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soundings

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The FRONT COMOR

Shipping cases rarely make the European Court of Justice and when the FRONT COMOR struck a jetty in Sicily in August 2000 the idea that several judges would be debating the consequences in Luxembourg some nine years later would have seemed improbable. However the incident has resulted in a ruling that the English Court does not have the power to grant anti-suit injunctions restraining a party from commencing or continuing proceedings in an EU Member state where those proceedings are in breach of an arbitration clause.

At the time of the incident the ship was under a voyage charter to the refinery which owned the jetty. This charter was subject to English law and a London arbitration clause. The refinery brought London arbitration proceedings against the ship's owner for its uninsured losses however the refinery's insurers began a separate subrogated action in the local court in Sicily under Italian law.

The ship's owner obtained an anti-suit injunction against the insurers in the English Court. The insurers appealed, and the House of Lords eventually referred the question of whether the owner was entitled to the injunction to the European Court.

That Court decided that the injunction should not have been granted, as it undermined the purpose of the European Judgments Regulation, which governs proceedings in the courts of all EU Member states and is designed to minimise the risk of multiple proceedings. It ruled therefore that only the Italian Court could determine whether it had jurisdiction to hear the insurers' claim, notwithstanding the arbitration agreement.

The decision has wider implications. Where proceedings are commenced in any European Member state in breach of an arbitration clause, it will now be up to the court where the offending proceedings have been commenced to determine whether the case can proceed. The ruling has not been universally welcomed, however its long term impact is unknown. The English Court will still be able to issue injunctions where non-contractual proceedings have been commenced outside the European Union - for instance in West Africa or in the Far East, which are the jurisdictions to which the majority of anti-suit injunctions issued in the English Courts relate. Moreover if proceedings are brought in breach of an arbitration clause, it may be possible to bring a claim in arbitration for any resulting costs incurred in the non-contractual forum. In some circumstances the claim could extend to any liability found by the foreign court, although causation issues may arise.

There will nevertheless undoubtedly be occasions where the ruling leads to unwelcome consequences, and there have been calls to amend the Judgments Regulation so that parties who choose London arbitration can expect that choice to be respected and upheld.

Intermediate Claims Procedure

The London Maritime Arbitrators' Association ("LMAA") has recently launched an Intermediate Claims Procedure.

The LMAA has for a number of years successfully operated its Small Claims Procedure for disputes where the amount at stake is less than \$50,000. This provides a much shortened procedure for resolving disputes by a sole arbitrator, with a cap on recoverable costs and on the arbitrator's fees. However, disputes which exceed \$50,000 have tended to proceed under the full LMAA terms, which on some occasions has led to a disproportionate level of costs being incurred.

The Intermediate Claims Procedure ("ICP") has been produced in conjunction with the Baltic Exchange, and is designed to bridge the gap between the small claims procedure and the full terms. It is anticipated that the procedure will be used for claims the value of which exceeds any agreed monetary limit for the small claims procedure (usually \$50,000, but occasionally \$100,000), but does not exceed \$400,000 (although a higher limit can be agreed.) However, the procedure will only apply by specific agreement of the parties, and the BIMCO/LMAA Recommended Arbitration Clause has recently been amended to achieve this.

The terms feature a condensed procedure with strict time limits. Cases will only feature oral hearings with

permission of the Tribunal but it is expected that the vast majority of cases will proceed on documents alone. The parties' recoverable costs are capped to 30% of the sums at stake (increased to 50% if there is an oral hearing.) The Tribunal's costs are also capped, at one third of the total to which the parties' costs are capped where there is a sole arbitrator, or two thirds where there is a two or three man Tribunal. There will only be a right of appeal to the Court if the Tribunal certifies that the dispute involves a question of law of general interest or importance to the trade or industry.

The Managers consider the ICP to be a positive development which should have the effect of reducing the cost of medium sized claims. Although it is possible that a party's actual costs will exceed the cap set out in the procedure, the existence of the cap should bring a sense of proportion to a dispute. In particular, the provisions whereby the Tribunal is to certify whether there should be a right to an appeal from any award will result in a swifter end to arbitration cases, and a significant saving in costs.

The full text of the procedure can be found at www.lmaa.org.uk.

BIMCO Piracy clause

In light of the rise in piracy incidents world-wide, BIMCO has recently published a clause which specifically addresses the risk and consequences of piracy.

The new clause has nevertheless been closely modelled on the CONWARTIME clause. It applies whether or not the risk of piracy existed at the time the charter was agreed (which may not be the case with the CONWARTIME clause.) It entitles an owner to refuse to proceed through an area where the master believes there is a risk of piracy. However the master has to make a proper assessment of the risk, and exercise reasonable judgement in determining that there is potential danger to his particular ship and crew. If the owner agrees to proceed through a risk area, he is entitled to take reasonable preventative steps, and the charterer is to bear the costs of any additional security and other costs (though this does not extend to Kidnap and Ransom insurance.) If however the owner refuses to proceed he is to advise the charterer and seek alternative voyage orders. The clause also specifically provides that if the ship is seized, it will remain on hire.

The clause does bring some certainty from an owner's perspective. It has however been commented that from a charterer's perspective it could be considered to be onerous – the extent to which it is used will to a large extent depend on the parties' respective bargaining power.

The full text of the clause can be found at www.bimco.org.

The UK Defence Club

Thomas Miller Defence Ltd, 90 Fenchurch Street, London, EC3M 4ST
tel: +44 207 283 4646 fax: +44 207 204 2131
email: tmdefence@thomasmiller.com web: www.ukdefence.com