

## Time charter

### Damages for premature termination due to financial crisis

**The collapse of the shipping market in the wake of the financial crisis of 2008 has resulted in several cases coming before the courts in relation to the early termination of time charters. One such case was *Glory Wealth Shipping –v– Korea Line (The ‘Wren’)*.**

The 1982 case of the ‘Elena D’Amico’ established the principle that the normal measure of damages for premature redelivery is the difference between the contract rate and the market rate at the time of the breach. However, because the 2008 collapse was so complete many current cases raise the problem of how to assess damages when there is no available market for a comparable substitute fixture. In this particular case LMAA arbitrators found that for a period of about eight months after the breach there was no market at all for period charters, so that damages should be based on actual income from spot charters during that initial period, but by mid-2009 a viable market had emerged for a two year time charter, and that market therefore formed the basis of assessment for the remaining period.

On appeal to the court, the judge agreed with the charterers that this ‘hybrid’ approach was contrary to legal principle. If there is an available market at the date of the breach, making a substitute fixture at the market rate is deemed to be the most reasonable action to take in mitigation of loss. It is unnecessary to consider whether the owner actually takes that action or makes an independent decision to employ the vessel in some other

way. However, if there is no available market at that time, the only way to assess the loss is to look at how the vessel is actually employed for the balance of the charter period, and see what loss is actually suffered. The judge accepted that a revival of the market during that period may be relevant to the issue of mitigation, and the market rate may also be a factor to be taken into account if damages have to be assessed before the end of the contractual period. However, that later rate does not, in itself, provide the correct measure of damages. The matter was therefore remitted to the arbitrators for reconsideration.

## Shipbuilding contract

### Supreme Court follows ‘commercial common sense’ in refund guarantee dispute

**In our Summer 2010 newsletter we reported on the case of *Kookmin Bank –v– Rainy Sky SA and others* in which the Court of Appeal rejected a claim by the buyers of six vessels for refunds of over US\$46 million under bank guarantees following the insolvency of the shipbuilder. In a judgment published at the beginning of November 2011 the Supreme Court has now reversed this decision and held that the bank must pay. The judgment will also be applicable to other kinds of commercial contracts, and supports the use of commercial common sense in contractual interpretation.**

The building contracts provided for advance payments to be refunded in various circumstances, including termination of the contract by the buyer, total loss of the vessel, or insolvency of the builder. The refund due upon insolvency arose under a separate clause which did not expressly give the buyer the right to terminate the



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contract. The bank relied on a paragraph in the guarantees which referred to the buyers' right to a refund upon termination, cancellation or rescission of the contract but not upon the builder's insolvency. The buyers, however, relied on another paragraph where the bank undertook to pay 'all such sums due to you under the contract', which they argued must have been intended to mean 'all pre-delivery instalments' regardless of the circumstances in which they became refundable.

The Commercial Court judge held that to interpret the guarantee as excluding insolvency would be a 'surprising and uncommercial result' as this was the very situation in which the security was most likely to be needed. He therefore upheld the buyers' claim, but the Court of Appeal (by a majority) agreed with the bank's more literal interpretation. In reversing this decision, the Supreme Court accepted that the wording of the guarantees was not wholly clear, but held that where a contract is capable of two possible interpretations the court should choose the construction which is more consistent with the commercial purpose of the agreement.

## Marine insurance

### Is a co-insurer bound by a lead insurer's settlement of a claim?

**In the case of *PT Buana Samudra Pratama –v– Marine Mutual Insurance Association (NZ) Ltd* the Commercial Court had to consider whether an assured could rely on a 'held covered' clause in a marine policy against a co-insurer despite having made fraudulent representations where the lead insurer had already settled the claim.**

B insured its tug under a marine policy incorporating the ITC – Hulls terms, under which B warranted that the vessel would not undertake towage or salvage services under a contract previously arranged by it. The policy also contained a 'follow the leader' clause 'in respect of all decisions, surveys and settlements regarding claims within the terms of the policy'. B's tug ran aground and was declared to be a constructive total loss. The lead insurer agreed to pay its share of B's claim under the insurance policy. M, one of two co-insurers, rejected liability on the basis that B was in breach of the warranty in the ITC clauses. B applied for summary judgment against M, arguing that M was obliged to follow the settlement by the lead insurer. M said that the claim was

not 'within the terms of the policy' where there had been a breach of warranty by B, prior to settlement of the claim by the lead insurer, and further that M was discharged from liability because B subsequently made fraudulent misrepresentations.

The judge preferred B's construction of the 'follow' clause because it referred to 'all settlements', therefore the lead insurer was to be followed on both issues of liability and quantum. He also found against M in respect of its reliance on B's breach of warranty. The judge held that it would be unreasonable to construe the 'follow' clause as being inapplicable where a breach of warranty had occurred before the date of the decision or settlement. If that were the case then the commercial purpose of the 'follow' clause would be frustrated. However, with regard to M's reliance on B's fraudulent representations the judge declined to order summary judgment in favour of B, requiring the matter to proceed to trial so that the facts could be determined by the court before deciding this issue.

## Sale of goods

### Short notice of ETA under FOB contract

**The dispute before the court in *Thai Maparn Trading –v– Louis Dreyfus* concerned two FOB sales of rice which required the buyers (D) to give a minimum of seven working days pre-advance of the vessel's ETA at the loading port. In each case, the sellers (T) rejected D's nomination notices saying that they did not have the cargo ready for loading on the specified date. D accepted these messages as repudiations of the contracts and claimed damages for T's default.**

In the GAFTA arbitration which followed, T argued (although they had not said this at the time) that D's nominations were invalid because they gave less than seven working days notice of the ETA. However, the GAFTA Appeal Board held that although this was a breach by D it did not make the notices invalid or justify T's refusal of performance. It simply meant that T was entitled to wait for the full seven days to expire before it was obliged to accept the vessel. Accordingly, T's messages stating that the goods were not available were correctly treated as repudiatory, and damages were awarded based on the market value, in accordance with the GAFTA default clause.

T appealed to the court, which upheld the GAFTA award. The judge rejected T's reliance on previous case

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law in which breach of 'pre-advice' requirements gave sellers a right of cancellation, since those cases concerned notices given too late, not simply insufficient notice periods. In this case, D's nominations had been given well before the end of the delivery period and if T had raised the objections at the time there was still time for D to give a fresh notice. The judge also rejected T's argument that the date of default was not the actual date of the repudiation but the date of D's acceptance of the repudiation. Based on previous case law, the date of default under the GAFTA default clause is 'the day when the time for performance came and went without due performance' and it makes no difference that the other party's declaration of default comes some time later.

## Voyage charter

### Was demurrage claim time-barred due to being incorrectly described?

**It is a well-established principle that contractual time bar clauses (such as the 90 days time limit for presenting demurrage claims, which appears in the BPVOY charter and other tanker charterparties) are to be strictly complied with. However in the recent case of *National Shipping Co of Saudi Arabia –v– BP Oil Supply Company* (The 'Abqaiq') the Court of Appeal refused to adopt an excessively strict approach which would lead to an unfair and uncommercial result.**

The vessel loaded two separate parcels of cargo at Freeport, and after loading the first parcel there were delays before the second parcel could be loaded. The shipowners (N) thought that the additional delays at Freeport did not count as demurrage but were to be claimed under a separate clause. They presented two separate invoices to the charterers (BP), one headed 'Demurrage invoice' and the other headed 'Supplementary invoice' for extra waiting time and bunker costs, amounting to about US\$500,000. BP raised some minor amendments to the demurrage invoice and N issued a revised invoice, which was promptly paid. However, the supplementary invoice was not paid. By the time the matter came before the court, BP's position was that the waiting time should in fact have been claimed as demurrage, and it was not now open to N to pursue the claim, since (a) there had been a full and final settlement of demurrage, and (b) the charterparty required any demurrage claim to be presented with specified supporting documents within 90 days after discharge, and as those documents had not been attached to the

supplementary invoice it was now time barred. In the Commercial Court, BP's arguments were successful. However, the Court of Appeal (which found BP's approach 'as surprising as it is unattractive') reversed the judge's decision. On the first point, it found that the true position was that the settlement related only to the first invoice. As to the time bar, the court pointed out that BP had in fact received all of the supporting documents which were required although some were attached to the first invoice and some to the second. The court accepted that it must be objectively apparent to the charterer that the documents presented are relied on in support of the relevant claim, but held that it was wrong to adopt a pedantic approach which focused on the form rather than the substance of the presentation. On the facts of this case, the claim had been validly presented, albeit wrongly described, and the time bar clause did not preclude N from putting a different legal label on the claim, the substance of which was presented in time.

## Carriage of goods

### Burden of proof in cargo claims

**In *Exportadora Valle De Collina SA –v– AP Moller-Maersk A/S* the Commercial Court was asked to decide where the burden of proof lay under a clause in a liner bill of lading. The case is of wider interest since the clause in question was almost identical to Article 18(2) of the Convention on International Carriage of Goods by Road (CMR).**

M, the sea-carrier, argued that the damage to a cargo of chilled grapes shipped from Chile to Europe was caused by insufficient or defective packing or bad stowage and therefore its liability under the contract of carriage was excluded. Under the relevant clause, once it was established that the loss or damage 'could be attributed to' insufficient/defective packing or bad stowage (among other things) it shall be presumed that it was so caused, unless cargo interests could prove that the loss or damage was not caused either wholly or partly by one or more of such causes.



The judge allowed the shippers' claim against M. He noted that the phrase 'could be attributed to' in the relevant clause meant that in order to give rise to the presumption M, as carrier, needed to prove only that one or more of those excluded matters relied upon could plausibly have caused the damage; not that on a balance of probabilities the excluded event did cause the damage. He then considered the strength of evidence required from the shipper to rebut that presumption, deciding that the shipper had to show on a balance of probabilities that the event in question did not cause the loss or damage claimed. Significantly, the judge rejected M's argument that the shipper had to prove a positive case of causative breach by M. He said that this was an ordinary matter of bailment: if the shipper could establish delivery of goods to M, the bailee, in good order and condition and redelivery in a damaged condition, then a prima facie breach of the contract of bailment had been established and the burden of proof was on M to show that all the relevant loss and damage was caused by a matter for which it was not responsible. If M could not do so then it was liable for the entire loss.

## Sale of goods

### Effect of second analysis under GAFTA contract

**Under GAFTA Sampling Rules, disputes relating to quality specifications of the goods can be resolved by buyers obtaining a second analysis from an independent analyst such as Salomon & Seaber (S&S) in London, which is final and binding. In the case of *RG Grain Trade –v– Feed Factors International* the court had to consider whether this was excluded by the terms of the contract and, if not, whether the buyers had the right to reject the goods when the S&S analysis found them to be out of specification.**

The contract provided for quality and condition to be final at loading as per certificate of a GAFTA approved superintendent of the sellers' choice. However, it went on to provide that the buyers also had the right to appoint their own supervisor, and then stated: '2nd analysis, if any, as per Salomon & Seaber, London'. The sellers' appointed superintendent certified the goods to be in accordance with the contract, but the buyers' superintendents found different results and the buyers applied to S&S for a second analysis. S&S found the goods to be out of specification as to protein and fibre, and the buyers rejected the goods.

The court agreed with the buyers (and the GAFTA Appeal Board) that the S&S analysis was final. Although the contract stated that the certificate of the sellers' appointed superintendent should be final, the provision for a '2nd analysis' had no purpose unless it was intended to supersede the 'certificate final' provision. However it did not necessarily follow that the goods could be rejected. In respect of protein, the GAFTA contract expressly provided that the goods should be accepted with an allowance. The Appeal Board concluded that because no scale of allowances was specified for fibre any deviation in this respect led to a right of rejection, but the judge said that this was wrong in law. The award was remitted to the Board to consider whether the breach in respect of fibre content was a breach of a condition of the contract, giving rise to a right of rejection, or only a warranty, leading to a claim for damages.

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