RISK WATCH

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WHEN DOES FAILING TO PAY HIRE BECOME A REPUDIATION?

A recent London arbitration addressed the question of when does a charterer's failure to pay time charter hire entitling owners to withdraw the ship also amount to a repudiation of the charter? If there is no repudiation of the charter, owners cannot generally recover damages for 'loss of bargain', i.e. a claim for any difference between the charter rate and the market rate of hire for the period of the charter that remains to be performed and they are limited to recovering hire due up to the date of withdrawal.

In this case, the owners withdrew the ship from charter service almost five years before the fixture had been due to end because of charterers' repeated failures to pay hire. The available market rate for the ship had fallen below the charter rate leaving owners a damages claim in the sum of US$15,910,650 for their 'loss of bargain'. Charterers denied that owners were entitled to this claim.

Under English law owners are denied a 'loss of bargain' claim where they withdraw the ship as it is deemed that it is their own action that has brought the charter to an end. However, where it is shown that the charterer is not just failing to pay some hire, but in fact does not intend to be bound by the charter contract, then the law takes the view that it is the charterer, not the owner, who has repudiated the contract. In that case, the owner is permitted to recover damages for 'loss of bargain'.

Owners argued that the following conduct showed that the charterers had repudiated the contract.

The charterers had:

- Underpaid the 72nd and 73rd hire instalments;
- Failed to pay the 77th instalment entirely;
- Proposed going forward to pay only 30% of the outstanding hire instalments;
- Written to owners to say: 'We once again apologise for the inconvenience so far caused, but this is really something beyond our control and owners should therefore take such steps as may be necessary to minimise losses/damage'; and
- Failed to answer owners' messages demanding payment of unpaid hire totalling US$845,200.

On 17 February 2012 charterers wrote to owners: '…our intention has always been, and still is, to perform our contractual obligations. Unfortunately current financial conditions are preventing us from dealing with this matter as we would have liked to. We are still discussing with various counterparts how best to continue operating… if owners believe the best way to mitigate is to fix the vessel for their own account we will not stop them.'

The arbitration tribunal had no hesitation in finding that even though charterers claimed that they wanted to perform the contract, the message on 17 February was as close as one might get to a clear admission that they were unable to perform and accordingly their conduct did constitute a repudiatory breach of the contract. The tribunal awarded damages to the owners in the sum of US$15,910,650.

Whether owners were actually able to recover the amount of this award from a charterer with financial difficulties is not recorded in the published report of the reasons for the award.

POST-AWARD ARREST IN HONG KONG FOR ENFORCEMENT OF AN ARBITRATION AWARD

In the recent case of *Handytankers KS v. Owners and/or Demise Charterers of M/V ALAS – [2014] 4 HKLRD 160,* the High Court of Hong Kong has upheld the arrest of a vessel by plaintiffs who had obtained a London arbitration award in relation to damages for breach of charterparty and unpaid hire. It would appear that Hong Kong does allow ship arrests for the purpose of enforcing an arbitration award on a maritime claim when it is properly framed.

In March 2013, owners of the *BETH* obtained an arbitration award in London in relation to damages for breach of charterparty and unpaid hire. As the charterers (respondents in the arbitration) failed to pay the award, the owners arrested the charterers' ship in Hong Kong. In response, the charterers applied to the High Court to set aside the warrant of arrest on the basis, *inter alia,* that there is no head of admiralty jurisdiction which permits the plaintiff to enforce a foreign arbitration award and the proceedings and the arrest were therefore an abuse of process.

Indeed, a claim pursuant to an arbitration award does not fall within the classes of claims in respect of which the Hong Kong courts can exercise their admiralty jurisdiction pursuant to section 12A(2) of the High Court Ordinance. However, the owners' claim was framed as a claim arising out of 'any agreement relating to the use or hire of a ship' (i.e. one falling under section 12A(2)(h) of the High Court Ordinance). The owners also made it plain in the arrest papers that the arrest was sought for the purpose of providing security for the anticipated judgment *in rem* and not as a means of enforcing the arbitration award.

(Continued overleaf)

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POST-AWARD ARREST IN HONG KONG FOR ENFORCEMENT OF AN ARBITRATION AWARD (CONTINUED)

The Hong Kong Court, upholding the arrest, followed the principle established in *THE RENA K [1979] QB 337* that a cause of action *in rem* does not merge in a judgment *in personam,* but remains available so long as, and to the extent that, the judgment remains unsatisfied, and this principle equally applies to arbitral awards.

The Court also rejected the charterers' argument that the owners were prevented from pursuing an *in rem* action by virtue of section 5(1) of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance and the decision of the House of Lords decision in *THE INDIAN GRACE (NO.2),* ruling that the section only becomes relevant where there is a judgment of a foreign court, as opposed to an arbitration award.

The *ALAS* decision is seen to have presented an option for a party in receipt of a foreign award in their favour to pursue enforcement via arrest in Hong Kong.

AGREEMENTS TO ARBITRATE?

Agreements to arbitrate underlie a dispute recently ruled on by the English Commercial Court in *Viscous Global Investments Ltd. v. Palladium Navigation Corporation (Quest)[2014] EWHC 2654* (the 'Quest').

Facts

In this case, the charter deemed to have been incorporated in the bills of lading provided for English law, London arbitration, and LMAA rules including small claims procedure for claims up to US$100,000.

Damage to a cargo of bagged rice resulted in claims being brought and security sought under four such bills of lading. The P&I club of the shipowner agreed to provide security of US$300,000 in the form of a club letter (LOU). A clause in the LOU given by the club and accepted by the claimants provided:

'1) We confirm that the Ship Owners agree that the above mentioned claims shall be subject to London Arbitration (under the auspices of the LMAA) and English Law to apply…, and for each party to nominate its own arbitrator and the two so appointed may appoint a third'.

Claimants duly commenced LMAA arbitration (not under the small claims procedure) for a consolidation of all their claims under all four bills of lading.

Respondents, the shipowner, referring to the small claims procedure in the arbitration clause of the head time charter, disputed the jurisdiction of the panel of three arbitrators arguing that as there were four bills of lading some (or even all) of the individual claims must have been less than US$100,000 and therefore small claims procedure applied to each of them.

The question that was eventually brought to court (because the arbitrators were split on the question) was whether the arbitration arrangements included in the LOU, and relied on by the claimants, were a completely new and overriding agreement, or simply a very limited amendment of the charterparty arbitration provision.

Decision

Giving his judgment, the Judge said: 'the arbitration agreement in the LOU is perfectly capable of operating as a new and free-standing agreement, containing everything that is needed in such a clause. It appears to be comprehensive, dealing as it does with the seat of arbitration (London), the procedure to be applied (LMAA), the constitution of the tribunal (three arbitrators, appointed in the usual way), the time for the defendant to appoint an arbitrator (14 days) and the substantive law to be applied (English law),…' He went on to say that given such a comprehensive set of provisions, there appeared to be no reason why the parties should not have intended the LOU to entirely replace the charterparty arbitration clauses.

Conclusion

Parties to a claim may agree and embark on a completely new dispute resolution procedure which differs from any previously agreed between them. Provided that it contains everything that is needed in such an agreement, the new agreement is valid and enforceable, and will override the original one.

Such an agreement may be contained in a document intended to provide security (in this case a Club LOU) and provided it is clear in its provisions, it will be construed that the parties intended that it would entirely replace the charterparty/bill of lading dispute resolution clause.

The Judge commented: 'Despite the attractive and interesting submissions it is hard to think that this was money well spent. It is also hard to think, however splendid the LMAA small claims procedure may be as a method of resolving small scale maritime claims, that this jurisdiction dispute is really about whether there ought to be one or three arbitrators appointed to deal with the merits of the various claims… Rather, it seems that the shipowners or their club are hoping to knock out the claim on the basis that the claimant has made a somewhat technical mistake in commencing arbitration, and that it is now too late to start again because any new arbitration would be time barred…'.