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IN THIS ISSUE

- The owners' obligation to commence the approach voyage under a voyage charter
- Negligence of master causing additional cargo handling costs - who pays?
- Want of prosecution – striking out an arbitration claim / geographic deviations and the Hague Rules
- Misdelivery and the Hague Rules time bar limit

The owners' obligation to commence the approach voyage under a voyage charter

In *CSSA Chartering and Shipping Services SA v Mitsui OSK Limited Ltd* (The "PACIFIC VOYAGER") [2018] EWCA Civ 2413 the Court of Appeal considered this area, a matter of continued importance to owners and charterers alike. Since 1935 it has been well established law that when a charterparty contains express provisions that the ship will proceed with utmost despatch to the loadport and couples this with a date or range of dates when the ship is expected ready to load, this places an absolute obligation on the owners. The ship must set off on its voyage to the loadport - the approach voyage - so as to get there on or around the agreed date.

This is often referred to as the Monroe obligation after the Court of Appeal decision on which it is founded. The Court of Appeal had also held in *Monroe Brothers & Ryan* [1935] 51 Lloyds Law Rep. 179 that whilst the protection of a general exceptions clause in a charterparty would apply to the approach voyage, it would not apply to the period before the start of the approach voyage. Thus the Monroe obligation is regarded as an absolute obligation.

The principle has been extended in subsequent cases to cover charterparties containing ETA provisions rather than expected ready to load dates.

The PACIFIC VOYAGER decision extends this further. The charterparty terms in dispute contained an *"utmost despatch"* provision but there was no expected ready to load or ETA date. However, it did contain an itinerary for the vessel, setting out the timetable for its port calls on the voyage prior to the fixture in question. There was also a cancelling date.

Whilst on this prior voyage the ship, a VLCC, hit a submerged object in the Suez Canal and suffered serious damage. Repairs were going to take *"months"* and so the vessel would not make it to the loadport by the cancelling date under the next fixture. There was, of course, no fault on the owners' part. The delay was caused by an unavoidable accident.

The charterers cancelled the charterparty. They also said that the owners were in breach of their absolute obligation to commence the approach voyage in time and claimed damages.

At first instance in the Commercial Court Mr Justice Popplewell found in the charterers' favour. Had the accident happened during the approach voyage, owners would have had the protection of the exceptions clause, but it had not so they could not escape the absolute nature of the obligation. The Court of Appeal, where Lord Justice Longmore gave the sole judgment, has now upheld the judgment against owners.

Longmore L J accepted that each charterparty must be construed on its own terms – *"so far, so uncontroversial"* as he puts it. Nonetheless, there has to be a more general approach against which those individual provisions are interpreted. Again in his own words:

"in a business world…previous decisions on the same or similar clauses must be treated as authoritative in the interests of business certainty…previous cases should be regarded as helpful guides in situations similar to situations that have arisen before.".

Continued on page 3

With that in mind the central issue in this case was how the express obligation to proceed with utmost dispatch to the loadport should operate. For Longmore L J it was *"self-evident"* that the itinerary was the provision that gave the answer. This set the date at which the vessel was required to leave the discharge port under the previous fixture once a reasonable time for discharging had elapsed. Since the vessel failed to do so, the owners were in breach. Interestingly, and unlike Popplewell J, the Court of Appeal was not persuaded that the cancelling date in the charterparty necessarily provided a reference point for the operation of owners' obligation. So this leaves open the question whether a voyage charterparty which contains an obligation to proceed with utmost despatch to the loadport but which only has a cancelling date by way of indication of the date at which the vessel is expected to be at the loadport should be looked at in the same way.

Permission to appeal to the Supreme Court is being sought. Lurking in the background is a further interesting point. The Court of Appeal was bound by previous authority that the exceptions clause does not cover the approach voyage. The Supreme Court would not be.

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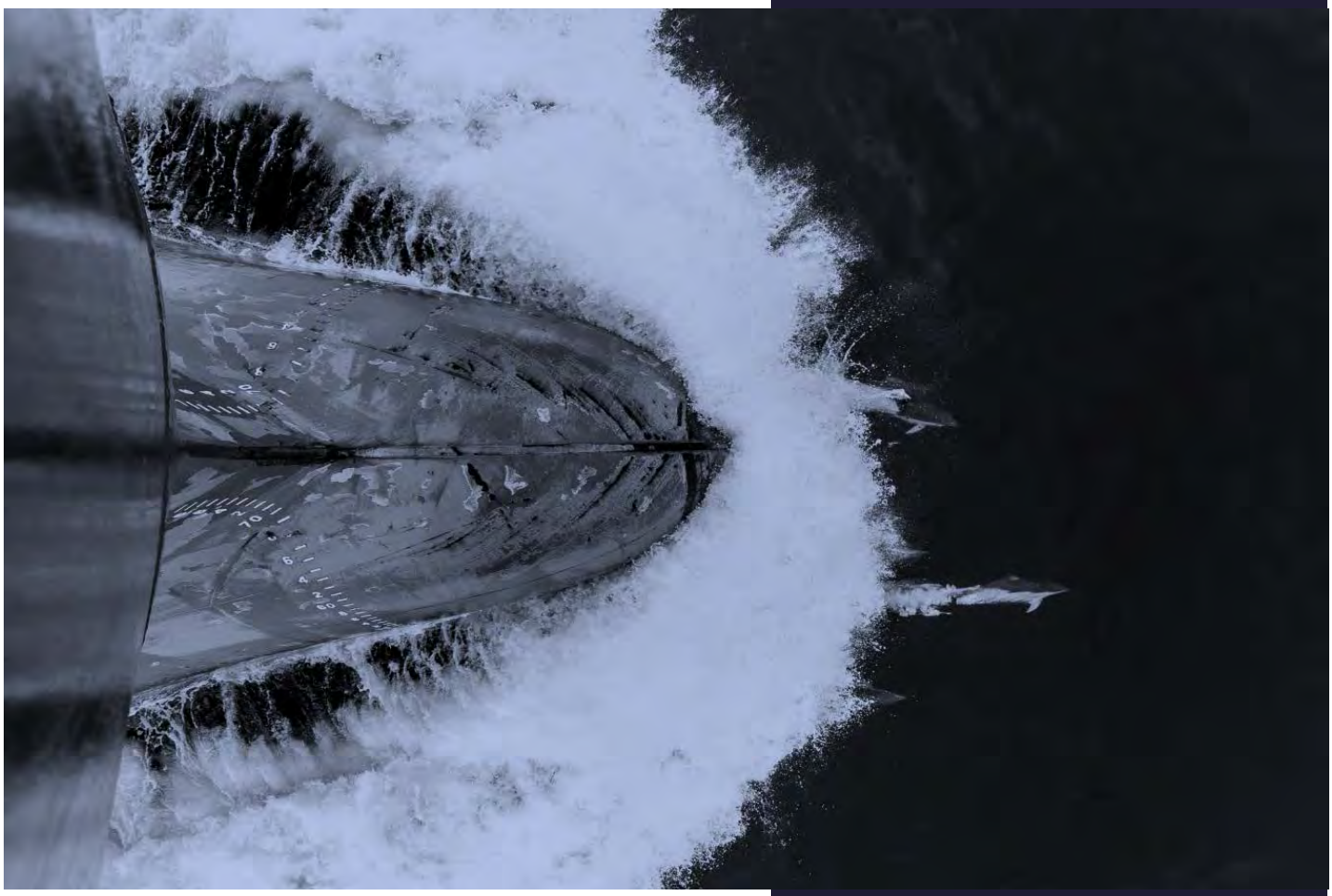

Negligence of master causing additional cargo handling costs - who pays?

Clearlake Shipping Pte Ltd v Privocean Ltd (The "PRIVOCEAN") [2018] EWHC 2460 concerned a claim against owners by time charterers under a NYPE charterparty in respect of unnecessary costs incurred by them in the carriage of a cargo of soyabeans.

The master had insisted on a stowage plan for charterers requiring strapping of a cargo of soya beans. This cost the charterers US$ 400,000 or so which they sought to recover from owners. The dispute went to arbitration and the tribunal in their award found that the master had been quite obviously negligent in his decision. The arbitrators also found that this was a breach of the charterparty. Nonetheless, they held that the charterers' claim failed by reason of the defence afforded to the owners under Article IV, rule 2(a) of the Hague Rules (or the US COGSA equivalent) which was incorporated into the charterparty:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) Act neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship"

That was the key area for the appeal to the High Court. Was the master's negligence really in the management of the ship or did it relate to the cargo, in which case, owners would not have a defence.

In reviewing the authorities, Mrs Justice Cockerill pointed out that the breaches complained of and established before the tribunal predated loading. The charterers ended up having to adopt a stowage plan unwillingly from the master. The master's decision making had not been primarily related to caring for the cargo. His decision had revolved around his concerns for the stability of the ship in the exercise of his supervisory role. It was negligence relating to the management of the ship, not the cargo. The owners could, therefore, rely on the Hague Rules defence.

Charterers also sought to recover the costs by reference to clause 2 of the NYPE charter:

"Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo…"

On that basis, so the charterers argued, they should not bear the costs of *unnecessary* extra fittings – in this case the strapping. That argument got short shrift. Clause 8 of the NYPE charterparty is the one which actually deals with the parties' respective cargo handling obligations. As such, trying to read a transfer of responsibility into Clause 2 could not be justified and she was *"entirely unpersuaded"* on the point.

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Want of prosecution – striking out an arbitration claim / geographic deviations and the Hague Rules

Dera Commercial Estate v Derya Inc (The "SUR") [2018] EWHC 1673 looks at the circumstances in which a tribunal may strike out a claim for want of prosecution pursuant to s. 41 (3) of the Arbitration Act 1996. The court also had the opportunity to consider whether a geographical deviation would prevent owners from relying on the one year Hague Rules time bar.

Dera ("charterers") chartered the ship from Derya ("owners") to carry maize they had bought in India for import into Jordan in the summer of 2011. When the ship reached Jordan the cargo authorities refused to allow its importation (fungus seems to have been the main objection). An impasse ensued whilst the charterers tried, unsuccessfully, to get the authorities to change their mind.

A short jurisdiction skirmish in London and Jordan resolved in favour of London arbitration as agreed in the charterparty. The owners' P&I Club put up security, arbitrators were appointed and time protected thereby on both sides. The ship remained at Aqaba with the authorities refusing permission to discharge.

In November 2011 the ship sailed for Turkey with the cargo on board without the consent of the charterers or the Jordanian authorities. The owners commenced proceedings in Turkey to recover demurrage and various costs. The charterers sought to contest the Turkish proceedings. They left it too late though and their objections were dismissed, thus allowing the cargo to be sold under judicial sale and the proceeds eventually transferred to the owners in 2013. Later the ship was sold for scrap.

Nothing had happened in the London arbitration since the appointment of arbitrators. In 2015, owners served particulars of claim seeking a declaration of non-liability. This provoked the charterers to serve particulars of the cargo claim.

At a hearing on preliminary points the tribunal struck out the cargo claim on the grounds that there had been *"inordinate"* and *"inexcusable"* delay which had caused serious prejudice as set out in s. 41 (3) of the Arbitration Act.

Contract claims in England are subject to a six year limitation period as set out in the Limitation Act 1980. It is very rare that an action once commenced would be struck out for delay if the six years had yet to expire. Court of Appeal authority makes it clear that this should only be done in exceptional circumstances.

But here the parties had specifically agreed a much shorter one year limit. Could the owners rely on this? Mrs Justice Carr supported the tribunal on this and found it was a factor to be taken into account. She was clear to record, however, that it was not *"the"* test on the question.

"The length of the relevant limitation period sets the context in which the nature of the period or periods of delay will be assessed, specifically whether the delay overall is inordinate or not. Whether or not delay is inordinate will always be a fact-sensitive exercise in each case."

It is always open to the parties to agree time extensions and this is a matter entirely for them. Many cargo claims take years to resolve by mutual consent. In the absence of this, though there *"is no reason why the one year rule is not objectively relevant the purpose of assessing delay. It sets the tone and context for that exercise."*

In a curious feature of the judgment, Mrs Justice Carr went on to consider the question whether a carrier could rely on the one year time bar in the event of an unauthorised geographical deviation – presumably in this case by reference to the voyage to Turkey. The House of Lords in a 1936 case called *Hain Steamship* had held that a geographical deviation was so serious a breach that the innocent party could treat itself as *"no longer bound by any of the contract terms"*. As a matter of precedent she was bound by the Hain Steamship decision. The existing law is that a geographic deviation precludes a carrier from relying on the one year time bar created by Article III Rule 6 if the other party to the contract of carriage elects to terminate.

Since *Hain Steamship*, however, various House of Lords decisions and legislation have changed the general approach of English law to categories of breach of contract and the effects on these on the continuity of contractual terms. As a result, she held:

"Were I not so bound…I would hold that a geographic deviation does not preclude a carrier from relying on the …time bar…The weight of modern authority supports that conclusion."

However, as she was obliged to follow *Hain Steamship*, she held that owners could not rely on the Hague Rules time bar if: (a) there had been a geographic deviation; and (b) the charterer had elected to cancel the contract.

This judgment will be a useful addition to an arbitrator's manual in relation to striking out claims for delay. There was a very little guidance on this area before. Equally the deviation point might look purely academic. It does though act as a clarion call for a reconsideration of the law relating to deviation by our appeal courts

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Misdelivery and the Hague Rules time bar limit

Deep Sea Maritime Ltd v Monjasa A/S (The "ALHANI") [2018] EWHC 1495 (Comm) considered whether the one year time limit for claims against a carrier found in Article III rule 6 of the Hague Rules applies to misdelivery claims.

The shippers Monjasa shipped a cargo of marine fuel oil in the ALHANI at Lome for carriage to Cotonou. In the event the vessel discharged the cargo by way of a ship to ship transfer off Lome to a third party without production of the bill of lading.

Monjasa claimed that the cargo had not been delivered to them and commenced proceedings against the ship in Tunisia within the one year time limit. Subsequently the Tunisian courts found that they did not have jurisdiction. Once the one year time limit had expired, the owners commenced English High Court proceedings seeking a declaration that they were not liable because the claim was out of time, and applied for summary judgment.

The High Court was required to decide two questions:

Does the Article III Rule 6 one year time limit apply to claims for misdelivery? If so, had the commencement of proceedings in Tunisia been effective to protect the one year time limit? The answer to the latter was no: the proceedings in Tunisia were in breach of the exclusive jurisdiction provisions in the bill of lading. They were not effective to protect the one year time limit if it applied to claims for misdelivery.

In considering whether the one year time limit applies to misdelivery the judge considered that the inclusion of the words *"in any event"* and "*all liability"* showed that the rule, on its own wording, was intended to be very wide and should be interpreted as such. Misdelivery claims could be covered. It was suggested, however, that this had not been the intention of the delegates who drew up the Hague Rules and an examination of their work ensued. Nevertheless, the judge could not derive any *"settled understanding"* on this point.

Further, judicial precedent has consistently stressed that the Article III Rule 6 time bar was intended to achieve finality. As the judge put it that aim *"would be seriously undermined if the Rule did not apply to misdelivery claims"*.

Monjasa sought to argue that the one year time limit could only apply to breaches of the Hague Rules. Since the rules do not address the question of delivery, nor impose an obligation to deliver against production of an original bill of lading, they argued that the time bar could not apply.

In answer to that point the judge held:

"Pumping the Cargo out of the ship into the hands of someone who is not in fact entitled to delivery of it seems the plainest breach of the Article III Rule 2 obligation "properly and carefully [to] load, handle, stow, carry, keep, care for, and discharge the goods carried."

That was sufficient for his decision but in fact he formulated the answer to the question in wider terms by holding that the one year time limit in Article III r 6 of the Hague Rules extends:

"…to breaches of the shipowner's obligations which occur during the period of Hague Rules responsibility, and which have a sufficient nexus with identifiable goods carried or to be carried…"".

Quite how far that extends remains to be seen. One thing is clear from this case though. Misdelivery claims are subject to the Article III Rule 6 one year time bar.

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>
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