CHAPTER TWO

Circular indemnity clause, Himalaya clause, and art III r8

In *The Marielle Bolton* [2009] EWHC 2552 (Comm), [2010] 1 Lloyd's Rep. 648, proceedings were commenced in Brazil against the shipowners and various third parties - time charterers, sub-time charterers, managers, and P&I insurers - under shipowner’s bills incorporating the Hague Rules. The bills contained English jurisdiction clauses and a ‘circular indemnity’ clause, which also operated as a ‘Himalaya’ clause in favour of the carrier’s sub-contractors. Flaux J granted an anti-suit injunction in respect of the proceedings in Brazil. The circular indemnity clause extended to claims against the third parties and the shipowners had sufficient practical interest to enforce it. The clause was not enforceable, however, by the third parties. Such a clause did not fall foul of art. III r8. The mere fact that the third parties entitled to the protection of a ‘Himalaya’ clause had performed ‘carriage functions’ did not make them a party to the contract of carriage evidenced by the bill of lading which was governed by the Hague Rules. In contrast, in *The Starsin* the Himalaya clause had provided that the carrier’s sub-contractors should be deemed to be parties to the bill of lading. Nor could the clause be struck out because it had the indirect effect of circumventing the Hague Rules. The third parties here had performed services incidental to the carriage but had not actually performed the actual carriage or been constituted as the carrier under the Hague Rules. Furthermore, suit had been brought in Brazil which did not apply the Hague Rules but rather a strict liability regime.

Title to sue under spent bills of lading

*Pace Shipping Co Ltd v Churchgate Nigeria Ltd* [2009] EWHC 1975 (Comm); Teare J had to consider whether the arbitral tribunal had erred in law finding that the respondent had title to sue under s.2(2)(a) of COGSA 1992 without considering the effect of the word ‘in pursuance of’ therein. The tribunal had found that the immediate and proximate cause of the transfer of the bills of lading was the contracts of sale which pre-dated the discharge of the cargo. It was argued that the tribunal had erred in law because the endorsement and delivery of the bills of lading could only have been effected "in pursuance of" the sale contracts if C had been entitled to receive the bills of lading under the contracts of sale. The issue, however, had not been raised before the tribunal but the words "in pursuance of" could most appropriately be understood to mean that the contractual or other arrangements had to be the reason or cause for the transfer of delivery of the bills. That test would usually be satisfied where the holder received the bills because he had a contractual entitlement to receive them under the contractual or other arrangements in existence before the bills were spent. However, s.2(2)(a) should not be restricted to cases where there was such a contractual entitlement. The majority arbitrators had been entitled to infer that the contract of sale had been the cause of the transfer or delivery of the bill of lading even though there may have been no contractual entitlement at the time the endorsement was made.

CHAPTER FIVE

© 2010 Simon Baughen
Article IV r2(a) and barratry

In *The Tasman Pioneer* [2010] NZSC 37 the master had taken a short cut through a narrow passage and grounded on a submerged rock. The master attempted to cover up the nature of the incident by continuing his journey and requiring his crew to alter the ship's chart. The Supreme Court of New Zealand held that the master’s conduct did not amount to barratry and that the carrier was protected by art. IV r2(a) of the Hague-Visby Rules. The test for establishing barratry as an implicit qualification to the exemption conferred by article 4 rule 2(a) paragraph was the same as under article 4 rule 5(e) and article 4bis rule 4, namely whether damage had resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result. A requirement of good faith would not be implied into art. IV r2(a). The Captain’s actions following the grounding were reprehensible, but they were still actions in the navigation or management of the vessel. As the shipowners had no knowledge of the decision to pass through the narrow channel and the master attempted to conceal the grounding from owners and charterers, they could not be said to have authorised or acquiesced in the master’s actions.

Management of cargo or management of vessel?

*The Eternity* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd's Rep. 107; Steel J.

The voyage charterer claimed that its cargoes of gasoil and moga had been contaminated as a result of the shipowner's failure adequately to separate the vapour phases of the two cargoes from the common inert gas line on board the vessel. Its case was that the vessel's inert gas isolation valves and/or control mechanisms were in an unsatisfactory state and/or that the crew were inexperienced and/or incompetent in handling the two cargoes. The charter was on an amended BPVoy4 form. Clause 12 guaranteed the existence of an inert gas system and cl.38 incorporated the Hague-Visby Rules. There was no necessary conflict with either clause 38 or the obligation of seaworthiness in clause 1 in respect of the standard of care required in maintaining and operating the system.

Accordingly there was no need for recourse to the principle that where there was a conflict between different provisions in a charterparty the more specific provision would prevail. The effect of clause 38 was not to establish any conflict with the apparently unqualified obligations in clause 12 but to replace those obligations with an undertaking that due diligence would be exercised. Any failure to close the isolation valves of the inert gas system or to maintain the valves in good condition was not a failure in the management of the vessel, but rather in the management of the cargo. Failure to operate or maintain properly those parts of the system available for the purpose of avoiding contamination of cargo could not be categorised as neglect or default in the management of the ship.

Article III r6 and appointment of arbitrator


© 2010 Simon Baughen
A time charterparty contained an arbitration clause which provided that in the event of a dispute, unless the parties agreed forthwith on a single arbitrator, the dispute should be referred to the final arbitrament of two arbitrators, one to be appointed by each party. Shipowners sent a message notifying charterers that if they did not pay the sum or agree to the appointment of a sole arbitrator, they would appoint their own arbitrator. Over seven days later, shipowners sent a second message, stating that since charterers had neither paid nor agreed to appoint a sole arbitrator, they had appointed their own arbitrator to commence arbitration proceedings.

The tribunal held that the first message from V did not commence arbitration proceedings within s.14(4) of The Arbitration Act 1996 and therefore arbitration proceedings had not been commenced within one year of discharge, as required by the Hague Rules art.3 r.6, and charterers were barred from advancing their own art.III(2) claims. Judge Mackie QC held that a broad and flexible approach to s.14(4) was required, concentrating on substance rather than form. What was important was not whether a notice contained a particular form of words but whether it made it clear that the arbitration agreement was being invoked and required a party to take steps accordingly, which was exactly what the first message did. The fact that a subsequent message gave explicit notice of the appointment of an arbitrator did not prevent an earlier communication from complying with s.14(4).

**Dead rats not dangerous cargo**


A cargo of soyabean meal pellets was loaded along with rats and the time charterer claimed damages for extraordinary expenditure and delay against the shippers for having loaded a dangerous cargo. The claim was rejected because goods that merely caused delay to the carrier were probably not to be regarded as dangerous within the Hague Rules. The cargo plainly posed no threat of damage to the ship itself. The arbitrators had positively found that the cargo of pellets did not pose a physical danger to another maize cargo on board and had made no finding that imposition of quarantine or dumping of the entire cargo was to be expected. There was no general principle that cargo was to be regarded as dangerous if it was liable to cause delay to the vessel and/or to the carriage of other cargo, in the absence of some local legal obstacle to its carriage or discharge. The decision in *Mitchell Cotts & Co v Steel Bros & Co Ltd* [1916] 2 K.B. 610 KBD was concerned with the violation of or non-compliance with some municipal law which was of direct relevance to the carriage or discharge of the specific cargo in question and the principle did not operate independently of legal obstacle.

**Charterer’s breach and indemnity from shipper under art. IV r6. Heating of an adjacent fuel tank excepted under art. IV r2(a)**

*The Aconcagua* [2009] EWHC 1880 (Comm); Christopher Clarke J

A container had been loaded onto a vessel and self-ignited during the voyage, causing an explosion that damaged the vessel and other cargo. The charterer settled a claim by the shipowners and sought an indemnity from the shipper under art. IV r6 of the Hague Rules on the
grounds that this particular cargo of calcium hypochlorite had an abnormally high thermal instability of which it had been unaware. The charterer admitted that it had negligently stored the container next to a fuel tank that was heated at some point during the voyage, but claimed that such heating had had no causative significance. The likelihood was that the heating of the tank was not a cause of the explosion.

If that were wrong, there had been no breach of the obligation of seaworthiness which required the vessel to be seaworthy at the start of the voyage. Whether the particular fuel tank was to be used depended on an operational decision made during the voyage and it was not bound to be used. The decision to heat the tank was negligence but not unseaworthiness. Such negligence would be an excepted peril under art. IV r2(a). Accordingly, even if the heating had been causative, C would still be entitled to an indemnity under Art.IV r 6.

CHAPTER SIX

The signing ceremony for the Rotterdam Rules was held in Rotterdam from 20 to 23 September 2009. Since then twenty two countries have signed the Convention; Armenia, Cameroon, Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Luxembourg, Madagascar, Mali, the Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo, and the United States of America. The Convention will come into force one year after ratification by the 20th UN Member state.

CHAPTER EIGHT

Lis alibi pendens. Interrelation between CMR and Brussels Regulation

_TNT Express Nederland BV v Axa Versicherung AG_ Case C-533/08, European Court of Justice, Opinion of Advocate General Kokott, 28 January 2010. Judgment of the Court (Grand Chamber) 4 May 2010.

Following non-delivery of cargo carried by road, the carrier sued the insurer of the goods in Rotterdam for a declaration that it was not liable over and above the limit set by the CMR. The insurer then sued the carrier in Munich for loss of the goods. The Munich court rejected a plea of lis pendens and gave judgment in respect of which the insurer obtained an enforcement decision in the Netherlands. The carrier appealed that decision on the basis that CMR took precedence over Regulation (EC) No 44/2001. The Dutch court referred this question to the ECJ.

The ECJ has now held that Article 71 of Regulation No 44/2001 must be interpreted as meaning that, in a case such as the main proceedings, the rules governing jurisdiction, recognition and enforcement that are laid down by a specialised convention, such as the _lis pendens_ rule set out in Article 31(2) of the CMR and the rule relating to enforceability set out in Article 31(3) of that convention, apply provided that they are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimised and that they ensure, under conditions at least as favourable as those provided for by the regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the
European Union (favor executionis). The Court does not have jurisdiction to interpret Article 31 of the CMR.

CHAPTER NINE

Bunkers on redelivery. Supplied to charterer with retention of title. S.25 SGA 1979 gives shipowner defence to conversion.

Angara Maritime Ltd v OceanConnect UK Ltd [2010] EWHC 619 (QB), His Honour Judge Mackie QC, 29 March 2010

Time charterers had purchased bunkers under a contract by which the seller retained title. The shipowner took over the bunkers on the ship’s early redelivery. The unpaid bunker supplier sued the shipowner in conversion. Judge Mackie QC held that s.25(1) of the Sale of Goods Act 1979 protected shipowners from what would otherwise be a claim for conversion, because they had purchased the bunkers from charterers upon delivery in good faith and without notice of any adverse right. The Span Terza [1984] 1 Lloyd's Rep 119 would be distinguished as the case was about ownership of bunkers at the point of sale in a dispute between suppliers and charterers. The seller could not succeed with a claim against the shipowner in bailment. The charterer was the bailee and the shipowner was a sub-bailee on terms and the seller in proceedings against the sub-bailee could not have better rights than the bailee. The seller was to be taken to have consented to the charterer sub-bailing the bunkers on the terms of the charterparty, which included terms stipulating that charterers provide and pay for bunkers.

Relationship between nomination of delivery port and cancellation clause

The Ailsa Craig [2009] EWCA Civ 425

Under a time charter the vessel was to be delivered at a port in Ghana/Nigeria range in Charterers’ option and the charterers were to have the option of cancelling the charter if the vessel were not ready and at their disposal on or before 31st October 2007. At the time the charterers cancelled the vessel was still at Piraeus undergoing modification works. The charterers did not nominate a delivery port and the Court of Appeal held that their obligation to do so was not a condition precedent to their right to cancel on the cancelling date. In any event, the obligation would not arise until the vessel had reached its ‘deviation point’ on the approach voyage from Piraeus at Las Palmas off Liberia. The time for charterers to make their nomination had, therefore, never arrived.

No implied warranty that berth safe in a port charter with no safe port warranty


Where there is a port charter which does not contain a safe port warranty, there is no implied warranty that any berth nominated by the charterers will be safe. The vessel was chartered for a voyage from Chekka in Lebanon to Algiers. At Chekka the vessel’s hull was damaged by an
underwater projection at the loading berth nominated by the charterers. In cl.1 of Gencon the word "safely" had been struck through in relation to the load port. It was held that there was no implied term that the berth nominated by the charterers would be safe. There was a contrast with safe port charterparties where the port must be prospectively safe for the vessel to use, which included a safe loading berth, so that a safe berth was implicit in the express warranty of safety of the port. In the present case where there was no safe port warranty, it did not follow from the mere fact that charterers were under a duty to nominate a berth that they also warranted that the berth was safe. The court held that clause 20 of the charterparty, whereby owners guaranteed that the vessel would be compliant with the ports' specifications and restrictions including draft, was inconsistent with the implication of a safe berth warranty. Further, charterers' options for nomination had been circumscribed with the stipulation that the berth nominated must comply with the salt water draft of 27 ft.

**Loss of deck cargo under time charter**


Deck cargo was lost under a trip charter on amended NYPE form which stated that cargo would or might be carried on deck, but not what cargo or how much ("an on-deck statement"). The arbitration tribunal had found three causes of the loss: an inadequate method of stowage of the deck cargo; unsatisfactory lashing equipment and inadequate care of the lashings during the voyage; and the instability of the vessel. Hamblen J held that where a charterparty incorporated the Hague or Hague-Visby Rules and the charterparty did not state or identify what or how much deck cargo was being carried, the Rules applied to the carriage of deck cargo unless the bill(s) of lading issued for the cargo contained an on-deck statement as required by article 1(c) of the Hague and Hague-Visby Rules.

The shipowners were, however, still liable in respect of the loss, even though the Hague-Visby Rules did not apply. Clause 8 placed on charterers the responsibility for loading, stowage and lashing. The master's right to supervise did not involve a duty to intervene but the case fell under the exception to that rule where the loss or damage was attributable to want of care in matters (such as the stability characteristics of the ship) of which the master was aware but charterers were not.

Loss due to negligence or unseaworthiness did not fall within clause 13(b) of the NYPE 1993 form which provided ‘In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded.’ The risks inherent in the carriage of deck cargo gave the clause a realistic content regardless of negligence or breach of the seaworthiness obligation.

**Delivery of cargo without surrender of bills of lading. Effect of charterer’s indemnity**

Shipowners agreed to discharge cargo without production of bills of lading against an indemnity from the charterer which provided that if the vessel were arrested or detained the charterer would put up security for its release. Following delivery of the cargo the shipowner had to put up security to prevent arrest by the holders of the bills of lading. The charterer’s obligation was a current one and the shipowner was entitled to an order of specific performance against the charterer to require it to put up security. The charterer’s obligation was conditional on the shipowner having delivered the cargo to a named receiver. However, the shipowner only needed to know that the person to whom he delivered the goods was the person to whom the charterer had requested that delivery be made. If the shipowner was in doubt as to that, he could ask the charterer to identify the intended receiver. If the shipowner then complied with such representations as the charterer made as to the identity of the person to whom delivery was to be made, the charterer would be estopped from denying that the shipowner delivered the cargo to the person to whom the charterer requested the shipowner to make delivery.

CHAPTER ELEVEN

Delay due to need to repair nominated berth. Whether covered by laytime exception and, if so, whether time lost claimable for breach of safe berth warranty

In *The Vine* [2010] EWHC 1411 (Comm), 16 June 2010, Teare J considered a claim involving substantial delays at an iron ore terminal in Itaguai, Brazil when repairs were being carried out to the berth. The charterparty stated: "1 or 2 safe berths, 1 safe port Itaguai, Brazil, always afloat". The events giving rise to the claim were that out of three berthing dolphins, Sumitomo type fenders, the middle and forward one had been damaged in two separate incidents, and as a result of the need for repairs there was a substantial delay before the vessel could berth. On the evidence, the requirement for port clearance as a precondition to accepting NOR had been waived and laytime accordingly started when NOR was given. The charterers were entitled to rely on the laytime exception of "partial or total interruptions on railway or port" in clause 5.8. The clause was not subject to the qualification that the interruptions had to have been outside the seller’s control, as per the wording in clause 5.9. Nor was the clause subject to the qualification that the interruptions had to have been outside the charterer’s control. In any event, the partial interruption in question had indeed been beyond the control of the charterers, because it was not attributable to some fault in the loading caused by those to whom the loading had been delegated, but to the earlier failure to repair the berth which was outside charterers' control, although it had not been beyond the control of the seller, whose subsidiary operated the berth.

However, charterers had nominated an unsafe berth, requiring more than ordinary navigation and seamanship to avoid the dangers inherent in the defective dolphins. The fact that there may have been no breach of the obligation to load within the laydays did not disable the Owners from claiming the agreed rate of damages for delay caused by breach of another obligation. Accordingly, the shipowners were able to recover damages at the agreed demurrage rate for the period of the delay.

Port or berth charter?

© 2010 Simon Baughen
In *The Merida* [2009] EWHC 3046 (Comm), [2010] 1 Lloyd's Rep. 274, an issue arose as to whether the charter was a port charter or a berth charter. Clause 1 defined the contractual destinations in a manner which, if it stood alone, must mean that it was a berth charterparty. First, the opening term was in a form which identified the destination as the berth. Second, the opening term provided expressly for charterers to nominate the berth at Xingang. Clause 2 referred to both safe ports and berths but did not qualify cl. 1 as the arbitrators had held. There was no apparent reason why the charterparty would have started out in cl.1 as a berth charterparty and then undergone a fundamental alteration in cl.2 to become a port charterparty. If instead cl. 2 were to be viewed as introducing a safe port warranty and reiterating the safe berth warranty, then there would be no inconsistency between cl.1 and cl. 2.

**Whether composite demurrage claim under BPVoy 4 barred by reason of absence of supporting documentation for part of claim**

*The Eternity* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd's Rep. 107; Steel J.

A dispute over demurrage arose under a charter on BPVoy 4. Charterer’s argued that: (1) the shipowner could not claim additional time under clause 19 because of its failure to provide pumping logs signed by the terminal representative; (2) The shipowner's entire composite claim was barred by clause 20 by reason of the absence of supporting documentation. It was held that Clause 19 was directed at operations involving a terminal, by which was meant a shore installation with an associated representative, and its provisions did not apply to the ship to ship transfer which took place in the instant case. The whole composite demurrage claim was not barred under clause 20 by reason of the admitted failure to serve signed pumping logs in regard to part of the discharge which had taken place at a terminal. It had been open to F to present a number of separate claims if so advised and in those circumstances the lack of documentation for one or more parts of the claim would not have constituted a bar to the balance. It could not have been the intention of the parties that the choice to present a composite claim would give rise to a different outcome. If a composite claim was required, the effect of clause 20 was not that the failure to provide all supporting documentation for one constituent part of the claim discharged liability for the entire demurrage claim, *The Sabrewing* [2007] EWHC 2482 (Comm), [2008] 1 Lloyd's Rep. 286 not followed.

**Failure to obtain free pratique under Shellvoy 5. Effect of demurrage time bar provision.**

In *The Eagle Valencia* [2010] EWCA Civ 713, the vessel was chartered on Shellvoy 5 terms and failed to obtain free pratique before she berthed. Clause 22 stated that NOR would not be valid if, inter alia, owners failed to obtain free pratique within six hours of giving NOR. However, a fresh NOR could be tendered once free pratique had been granted and time would then run 6 hours thereafter. The owners had served a second NOR by email which constituted a valid NOR. However, the charter required owners to submit their demurrage claim ‘fully and completely documented’ within 90 days of discharge and in submitting their demurrage claim the owners had relied on the invalid NOR and could not now amend their claim to rely on the emailed NOR.

**CHAPTER TWELVE**

© 2010 Simon Baughen
Time charter clause on compensation for late redelivery a penalty clause

In *The Paragon* [2009] EWCA Civ 855, [2009] 2 Lloyd's Rep. 688, the Court of Appeal held that a clause providing that hire rate would be market rate for last 30 days of charter until redelivery if charterers redelivered later than final terminal date was a penalty and unenforceable. The legal measure of damages must apply, which for an illegitimate last voyage was the charter rate until the final terminal date and thereafter the market rate, as per the House of Lord’s decision in *The Achilleas*. The shipowners also argued that the charterers had given illegitimate orders for the last voyage and that as these fell outside the contract the shipowners should be compensated on a *quantum meruit* basis for the whole of the final voyage. The argument was rejected. A failure to redeliver on time was not a repudiatory breach. The clause in question was not a condition, and therefore breach entitled owners only to decline to perform the last voyage ordered.

**Definition of ‘intention to fail to make payment’ under cl.62 anti-technicality clause.**

*Owneast Shipping Limited v Qatar Navigation QSC* [2010] EWHC 1663 (Comm); [2010] All ER (D) 69 (Jul).

Clause 62 of a time charter provided that where there is any failure to make “punctual and regular payment” due to errors or omission of Charterers' employees, bankers or Agents or otherwise for any reason where there is absence of intention to fail to make payment as set out, Charterers shall be given by owners 3 banking days notice to rectify the failure and where so rectified the payment shall stand as punctual and regular payment.” Christopher Clarke J held that ‘intention’ did not include recklessness. However, where the charterer had intended to make a payment which involved a calculation of a deduction made in bad faith, but then failed to make that underpayment due to their incompetence, they were not entitled to the protection of cl.62 and the shipowner was entitled to withdraw without giving three days notice under the clause.

**Withdrawal. Shipowner’s claim for costs of unloading cargo fails under cl. 13 of Shelltime and in bailment.**


The shipowners withdrew the ship from a time charterparty in Shelltime 3 form, due to unpaid hire, at a time when the ship had just loaded a cargo. The charterers threatened to arrest the vessel for wrongful withdrawal and the shipowners provided a guarantee for $18,000,000. The shipowners claimed compensation for the use or detention of the ship between notice of withdrawal and discharge of the cargo, for fuel consumed during that time and used to unload the cargo, and for the costs of providing and maintaining the guarantee.

The Court of Appeal held there was insufficient nexus for the purposes of cl.13 between the master's compliance with charterer's order to load the cargo and the loss and expense in respect
of which the shipowners sought an indemnity. The claim resulted from their decision to withdraw the ship, a decision over which the charterer had no control and the results of which it could not quantify. The loss was not effectively caused by the failure to pay hire because the shipowner's decision to withdraw the ship had broken the chain of causation. The implication in the charterparty was that the ship would be returned free of cargo and that if the ship was withdrawn for non-payment of hire, charterers would make arrangements for discharge of any cargo within a reasonable time. There was no express or implied obligation on charterers to make payment to the shipowners in such circumstances.

The Court of Appeal also held, reversing the finding of Andrew Smith J on this point, that the shipowners were not entitled to remuneration as bailee following the withdrawal. The shipowners had performed no service for the charterers for which they were entitled to remuneration. There was no element of accident, emergency, or necessity which would justify remunerating the shipowner as a bailee of necessity, as had been the case in *The Winson* [1982] AC 939. The shipowners were, however, entitled to claim the cost of bunkers consumed during the discharge of the cargo from the vessel. Under the Senior Courts Act 1981 the shipowners were also entitled to recover the costs of providing the guarantee they had provided to the charterers, as costs of the action.

**Vessel remains off-hire while on route to repair yard on route common to projected discharge port**

*TS Lines Ltd v Delphis NV* [2009] EWHC 933 (Comm); [2009] 2 Lloyd's Rep. 54; Burton J

A time-charter contained a clause giving charterer the option of re-delivering the vessel if it was off-hire for a period of 20 consecutive days. The charterer employed the vessel on a round voyage of Asian ports. She left Yokahama on September 6, 2007, the next intended port being Shanghai, where she was to discharge her cargo. However, she sustained damage soon after leaving Yokahama and was obliged to remain there until September 22. Thereafter, acting on a condition imposed by Class, she went direct to Hong Kong where she discharged her cargo, then sailed on to a repair yard. On September 28, the charterer cancelled the charterparty. The shipowner accepted that the vessel was off-hire between September 7 and September 22, but argued that there had thereafter been a one-and-a-half day break in the off-hire period; the vessel coming on-hire again when she left Yokahama because, although she was not bound for Shanghai, the routes to Hong Kong and Shanghai were for some distance identical, and while she was on the common route she was efficient for the purposes of the off-hire clause in the charterparty. The shipowner’s argument was rejected. As a result of the damage sustained outside Yokahama, the vessel was first of all unable to voyage anywhere, and then she was only able, because of Class instructions, to go straight to a repair yard, discharging the cargo bound for Shanghai in Hong Kong. She remained off-hire throughout that period. The important question to ask was under what instructions the vessel was operating at the relevant time. Even while she was on the common route, the vessel was not following charterer's instructions to proceed to the discharge port, Shanghai.

**Time lost due to detention by pirates falls outside cl.15 NYPE form**

© 2010 Simon Baughen
In *The Saldanha* [2010] EWHC 1340 (Comm) Gross J held that time lost due to the detention of the vessel by Somali pirates was not off-hire and did not fall within the following events listed in cl.15 of the NYPE form. It was not "detention by average accidents to ship or cargo “as detention by pirates could not naturally be described as an "accident". It was not "default and/or deficiency of men" as "default of men" did not include a failure to take recognised anti-piracy precautions and did not extend to the negligent or inadvertent failure to perform the duties of the master and crew. Rather, it would have to be a refusal by the master and crew to perform the services. It did not fall under "any other cause" as the absence of the word "whatsoever" was indeed material and that piracy was not eiusdem generis.

**Successful claim by charterers for loss of fixture due to shipowner’s failure to repair holds**

In *The Sylvia* [2010] EWHC 542 (Comm), [2010] 2 Lloyd's Rep. 81, the charterers were able to claim damages for loss of a fixture caused by the shipowners’ failure to exercise due diligence in repairing holds as ordered by the port state. The loss was foreseeable and fell under the first limb of *Hadley v Baxendale*. Hamblen J declined to apply the rule in *The Achilleas* which had not provided a new generally applicable legal test of remoteness in damages. In the vast majority of cases, the old established test should be applied, and the test in *The Achilleas* should be applied only in exceptional circumstances. In the great majority of cases it would not be necessary specifically to address the issue of assumption of responsibility which was the broader approach adopted in *The Achilleas* to the issue of remoteness of damage. However, in unusual cases, such as *The Achilleas* itself, the context, surrounding circumstances or general understanding in the relevant market might make it necessary specifically to consider whether there had been an assumption of responsibility. That would be most likely to be where the application of the general test in *Hadley v Baxendale* might lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there was clear evidence that such a liability would be contrary to market understanding and expectations.

**CHAPTER FIFTEEN**

**Future economic conditions not a factor in assessing salvage award**


Following the grounding of a bulk carrier en voyage from Chile to India, salvage services were provided by professional salvors. Gross J held that future economic conditions were not a factor in assessing the award; nor were the economic conditions between the date of termination of services and the date of the award a factor. The law of salvage had adopted the date of termination of services as the relevant cut-off point. The appeal arbitrator had erred in holding that the principle in *The Amerique* (1874) LR 6 PC 468 did not apply to complex and comprehensive cases. Therefore, the high value of the fund must not be allowed to raise the quantum of a salvage award to an amount altogether out of proportion to the services actually rendered. That principle applied equally to all cases, whether straightforward or involving high dangers or complex services. The question, which was necessarily fact sensitive, was whether an award based on the value of the subject-matter salved was "altogether out of proportion".
CHAPTER SEVENTEEN

2010 Protocol to the 1996 HNS Convention

The 2010 Protocol to the HNS Convention was adopted in April 2010 and will be open for signature from 1 November 2010. It will enter into force eighteen months after the date on which the following conditions are fulfilled: (a) at least twelve States, including four States each with not less than 2 million units of gross tonnage, have expressed their consent to be bound by it; and (b) the Secretary-General has received information in accordance with article 20, paragraphs 4 and 6, that those persons in such States who would be liable to contribute pursuant to article 18, paragraphs 1(a) and (c), of the Convention, as amended by this Protocol, have received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo contributing to the general account.

The three salient features of the Protocol are. First, shipowner compensation limits, for packaged HNS only, have been increased to 115 million SDRs (around US$172.5m). If damage is caused by bulk HNS, compensation would first be sought from the shipowner, up to a maximum limit of 100 million Special Drawing Rights (about $150m). Once this limit is reached, compensation would be paid from the second tier, the HNS Fund, up to a maximum of 250 million SDR (US$375 million) (including compensation paid under the first tier). The HNS Fund will comprise four separate accounts for oil, LPG, LNG and a general account for other HNS substances such as bulk solids and chemicals. Each separate account will meet claims attributable to the relevant cargo without cross subsidisation and will be funded in proportion to total receipts of relevant cargoes in Contributing States. Second, no compensation shall be paid by the HNS Fund for damage in the territory of a state which has not fulfilled its obligations to report contributing cargo. Third, the provisions relating to payment of contributions for LNG cargoes have been amended. The receiver, as defined in Article 1(4) of the Convention, will be liable for annual contributions to the LNG account, except where the titleholder pays them, following an agreement to this effect with the receiver, and the receiver has informed the State Party that such an agreement exists.

CHAPTER EIGHTEEN

Sale of yachts. Commission agreement implicitly subject to law chosen in sale contract

FR Lurssen Werft GmbH & Co KG v Halle [2010] EWCA Civ 587

The claimant, a German shipyard, had entered into two separate contracts to build two yachts for the defendant buyer. The contracts contained LMAA arbitration and English law clauses. There was also a separate commission agreement whereby the claimant would receive a commission if it introduced a buyer to the shipyard. This agreement was very short and did not contain any governing law or jurisdiction clause. The Court of Appeal held that a choice of English law had been clearly demonstrated from the circumstances. The commission agreement was at the very
least an "associated or succeeding contract", and a clear but implicit choice of law had been made.

**No power to stay proceedings where court possesses jurisdiction under art. 5 of Brussels Regulation**

In *Oceanfix International Ltd v AGIP Kazakhstan North Caspian Operating Co NV* [2009] ScotSC 9, Sheriff JK Tierney held that where a court possessed jurisdiction under article 5 of the Brussels Regulation, it had no power to stay its own proceedings and was required to hear the case.

**Oral towing contract subsequently evidenced in writing containing English jurisdiction clause falls within art. 23 of Brussels Regulation**


A tug was hired to refloat a fishing vessel which had grounded due to adverse weather. In the course of refloating the fishing vessel capsized and sustained further damage as well as the loss of its cargo of fish. The tug sought a negative declaration in the English courts against the fishing vessel and its insurers who in turn sought a declaration that they could not be sued in England as they were entitled to be sued in their domicile, Italy, under art. 2 of the Brussels Regulation. The owners of the tug relied on the English jurisdiction clause in TOWHIRE which had been incorporated into the contract which was made over the telephone. The contract was subsequently evidenced by a written recap and therefore was subject to art. 23. The declaration was granted as regards the owners of the fishing vessel but not as regards their insurers who had not been a party to the towage contract, even though they had been named in it as hirers.

**Applicable law under Rome 1 governing guarantee of debts**


PCL, an Irish company, guaranteed PUK’s obligations under a contract with CMP for piling worked in the construction of a new ferry terminal in Belfast. A dispute arose under this contract and CMP sued under the guarantee, PUK having become insolvent. Ramsey J held that the court possessed jurisdiction under art. 5 of the Brussels Regulation. The place of performance of the obligation in question - the guarantee – was determined by the law applicable to the guarantee. Under art. 4(2) of the Rome Convention the presumption was that the guarantee was governed by Irish law because the obligation to pay money was the performance which characterised the contract and that obligation was imposed upon PCL. However, that presumption was ousted by article 4(5) because the guarantee was more closely connected with England in that the place of payment under the guarantee was England. English law was thus the applicable law. Under English law the debtor had to seek out the creditor, so that the obligation to make payment was in England.
Conflicts of Law. Damages. Pre-judgment interest. Procedure or substance?

*Maher v Groupama Grand Est* [2009] EWCA Civ 1191, [2010] 1 W.L.R. 1564, The claimants, who were domiciled in England, were injured in a road accident in France in March 2005 in which the French driver was killed. They commenced proceedings in England. The Court of Appeal held that the claim against the French driver's insurers in England under the direct action set out in the Fourth Motor Insurance Directive, European Parliament and Council Directive 2006/26/EC was a claim in tort. Damages were to be assessed under English law as the measure of damages is a matter of procedure and the law of the forum applies. However, the existence of any right to pre-judgment interest was a matter for French law, as that was a substantive issue governed by the law applicable to the tort, but the amount of such interest was a matter of English procedural law under the Senior Courts Act 1981, section 35A.

Had the accident occurred on or after 11 January 2009, the measure of damages would have been governed by French law, in accordance with European Council Regulation 864/2007/EC, the Rome II Convention, art 15 of which states that the law applicable to a tort also governs the assessment of damages.

**CHAPTER NINETEEN**

Breach of arbitration clause by cargo owner, instigated by insurer, in using arrest to force jurisdiction in another forum


The vessel loaded a cargo of bagged rice at Montevideo and carried it to Dakar. The master issued 14 bills of lading which expressly incorporated the charterparty arbitration clause. On discharge at Dakar the cargo insurer claimed that there was substantial damage/shortage and sought a bank guarantee, failing which the vessel would be arrested. The P & I club offered to put up security in the sum demanded in the usual terms of a club letter of undertaking answerable to English law and jurisdiction. The cargo insurer obtained an order from the Senegalese court for the arrest of the vessel as security for payment of the claim. The vessel was released 13 days later after the English court had granted an anti-suit injunction and the club had issued a "competent court or tribunal" letter of undertaking.

It was held that the English court would not restrain a party to an English arbitration clause from arresting a vessel in another jurisdiction where the sole purpose of the arrest was to obtain reasonable security for the claim to be arbitrated or litigated in England. Where, however, the claimant's actions went beyond simply seeking reasonable security for the arbitration proceedings, there was a breach of the arbitration clause which the English court would restrain. The cargo insurer’s intention was to use the arrest as a means of forcing Senegalese jurisdiction, if at all possible. It was only the intervention of the English court which prevented that result from being achieved. The cargo owner was in breach of the express terms of the arbitration clause and the insurer, as the driving force behind the arrest, was liable for the accessory tort of procuring the bill of lading holder's breach of the contract to arbitrate all disputes in London. Damages would be for the ten days during which the shipowner had lost the use of the vessel, as

**English court bound to recognise Spanish judgment that arbitration clause not incorporated into bill of lading**

In *The Wadi Sudr* [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep. 193.] a shipowner’s bill of lading was issued to a Spanish company, Endesa, who were importing coal. The bill stated that it incorporated the arbitration clause in the charterparty. The vessel was damaged en route, and Endesa had to obtain an alternative supply of coal. Endesa commenced proceedings in Spain against the shipowners who shortly afterwards commenced proceedings against Endesa in England, seeking negative declaratory relief. The Spanish court ruled that there was no arbitration agreement or, if there was, that it had been repudiated by the commencement of English substantive proceedings. The Court of Appeal declined to grant the shipowners a declaration that there was a binding arbitration clause, overruling the decision of Gloster J. The Spanish court had decided that the arbitration clause was not incorporated and its judgment fell within the Brussels Regulation and had to be recognised by the court of another Member State under article 33(1) of the regulation. If the English court was bound to recognise the Spanish judgment, there was no room for a public policy argument against recognition under article 34(1) which provides that ‘A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought’.

Had the English court granted a declaration that there was an arbitration clause before the Spanish court had ruled, it would not be necessary to invoke public policy because the arbitration could proceed and the English court would be entitled to enforce any award by virtue of the earlier English judgment under article 34(3) which provides that. ‘A judgment shall not be recognised: 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought’.

**Arbitration. Anti-suit injunction in respect of proceedings in court of a non Member State**

*Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66; [2010] 1 C.L.C. 113

Midgulf entered into two contracts, in June and July 2008, to sell sulphur to GCT, a Tunisian state-owned company. Disputes arose about the quality of the sulphur. Midgulf applied to the High Court for the appointment of an arbitrator, but GCT responded by seeking a declaration in Tunisia that there was no binding arbitration clause and then by commencing two actions in Tunisia for damages. Midgulf then sought a temporary anti-suit injunction in England. The Tunisian court subsequently refused to grant a declaration, and GCT appealed. The Court of Appeal held that the arbitration clause had been incorporated into the contract and that an anti-suit injunction should be granted: it was a breach of the arbitration clause for GCT to seek declaratory relief in Tunisia; Midgulf had not submitted to the jurisdiction of the Tunisian court; and there was nothing in the decision of the European Court of Justice in *The Front Comor* [2009] 1 Lloyd's Rep 413 to preclude the grant of anti-suit injunctions in cases where the competing court was outside the EC or EFTA.

© 2010 Simon Baughen
Arbitration. Anti-suit injunction and declaration in respect of proceedings in court of a non Member State where arbitration not commenced in England


An arbitration clause stated that any dispute was to be governed and construed in accordance with English law, which was contained in an agreement between two companies, X and J, incorporated and carrying on business in the Republic of Kazakhstan. J commenced proceedings before the courts in Kazakhstan and X sought from the High Court a declaration and an anti-suit injunction preventing J from bringing proceedings in Kazakhstan. Burton J held that X was unable to rely on s.44 and, consequently, the gateway contained in CPR r.62.5(1)(b) was not available. A claim by reference to s.44 could only be justified if there were actual or intended proceedings and here X had not commenced arbitration. However, there was jurisdiction for the court to entertain a claim for a declaration and, therefore, an anti-suit injunction even where there was no actual or intended arbitration proceedings where the relief was sought. There was a good arguable case that X had an arbitration claim and there was an available gateway under CPR r.62(5)(c).

Proper law of tort. Commencement of Rome II Regulation.

Homawoo v GMF Assurance SA [2010] EWHC 1941 (QB)

The claim arose out of a road traffic accident which occurred in France on 29th August 2007 in which the Claimant was injured by a vehicle being driven by the First Defendant's insured, the Third Defendant. Proceedings were commenced by the issue of a claim form in England on 8th January 2009. Was the matter governed by The Private International Law (Miscellaneous Provisions) Act 1995 or by the Rome II Regulation? Slade J referred to the ECJ the question of the meaning and effect of Article 31 that Rome II is to apply to events giving rise to damage which occur after the ‘entry into force’ of the Regulation on 20th August 2007, and of the meaning and effect of Article 32 which provides the Regulation ‘shall apply from 11th January 2009’. Slade J expressed the view that the application date of 11th January 2009 of Rome II referred to in Article 32 was not a reference to the commencement or determination of legal proceedings, and that a construction of Article 31 to provide that the Regulation shall apply to events giving rise to damage which occur on or after 11th January 2009, would give legal certainty.

Subsequently in Bacon v Nacional Suiza Cia Seguros Y Reseguros SA [2010] EWHC 2017 (QB) Tomlinson J expressed the view that the Regulation directs courts in member states that as from 11 January 2009 the law which they shall apply to a non-contractual obligation arising out of events giving rise to damage occurring on or after 20 August 2007 shall be as prescribed by the Regulation.

CHAPTER TWENTY

© 2010 Simon Baughen
1976 Limitation Convention. Whether one or two ‘occasions’


A pipeline was fouled by a container vessel and was then further destroyed by the vessel's subsequent movements. The shipowners began proceedings in Australia under the Convention on Limitation of Liability for Maritime Claims 1976 as amended by the 1996 Protocol. The issue arose that depending on how many "occasions" there had been, the shipowner would have to establish additional limitation funds. This depended upon whether the causes of the claims that arise from each act, neglect or default were sufficiently discrete that, as a matter of commonsense, they could be said to be distinct from one another. The claims here had arisen on two distinct occasions - the anchor fouling the pipeline, and the rupture of the pipeline about thirty five minutes later, so that two limitation funds would have to be established by the shipowner.

Slot charterers entitled to limit under 1976 Limitation Convention


A large container vessel suffered damage in heavy weather and was beached on the south coast of England. The casualty gave rise to claims in excess of £100m against the claimants (M) as owners of the vessel. M had constituted a limitation fund under the 1976 Limitation Convention in the sum of £14,710,000 and the court had made a general limitation decree. H and S were slot charterers of the vessel and had issued their own bills of lading providing for German law and jurisdiction. The issue had been left open by the Court of Appeal in *The CMA Djakarta*. It was held that H and S fell within the definition of ‘charterer’ in art.1(2) of the 1976 Limitation Convention and were entitled to limit their liability. A literal reading of the phrase "charterer of a ... ship" might suggest that the definition did not include the charterer of a part of a ship, but a literal reading had to give way to a purposive construction. In *The Tychy* it had been held that a slot charterer was within the phrase "charterer of ... the ship" in s21 (4)(b) of the Supreme Court Act 1981 relating to the arrest of ships.