NORDISK MEDLEMSBLAD
Membership Circular

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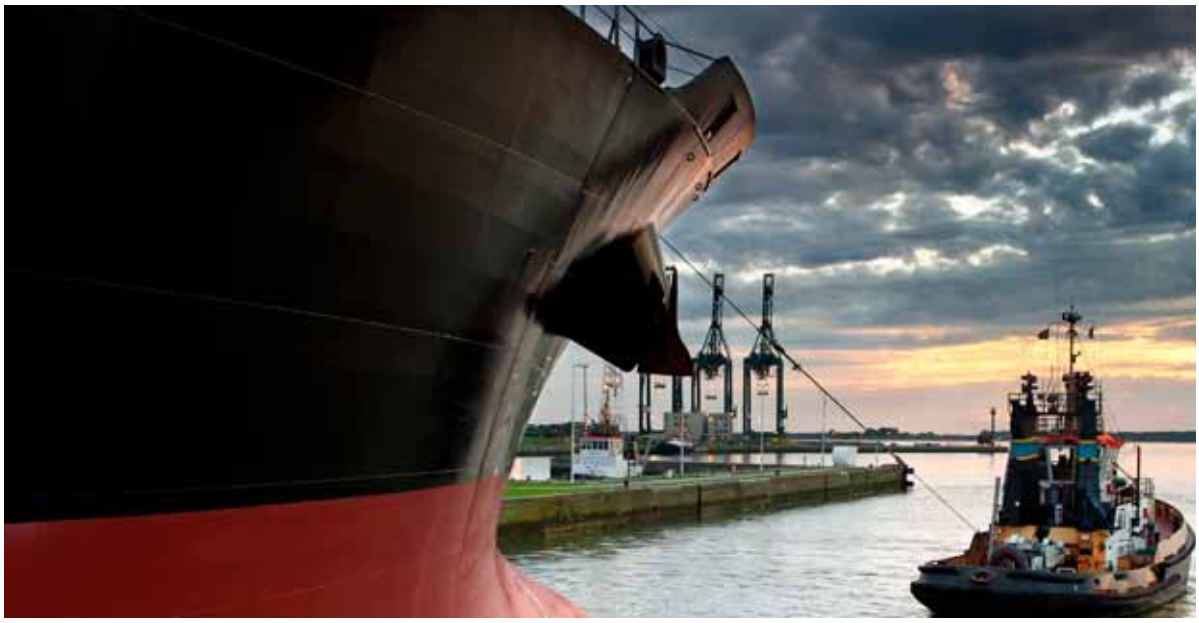
Nordisk Skibsrederforening
(NORDISK DEFENCE CLUB)



UNSAFE PORT AND OFF-HIRE – HOW A CLAIM MAY BE FOULED BY FACTS

Review of a London arbitration award

We recently acted for one of our members in a London arbitration that illustrates how dramatically the outcome of a case may turn on the facts.

Our members had their vessel out on time charter to a charterer who in turn had sub-chartered the vessel under a voyage charter. In connection with loading at Richards Bay, the vessel anchored awaiting a ready berth. When the vessel attempted to heave anchor, problems were encountered in that the anchor had become entangled with a fouled anchor that had to be cut loose before the vessel could berth. At the time (before our involvement) the members conceded to off-hire for the time it took for the vessel's anchor to be cut loose – amounting to about USD 35,000.

About one year later, however, time charterers commenced arbitration claiming additional amounts. The basis for their claim was that our members were allegedly in breach of charter in that the master had negligently dropped anchor in an area which on the local chart was marked "Foul ground lost anchor and chains". The time charterers claimed as damages (alternatively off-hire) time lost because the vessel had lost her berthing turn following the incident with the anchor (about USD 65,000), plus allegedly lost demurrage earnings under the sub-charter by reason of the vessel's NOR having been invalid due to the problem with the anchor (about USD 11,000).

The allegation that the vessel had dropped anchor in a marked danger zone was supported by a statement by the local port authorities. Together with our members we enquired into the alleged facts, which seemed not entirely to make sense. We procured local charts of Richards Bay as well as the vessel's logs, which

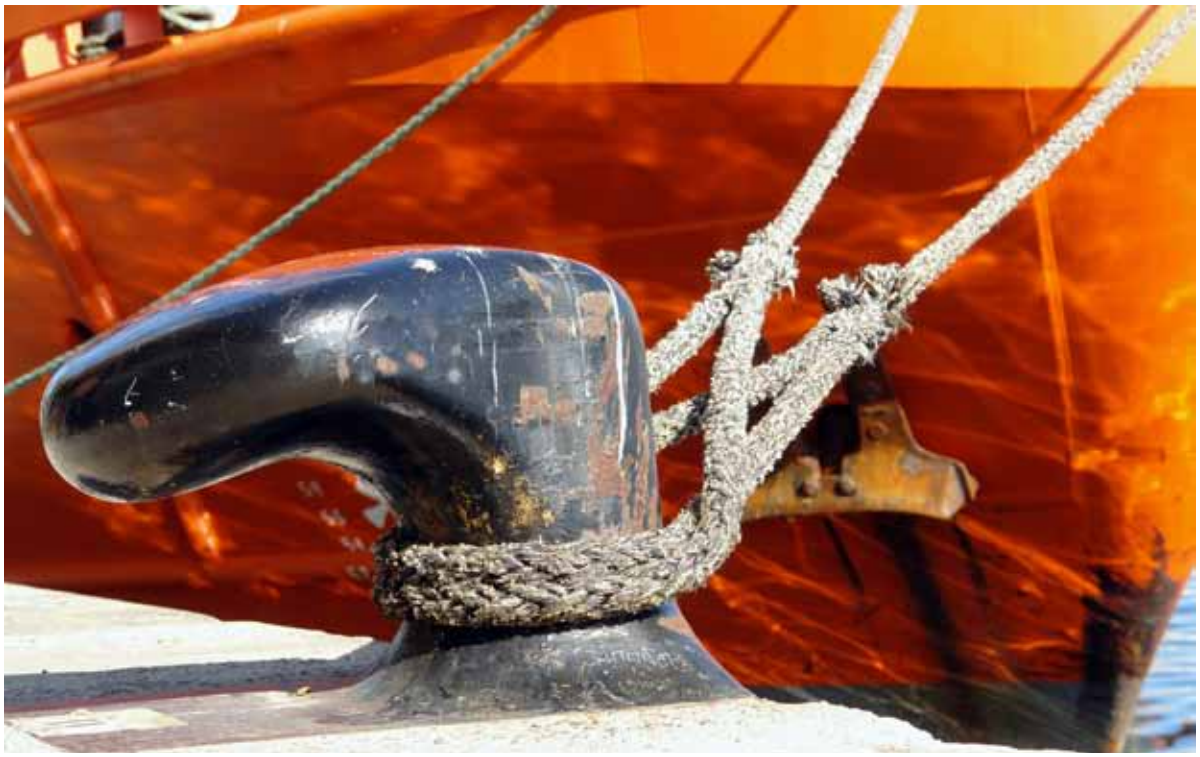
BY TROND SOLVANG

gave GPS positions every 12 hours. These positions included the vessel's location when the anchor was dropped and the location when the fouled anchor was eventually cut loose. This evidence showed clearly that the master had in fact dropped anchor well outside the danger zone indicated on the chart, and that the vessel had drifted into the zone in the course of the struggle to have the fouled anchor cut loose. It therefore seemed that the statement by the port authority wrongly assumed that the vessel's position when the fouled anchor was cut loose was the same as the position where the vessel had dropped anchor initially. No evidence to rebut these facts was produced by the time charterers.

On the basis of these factual findings we pleaded that time charterers' claims were bound to fail. Moreover, we asserted that Richards Bay was an unsafe port in the legal sense because of debris on the seabed outside the areas so marked on the local charts. This meant that charterers were in breach of charter for having ordered the vessel to an unsafe port.

Accordingly we submitted a counterclaim for the costs our members had incurred in having the anchor cut loose. Furthermore we claimed repayment of the initially conceded off-hire of about USD 35,000. On this latter point, time charterers argued that our members could not re-open an off-hire claim to which they had already conceded. We, on the other hand, argued that the off-hire claim had been conceded on the condition that further arguments would not be raised and time charterers had themselves breached that condition by subsequently claiming additional off-hire and damages.

In short, our members succeeded in full and were also awarded their costs in respect of the arbitration.



The moral of this story is that one should ascertain the true facts before commencing arbitration. In this case time charterers had USD 35,000 in their pocket and commenced arbitration to recover more. Instead they lost the USD 35,000 and were obliged to pay to our members twice that amount plus the costs of the arbitration.

THE OWNER'S RIGHT TO REJECT THE EARLY RE-DELIVERY OF A VESSEL ON A TIME CHARTER

A review of the "Aquafaith" decision in the English Commercial Court

Given the depressed economic climate and persistent stagnation in the shipping industry as a whole, the *Aquafaith* decision addressed a highly relevant question for shipowners – are they entitled to refuse early redelivery of a vessel under a time charter or, if they are obliged to take re-delivery of the vessel, do they have to mitigate their loss in the spot market and ultimately pursue a claim for damages?

This question relates directly to a long-established rule in contract law stemming from *White and Carter (Councils) Limited v McGregor* [1962] AC 413 and its progeny. The basic principle of *White and Carter* is that where one party repudiates a contract *"the innocent party has the option of either accepting that repudiation and suing for damages… or refusing to accept the repudiation and affirming the continuation of the contract."* This is conditioned by the caveat that if the innocent party chooses to continue the contract he must be able to do so himself, "*without the need for any action on the part of the contract breaker*, [and then] *he will be in a position to sue for the agreed price*" (hire in our context).

In *Isabella Shipowner SA v Shagang Shipping Co Ltd.* ("*The Aquafaith*") [2012] EWHC 1077 (Comm), the charterers chartered *The Aquafaith* on an amended NYPE form for approximately five years beginning in September 2006. The charterparty specifically included an express warranty prohibiting redelivery of the vessel before 59 months had passed, with the earliest possible redelivery date being 10 November 2011. Toward the end of the hire period the charterers no longer needed the vessel and announced their

BY PAIGE YOUNG

intention to anticipatorily breach the charter on 6 July 2011. The owners refused to accept this and commenced arbitration on 25 July 2011.

In the arbitration award, the tribunal (Mr. William Robertson) considered *White and Carter* and agreed with the charterers that there were no means by which the owners could complete the contract without any action on the part of the charterers and therefore *White and Carter* did not apply. The tribunal also asked whether the owners had a "legitimate interest" in continuing the contract rather than seeking damages, in an attempt to determine whether the case fell within the exception to *White and Carter*. The tribunal's choice of the "legitimate interest" test derives from a remark made by Lord Reid in Whi*te and Carter* that is highlighted as part of a general exception to the principle in the standard treatise, *Time Charters*, 6th Edition, 2008. The tribunal ultimately found that the owners had no legitimate interest in forcing the charterers to perform the contract rather than claiming damages. Consequently, the charterers prevailed.

On appeal, the High Court took a different view and found that the tribunal had come to the wrong conclusion factually in determining that *White and Carter* did not apply and had also applied the wrong test when it was considering the applicability of the exception.

In regard to the facts, the court found that no participation was required by the charterers to maintain the charterparty because the vessel could simply sit and earn hire without their involvement. Thus, the court found the case to be within the scope of the *White and Carter* principle.

As to the exception to *White and Carter*, the court determined that the arbitrator had applied the wrong test and that a "reasonableness" principle should temper, if not supersede, the "legitimate interest" analysis upon which the arbitrator had relied. The test as it was articulated by the court ultimately favoured owners in that it asked if the owners' conduct was "so reprehensible that damages would be an adequate remedy" (as opposed to keeping the contract alive), making it applicable only in extreme circumstances. The court took into account the fact that the charterers were facing financial difficulty and the significant burden of claiming damages from a potentially insolvent charterer. The court also noted that being forced to mitigate one's damages by trading on the spot market is not easy in difficult market conditions and that with approximately three months left on the five-year charter, finding a new time charter for that period would be nearly impossible. Thus, reversing the arbitration award, the court found that the owner's desire to affirm the contract was not "wholly unreasonable" and that the exception did not apply.

Practically speaking, this provides some clarity in the law and potentially strengthens the position of owners with vessels on time charter facing an early redelivery. It is also edifying to see the *Aquafaith* confirm the position that Nordisk has always maintained in their legal advice to their members, who can now rely on this advice with a clear commercial court decision as support.

"M/V PANORMOS" – INTERPRETATION OF "ALWAYS ACCESSIBLE" BY THE NORWEGIAN COURT OF APPEAL

In a case dating from December 2011, the Norwegian Court of Appeal (*Borgarting*) had to construe the term "always accessible" and inter alia determine whether the owners or the charterers would have to bear the risk of the vessel being prevented from entering berth due to poor weather conditions and night sailing restrictions. The judgment is of interest both in that it clarifies the interpretation of the term in the context of Norwegian law, and also in that it highlights the different approach taken by the English Commercial Court when interpreting the similar term "reachable on arrival".

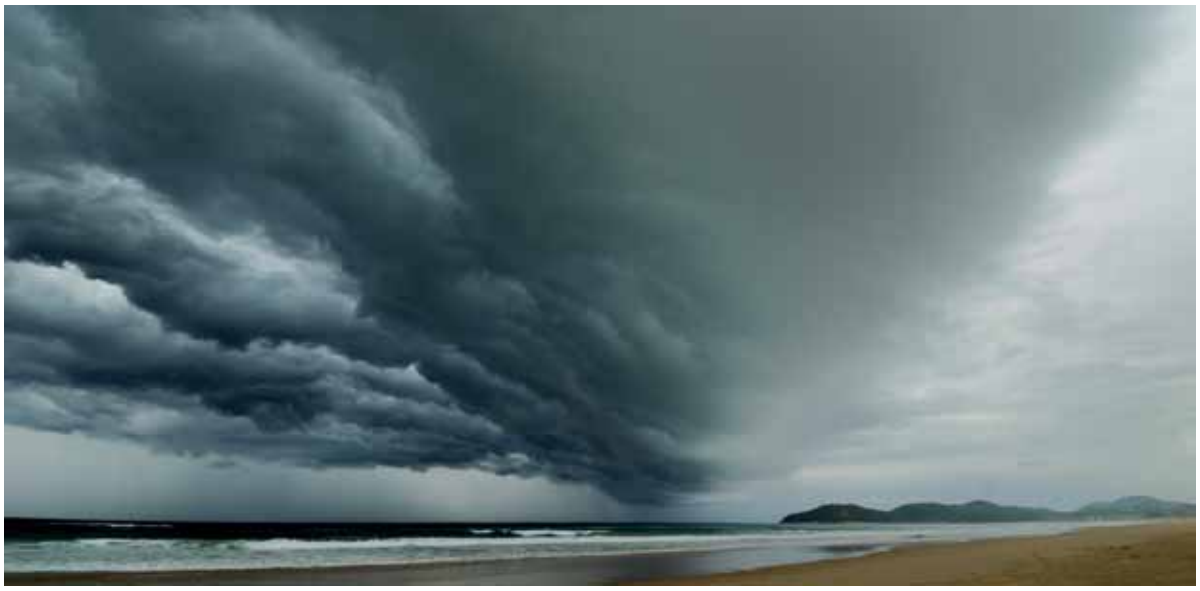
The case concerned a claim for demurrage under a *Hydrocharter* voyage charter in which the parties had inter alia agreed to "one good safe berth…at all ends always accessible". It was also agreed that "owners have satisfied themselves about restrictions". Upon arrival in the port of loading, the berth was occupied by another vessel and *The M/V Panormos* had to remain at anchorage. Although the berth became available the next day, strong winds prevented the vessel from reaching berth and she had to remain at anchorage for another two days until weather conditions improved.

As it happened, this was unfortunately not the last time that strong winds were to delay the voyage. Upon arrival at the port of discharge, the port was closed due to strong winds. Although it reopened for a short period during the night, the port's night sailing restrictions prevented the vessel from berthing that night. In the end she had to wait approximately two-and-a-half days before berthing.

The owners claimed demurrage inter alia on the basis that laytime was running while the vessel was prevented from berthing, firstly due to poor weather conditions in the port of loading and secondly due to

BY NORMAN HANSEN MEYER

poor weather conditions and night sailing restrictions in the port of discharge. According to the owners, since the charterers had warranted the berth to be "always accessible", it must follow, inter alia from the natural meaning of the term and from English case law, that charterers had to bear the risk of all obstacles including nautical obstacles. Charterers, on the other hand, argued that the term "always accessible" did not alter the general allocation of risks as between charterers and owners, and that any nautical obstacle that prevented the vessel from reaching berth was the owners' risk. Furthermore, the charterers asserted that even though the charter party stated that laytime would run in respect of "time lost in waiting for berth", in this case laytime did not run since the poor weather conditions would in any event have made it impossible for the vessel to berth.



The court held in favour of the charterers. Firstly, the court considered the term "always accessible" to be ambiguous and held that the question could not be resolved purely by applying a natural understanding of the phrase. The court further determined that neither of the parties had sufficiently established that there was a clear and consistent understanding of the term "always accessible" either within the trade or the shipping industry as a whole. The court referred to several English judgments dealing with the term "reachable on arrival", a term commonly used in tanker charters that is generally considered to be equivalent to "always accessible" (at least in respect to the matters in question). The court concluded that the position under English law was unclear and that the question whether a "reachable on arrival" or "always accessible" warranty meant that the charterer bore the risk of nautical obstacles was yet to be determined decisively by the English Supreme Court. The fact that two of the most recent cases from the Commercial Court (T*he Sea Queen*, [1988] 1 Lloyd's Rep. 500 QB and *The Fjordaas*, [1988] 1 Lloyd's Rep. 336 QB) both held in favour of owners when interpreting "reachable on arrival" (i.e. the charterers assumed the risk of nautical obstacles until the vessel had arrived) was not discussed in any detail. However, while not directly commenting on the position taken by the Commerical Court in the two latter cases, the Norwegian court noted that the question had not yet been decided by the English Supreme Court and that English legal text-books expressed significant doubt as to the current position under English law. The court further noted that it was impossible to infer from the English cases how the terms "always accessible" and "reachable upon arrival" were generally understood within the shipping industry.

The court then turned to the Norwegian Maritime Code Section 333 (1), which states that laytime runs in the event of congestion and "other hindrances which the owner could not reasonably have taken into account at the time when the contract was

concluded". In the court's opinion, poor weather was a typical hindrance that the owners could indeed take into account, which would normally mean that laytime did not commence. The court further held that since the term "always accessible" was ambiguous, and since neither party had succeeded in establishing a precise and consistent understanding of the term within the shipping industry, it was reasonable to conclude that the parties had not deviated from the position that would apply under Norwegian background law and Section 333 of the Maritime Code, meaning that the risk of nautical obstacles remained with owners. The court noted, however, that in warranting that the berth was "always accessible", the charterers had warranted that there would be no physical obstacles preventing or blocking passage to the berth.

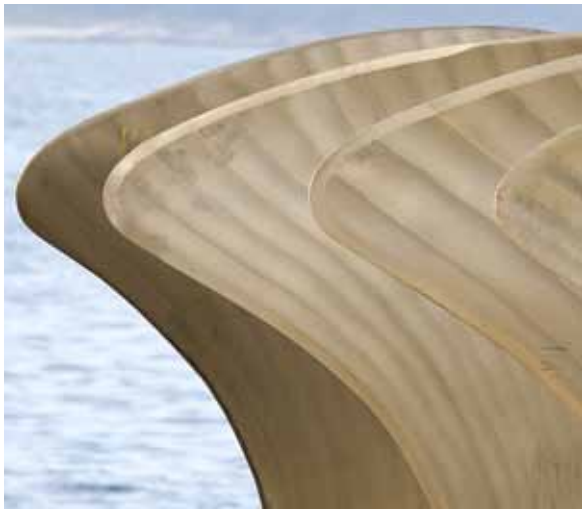
The question of whether laytime was running while *The M/V Panormos* was prevented from proceeding due to night sailing restrictions was dealt with in brief. The court held that by having agreed to the phrase "owners have satisfied themselves about restrictions", the owners had clearly assumed the risk of delays caused by such restrictions. Accordingly laytime did not run.

Finally the court dealt with the charterers' argument that laytime did not run while the berth in the port of loading was occupied by another vessel since poor weather would in any event have prevented *The M/V Panormos* from berthing. The court accepted the assertion that even if a vessel is prevented from berthing due to congestion, laytime will not run provided it is clear that the vessel in any event would have been prevented from berthing due to poor weather conditions. The court however held that the charterers had failed sufficiently to establish that, during the period of congestion, the weather conditions were such that berthing would in any event not have been possible. The charterers' claim that laytime did not run during the period of congestion was thus rejected by the court.

The court's ruling accords with Norwegian background law, where there is a general assumption that the owners bear the risk of nautical obstacles unless specifically agreed otherwise. It is interesting to compare the *M/V Panormos* judgment with the English Commercial Court's application of the term "reachable on arrival". Building on Mr. Justice Roskill's reasoning in T*he President Brand*, [1967] 2 Lloyd's Rep. 338, where it was stated that "reachable" means inter alia that there must be sufficient water to reach the berth or location, the Commercial Court in two of its more recent cases has taken the position that a "reachable on arrival" warranty means that the charterers have assumed the risk not only of congestion and physical obstacles but possibly even of navigational obstacles, see *The Sea Queen* and *The Fjordaas*.

The facts of the latter case bore many similarities with the facts in *The M/V Panormos* in that the vessel was unable to proceed immediately to berth because of inter alia night sailing restrictions and poor weather conditions. Contrary to the findings of the Norwegian Court of Appeal in *The M/V Panormos*, in *The Fjordaas* the Commercial Court refused to rely on the traditional allocation of risk, according to which weather is a typical example of something that is owners' risk. On the contrary, the court held that the distinction between physical causes of obstruction and non-physical causes rendering a designated place unreachable was not supported by the language of the contract or by common sense. Accordingly the court concluded that the delay caused by poor weather conditions was a breach of charterers' "reachable on arrival" warranty.

One thing that is clear is that under both Norwegian and English law, if the owners want to ensure that laytime will run even if poor weather conditions prevent access to the berth, it is advisable to include a specific statement to this effect in the charter party.



"SUCH CONSENT NOT TO BE UNREASONABLY WITHHELD"

Guidance on the interpretation of this expression provided by the English High Court

One often encounters the requirement for consent to be given before certain actions can be taken in shipping and offshore contracts, for example, in respect of sale of the vessel by the owners under a time charter or a change in the management of the vessel. This consent is often subject to the proviso that it shall not be unreasonably withheld but without any further explanation as to what circumstances might be considered unreasonable.

In a recent non-shipping case, *Porton Capital Technology Funds and other companies v 3M UK Holdings Ltd and another company* [2011] EWHC 2895 (Comm), the Commercial Court considered the meaning of "*such consent not to be unreasonably withheld*" and clarified and re-affirmed the principles for interpreting this expression, which had previously been established in landlord and tenant law. It is submitted that, whilst the case before the Commercial Court was a dispute arising out of the sale and purchase of a medical development company, these guidelines are likely be followed by the courts when having to consider this expression in all types of contract. This makes them relevant to the shipping and offshore community not only in respect of the sale and purchase of ships, rigs and other marine equipment, but also charterparties.

BY SCARLETT HENWOOD

As set out above, the dispute arose out of a sale and purchase agreement (the "SPA"), pursuant to which the entire shareholding of Acolyte Biomedica Limited ("Acolyte") was sold to an investment company ("3M") in 2007. The only asset of Acolyte was a commercial product called BacLite MRSA ("BacLite") – a product which was designed to be a faster and more accurate test for MRSA (a deadly super bug found in UK hospitals and easily transmitted between patients).

The consideration for the shares was a partial cash payment combined with an earn-out payment (i.e.

a future payment) based on the net sales of BacLite for 2009 ("Earn-Out Payment"). The Earn-Out Payment was contemplated by the parties to be the principal return to be made to the sellers. The long-term plan was for BacLite to be developed and sold to hospitals in the EU, USA and Australia. This required approval and licences to be obtained from the relevant medical authorities and then marketing in each of the sales regions to effect the sales. Some of the key personnel involved in the development of BacLite were kept on as part of the sale. At the time of the sale, the latest version of BacLite had been approved for use in the EU and a couple of orders had been received from hospitals.

Clause 4 of the SPA set out the details of the Earn-Out Payment and the respective obligations relating thereto. The following two clauses are relevant to this article:

"Except as expressly set forth in Clause 14.4, the Vendors acknowledge that the [3M] is under no obligation or duty to conduct its business in a manner that increases the amount payable under this Clause 4. Each Vendor hereby acknowledges and agrees that the Earn-Out Payment is contingent on [Acolyte's] future performance and is not guaranteed."

By clause 4.14(i), 3M undertook:

"without the written consent of the vendors, which shall not be unreasonably withheld, [Acolyte] shall not… cease to carry on its business or the business of the development and marketing of [BacLite]…"

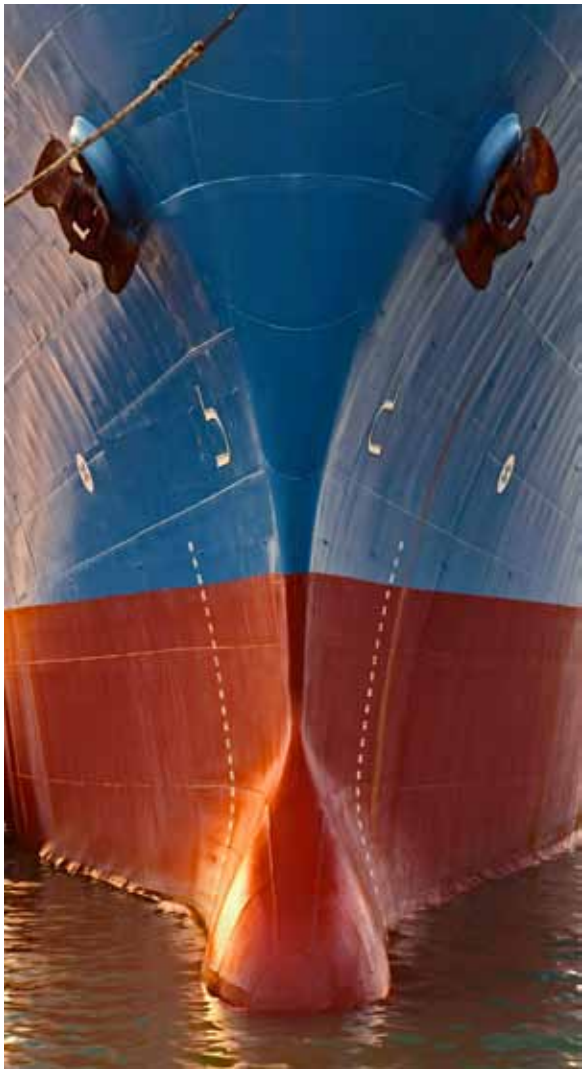
Whilst the sequence of events between the sale and December 2008 are detailed and complicated, it is sufficient for the present purposes to know that (i) the approval to sell BacLite in the US and Australia was not received, such that the product was not capable of being properly marketed and sold in these regions, and (ii) sales of BacLite in the EU never reached the numbers projected. As a result, the business was terminated in December 2008 such that there were no net sales in 2009.

The claimants (who were some of the shareholders who made up the sellers) brought their claim on a number of bases, one of which was that the failure and termination of the business involved breaches of contract on the part of 3M which caused the claimants to suffer losses of approximately USD 56.45 million (which was what the claimants alleged was their share of the net sales for 2009 would have been).

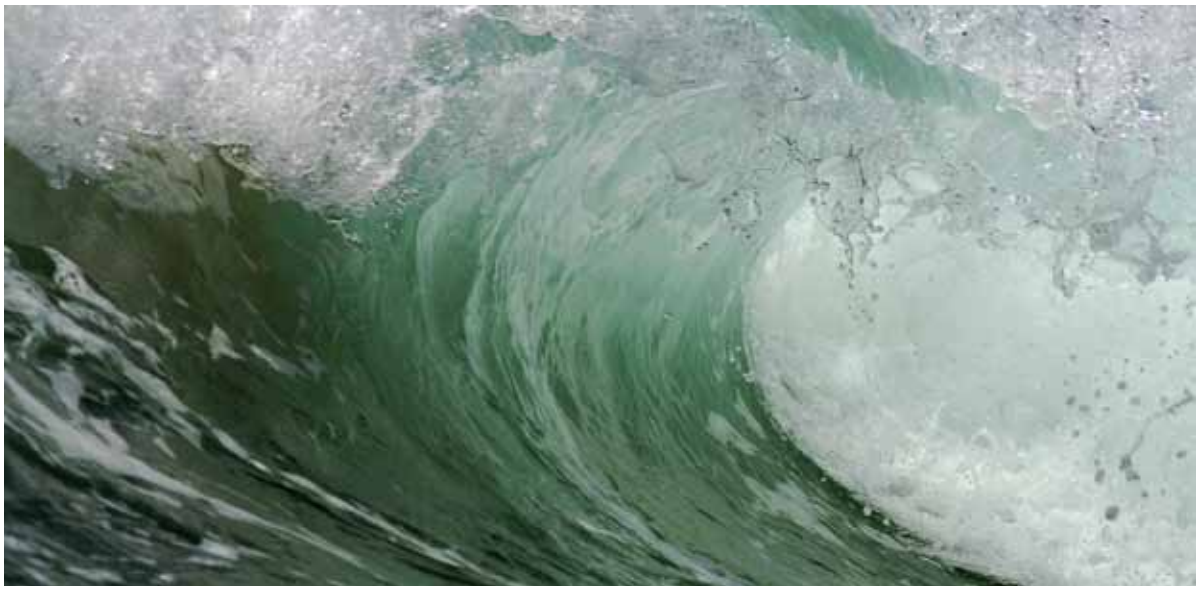
3M's case was that they always acted in good faith and in accordance with the SPA and that they were entitled to terminate the business in circumstances where they had requested consent and offered compensation and the claimants had reacted unreasonably. The sequence of events was as follows:

In August 2008, in light of the failures of the BacLite product set out above (i.e. failure to obtain approval and failure to reach projected sales figures), 3M invited the vendors by letter to consent to the termination of the development and marketing of the product in return for a compensation payment of USD 1.07 million. The sellers refused to provide their consent.

3M's case was that this consent was unreasonably withheld such that they were either entitled to terminate the business or, alternatively, the refusal amounted to a repudiation of the SPA by the ven-



dors. Furthermore, 3M maintained that the reason for the failure of the BacLite product to achieve the projections in the long-term plan was down to the failings of the product itself and that the market had moved against it between the date of the sale and the date of 3M's offer. As regards this latter point, it is sufficient to know that in the meantime a new product had been released into the market which was almost as quick and as accurate as BacLite, but which was considerably cheaper. As such, 3M's final defence was that even if they had not terminated the SPA, the earnings for 2009 would have been minimal. The claimants' case was that they were entitled to withhold their consent such that they did not repudiate the SPA and that it was repudiated by 3M.



In light of the above, one of the key issues before the court was whether the vendors acted unreasonably in withholding their consent in late 2008. As set out above, the principles relating to the issue of withholding consent have been mainly developed in landlord and tenant cases. In *British Gas Trading Limited v Eastern Electricity*, however, the commercial court held that these principles should also be applicable to commercial contracts (in that case in the context of a contract for the commercial supply of gas and electricity) and the court in the present case agreed. The principles which the court held were relevant in this context are as follows:

- the burden is on the party seeking consent to show that the party withholding consent acted unreasonably;
- the party withholding consent does not need to show that their refusal to consent was right or justified, just that it was reasonable in the circumstances;
- the question of whether the refusal was reasonable or unreasonable will be one of fact to be determined by the tribunal of fact;
- in considering whether to consent or not, a party is entitled to take into account its own interests; and
- the party being requested to consent is not required to balance their own interests with those of the requesting party.

It is perhaps the last two principles that could have the most significant consequences for parties to shipping and offshore contracts. In the BacLite case, the court was persuaded by the claimants' arguments that they were entitled to take into account their own interest in earning as large an Earn-Out Payment as possible (especially as this was contemplated to be the principal return), and that the fact that keeping the development and marketing of BacLite alive would likely cause 3M to incur significant costs was irrelevant. In considering the factual situation, the court was further clearly influenced by the fact that the request for consent made by 3M was against a background where, in November 2006, mutual sales pro-

jections for 2009 were around GBP 22 million and, in January 2007, 3M's estimate of sales was USD 28 million (this was communicated to the vendors at the time). However, these projections aside, the sellers had little knowledge and no involvement in the business from the date of sale onwards. It would therefore have been a surprise to the sellers to receive the information from 3M that the business had effectively failed and that the Earn-Out Payment was only worth USD 1.07 million and this would have been viewed with scepticism. The court concluded that the reasonableness of the sellers' refusal was borne out by the fact that there were a number of estimates at the time which exceeded the figure offered and that the figure offered was accepted to be on the conservative side. It therefore concluded that the sellers' consent was reasonably withheld.

This case is interesting as the conclusion of the court is perhaps surprising given its analysis of the facts of the case and its basic agreement with 3M's position that it was the inherent issues with the BacLite product and the fact that the market turned against the product that ultimately caused its failure. Notwithstanding these findings, the court still considered that the sellers were reasonable in withholding their consent, although its views on the failure were reflected in the amount of damages awarded. The court awarded USD 1.29 million, which was what it concluded, on the basis of the evidence put before it, would have been the claimants' share of the projected net sales for 2009 – not much more than the original offer by 3M.

Whilst the outcome of each case will of course be dependent on the facts, what the court's decision highlights is that the insertion of "*such consent not to be unreasonably withheld*" with regard to the giving of consent may not have the effect desired. We therefore recommend that, when drafting a contract, careful thought is given to whether the expression "*such consent not to be unreasonably withheld*" is appropriate or whether other wording should be used, for example, if possible, the parties could specify in the clause the circumstances in which refusal is deemed to be unreasonable or consent is deemed given.

If you have any queries on this topic please do not hesitate to contact us.

THE ROTTERDAM RULES – AN UPDATE

It will be recalled that a new convention on the carriage of goods by sea, the Rotterdam Rules, was introduced in September 2009. At that time 23 states signed the convention. Signing is, however, a non-binding formality; it takes ratification for states to be bound by a convention. So far only two countries (Spain and Togo) have ratified, while 20 ratifying states are required for the convention to enter into force. It is believed that it will take ratification by some of the major maritime or trading nations – such as the US or China – for the ratifying process to gain momentum. There are strong indications that the US will ratify, although the position of China is thus far uncertain.

As early as 2009 the Norwegian and Danish governments had assigned their respective Maritime Law Commissions with the task of producing draft legislation based on the Rotterdam Rules, as well as giving recommendations as to whether the respective countries should ratify. The report by the Norwegian Commission (on which the author served as Secretary) was handed to the government in April this year, and the Danish report was handed over in June.

BY TROND SOLVANG

Despite some critical remarks concerning the complexity of the rules, both reports conclude that the rules are generally suitable to form the basis of new legislation, which would then replace the current chapter on liner transport (Chapter 13) in the respective Maritime Codes. Moreover, if the draft legislation is enacted it will apply to national as well as international contracts of carriage (the Rotterdam Rules only apply to the latter).

On the important point of ratification, both the Norwegian and Danish reports highlight the main ambition of the convention: the creation of international uniformity through replacement of the current fragmented system of the Hague, Hague Visby and Hamburg Rules. States however face a dilemma: by deciding to take an active role and ratify in the belief that other states will follow suit, a state risks - if other states fail to ratify – becoming party to a convention that merely exacerbates the current fragmented situation. On the other hand, by taking a wait-and-see position, a state may assist in causing the ratifying

process to lose momentum if other states do the same thing.

On this question the Norwegian Commission takes a conservative approach by recommending that Norway should only ratify if the US or some major EU states have already ratified. The Danish Commission makes no similar reservation as it is acting on the assumption that the US will ratify, but in reality this seems to mean the same thing.

The report by the Norwegian Commission is currently being circulated as part of a public hearing with a deadline in October this year for input to the Ministry of Justice from the various interested parties. Thereafter the Ministry will decide whether, and in what form, the draft legislation will be put before Parliament. But as already indicated, the most important part of this process relates to international considerations, with the key question being whether the US will ratify.

While awaiting the answer to this question, we take this opportunity to review some of the main elements of the draft legislation as based on the convention:

- The scope of the rules is more extensive than the current law in that the rules cover door-to-door transports containing a sea leg. The solution is motivated by practical needs: container transport is often performed door-to-door under a single transportation contract, hence it makes sense to have one set of rules applying to the entire contracted transport. On the other hand, such a door-to-door solution gives rise to potential complications vis-à-vis conventions and national law applying to other modes of transport than sea carriage (the CMR relating to road transportation, the CIM relating to rail transportation, etc.). The Rotterdam Rules resolves some, but not all, of these conflicts. The law Commission has provided gap-filling guidelines concerning areas not covered by the Rotterdam Rules.
- The rules contain provisions to facilitate the future adoption of electronic cargo documents.
- The rules contain provisions intended to address current problems with delays in the delivery of goods at destination caused by lack of production of original cargo documents (bills of lading). The rules introduce a new kind of cargo document which, in given circumstances, allows for delivery of goods without production of original documents.
- Certain rules are introduced to allow the cargo owner to give instructions relating to the goods while en route.
- The limitation on liability for cargo damage is somewhat increased compared to the current law (from 2 SDR per kilo/667 SDR per unit to 3 SDR per kilo/875 SDR per unit) while the current exception from liability for nautical fault is abolished.
- The mandatory aspect of the rules is somewhat eased by allowing freedom of contract in so-called volume contracts (service contracts). The background to this is a desire to enable shippers with large quantities of goods to negotiate individual long-term contracts with carriers, in order for example to reduce freight rates. Currently such volume contracts exist primarily in the US liner trade but their use is likely to expand to other areas.

Due to the effort to achieve modernization, the Rotterdam Rules are more extensive than the existing conventions. Hence the draft legislation is also more extensive than the equivalent provisions in the current Maritime Code. On the other hand the Rotterdam Rules are not intended as a complete code covering all aspects of sea carriage, which means that the rules in some areas must be filled in by national law. In these areas the law Commission has mainly retained the existing rules of the Maritime Code. Examples of such areas include: a carrier's right to lien the goods; a shipper's liability for non-delivery of goods; a carrier's right to pro-rata freight in case of interruption of the carriage; the right of each party to terminate the contract in case of material breach by the other.

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