

## Voyage charter

### Did strike clause cover delay caused by congestion due to after-effects of strike?

**In the case of *Carboex -v- Louis Dreyfus*, the Commercial Court had to consider the interrelationship between clause 9 of the AmWelsh charterparty form and a bespoke clause which provided for laytime to count 'whether in berth or not' (WIBON).**

The dispute arose from a national haulage strike in Spain in 2008, which caused severe congestion at the port of discharge, leading to demurrage claims in relation to four vessels chartered by a Spanish charterer under a contract of affreightment. The strike was over before each of the vessels berthed, and in two cases before they arrived at the port, but in all four cases berthing was delayed due to the after-effects of the strike. The charterers relied on AmWelsh clause 9, which provides that in case of strikes and other causes beyond the control of the charterers which prevent or delay the discharging, such time does not count as laytime. However, owners argued that because of the WIBON provision the charterers took the risk of congestion, and clause 9 would only exclude time lost by reason of a strike after the vessel had berthed.

Maritime arbitrators agreed with owners' interpretation, but charterers successfully appealed to the Commercial Court. The AmWelsh exceptions clause and its predecessors have been considered by the courts in several cases going back to the early twentieth century, and after reviewing the case law the judge held that the

clause was to be construed as a free-standing provision. It was not 'cross-contaminated' by the WIBON provision, which simply determined the point at which the laytime clock was to start ticking. Accordingly, charterers were protected by clause 9 where a vessel was delayed by congestion due to the after-effects of a strike.

## The Bribery Act 2010

### New law affects worldwide activities of businesses with a UK connection

**Following a lengthy consultation procedure, the Bribery Act 2010 came into force on 1 July 2011. This is just the latest example of on-going action by governments throughout the world to combat bribery, but in some respects the UK legislation goes further than previous laws such as the US Foreign Corrupt Practices Act or the OECD Convention.**

The Bribery Act 2010 applies to bribery in private business transactions as well as dealings with government officials, and it allows for commercial organisations to be prosecuted for failing to prevent bribery being carried out by their agents, employees or others acting on their behalf. Companies can be prosecuted in the British courts if they have any business presence in the UK, even if the bribery is committed by an agent in another country and has no connection with the UK business. However, liability can be avoided if companies can show that they have put in place adequate procedures designed to prevent bribery. Gateley's commercial team has developed a compliance tool kit to assist businesses to devise and implement adequate anti-bribery programmes. Please contact us for more details.



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## Marine insurance

### Cancellation of policy due to Iran sanctions

**Amongst the economic sanctions imposed on Iran by western governments, the EU Council Regulation published in October 2010 prohibits the provision of insurance or re-insurance to any Iranian person, entity or body. Article 26(4) of the regulation prohibits the extension or renewal of insurance agreements concluded before the entry into force of the regulation, but does not prohibit compliance with pre-existing agreements. The meaning and effect of this provision was one of the issues considered by the English Court in *Arash Shipping -v- Groupama Transport*.**

The case concerned the hull and machinery policy for the Iranian fleet of oil tankers, one of the largest fleets in the world. The policy incepted before the regulation came into force but contained a review clause providing that subject to certain conditions it would be extended for a further period on an unaltered basis. It also contained an Iran Sanctions Clause permitting the insurer to cancel 'where the assured has exposed or may, in the opinion of the insurer, expose the insurer to the risk of being or becoming subject to any sanction...'. The leading insurers gave notice of cancellation of their participation in the policy on the grounds that any extension would or might expose them to the risk of criminal prosecution for breach of the regulation.

The ship owners applied to the Commercial Court, about one month before the policy was due to expire, for a ruling on the validity of the cancellation. The case was heard 11 days later and judgment given two days after that. An urgent application was then made to the Court of Appeal, which issued its decision three days before the expiry date, confirming that the insurers' cancellation notice was valid. The court rejected the owners' argument that the right to cancel arose only if the insurers were exposed to risk of breach by an act or omission by the assured. Once the insurers formed the opinion that they were at risk they were entitled to cancel, and this opinion could not be regarded as perverse or unreasonable. On this basis it was unnecessary to make a final decision on whether a renewal of the policy would in fact have been in breach of article 26(4) or whether it could be regarded as a compliance with a pre-existing agreement. However, the Commercial Court judge had held that the renewal was prohibited, and one member of the Court of Appeal indicated that if it had been necessary to decide the question he would have taken the same view.

## Charterparty

### No binding fixture when wrong company was named as owner – but contract formed by conduct

**In the case of *TTMI -v- Statoil*, the Commercial Court upheld a decision of a maritime arbitrator that no contract had been made between the disponent owner (T) and charterer (S) because in the fixture recap T's broker had mistakenly named T's parent company (SE) as disponent owner. However, the judge considered that a contract had subsequently come into existence by the parties' conduct, so the arbitrator's decision to strike out T's claim for demurrage was reversed.**

T argued, relying on earlier case law, that the court should treat the parties as having intended to create a contract between S and whichever company within the SE group was in fact the disponent owner of the vessel. However, the judge felt unable to reach that conclusion, since in this case the recap email was not simply a confirmation of an earlier oral agreement: it was itself the agreement, and it expressly named SE as disponent owner. On the evidence, the brokers had no authority to make a contract on behalf of SE, and neither could SE be regarded as having acted as an agent for T.

The judge then went on to find that, viewed objectively, a contract was formed between T and S by their subsequent conduct. T gave instructions to the vessel to perform the voyage, Notices of Readiness given on behalf of T were accepted, the freight invoice required payment to T's bank account, and S had in fact paid the freight to that account. The judge also rejected an argument by S that this contract was not subject to London arbitration because the Arbitration Act 1996 applies only to an arbitration agreement 'in writing'. The judge held that although the contract was not made at the time of the fixture recap the parties proceeded on the basis that the terms set out in the recap applied, and this was sufficient to meet the requirements of the Arbitration Act 1996.

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## Sale of goods

### FOSFA arbitration clause excludes right to apply to court for security

Many of the standard contract forms used in commodity trading contain so-called ‘*Scott -v- Avery*’ clauses which impose an obligation on the parties to refer all disputes to arbitration and prohibit any court action or legal proceedings until after the arbitration is concluded. It has been established by case law that this type of clause prohibits an application to a foreign court for attachment of assets as security for a claim. However, it was unclear whether an application to the English court for a ‘freezing injunction’ would be permitted. A recent decision of the Commercial Court has clarified this issue.

The parties’ names are confidential, but the case has been reported under the name of *B -v- S*. This concerned a FOSFA arbitration claim for almost US\$3 million. B applied to the English court for a worldwide freezing injunction over S’s assets as security for the claims. However, S successfully challenged the injunction on the grounds that B’s action was a breach of the FOSFA sale contract and the parties had agreed to exclude the court’s jurisdiction to make such an order. B relied on a 1978 decision in which the Court of Appeal held that attachment proceedings in Italy were in breach of the arbitration clause, but indicated that the position would have been different if the proceedings had been brought in England. Similar views have been expressed in subsequent cases, and B argued that this was the general understanding in the trade. The judge however noted that that case (and others which had followed it) had been decided under the old Arbitration Act 1950 and there had been no similar decision under the Arbitration Act 1996. The underlying principle of the 1996 Act is party autonomy, and unlike the 1950 Act it allows the parties to agree to exclude the powers of the court to grant freezing injunctions. Whatever may have been generally understood in the trade, the standard FOSFA arbitration clause did have the effect of excluding the court’s powers, and the injunction must be set aside.

It should be noted that similar provisions in the GAFTA contract forms were amended a few years ago to allow legal proceedings whose sole purpose is to obtain security for a claim. However, this decision makes it clear that the position under FOSFA terms is different.

## Carriage by sea

### Letter of indemnity for delivery of cargo without bills of lading

Issues relating to the enforcement of a letter of indemnity (LOI) issued by cargo receivers were considered by the Commercial Court in the case of *Great Eastern Shipping Co. -v- Far East Chartering and another*. The origin of the dispute was the insolvency of V, the buyer of a cargo of coal shipped from Indonesia to India. The shipowners, G, had in the meantime delivered the cargo to B, the ultimate receivers (sub-buyers from V) against B’s LOI in the customary terms. The unpaid sellers, who still held the original bills of lading, sued G who in turn sued B under the LOI.

B resisted the claim on various grounds, all of which were rejected by the court. One of their defences was that the indemnity was given in consideration of the ‘delivery’ of the cargo, and G had not delivered the cargo to B but only discharged it into the custody of the port authority, from where it had later been delivered to B. The judge considered that this involved too literal an approach to the LOI wording, and said that in ordinary plain English a cargo which has reached a port, been discharged and collected by the receiver has been delivered. B also argued that the LOI should not be enforced on public policy grounds. The LOI had been given to the vessel’s charterer, not directly to G, which claimed as a third party beneficiary under the Contracts (Rights of Third Parties) Act 1999. The charterer was a company associated with V and must have known that the sellers were unpaid and still held the bills of lading, and that the delivery of the cargo to B was wrongful. A party cannot take advantage of its own wrongdoing, and if the LOI was not enforceable by the charterer G could not be in any better position under the 1999 Act. This argument was also rejected by the judge. This was a routine commercial dispute and the evidence did not show any deliberate wrongdoing or bad faith, so the issue of public policy did not arise.



## CIF sale contract

### Interpretation of laytime provisions

**Under a CIF sale contract the seller has to arrange for shipment of the goods to the agreed destination, but has no duty to ensure the actual delivery of the goods. However, there are frequently provisions for laytime and demurrage to deal with delay to the vessel at the discharge port. In the case of *Suek AG -v- Glencore*, the Commercial Court was asked to resolve a dispute as to the interpretation of one such provision**

The contract provided for Notice of Readiness (NOR) to be given on arrival at the discharging berth, unless the berth was occupied, in which case NOR could be given at the usual waiting place. Another clause provided that time spent waiting for the tide should not count as laytime. In this case, when the vessel arrived at the discharge port, the buyers' berth was occupied by another vessel, but due to tidal conditions the vessel could not in any event reach the berth. The Master gave NOR at the usual waiting place and there was a dispute as to which party was responsible for the waiting time. The court decided in favour of the sellers. It was the buyer's duty to provide a berth, and the exception permitting NOR to be tendered at the anchorage applied whenever the berth was occupied; this did not have to be the only reason why the vessel could not reach it.

## Carriage by sea

### Burden of proof in cargo claims

**In the case of *Milan Nigeria Ltd -v- Angeliki B Maritime Co*, the Commercial Court allowed the appeal of cargo owners against an arbitration award which had imposed the burden of proof on cargo owners to establish the cause of cargo damage, and not the vessel owners.**

M was the owner of a cargo of bagged rice and brought a claim for short delivery and alleged wetting against A, the owners of the vessel 'Angeliki B'. The tribunal rejected M's short delivery claim but upheld M's damages claim in part, on the basis that M had not discharged the burden of proving all of the damage suffered to the cargo was due to A's breaches of the contract of carriage. M appealed on the basis that the tribunal had wrongly imposed the burden of proof on M, holding that M was responsible for 62% of the damage.

It was undisputed that the cargo suffered damage during the sea voyage but the main issue was whether A was responsible for the damage. The court found that the tribunal erroneously held in law that cargo owners bore the burden of proving the cause of the damage. Had the tribunal applied the burden correctly, it would have been for owners to establish how much of the damage was due to 'inherent defect, quality or vice' or any other excepted peril under the Hague Rules. The court also dismissed A's appeals on other issues and directed that the award be remitted to the tribunal for reconsideration.

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