dispute resolution clauses, to ensure that each stage is effective and enforceable. In this case the insured were unable to enforce the mediation clause as a binding obligation to mediate and were left unable to enforce a Brazilian exclusive jurisdiction clause.

Clauses which do not expressly state the governing law, or which fail to achieve the desired 'multi-tiered' process are more likely to lead to uncertainty, inconvenience, additional costs and delays in both progressing and enforcing the proceedings.

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A version of this article was published on the Steamship Mutual website and will appear in their Sea Venture newsletter in due course.

Slow steaming ahead: the impact of economic conditions and environmental scrutiny

The shipping industry has seen a return to slow steaming since the credit crunch in 2008, as a result of reduced freight and increased bunker rates. Together with the increased focus on environmental efficiency, this has thrown up a number of complex legal and commercial issues.

Slow steaming raises a number of legal issues, most notably in relation to the implied charterparty obligation of due despatch and deviation for delay under bills of lading.

There is an obvious conflict between an obligation to prosecute a voyage with utmost despatch and an obligation to slow steam. The new BIMCO fuel efficiency terms for time and voyage charters recognise this issue and provide that if the Master exercises due diligence in the performance of his/her instructions, he/she will not be in breach of the reasonable despatch obligation.

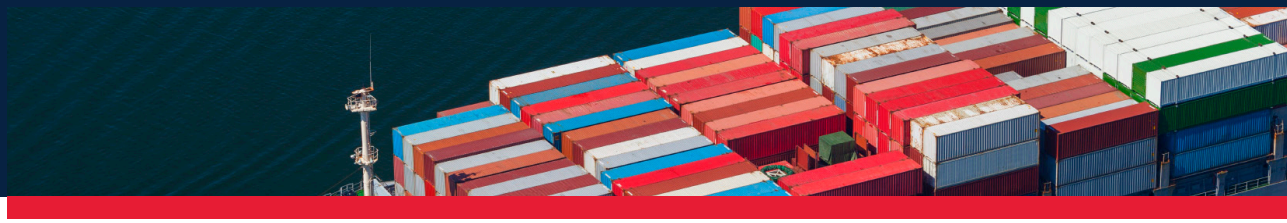
However, the problem does not end there. The utmost despatch obligation may also be on a contractual footing under the bill of lading. This exposes carriers to the risk of claims for deviation by delay. The BIMCO fuel efficiency terms seek to redress this by obliging charterers to ensure that the terms of the bill of lading, waybills and other documents evidencing the contract of carriage issued on or behalf of owners state that compliance by owners with the fuel efficiency clause will not constitute a breach of the contract of carriage. The clause also requires charterers to indemnify owners against all consequences and liabilities arising under the bill of lading to the extent that such liabilities have resulted from owners' breach of the obligation to proceed with utmost despatch or are held to be a deviation. It is foreseeable that disputes will arise where there is a failure to incorporate the terms.

Owners seeking to slow steam under a voyage charter that does not incorporate the BIMCO terms should pay particular attention to these dangers as they are exposing themselves to claims for breach of both the charterparty and bill of lading. Whilst it may be possible to obtain retrospective agreement from charterers, this is unlikely to be feasible under the bill of lading. The same risk, in terms of bill of lading claims, applies to time charters.

Despite these potential pitfalls, slow steaming remains an attractive option given increased environmental scrutiny as well as the obvious economic benefits. The benefits of fuel efficiency have long been recognised in the container industry. However, with the financial recession and bunker rates now exceeding US$700 per tonne, slow steaming has become more widespread, including in the dry bulk and tanker sector.

There has also been increased pressure on the shipping industry to reduce the 3-4% of global CO_2 emissions from international shipping, as well as sulphur emissions. This pressure is likely to increase with the IMO's sulphur requirements due to come into force in 2015 for Emission Control Areas.

Despite the current oversupply of tonnage and low charter rates in some sectors, the combined effect of increased environmental regulation



and spiralling bunker costs has seen owners who are in the market for new vessels, ordering eco-ships. Owners will no doubt seek to invest in more fuel-efficient vessels in the long-term, as efficient vessels have a commercial advantage.

This change in attitude has also seen a renewed call to retro-fit older vessels with fuel efficient technology, involving engine modifications and modern hull coatings. A barrier to this happening widely is the current split of incentives between owners and charterers, where the charterer of a retrofitted vessel stands to save on bunker costs, but the owner sees the capital investment as a risk, because he is not certain of gaining a share of the savings if charter rates do not increase. The Sustainable Shipping Initiative is currently developing methods to align incentives for retro-fits by reapportioning the risks and fuel cost savings between owners, charterers, banks and technology providers.

In summary, owners who are keen to implement slow steaming practices will find the BIMCO fuel efficiency terms a useful starting point. However, owners will also want to be aware of the increased scrutiny of the shipping industry and ensure that their fleets are ready to meet the more stringent environmental regulations. Despite the difficult financial conditions, some owners appear to be rising to these demands by looking to bring eco-vessels into charter.

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A version of this article appears in The Baltic, Winter 2012 (magazine of The Baltic Exchange).

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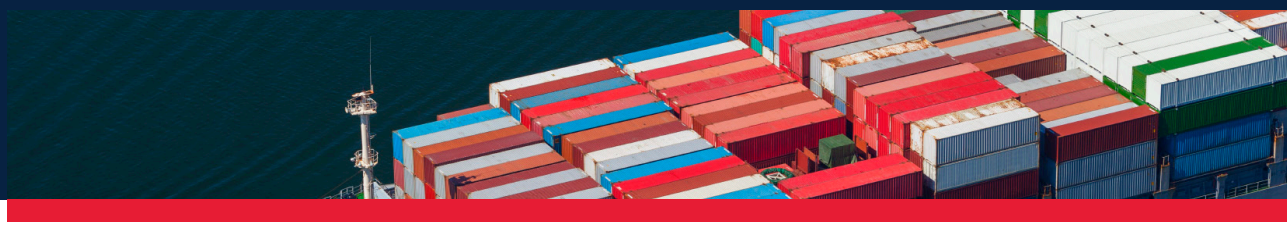
The impact of EU Regulation 392/2009 on carriage of passengers by sea in France and wider implications for the rest of Europe

The entry into force of the new EU Regulation on the liability of carriers of passengers by sea in the event of accidents (the Regulation) will make major changes to the legal regime covering carriage of passengers by sea in Europe. The Regulation comes into force on 31 December 2012. We summarise the main changes below.

The new Regulation brings into force the 2002 Protocol to the Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (the Athens Convention) for all EU member states, despite the 2002 Protocol not having been ratified internationally. This means that for those countries which are already party to the Athens Convention, there will be some changes (although some countries, such as the UK, already have limits of liability which exceed the Protocol requirements), but some other EU member states, notably France and Italy, are not parties to the Athens Convention and this will therefore produce some important changes across Europe as the Athens Convention and 2002 Protocol come into force in those countries.

Application of the 2002 Protocol in France

France has ratified most of the major maritime conventions, but surprisingly has never ratified the Athens Convention or any amending Protocol. France ratified the Brussels Convention of 29 April 1961, but then denounced it in 1975. Therefore, carriage of passengers by sea was,



until the entry into force of the new Regulation, exclusively subject to the French law dated 18 June 1966, recently enacted in the Code des transports (order n°2010-1307 dated 28 October 2010).

Unlike the Athens Convention, neither the 1966 law nor the Code des transports provide for specific limitations of liability in case of personal injury or death. The Code only refers to those limits contained in the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) as amended by the 1996 protocol.

New limits of liability

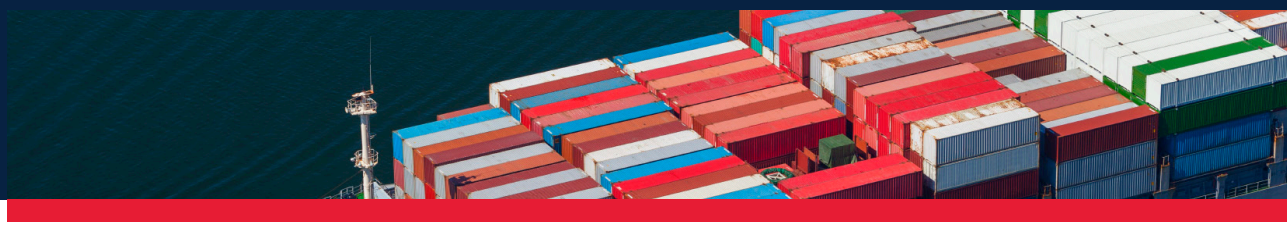
The Regulation, which incorporates the Athens Convention as amended by the 2002 Protocol, contains limitations per passengers in case of death or personal injury (strict liability up to the limit of SDR 250,000 per passenger in case of a shipping incident and a global limitation of liability of SDR 400,000 per passenger). Furthermore, the new Regulation increases substantially the limit of liability currently contained in the French Code des transports in case of loss of or damage to luggage.

The key changes to limits of liability are summarised in the table below:

	Athens Convention, 1974 (including the 1976 Protocol)	Code des transports	Code du Tourisme (French package travel regulations)	2002 Protocol EC Regulation 392/2009
Death or personal injury	46,666 SDR, per passenger on each distinct occasion.	Reference to the LLMC: 175,000 SDR, per passenger multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate.	Compensation is limited in accordance with the international conventions governing the services, according to Article 5.2. of the Package Travel EC Directive.	400,000 SDR, per passenger on each distinct occasion. Strict liability up to 250,000 SDR, in case of shipping incident.
Loss of or damage to luggage	Cabin luggage: 833 SDR, Vehicles including all luggage carried in or on the vehicle: 3,333 SDR, Other luggage: 1,200 SDR	Cabin luggage: 1,440 € Personal effects: 460 € Vehicles including all luggage carried in or on the vehicle: 4,600 € Other luggage: 1,520 €		Cabin luggage: 2,250 SDR, Vehicles including all luggage carried in or on the vehicle: 12,700 SDR, Other luggage: 3,375 SDR, Possible deductible: 149 SDR

Effect on cruise market

The new Regulation will also impact on the liability of cruise operators. English and French courts currently take the view that cruises should be regarded as package travel and, as such, subject to the strict liability provided by the EU package travel regulations (implemented in France under the "Code du Tourisme" and otherwise in the EU by The Package Travel, Package Holidays and Package Tours Regulations 1992). Whether this strict liability should also apply to damages in relation to the carriage itself (and not only to the tourist services) is not a straightforward question in France. As from 1 January 2013, the French Courts will have to apply the Regulation to cruise operators and the claimant will have to prove the fault or the negligence of the cruise operator when the damage is in relation to the carriage, provided that it was not caused by a shipping accident.



Insurance

The Regulation provides for compulsory insurance of not less than 250,000 SDRs per passenger, per occasion, and the ship's registry must issue a certificate to evidence this. In France, this has already been implemented in the "Code des transports" (article L51232, which will also enter into force on 31 December 2012).

Application to French domestic carriage

France has already confirmed that it will apply the Regulation to domestic carriage on board ships A and B as from 31 December 2012.

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Speed and performance - London 2012

Notwithstanding that two of the leading cases on Speed and Performance were heard two decades ago (*The Didymi [1988] 2 LLR 108 and The Gas Enterprise [1993] 2 LLR 352*) these types of dispute remain common in arbitration.

In those two cases, the Court of Appeal held that a vessel's speed and performance should be determined by assessment in periods of good weather, and reasoned that if the vessel underperformed in good weather, then she would also have underperformed in bad weather.

Two recent arbitrations reported in the London Maritime Law Newsletter (*3/12 and 4/12*) have shed more light on the principles contained in the *Didymi* and *Gas Enterprise*.

London Arbitration 3/12 and 4/12

In general, charterparties will expressly define what is meant by good weather. In *3/12 and 4/12*, it included weather *"up to/including Beaufort Force 4 and Douglas Sea State"*. The charter also provided that the vessel should *"maintain on all sea passages from seabuoy to seabuoy speed and consumption as per vessel's description... figures... always about and... always in good weather conditions and no adverse currents"*.

London Arbitration 3/12 and 4/12 have three main lessons:

1. Subject of assessment: entire period or each voyage?

   When their Charterers deducted sums from hire because of alleged underperformance during 2 out of 17 voyages, the Owners took a novel approach by arguing that it was necessary to assess the *"average performance"* of the vessel over the full charter period (i.e. 17 voyages). Owners said that in order to calculate the *"average performance"* it was necessary to consider a reasonably sufficient number and spread of good weather periods (i.e. the full period of the charter). On Owners' calculation the vessel did not underperform.

   The Arbitrators, however, agreed with Charterers that as the warranty was *"on sea passages from seabuoy to seabuoy"* the correct interpretation was for each voyage to be considered separately when analysing whether the vessel underperformed. As a result, there was underperformance.

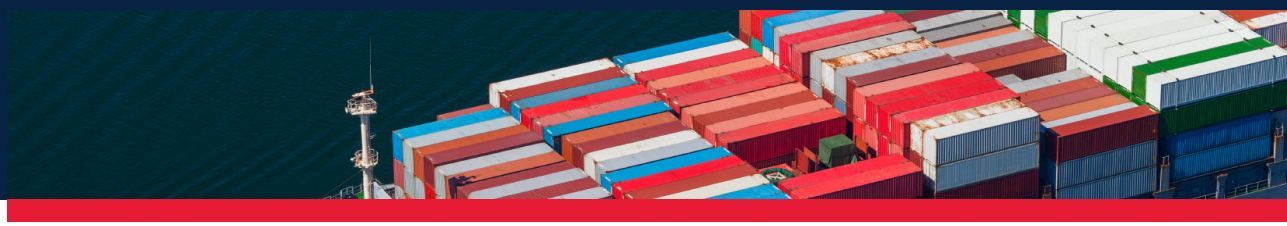
2. Off-setting bunker saved against underperformance claims

   Owners also argued that they had a right to off-set a saving in fuel consumption *"across the Charter"* against the Charterers' deduction for hire resulting from the underperformance.

   The Arbitrators found that at most Owners could off-set the under-consumption of say IFO against an overconsumption of MDO but not off-set the savings in bunkers (if any) against underperformance claims.

3. "Half an eye on the charter warranties"

   Both arbitrations dealt with an issue that often arises -



inconsistencies between the log book records and those of a weather bureau report concerning the weather conditions.

The arbitrators commented in 3/12, *"The assessment of sea conditions was not an accurate science and log entries were at times made with half an eye on charter warranties."*

In *London Arbitration 4/12* the Arbitrators found that there was a sufficient inconsistency of over 0.5 on the Beaufort scale on average to justify the application of a charterparty provision giving priority to the evidence contained in independent bureau reports where there was a pattern of discrepancy.

Key points when fixing a charter from Owners' perspective

While each case that is arbitrated is very fact dependent, there are a number of points that Owners may generally wish to consider when fixing their vessels:

1. Endeavour to ensure that the vessel is able to perform according to the warranty.

2. Preface any warranty given with "about" - e.g. "about 12 knots on about 40 mt." This will generally give a 0.5 knot speed margin and a 5% mt consumption margin either side of the warranted quantity.

3. If possible preface the warranty with "Without Guarantee", which will allow an argument that the warranty has no contractual effect.

4. Clearly define what constitutes "Good Weather".

5. Insert a clause providing that adverse currents and/or condition of the bottom of the vessel are taken into account when assessing performance.

6. Ensure that Owners are entitled to a credit for fuel or hire saved should the vessel overperform and detail how the credit should be applied.

7. Insert a clause that provides for the evidence of log books to take precedence over that of weather bureau reports.

Key points when fixing a charter from Charterers' perspective

As is true in most negotiations, the Charterers should largely be taking the opposite position to Owners in relation to any speed and consumption warranty provided by Owners (e.g. not agree to "about" or "without guarantee" if possible.)

Charterers should also be aware that if the definition of good weather is too narrow there may never be "good weather" against which a speed and performance claim can be measured, which could make it close to impossible for the Charterer to make a claim.

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News

Holman Fenwick Willan boosts Asia-Pacific capabilities with Partner promotions

We are delighted to announce the promotion of shipping lawyers Dominic Johnson and Nic van der Reyden to Partner, effective 1 November 2012.

Conferences & Events

Maritime passenger transport: what new challenges?
Paris
(6 December 2012)
Stephanie Schweitzer

Salvage Law and Practice Seminar - LOF claim exercise
London
(10 December 2012)
Toby Stephens

Salvage & Wreck Removal
London
(12 December 2012)
Andrew Chamberlain

LMA: Bills of Lading
Hotel Pullman, Dubai
(12-13 December 2012)
Simon Cartwright, Sam Wakerley, Yaman Al Hawamdeh and Nejat Tahsin

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