ZFZ | ZEILER FLOYD ZADKOVICH

SHIPPING CASES – A YEAR IN REVIEW: 2019-2020

NEW YORK | VIENNA | LONDON | MEXICO CITY | CHICAGO | HOUSTON | SYDNEY

INTRODUCTION

This Guide has been written by the team at Zeiler Floyd Zadkovich to provide an overview of the significant shipping cases that have been decided by the English courts in 2019 and 2020. The aim of the Guide is to present brief summaries of the major cases and the important points of law that were extrapolated in each matter.

SHIPPING CASES

A COVID-19 JURISDICTION LAND GRAB?

The Miracle Hope [2020] EWHC 995 (Comm)

In a reminder of the breadth and reach of the English Court's jurisdiction, the Court recently made a finding on the sufficiency of security to release a Singaporean vessel arrest.

A vessel was arrested in Singapore in support of a claim regarding discharge of cargo without production of bills. The arresting bank claimed damages of USD76 million in the underlying claim.

Charterers and sub-charterers attempted to provide security but failed to agree terms acceptable to the bank. They applied to the Singapore Court for a ruling on the adequacy of the security; however, due to COVID-19, that hearing was delayed.

Owners brought an application in England seeking an order that the security was adequate. The Court held that if the court of the arrest jurisdiction was unable to determine if the security was adequate, there were powerful reasons why the court of the charterparty dispute should do so. The Court could find, as a question of fact, whether the security offered matched what the arrest jurisdiction would require.

CANCELLATION CLAUSES: ROOM FOR MOVEMENT?

The Alpha Harmony [2019] EWHC 2522 (Comm)

The Owner of the vessel Alpha Harmony chartered her to ADM on an amended Norgrain 1973 form (the Head Charter). ADM, as disponent owner, then sub-chartered the vessel to Bilgent on an amended Baltimore Form C Berth Grain form for a voyage from Brazil to China (the Sub-Charter). The Head Charter provided for two laycan periods, the second of which ended on 31 May 2015. The Sub-Charter also provided for a laycan period ending on 31 May 2015. On 2 April 2015 the laycan spread was narrowed by Bilgent to 1 to 10 May 2015 and also by ADM under the Head Charter. The vessel tendered notice of readiness (NOR) by email at 07.04 on 10 May 2015 which was a Sunday. The email stated that the vessel had arrived at 02.50.

Under both charters a clause provided for NOR to be delivered between 08.00 and 17.00 on a weekday and between 08.00 and 11.00 on a Saturday. No express provision was made for delivery of a NOR on a Sunday. Laytime was to commence at 08.00 on the next working day after a valid NOR had been tendered. Bilgent cancelled the Sub-Charter at 20.47 on Sunday 10 May 2015 and ADM cancelled the Head Charter at 05.55 on Monday 11 May 2015. The legal issue was whether the cancellations were lawful in circumstances where, although NOR had been tendered before the relevant time on the cancelling date, it had not been tendered during the permitted hours.

In arbitration, the arbitrators held that both cancellations were invalid. However, on appeal in the Commercial Court of the Queen's Bench Division, Teare J held that Bilgent lawfully cancelled the Sub-Charter. His Lordship reasoned that it was entirely in accordance with clause 16 of the charterparty, as a NOR could only be tendered on Monday-Saturday. Thus, when it was delivered on Monday, it was out of time. In relation to the Head Charter, Teare J found that ADM was not entitled to cancel the charter. This was because clause 17 provided that in the event that NOR was delivered at any time before 23.59 on the cancelling date, there would be no option to cancel. Thus, a NOR could be delivered 'at any time' on the day of cancellation, which included a Sunday. Given that this occurred, ADM did not validly cancel the charter. The reason for the different results in the two appeals was that the two charters were not on back-to-back terms. As a result, Bilgent's appeal in the Sub-Charter arbitration was allowed and ADM's appeal in the Head Charter arbitration was dismissed.

UNCERTAINTY AROUND BIMCO'S NON-PAYMENT OF HIRE CLAUSE?

The Caravos Liberty [2019] EWHC 3171 (Comm)

The vessel was time-chartered on an NYPE form containing the BIMCO Non-Payment of Hire Clause. Hire was payable 15 days in advance, every 15 days.

On one of the payment dates, Charterers withheld disputed hire. For two subsequent payments, Charterers paid the full amount of ongoing hire, but continued to withhold the arrears from the prior underpayment. Eventually, Owners served an anti-tech notice demanding payment of the arrears, purportedly in line with the BIMCO Non-Payment of Hire Clause. Following Charterers' failure to comply, Owners withdrew the Vessel.

In arbitration, it was held that Owners were not entitled to withdraw. The BIMCO clause was not engaged. There was a difference between the right to claim repayment of a contractual debt and the right to withdraw on the basis of the BIMCO clause. The latter involves a tight timetable, and strict compliance to the clause (as is commensurate with the 'nuclear' effect of withdrawal'). Owners had lost the opportunity to do the latter.

This judgment serves as a reminder – on significant matters such as withdrawal of a vessel from a charterparty, take advice and act promptly.

PRESERVING TIME IN ICA CLAIMS

London Arbitration 3/20

The inter-club agreement ("ICA") is designed to prevent litigation. It normally does so, so any reporting providing further clarity is welcome. In a recent arbitration, charterers faced a cargo claim from shippers. In turn, Charterers sought to pass that claim to Owners under the ICA.

Clause 6 of the ICA requires "written notification" of the claim, to include "if possible… details [of the claim]" within 24 months of the delivery of the cargo. Here, there were a series of agreements for extensions of time to commence an action. Despite those extensions, Owners sought to rely Clause 6 ICA to say the claim was time barred.

They failed – but not because of the time extensions. The Tribunal held that written notification of the claim had already been transmitted to Owners, so Clause 6 was (in part) satisfied. All that is required is some form of written notice. The second part of Clause 6, which requires claim details, is not necessary to preserve time. A failure to provide these details is a breach, and would give rise to a counter-claim in damages (we note that practically, it is hard to see how this could lead to any loss). This case suggests that the ICA time bar is easily satisfied. No need to commence a claim, no need to include claim details. Just a written notification.

WHAT TAKES PRIORITY: INTERNATIONAL RELATIONS OR SAFETY OF LIFE AT SEA?

The 'Ocean Prefect' [2019] EWHC 3368 (Comm)

The grounding of the vessel, the "Ocean Prefect", in the UAE resulted in a safe ports dispute between owners and charterers.

The marine accident investigation branch (MAIB) carried out flag state investigations with a report being issued shortly afterwards. The owners wished to rely on this report as evidence in the arbitration, however charterers argued that this should be refused under the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.

It was held by the court that arbitration proceedings were judicial proceedings within the meaning of the regulations and their purpose was to attribute blame or liability. As a result the court's permission was required to use the report.

Further whilst the arbitration proceedings would be private the MAIB report would be public and could prejudice further accident investigations in the future. The court decided that the interests of justice in this case did not outweigh the likely prejudice to accident investigations in the future and the UK's relations with another state or international body.

The interests of safety at sea outweighed any of the parties' commercial interests.

SHIPOWNERS AND THE WIDE AMBIT OF EXCLUSION CLAUSES

The 'Elin' [2019] EWHC 1001

Suit was brought against the shipowner following the loss of deck cargo during heavy seas. The claimants, who held interests in the cargo, alleged that the shipowner had breached their fiduciary duty to carry the cargo in the same good order in which it was placed on the vessel, that they had failed to make the vessel seaworthy and in particular to make the ship and her holds fit for the reception, carriage and preservation of deck cargo.

The bill of lading included a clause that excluded the carrier from being responsible for loss or damage, howsoever arising, in respect of deck cargo.

It was held that the wording of the clause was effective to exclude liability for both negligence and unseaworthiness with regards to loss of deck cargo. The clause covered any and every cause, and so there was no justification in the courts eyes for excluding this limit on shipowners liability.

STOP! LAST MINUTE BID BY A MORTGAGEE TO PREVENT A JUDICIAL SALE

Qatar National Bank (QPSC) v The Owners of the Yacht "Force India" (No 2) [2020] EWHC 719 (Admlty).

Following an order made by the admiralty court for the sale of a yacht at the request of a mortgagee, the mortgagee applied to have the order for sale set aside on the final day for bids to be received.

The court declined this request but set aside the time to enable a hearing to take place, allowing the Court to consider the arguments of all interested parties. The order was set aside on the basis that a third party had paid the sum secured by the mortgage, and so the judicial sale of the vessel was no longer required.

The admiralty court noted that the court should be reluctant to set aside a sale, particularly where the application was made as late as this one was. The setting aside of such sales should not be made practise and should only happen in unusual and exceptional circumstances.

APPLYING FOR BAIL AS SECURITY IS NOT A WAIVER OF THE ARBITRATION AGREEMENT

Norstar Shipping and Trading Ltd v The Rosy 2019 FC 1572 (London Arbitration)

On 18 March 2019 the plaintiffs entered into a Charterparty with the owners of the "Rosy" Rosy Marine Corportation ("RMC"). Disputes arose as to whether repudiation of the charter on behalf of RMC had occurred and on 11 October 2019 the Plaintiffs filed a statement of claim against Owners. The Plaintiffs then brought a motion to set bail in the Federal Court of Canada whilst the factual matters of the case were to decided by London Arbitration - which expected to take 2 years. The Defendants argued that this was a waiver of the arbitration agreement.

Despite the fact the plaintiffs had undertaken not to pursue litigation in courts, Elliott J found that naming the other party in this case did not qualify as a waiver of the arbitration agreement in terms of any confidentiality agreement. In her judgment Elliott J stated that bail would be set equal to "the reasonably best arguable case, plus interest and costs as limited by the value of the arrested vessel". Her Honour was of the view that it would be impractical to disallow arbitral parties from disclosing the substance of their cases in a bail hearing due the "reasonably best arguable case" requirement. The plaintiff was able to supply a supporting affidavit laying out the best reasonable case and the Court set bail at the amount claimed plus 30%.

GATHERING OF EVIDENCE IN A SHIPPING DISPUTE: INADMISSIBILITY BY TORTURE

Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd [2020] UKSC 34

The parties were in a dispute arising from a Charterparty between the appellant and the respondent's subsidiary, agreed in 2008. The respondent had guaranteed its subsidiary's performance under the contract and the appellant commenced proceedings against the respondent under the guarantee in 2012 after the contract was terminated for repudiatory breach. In defence, the respondent alleged the contract was concluded after acts of bribery and relied on evidence in the form of three confession statements acquired during a Chinese Public Security Bureau Investigation. The appellant argued the statements had been obtained by torture and were therefore inadmissible evidence.

The primary judge found in favour of the appellant. It was held that on the balance of probabilities there had been no bribery and that torture could not be ruled out. The Court of Appeal considered the issue of whether the primary judge made an error of law in reaching his ultimate conclusion and/or whether it was a conclusion that no reasonable judge could have reached. They found that the decision was "unsustainable" as the Judge failed: (1) to address issues in a logical order; (2) to assess the weight of certain confessional evidence; (3) to take all appropriate matters into account regarding the bribery issue and (4) to exclude irrelevant matters, namely his "lingering doubt" that torture was used to procure the confessions.

The appellant appealed to the Supreme Court seeking restoration of the trial judge's decision. The Supreme Court unanimously allowed the appeal and countered the Court of Appeal's findings with the following reasoning:

(1) Whilst the Court of Appeal's proposed approach to the order of issues was logical, there is no "one size fits all" approach. The trial judge's approach was legitimate and consistent with the way Shagang had put forward its case at trial.

(2) Despite not setting it out separately, the trial judge had paid due regard to the weight of the confession evidence.

(3) The trial judge considered all three confessions and whilst he considered them compendiously rather than systematically, there was no error of law.

(4) There is no rule in law that if an allegation of torture is not proved to the required standard, that the possibility of the involvement of torture must be ignored.

COURT OF APPEAL RULES ON UNSEAWORTHINESS & NAVIGATION

The 'CMA CGM LIBRA' [2020] EWCA Civ 293

This appeal considered the scope of liability on a shipowner imposed by Article III Rule 1 of the Hague Visby Rules ("the Rules") to ensure that a vessel is seaworthy.

Article III Rule 1 stipulates:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) Make the ship seaworthy.

The Appellants were the Owners of the CMA CGM LIBRA ("the Vessel"), which as a result of a defect (a failure to provide a warning about the unreliability of charted depths outside the fairway contained in NM 6274(P)/10) in the Vessel's passage plan and working chart, became grounded in shallow waters and suffered damage. The primary judge found that this rendered the Vessel unseaworthy and thus the Owners were in breach of Article III Rule 1 of the Rules

The Appellants appealed on two grounds:

1. That the judge wrongly held that a one-off defective passage plan rendered the Vessel unseaworthy and failed properly to distinguish between matters of navigation and aspects of unseaworthiness; and

2.The judge wrongly held that the actions of the Vessel's master and crew which were carried out qua navigator could be treated as attempted performance by the carrier of its duty qua carrier to exercise due diligence to make the Vessel seaworthy.

Flaux LJ gave the leading judgment, with whom Males and Haddon-Cave LJ concurred.

As to the first ground of appeal, Flaux LJ rejected the argument that the fact that the defect was a one-off does not excuse it from resulting in the Vessel being

unseaworthy. His Lordship, relying on *Dobell v Passmore* [1985] 2 QB 408, further went on to affirm that negligence in navigation is in fact sufficient to constitute unseaworthiness.

In addressing the second ground of appeal, his Lordship stated that the distinction that the Owners attempted to draw between acts of the master and crew qua carrier and acts qua navigator was misconceived. The Owners submitted that they were not liable for the defective plans as the responsibility to navigate safely was solely on the master and crew. His Honour rejected this stating that once the Owners had assumed responsibility for the cargo, 'all acts of the master and crew in preparing the vessel for the voyage are performed qua carrier', even if performed before and at the commencement of the voyage.

As such, both grounds of appeal were dismissed.

ZFZ | ZEILER FLOYD ZADKOVICH

SYDNEY
Zeiler Floyd Zadkovich LLP
Level 15, 1 O'Connel Street, Sydney
NSW 2000

T +61 27 908 26 26
E sydney@zeilerfloydzad.com

VIENNA
ZFZ Zeiler Rechtsanwälte GmbH
Stubenbastei 2
Entrance Zedlitzgasse 7
3rd floor: conference area
6th floor: office
1010 Vienna, Austria

T +43 1 890 10 87 – 0
E vienna@zeilerfloydzad.com

LONDON
Zeiler Floyd Zadkovich LLP
Summit House
12 Red Lion Square
London WC1R 4QH, United Kingdom

T +44 203 740 25 76
E london@zeilerfloydzad.com

NEW YORK
Zeiler Floyd Zadkovich (US) LLP
215 Park Avenue South
11th floor
New York, NY, 10003 USA

T +1 332 213 06 70
E usa@zeilerfloydzad.com

MEXICO CITY
Zeiler Floyd Zadkovich S.C.
G. González Camarena No. 1600,
4th floor Suite 80, Santa Fe, 01210
Mexico City, Mexico
Alcadía Alvaro Obregón

T +52 55 5081 8457
E mexico@zeilerfloydzad.com

CHICAGO
Zeiler Floyd Zadkovich (US) LLP
500 West Madison Street
10th floor
Chicago, Illinois, 60661 USA

T +1 708 320 00 10
E usa@zeilerfloydzad.com

HOUSTON
Zeiler Floyd Zadkovich (US) LLP
4265 San Felipe Street
Suite 1100
Houston, Texas 77027 USA

T +1 346 235 01 19
E usa@zeilerfloydzad.com