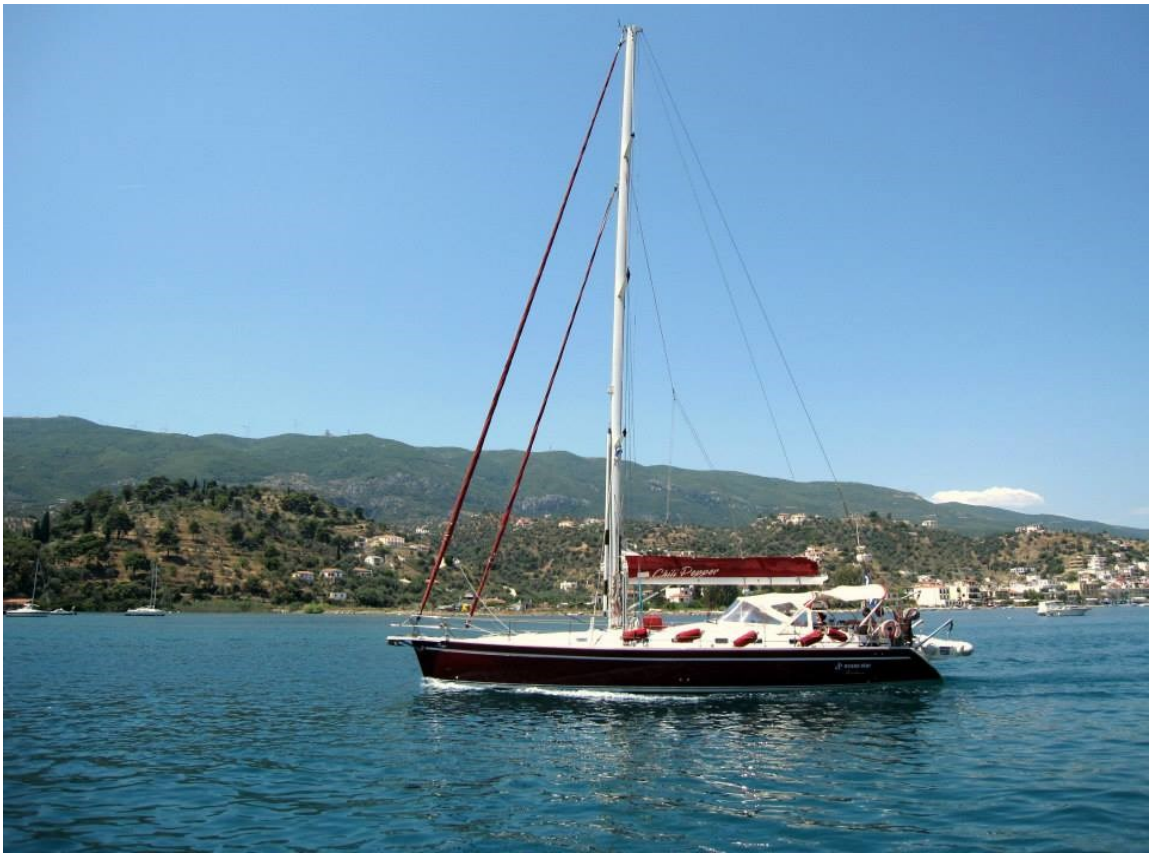
Campbell Johnston Clark

QUARTERLY CASE UPDATE

JULY 2015



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FONNSHIP A/S v SVENSKA TRANSPORTARBETAREFÖRBUNDET (The "SAVA STAR") [2015] CJEU Case C-83/13

BACKGROUND

The ship Sava Star was owned by Norwegian company Fonnship and was registered in Panama. The crew (employed by Fonnship) consisted of 4 Polish officers and 2 Russian seamen. The Sava Star sailed between states party to the Agreement on the European Economic Area.

In 2001 and 2003 Swedish trade unions complained about low wages of the crew and insisted that the Fonnship enter into Special Agreements to govern the crew's wages. Fonnship brought action against the unions in Sweden for losses as a result of being compelled to enter into the agreements. The Unions in turn sued Fonnship for breaching the special agreements. The question referred to the CJEU by the Arbetsdomstolen (Swedish labour court) was whether article 1 of the Regulation (EEC) No 4055/86 must be interpreted as meaning that a company established in a state that is party to the EEA Agreement and which was the proprietor of a vessel flying the flag of a third country, by which maritime transport services were provided from or to a state that was a party to the EEA Agreement, might rely on the freedom to provide services in carrying out that economic activity.

Article 1(1)-(3) Regulation (EEC) No 4055/86:

1. Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

3. The provisions of Articles 55 to 58 and 62 of the Treaty shall apply to the matters covered by this Regulation.

The Swedish trade unions argue that where a vessel flies the flag of a third country, the employment conditions of the crew and the industrial action taken cannot be examined in the light of EU law as they are not connected to that law. They also claim that Fonnship cannot be regarded as a provider of maritime transport services established in the EEA, alleging that Fonnship had delegated running the Sava Star to another company which was controlled by a company established in Panama.
Article 1 identifies two categories of persons who enjoy freedom to provide services in the shipping industry from or to states party to the EEA Agreement: nationals of a member state party to the EEA Agreement who are established in the EEA; nationals of a state that is a party to the EEA who are established in a third country; and shipping companies established in a third country and controlled by nationals of a state that is a party to the EEA Agreement.

The EU legislature wished to ensure that a significant part of the commercial fleets owned by nationals of a member state come under the liberalisation of the shipping industry established by the regulation, so that member states ship owners could more easily face the restrictions imposed by third countries.

DECISION

Held that since there is no requirement of a connection in art 1(1) of the regulation, the nationals of a state party to the EEA Agreement who operate from an establishment situated in the EEA is included in the scope ratione personae of the regulation and thus the flag flown on the vessel is immaterial. It is therefore necessary to determine whether that national or company is a service provider.

It is for the national court to determine whether Fonnship is a service provider. Assuming that it does so decide, and, since it is not at issue whether the persons for whom the services were intended were established in a member state which is a party to the EEA Agreement, the referring court would have to conclude that the company falls within the scope ratione personae of the regulation pursuant to art 1(1). Thus any obstacle without justification will impede the provision of these services and must be declared

incompatible with EU law.

The application of the regulation is not affected by the third country nationality of the crew nor the flag flown.For art 1(1) of the regulation to apply it is sufficient for a provider of the maritime transport service to be a national of a state that is a party to the EEA Agreement, established in a state that is a party to the Agreement other than that of the person for whom the services are intended.

Held that article 1 of the regulation was to be interpreted as meaning that a company established in a state that was a party to the EEA Agreement and which was the proprietor of a vessel flying the flag of a third country, by which maritime transport services were provided from or to a state that was a party to the EEA Agreement, might rely on the freedom to provide services, provided that it could, due to its operation of that vessel, be classed as a provider of those services and that the persons of whom the services were intended were established in states that were parties to the EEA Agreement other than that in which that company was established.

LORAND SHIPPING LTD v DAVOF TRADING (AFRICA) BV (THE MV "OCEAN GLORY") [2014] EWHC 3521 (Comm)

BACKGROUND

This claim concerned an appeal to the High Court under section 68 of the Arbitration Act 1996 ("the Act") and whether there had been a serious irregularity in relation to an award made by a Tribunal. The matter was heard by Eder J.

The case concerned a claim for an "Interim award on Demurrage". In May 2013 the vessel "Ocean Glory" ("the Vessel") was chartered on a Gencon form for the carriage of animal feed from the Ivory Coast to Morocco.

On 7 June 2013 the Vessel lost her rudder. She was towed to Nador, Morroco and arrived on 2 July 2013. Discharging operations were delayed and they were eventually completed on 6 August 2013.

The charterparty provided all disputes to be subject to English law and arbitration in London. There was a 6 month or 12 month time bar in which to make a claim pursuant to clause 27 of the charterparty. Arbitration was commenced by Owners soon after discharge. Both sides appointed an arbitrator. After that Owners served claim submissions for an interim award on demurrage. The submissions contained the following at paragraph 11 "…The Tribunal's jurisdiction is to be reserved for any and all claims against the Respondents, relating to any claim for damage to cargo, that may be brought against the Owners by the cargo receivers under the Bill of Lading and/or in respect of any and all damage suffered by the Vessel, by reason of the extended stay of the Vessel at the Port of Nador and/or the extended services of the Salvors under the LOF (due to the Charterers' breach of the Charterparty) and in respect of which the Claimants will seek an indemnity from the Respondents at the appropriate time". The Charterers' submissions opposed this pleading.

In Reply Submissions Owners stated "Only the claim for demurrage is currently the subject matter of these Submissions. Any other claims for damages arising from the delay in discharge of cargo and breaches of the Charterparty will be pursued later".

The Tribunal proceeded to consider and make its award on the basis of written submissions by agreement of the parties. After, the Tribunal published its Final Arbitration Award. Paragraphs 11 to 29 dealt with the claim for demurrage. Paragraphs 30 to 31 dealt with "other disputes". Paragraph 30 stated that as no evidence had been submitted that cargo interests were intending to bring a claim under the bill of lading, Owners' application was refused.

Paragraph 31 stated if cargo interests pursued a claim, then Owners would be able to consider whether new proceedings could be issued.

The effect of the award was by the Tribunal not reserving its jurisdiction over other claims was to exhaust the Tribunal's jurisdiction and to render them functus officio.

The Owners challenged the award for serious irregularity on the basis the Tribunal did not intend to shut out any further claims against Charterers in respect of any liability

incurred by Owners to third parties. There was a serious irregularity because the Tribunal adopted a course of action which was not being advocated by either party and without giving the parties an opportunity to comment on what they were proposing to do.

DECISION

The term "Interim Award" was a misnomer. The use of the phrase "Interim Award" was in Eder's mind a constant source of confusion. Owners were actually applying for a partial award under section 47 of the Act, for demurrage.

Owners' indemnity claim / other claims had been referred to the Tribunal. The fact specific claims had not been quantified was not fatal. The course the Tribunal took was not advocated by either party. Instead it refused to reserve its jurisdiction and declined to determine the claims in favour of Charterers. The Tribunal's failure to give the parties an opportunity of addressing the point before adopting that position in its final award constituted a serious irregularity.

Eder J was quite critical in his decision of the use of certain terminology i.e. the use of the word Interim Award. The correct position was that Owners sought, by way of application, a partial award pursuant to section 47 of the Act.

Owners also alerted the Court to the fact that they faced difficulties regarding the fact no cargo claim / other indemnity claim had been brought under the charterparty. Under Moroccan law which was subject to the Hamburg Rules there was a 2 year time limit for cargo interests to bring proceedings. Had this point been raised with the parties then Owners would have been able to alert the Tribunal to the fact that proceedings had been commenced between Owners and Cargo interests and Owners' arbitrator had been appointed as sole in that reference.

The main focus of the application to the High Court concerned para 11 of the claim submissions (quoted above in italics). Eder J went on to say that this language contained in that passage was quite confusing. He pointed out to the fact that using the word "reserved" gave rise to some difficulties because it suggested that other claims had been referred to the Tribunal (whereas, at that point no other claims had been advanced).

Eder J confirmed that where the Tribunal opts for an alternative course to that which either party advocated/ proposed, it is right that the Tribunal gives the parties an opportunity to address it, on that possible course, before it is adopted. Depending on the circumstances this may amount to a serious irregularity.

The Tribunal did not agree to Charterers' submission to reject Owners' indemnity claim. Further, the Tribunal did not accede to Owners in that they did not reserve the right over any other claims. The result was that the Tribunal refused to reserve jurisdiction and to decline to determine claims in favour of Charterers.

Eder went on to say the Tribunal's stance raised a fundamental issue regarding the nature of the arbitral process and this was that where a claim is submitted to a tribunal for determination, that tribunal is obliged to determine the claim one way or another. Eder J tentatively put forward that the tribunal cannot simply decline to act.

The case gives rises to some interesting points. First is the choice of language used in arbitration. It is our experience that the use of the word "interim" is commonly used instead of "partial" in terms of a party seeking an award. Eder J has sought to provide some guidance in the use of language which is common to arbitration. Going forward this should be kept in mind when considering issues

This case also demonstrates the importance of trying to establish what, if any, other claims might be brought under a charterparty. If a party can demonstrate that there is a real possibility for other claims being brought, then they may have a better chance of persuading a Tribunal to reserve its jurisdiction for those claims not yet brought/ quantified/crystalized.

Maybe of most importance is that the decision provides authority that the Tribunal cannot and should not ignore the parties' pleadings which relate to a how the matter should be handled in terms of other claims which a party may seek to bring. A Tribunal should put to the parties any alternative proposed by the Tribunal that was not put forward by either of the parties.

STENA BULK AB v COPLEY AND OTHERS [2015] 1 Lloyd's Rep. 280

BACKGROUND

The insolvency of the OW Bunkers Group ("OWB") in late 2014 has left a number of recipients of bunkers, former clients of OWB, unsure as to whom they should be paying sums to in respect of the bunkers they have received. This is as the former clients of OWB received competing demands from OWB, the receivers of OWB, the suppliers of the physical bunkers and also a financial institution (ING Bank NV) as assignee of OWB's rights. These demands at times were accompanied by the threat of ship arrest; a thoroughly unappealing prospect for a party willing to settle invoices for services rendered who is simply unsure whom entitled to receive payment.

As a result of the uncertainty, the claimant, who is an owner and charterer and who had purchased bunkers for various vessels from OWB, commenced proceedings (an ex parte application) in the Admiralty Court in London, pursuant to CPR 86 as a stakeholder, seeking to pay funds into Court in respect of such bunkers. The claimant's highlighted in their application that they could not be liable to two or more parties for the same sum of money and that the Court had authority to order money to be paid into Court in aid of arbitration (17/5/8 in the 1999 RSC White Book, volume 1). The total sum that the claimant wished to pay into Court amounted to US$3,921,176.73. The reason that the claimant's wished to pay such a large sum into Court was to provide security for the various competing claims that the claimant faced, thereby reducing the prospects or ability of the parties interested in the outstanding sums due in respect of the bunkers from arresting any of the Claimant's owned and/or chartered vessels. Further, by paying funds into Court the claimant would force those competing parties claiming right to portions of the funds to mutually agree who was entitled to receive what funds, or in the alternative make submission to the Court via interpleader proceedings. In any event, it would not fall on the claimant to determine who was entitled to which proceeds.

DECISION

The Admiralty Court accepted the claimant's submissions and permitted the payment of funds into Court. The Court was satisfied that it had jurisdiction in the matter and that the order to pay funds into Court was "consistent with the overriding principle and the interests of justice".

In summary, payment was consistent with the powers of the court, amongst other things:

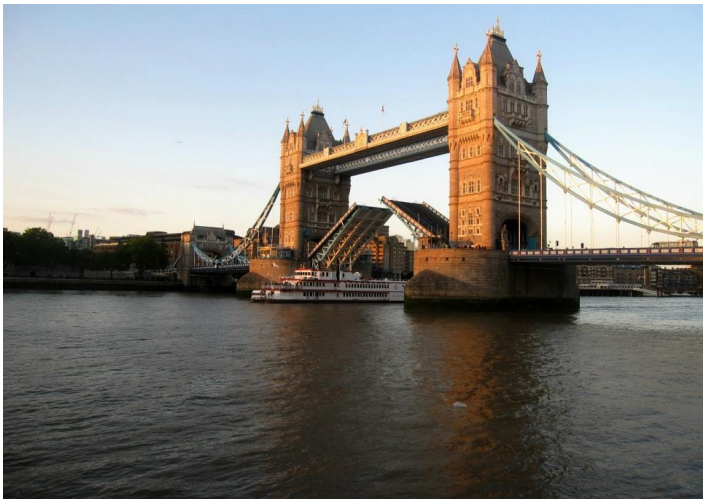
to make any order for the purpose of managing the case and furthering the overriding objective;

the order was not dissimilar from an interim order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to a fixed sum of money;

17/5/8 in the 1999 RSC White Book, volume 1 states that in interpleader proceedings the court can order money to be paid into court in aid of an arbitration; and

CPR61.7 permits a shipowner the right to enter a caution against arrest to prevent fleet disruption. The Court felt that granting the claimant's request would be similar to this right.

This ruling should provide some comfort to parties facing competing claims in respect of the same sum(s). Whilst recourse to the Courts is often a last resort (due to the time and cost associated with an application), it is perhaps favourable to having vessels arrested or being asked to pay more than one party for the same goods or services.



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ZHOUSHAN JINHAIWAN SHIPYARD CO LTD v GOLDEN EXQUISITE INC AND OTHERS [2014] EWHC 4050

BACKGROUND

Golden Exquisite and others as buyer (together, the "Buyer") utilised its right to cancel under a set of shipbuilding contracts (all on materially identical terms) with Zhoushan Jinhaiwan Shipyard (the "Yard") on the basis that unacceptable delays had accrued.

Pursuant to Articles III.1(c) and VIII.3 of the shipbuilding contract, there were 3 types of delay:

Permissible (as defined in Art VIII.1): delays outside the control of the Yard that allowed for an extension of time for delivery of the vessel. However, if the delay was for 225 days after the contractual delivery date, the Buyer could cancel the contracts and recover the instalments (without interest);

Non-permissible: delays that allow the Yard no extension of time for delivery. if the delay was for 210 days after the contractual delivery date, the Buyer could cancel the contracts and recover the instalments (with interest); and

Excluded: delays excluded from consideration when determining whether the Buyer was entitled to reduce the contract price or cancel the contract because of delayed delivery but may allow the Yard an extension to the delivery date.

Separately, a 270 day delay to the contractual delivery date resulting from a combination of permissible and non-permissible delays also allowed the Buyer to cancel.

In each case, the Buyer gave notice to cancel after more than 270 days had passed from the contractual delivery date. A demand for a refund of all instalments pursuant to Article X was made (with a claim for interest). In each case, the Yard contended that the notices of cancellation were invalid as delays of at least 90 days were the result of the Buyer's default – specifically that, during construction, the Buyer had breached its obligations relating to the inspection of the ship under Article IV as its surveyor had taken far too long to perform the inspection – and therefore the exclusionary provision of Article III.1(d) should apply.

Referencing the types of cancellation above, if the cancellations were lawful, the buyer would be entitled under Article X to a refund of all instalments paid before the cancellation, with interest on those instalments, from the date of payment to the date of repayment. If the cancellations were unlawful, the yard would be entitled to keep the instalments and re-sell the vessels, crediting the buyer only with the balance of the proceeds of any such sale, after the yard has recouped its expenses.

DECISION

On the facts, the Court per I Leggatt J. held – looking at the contract and the parties intentions as a whole – that:
the Yard was in default; and

the Yard's allegations that the Buyer was in default were not sufficient to allow for a reduction in delayed period calculation in accordance with Article III.1(d) as the Buyer's alleged breach was not referenced in that Article and the factual matrix put it beyond the parties intentions to have it included.

Therefore, the Buyer's breaches were therefore not Permissible delays.

In any case, even if the Buyer's breaches were permissible delays, the Yard's failure to comply with the contractual requirement to give notice under the contracts meant that the Yard could not rely on these delays to claim an extension of time for delivery. The delays were therefore non-permissible delays that did not allow the Yard an extension of time for delivery. At the time of cancellation, the Buyer had the right to cancel the contracts under both Article III.1(c) and Article VIII.3 and therefore could claim interest on top of the instalment repayments.

The Court noted that if this conclusion was not reached, the Yard would effectively be able to seek an extension under the permissible delay regime without the need for notice that would create uncertainty. The Court's decision suggests that, in the future, a court/tribunal may be slow to accept an argument that a particular period should be excluded where the Yard has not given notice and therefore that a Buyer may wish to hesitate to accept, at face value, any assertion that periods of delay are to be excluded when calculating the cancellation date.

MONDE PETROLEUM SA v WESTERNZAGROS LTD [2015] EWHC 67 (Comm)

BACKGROUND

In 2006, WesternZagros Ltd (WZL), an oil and gas company incorporated in Cyprus, entered into a consultancy agreement with Monde Petroleum SA (Monde), a company incorporated in the British Virgin Islands. Under that consultancy agreement, Monde was obliged to assist WZL with negotiations relating to oil exploration in Iraq, in return for a monthly fee.

Clause 13.2 of the agreement provided:

"If the dispute has not been resolved within sixty (60) days …, then either Party may, by notice in writing to the other, refer the dispute to arbitration to be fully settled."

Clause 13 went to provide that the arbitration was to be held in London under the IIC Rules.

In January 2007 WZL stopped paying the monthly fee invoiced by Monde, and on 16 March 2007 WZL purported to terminate the CSA pursuant to a contractual termination provision. WZL disputed that the unpaid amounts invoiced by Monde, which included a milestone payment, were due. On 18 April 2007 the parties entered into a settlement agreement, under which WZL was to pay Monde's disputed invoices in full and there was a mutual release and waiver of all claims by each party against the other in respect of the CSA.

Clause 3.3 of the Termination Agreement provided:

"This Agreement shall be governed by and construed in accordance with the laws of England and Wales. The parties herein irrevocably attorn to the exclusive jurisdiction of the courts of England and Wales."

Clause 3.5 provided:

"This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and shall supersede any and all prior negotiations and understandings."

Monde subsequently brought proceedings against WZL in the Commercial Court under the exclusive jurisdiction provision of the settlement agreement claiming that Monde was induced to enter into the settlement agreement by misrepresentation and/or duress. Monde claimed damages relating to the amount it would have earned under the consultancy agreement. Although Monde's primary case was that the Commercial Court had jurisdiction pursuant to the settlement agreement, Monde also commenced arbitration proceedings against WZL claiming damages for the wrongful termination of the consultancy agreement. Monde said the wrongful termination claim was a protective measure to prevent Monde's arbitration claim being time-barred in the event that its claim could not be pursued in the Commercial Court. WZL counterclaimed in the arbitration for declaratory relief, including that Monde had no further entitlement under the consultancy agreement and therefore had not lost any benefit by entering into the settlement agreement.

The arbitration tribunal decided that it had no jurisdiction to determine WZL's claims for declaratory relief, on the grounds that the settlement agreement was binding on the parties. The tribunal reasoned that the Commercial Court had not yet determined Monde's claims for misrepresentation/duress and the arbitration clause in the consultancy agreement was "inoperative" because there was no possibility of any dispute falling within the scope of that clause. The tribunal also ordered WZL to pay Monde's arbitration costs.

WZL applied to the Commercial Court under section 67 of the Arbitration Act 1996 to challenge the tribunal's decision that the tribunal did not have jurisdiction. WZL claimed that, by reason of the principle of separability enshrined in S.7 of the Arbitration Act 1996, clear and express agreement of the parties would be required to supersede the scope of the arbitration agreement; and accordingly, the dispute resolution clause in the settlement agreement had not overridden the arbitration agreement in the consultancy agreement. Monde argued that the dispute resolution clause in the settlement agreement was intended to supersede the arbitration agreement.

DECISION

Popplewell J recognised the presumption that rational businessmen who are parties to a contract intend all questions arising out of their legal relationship to be determined in the same forum (following Fiona Trust & Hold-

Holdings v Privalov & others [2007] Bus LR 1917 [2008] 1 Lloyd's Rep 254) and found that "this presumption in favour of one-stop adjudication may have particular potency where there is an agreement which is entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes which have arisen under such an agreement" (at 38).

If an original agreement and a settlement agreement contain different dispute resolution provisions, the judge stated that, "the parties are likely to have intended that it is the settlement/termination agreement clause which is to govern all aspects of outstanding disputes, and to supersede the clause in the earlier agreement" (at 38). Having noted that the court should consider the surrounding circumstances, including the precise wording of the relevant clause, he added that "A termination or settlement agreement which contains no new dispute resolution clause is unlikely to be treated as a direct impeachment of an arbitration clause in an earlier agreement, in the absence of clear language, because it is directed merely at a challenge to the continued substantive rights under the matrix agreement, not the separate arbitration agreement within it. But a new and inconsistent dispute resolution provision will raise the presumption that the parties intended to impeach not just the earlier agreement but also the dispute resolution agreement within it and so go directly to impeach the arbitration agreement" (at 44).

Popplewell found in this case that the tribunal had correctly decided that it had no jurisdiction in relation to WZL's claims and therefore refused WZL's appeal. Addressing the question of what the position would be if the settlement agreement were rescinded by the Commercial Court on the basis of misrepresentation and/or duress, at 49 he found that the jurisdiction clause in the settlement agreement was separable, such that setting aside the settlement agreement would not entail an impeachment of the separate jurisdiction clause: Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2009] 2 All ER (Comm) 129 per Longmore LJ at paragraphs [24]-[26].

ASTON FFI (SUISSE) SA v LOUIS DREYFUS COMMODITIES SUISSE SA [2015] EWHC 80 (Comm)

BACKGROUND

An FOB sale of wheat provided for a third party to appoint a quality inspector to carry out an inspection at the port of loading. A certificate from the inspector in specified form was one of the documents required to be presented by the Seller to obtain payment under a "cash against documents" payment clause. An inspector was appointed, but the certificate issued was not in the form required by the payment clause. Further, the Buyer contended that under the terms of the contract the inspector was required to be GAFTA approved. The wheat was rejected by the Buyer at the port of loading as being not of the contractual quality. The Seller contended that the Buyer was not entitled to dispute the quality of the wheat because the inspector was non-GAFTA approved and the certificate was not in conformity with the contract. It was held that (1) on its true construction the contract did not require the inspector to be GAFTA approved and (2) although the certificate was not in conformity with the contract, the consequence of this was that the Seller could not obtain payment under the "cash against documents" clause. The non-conformity of the certificate did not preclude the Buyer from rejecting the goods by reason of their not being of the contractual quality.

The terms of the contract

This was a contract for sale of 30,000mt of Russian milling wheat FOB "AS PER GASC TENDER TERMS". The Buyers had also entered into a sub-sale to the General Authority for Supply Commodities (GASC), the Egyptian state wheat procurement body.

The contract also contained the following relevant terms:

Inspection
WEIGHT, QUALITY AND CONDITION FINAL AT TIME AND PLACE OF LOADING AS PER RELEVANT GASC TENDER. Buyer's right to appoint a 1st class GAFTA approved surveyor. Should there be a major discrepancy between the two analysis results carried out by the 2 sur-

surveying companies, then a first class GAFTA approved 3rd surveyor (to be mutually agreed upon) should act as arbitrator.

Governing Contract
All conditions not in conflict with the above as per GAFTA 49. Arbitration, if any, in London as per GAFTA 125
The GASC Tender Terms referred to in the contract was a document issue by GASC. The Terms included the following:
Payment:
Payment will be cash upon confirmed, irrevocable, non-transferable and divisible L/C against presentation of the following documents:
. . .

(5) Superintending Certificate with (Sublots composite analysis) In One Original And 5 Copies To Be Issued By the Inspection company nominated by the buyer indicating Quantity, Weight, Specifications, Packing, Quality, goods kind At loading Time And Indicting Also That Holds And Hatches Of Carrying Vessel Are Clean And Free From Alive And Dead Insects And Fit For Shipping Wheat.

Clause 19 of GAFTA 49 provided:

19. SAMPLING, ANALYSIS AND CERTIFICATES OF ANALYSIS

The terms and conditions of GAFTA Sampling Rules No 124 are deemed to be incorporated into this contract. Samples shall be taken at time and place of loading. The parties shall appoint superintendents, for the purposes of supervision and sampling of the goods, from the GAFTA Register of Superintendents. Unless otherwise agreed, analysts shall be appointed from the GAFTA Register of Analysts."

GAFTA Sampling Rules No 124 provided:

"*GENERAL*
1.2 Pursuant to the contract terms and for the purposes of these Rules, superintendents shall be appointed from the GAFTA Register of Approved Superintendents.
. . .
10. NON-COMPLIANCE WITH THE RULES
In the event of non-compliance with the preceding provisions of these Rules being raised at arbitration as a defence, any quality and/or condition and/or rye terms arbitration claim shall be deemed to be waived and barred, unless the arbitrators or board of appeal as the case may be, shall in their absolute discretion determine otherwise."

The Facts

The Buyer nominated the vessel "Mega Hope" to load the goods at Novorossiysk. An inspection company, Comibassal, a non-GAFTA approved company, was appointed by GASC under the sub sale and also nominated by the Buyer under contract. The Buyers also appointed a GAFTA-approved inspector called Botrans. When only part of the cargo was loaded, the surveyors both reported the cargo was out of specification due to an excessive quantity of Lolium seeds. However, the certificate issued by Comibassal did not contain all of the information required by clause (5) of the GASC terms. GASC rejected the (part) cargo under the sub sale and the Buyers reserved their right to reject the cargo under this contract. By agreement, the part cargo was discharged at Kerch and replaced with an on spec cargo, and the parties agreed to refer the question of who was to pay the costs of this exercise to GAFTA arbitration.

Issues

The issues were as follows:

Did the contract require that the quality inspector appointed pursuant to the GASC terms be GAFTA approved?

Were the Buyers precluded from rejecting the cargo by reason (1) of Comibassal being a non-GAFTA approved surveyor and/or (2) by reason of the fact that the Comibassal certificate as not in the form required by the contract?

DECISION

On the first issue, the court reasoned that the GASC terms required the appointment of a surveyor, but did not state that this had to be a GAFTA approved surveyor. The question was whether such a requirement was imported by these words in the inspection clause:

"Buyer's right to appoint a 1st class GAFTA approved surveyor. Should there be a major discrepancy between the two analysis results carried out by the 2 surveying companies, then a first class GAFTA approved 3rd surveyor (to be mutually agreed upon) should act as arbitrator."

This clause provides for the possibility of three surveyors: (1) a "first surveyor", as to which nothing is said about who is to make the appointment and what qualifications are required, if any; (2) a second surveyor appointed by the Buyer and (3) a third to act as arbitrator if the first two disagree. The second and third surveyors are expressly required to be GAFTA approved. The court reasoned that because nothing

was said about the qualifications of the first surveyor, in sharp contrast to the express requirements in relation to the second and third surveyors, the correct inference was that he did not have to be GAFTA approved. The court recognised that it would have been more reasonable and would have provided the Seller with a greater degree of confidence if the first surveyor had also been required to be GAFTA approved, but that was not what the contract said, and it was not for the court to imply a term or manipulate the words of the contract so as to achieve a more reasonable result.

In relation to the second issue, it was not in dispute that the Comibassal certificate failed to comply with clause 5 of the GASC terms. That meant that the Seller could not present conforming documents under the cash against documents payment provision, and that the Buyer would have been entitled to reject the documents had they been presented for payment. However, in a documentary sale, there are two distinct rights of rejection: (1) the right to reject non-conforming documents and (2) the right to reject non-conforming goods. The second right could only be excluded by clear and unambiguous language.

Accordingly, the non-conformity of the Comibassal certificate did not prevent the Buyers from relying on it, and/or on other admissible evidence, to prove that the goods were non-conforming and that they were entitled to reject them. The case was remitted to the GAFTA Board of Appeal to decide whether on the facts the Buyers were entitled to reject the goods.

This case contains nothing innovative but serves to underline three points:

First, contracts which are put together by incorporating other groups of terms into a basic structure need to be checked carefully for coherence. The overlapping survey and inspection clauses in this contract caused the parties understandable confusion.

Second, if this is not done the English courts are likely take the resulting mess literally rather resorting to implied terms or creative interpretation to make the result more reasonable. Third, the right to reject goods and the right to reject documents are two distinct rights and requirements which apply to one will not necessarily be imported into the other unless clear and unambiguous language is used: the underlying principle.

NAVIG8 INC v SOUTH VIGOUR SHIPPING INC AND OTHERS [2015] EWHC 32 (Comm)

BACKGROUND

The claimants, Navig8, were charterers of four vessels. The charterparties had been signed by the charterers and by Star Maritime Management Company Pte Ltd (SMCC), who were the commercial managers appointed by the demise charterers of the vessels. During negotiations, SMCC had made it clear that they were acting on behalf of the registered owners.

Each charterparty contained the following words to describe the owners:

'Disponent Owners Signatory in Contract:

Star Maritime Management Company Pte, Ltd."

The charterers contended that the words "disponent owners" were used in the sense of SMCC being a manager of the vessels, and as such, SMMC had the power to fix charterparties on behalf of the registered owners, with the effect that the registered owners were bound by (and therefore in breach of,) the charterparties.

The registered owners withdrew the vessels from service when the charterparties had more than a year left to run, on the basis that they were not in fact parties to the contract. The charterers sued for damages, contending that the withdrawal was a repudiatory breach of contract. In the alternative, the charterers also sued SMCC for damages, for breach of an implied warranty of authority.

The registered owners argued that in circumstances, as here, where the vessels were on demise charter at the relevant time, the wording of the charterparty (as above) meant either that SMMC were acting on behalf of the demise charterers, or they were contracting on their own behalf. What such words could not mean, however, was that SMCC were acting on behalf of the registered owners in entering into the charterparties. They further denied that SMMC were, at any stage, given authority to enter into the charterparties on their behalf.

DECISION

The court made three main findings on the basis of the above facts:

First, the court held that identification of parties to a contract, although an objective test, is ultimately a question of fact. Here, the term "Disponent Owners" was intended to signify that SMMC were in fact acting as commercial manager of the vessels - although in the usual course of events, the term would be used to refer to a person who was himself chartering the vessel from the registered owner (The Astyanax [1985] 2 Lloyd's Rep 109). Teare J referred to a similar decision in O/Y Wasa Steamship Co Ltd and NV Stoomschip "Hannah" v Newspaper Pulp & Wood Export Ltd (1948) 82 Ll L Rep 936, where "Disponent Owners" was held to be "not inapt to cover someone who is a manager, particularly if he is a manager having very wide powers". He did not believe that any of those signing the charterparties would have believed that SMMC were incurring personal liability on the charters.

Second, on the evidence, it was not established that SMMC had the requisite authority to charter the vessels on behalf of the registered owners. As such, the charterers' claim against the registered owners was necessarily to fail.

Finally, on the basis of the above, SMMC were held liable to the charterers for a breach of an implied warranty of authority. The measure of damages was the sum which would otherwise have been payable by the registered owners as damages (that being, the difference between the charterparty rate and the market from the date of breach – the date the registered owners withdrew the vessels from service), plus the balance of account.

This case illustrates the importance of defining (and, for a counterparty, ascertaining) the limits of a third party or agent's authority in negotiating or signing charterparties. Agents who breach a warranty of authority may be held liable for damages under contracts they entered into, purportedly on behalf of their principal. Although principal may not be liable for damages under contracts so created, they may have to spend time and money in litigation costs as a result of their operation.

KASSIOPI MARITIME CO LTD V FAL SHIPPING CO LTD (THE "ADVENTURE") [2015] EWHC 318 (Comm)

BACKGROUND

This is the latest decision by the English Courts in relation to provision of documentation within Charterparty time bars for demurrage claims and indicates how strict both the Courts and arbitral tribunals will be when it comes to supporting documentation for demurrage claims. The English High Court provided that the obligations under BPVOY4 Charterparty entailed that Owners were required to provide all relevant supporting documentation within the 90 day time limit, not just "essential" documentation, or their demurrage claim would be time-barred.

Pursuant to a charterparty on an amended BPVOY4 form dated 15 June 2011 (the "Charterparty"), Kassiopi Maritime Co Ltd ("Owners") chartered the M/T "ADVENTURE" (the "Vessel") to FAL Shipping Co Ltd ("Charterers") from Bahrain to Sudan.

The Vessel was delayed at both the load port and the discharge port. As a result of these delays, Owners brought a claim for demurrage in the amount of USD 364,847.78. Owners submitted their claim for demurrage by e-mail on 5 August 2011 with supporting documentation. Charterers refused to make payment on the grounds that Owners had not included all the necessary documentation in their demurrage claim and therefore that, because the 90-day period under the Charterparty to submit the documents had then elapsed, Owners' claim was effectively time-barred.

The relevant clauses provided as follows:

19.7.3. No claim by Owners in respect of additional time used in the cargo operations carried out under this Clause 19 shall be considered by Charterers unless it is accompanied by the following supporting documentation: ... copies of all other documentation maintained by those on board the Vessel or by the Terminal in connection with the cargo operations."

20.1. Charterers shall be discharged and released from all liability in respect of any claim for demurrage, deviation or

detention which Owners may have under this Charter unless a claim in writing has been presented to Charterers, together with all supporting documentation substantiating each and every constituent part of the claim, within ninety (90) days of the completion of discharge of the cargo carried hereunder."

The matter was referred to arbitration.

DECISION

Arbitral Tribunal

The Tribunal looked at the two clauses separately in determining whether the claim was time-barred, firstly they considered whether the documentation specified under Clause 19.7.3 had been provided and then looked at whether this supporting documentation had been provided in accordance with Clause 20.1.

The Tribunal held that Owners' claim for demurrage failed. The claim was time-barred because insufficient documentation had been provided by Owners in support of their claim (applying the decision in The Eagle Valencia [2010] 2 Lloyd's Rep 257). The Tribunal considered that Owners were required by Clause 19.7.3 to provide all the documents which they would be required to disclose in arbitration for a demurrage claim, at the point in when the claim was first presented. Owners had failed to provide time sheets, port logs and an e-mail which recorded that free pratique had been granted at the discharge port.

An appeal was made to the Courts by Owners pursuant to s69 of the Arbitration Act 1996.

Commercial Court

Hamblen, J disagreed with the interpretation of the Tribunal that Clause 19.7.3 required the provision of documentation akin to disclosure. He commented (@27) that "The obligation of disclosure is likely to go far wider than merely "supporting documentation" and require a search which is considerably more rigourous than that contemplated by a clause such as this…" Hamblen considered that compliance with Clause 19.7.3 required provision of "contemporaneous records kept by the vessel relating to the cargo operation…" this contemplated documentation which was compiled on a regular, on-going basis rather than on a "one-off" basis (@30-31).

In relation to Clause 20.1, the Court considered that Owners were required to provide not just "supporting documentation" but all such documentation. Hamblen cited the judgment of Tomlinson LJ in The Abqaiq [2012] 1 Lloyd's Rep 18 (CA) that Owners would be required to provide "documents which objectively [the charterers] would or could have appreciated substantiated each and every part of the claim". This would include summary & detailed demurrage reports, NORs, port logs, SOF, Letters of Protest, discharging logs, time sheets and pumping logs. Hamblen accordingly agreed with the Tribunal that port logs and time sheets needed to have been provided by Owners. He was less certain on the email with the manuscript note as secondary documentation would not usually be required, however, in this instance the time of granting of free pratique was relevant to the calculation of laytime and there was no other record of it. As such, the Court concluded that it was "probably" to be regarded as a supporting document.

In conclusion, the Court determined that Owners' claim failed under Clause 20.1 regardless of whether the claim was partially barred under Clause 19.7.3.

This decision serves as a reminder to Owners that they must ensure strict compliance with documentary requirements and time limits for demurrage claims or their claims are likely to be time-barred. The demurrage claim provisions within a Charterparty are there to enable the parties to settle demurrage claims quickly and efficiently and for this Charterers require all the relevant documentation. In Charterparty provisions like Clause 20.1 of BPVOY4, "all supporting documentation" covers documentation in support of both the claim and quantum. If one of the documents submitted in support of a claim makes reference to another document, it is also important that this is included.

The court made three main findings on the basis of the above facts:

First, the court held that identification of parties to a contract, although an objective test, is ultimately a question of fact. Here, the term "Disponent Owners" was intended to signify that SMMC were in fact acting as commercial manager of the vessels - although in the usual course of events, the term would be used to refer to a person who was himself chartering the vessel from the registered owner (The Astyanax [1985] 2 Lloyd's Rep 109). Teare J referred to a similar decision in O/Y Wasa Steamship Co Ltd and NV Stoomschip "Hannah" v Newspaper Pulp & Wood Export Ltd (1948) 82 Ll L Rep 936, where "Disponent Owners" was held to be "not inapt to cover someone who is a manager,

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