RISK WATCH

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AVOIDING UNFAVOURABLE JURISDICTIONS

Caresse Navigation Ltd v (1) Zurich Assurance MAROC (2) WAFA Assurance (3) AXA Assurance MAROC (4) Atlanta (the "CHANNEL RANGER") [2014] EWCA Civ. 1366

The use by owners and carriers of declaratory proceedings to avoid unfavourable jurisdictions appears to be increasingly successful. In the case of the *CHANNEL RANGER* the owners hoped to avoid an unfavourable decision in the Moroccan courts that they were liable for damage to coal.

The *CHANNEL RANGER* loaded 39,000 mt of coal in Rotterdam for carriage to Nador, Morocco. The ship was on time charter and, in turn, on sub-voyage charter. On arrival at Nador, the cargo was found to be self-heating, hold No.2 was doused with seawater as an emergency measure. The ship was then arrested by receivers and the P&I club put up security in the form of a bank guarantee for the equivalent of USD1.1million.

After the ship had left the port, the owners applied to the English High Court for a declaration of non-liability to cargo interests. The cargo insurers challenged the English High Court's jurisdiction and commenced proceedings in Morocco against the owners for the damage to the cargo. In reply, the owners applied to the High Court for an interim anti-suit injunction to prevent the Moroccan proceedings from continuing. Owners argued that the Moroccan proceedings were in breach of the exclusive jurisdiction clause in the relevant charterparty which was incorporated into the bill of lading.

The bill of lading contained the following term:

"All terms, and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration clause are herewith incorporated".

In contrast, the voyage charterparty (held to be the relevant charterparty) contained the following clause:

"This Charterparty 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".

Therefore, a question was whether the bill of lading could incorporate a Law and Court jurisdiction clause from the charterparty when the bill of lading only expressly referred to incorporation of a law and arbitration clause.

The English High Court took the view that this issue was one of construction of the terms of the contract rather than one of incorporation. The Court held that the only clause that the parties could have intended to refer to by the words "Law and Arbitration clause" was the Law and Court jurisdiction clause in the voyage charterparty, such that the reference to 'law and arbitration' in the bill of lading incorporated the English law and exclusive High Court jurisdiction clause of the voyage charterparty. The owners' application for an interim anti-suit injunction was successful. Cargo interests appealed.

The Court of Appeal upheld the decision of the High Court. It stated again that the question in this case was not one of incorporation of terms but of construing the meaning of the words in the bill of lading. The argument put forward by cargo interests that the meaning of the words in the bill of lading should be "arbitration clause if any" was found to be wholly uncommercial since the original parties to the bill of lading were taken to have known of the terms of the voyage charterparty and to have known that it did not contain an arbitration clause. The Court confirmed that the words in the bill of lading should be considered as a whole in context, including the relevant commercial background.

The case is a useful illustration of the English Court's approach to law and jurisdiction clauses as well as the importance of anti-suit injunctions. By securing English law and jurisdiction owners were able to maintain a neutral jurisdiction for determination of liability for the cargo claim.

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FALCA – FAST AND LOW COST ARBITRATION

English law and London arbitration continues to be the world's leading centre for determining shipping disputes. To promote that role, the London Maritime Arbitrators Association (LMAA) publishes various terms which together govern the majority of London maritime arbitrations. The four main sets of terms are LMAA Terms; Small Claims Procedure (SCP); Intermediate Claims Procedure (ICP); and Fast and Low Cost Arbitration (FALCA) Rules. Each set has differing rules and together are meant to offer a range of procedures to cater for any potential dispute. This article looks at the FALCA Rules while adding a note of caution to potential users.

The FALCA Rules (found on the LMAA website: http://www.lmaa.org.uk/terms-falca-terms-and-notes.aspx) were introduced in the late 1990s and are aimed at resolving claims between USD50,000 and USD250,000 in a quicker and cheaper manner than a full arbitration under LMAA Terms. This is meant to be achieved by a faster slimmed down arbitration procedure controlled by a sole arbitrator. To promote this, Rule 15 of the FALCA Rules states that the arbitration award should be made within 7 months of the appointment of the arbitrator. In addition, Rule 18 of the FALCA Rules provides:

"…each party by agreeing to these Rules waives any right to call for security for costs in excess of £7,500 in total in so far as such waiver may validly be made".

However, the fact that security for costs is capped does not mean that actual costs incurred and therefore the costs exposure for the unsuccessful party are capped or proportionate to the amount in dispute. The resulting peril is illustrated by a recent arbitration involving one of the Club's Members.

The charterparty between Members (owners) and charterers provided that disputes between USD50,000 and USD250,000 should be resolved pursuant to the FALCA Rules in London. A dispute arose with charterers claiming USD130,000 against owners relating to alleged wet damage to a cargo of coal. In October 2012 charterers gave notice of the appointment of a sole arbitrator under the FALCA Rules. The arbitration proceeded and subsequently an award was given in favour of charterers together with costs.

Aside from Members being disappointed at losing the arbitration:

(a) it took almost two years from the appointment of the arbitrator before the award was issued. This was despite Rule 15 of the FALCA Rules; and

(b) Charterers' costs (including experts' fees) were approximately USD83,000 while the arbitrator's fees were nearly USD28,500.

There might be many occasions when agreeing the FALCA Rules is appropriate. However, in addition to understanding that there is no costs ceiling, Members should always consider:

- Is arbitration under the FALCA Rules suitable, say if the dispute has complex elements? In trying to be "fast", the sole arbitrator might cut through the complexities and reach an award that does not necessarily make good sense of the technical issues. In owners' case, the cargo claim involved the use of written expert advice on how coal could be damaged by alleged high salt content.

- Having a sole arbitrator can be more efficient but this removes the benefit of the collective minds of a three-man arbitration panel. As such, the result may be less predictable, especially if the complexities involve absorbing areas of specialist (in this case chemical) knowledge.

- There is no right of appeal.

Therefore, before agreeing in advance in a charterparty the FALCA Rules, Members should consider the advantages and disadvantages of its procedure. One size does not fit all!