

soundings

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Message from the Managers

Members will be aware from a circular issued recently that the Association's Directors decided on a 5% General Increase for the 2010/11 policy year. This decision reflects the current state of the shipping markets and also the financial position of the Association.

In December the Managers will be circulating to Members proposed new Rules for the Association. The proposed new Rules are designed to be modern and to clarify the existing cover but without altering or restricting the scope of cover that is offered. Members will be asked whether they agree to the changes at an EGM in January, 2010 so that the new Rules come into effect from 20th February, 2010. If any Member has any questions regarding the proposed new Rules they should contact the Managers.

Rule B – Is The Fog Lifting?

One of the few things that can be said with certainty following the US Second Circuit Court's decision in The Shipping Corporation of India -v- Jaldhi Overseas Pte Ltd is that Rule B procedures can no longer be used to attach wire transfers passing through New York bank accounts, and that the New York banking community (and a significant section of the judiciary) is very relieved about this.

What has been less clear is the extent to which the judgment has retroactive effect - in other words whether it will result in the release of any funds previously attached pursuant to Rule B attachment orders. In the immediate aftermath of the SCI v. Jaldhi decision some New York judges took the view that it did have such effect, and began issuing "orders to show cause," requiring those plaintiffs who had obtained attachments to give reasons why any attached funds should not be released.

The subsequent decision in *Hawknet v Overseas Shipping Agencies* has now confirmed

what many suspected, namely that the SCI v. Jaldhi decision does have retrospective effect, and therefore funds which have been attached and which have remained in the same account in which they were attached are likely to be released.

However, that is not the end of the matter, as some plaintiffs are expected to resist the release of funds, on the grounds that any underlying proceedings to which the original attachment order relates would not have been pursued in the absence of the security provided by the Rule B attachment, and that it would therefore be unfair to order

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Excluding Rights of Appeal

The English Court has recently considered, in *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd*, what is needed to exclude the right of appeal from an arbitration award.

An award was given in UNCITRAL arbitration proceedings concerning the purported termination by a subsidiary of Shell of an LNG co-operation agreement. Shell was seeking leave to appeal the award on the basis that it was wrongly decided. However, the arbitration agreement provided that “the decision of the majority of the arbitrators... shall be final, conclusive and binding upon the parties”. The successful party under the award (referred to in the judgment by its former name, Centurion) argued that these words excluded any right of appeal.

Under English law, unless the arbitration agreement or clause provides otherwise, arbitration awards can only be appealed on 3 grounds - that the award was made without jurisdiction, or following a procedural irregularity, or resulted from an error of law. The 1996 Arbitration Act allows parties to exclude the right of appeal from errors of law, although they cannot exclude appeals on questions of jurisdiction or irregularity.

In arguing that the arbitration agreement in this case precluded any appeal on a question of law, Centurion claimed that the words “final conclusive and binding” showed that the parties had agreed in no uncertain terms that

there should be no ability to appeal against the award, which would conclude all matters in issue between them without further argument or recourse. It placed particular emphasis on the word “conclusive”, which it argued was as strong an indication as there could be that there should be no right of appeal.

However the judge disagreed. She held that in order to exclude rights of appeal, parties need to use very clear wording in their arbitration agreements. In examining the words which were used in this case, the judge considered that a “final” award was one which prevented the claimant from bringing the same claim again in a fresh arbitration. A “conclusive” award prevented a party in a subsequent arbitration from disputing an issue of fact or law which the earlier award determined. A “binding” award was one where each party promises to abide by the award. However, even collectively, the judge did not consider these words were enough to exclude the right to appeal.

It follows that where parties wish any arbitration award to be the end of the matter, they should say so, and unless the clause specifically provides that “there shall be no right of appeal” any other wording is unlikely to be sufficient.

Rule B continued

that the funds be released. It is also anticipated that further actions may be taken against funds as they are released, and the Managers are aware of at least one case where a plaintiff has obtained a world wide freezing order from the English court targeting Rule B funds about to be released in New York, and ordering that the funds be transferred to England to be held by way of security there.

What of those cases where the parties have agreed that attached funds be placed into escrow, or where a bank guarantee has been given as security for the claim? As at the time we went to print, the US court has not give any directions on whether funds transferred into an escrow account should be released. It could be argued that such funds will be deemed to have become the “property” of the defendant at the time of the transfer, and therefore should be unaffected by the recent decisions. Similarly there is no guidance on those cases where a party has given a bank guarantee in order to lift an attachment. However as the New York legal community comes to terms with the post Rule B world, it is likely that this issue will be tested at some stage in the near future.

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