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Cover Story

Does the Court Have Power to Order Sale of Cargo for Failure to Pay Hire?

Introduction

What can vessel owners do when there are cargoes remaining on board but the cargo owners fail to pay hire? The question is addressed in the Commercial Court in the recent case *Dainford Navigation Inc v PDVSA Petroleo S.A. (The "Moscow Stars")* [2017] EWHC 2150 (Comm). Following the cargo owner's repeated failure to pay hire, interim remedies were granted by the court by ordering sale of cargo. Although this is not the first time the court orders sale of cargo, there has not been any reasoned decision in the jurisdiction in the past. The present case provides clearer guidance as to the circumstances leading to the interim remedies of sale of cargo for failure to pay hire.

Facts

Dainford Navigation Inc. (the "**Claimant**"), owner of the vessel "MOSCOW STARS" (the "**Vessel**") time chartered the Vessel to PDVSA Petroleo S.A. (the "**Defendant**"), a Venezuelan state-owned oil and gas company, to carry about 50,000 gross metric tons of crude oil (the "**Cargo**"). The Defendant repeatedly failed to pay time charter hire since January 2016. The Cargo was loaded in October 2016.

Pursuant to the charter:

1. The Claimant gave notices of exercise of a lien over the Cargo for the sums due; and
2. Arbitration had been commenced in accordance with the London arbitration clause whereby the Claimant claimed outstanding hire and other outstanding sums.

In December 2016, the Claimant obtained leave from the arbitral tribunal to apply to the Commercial Court for an order for sale of the Cargo. At the time of application to the Court, there was an outstanding payment of about US$7.7 million. The Cargo had remained on the Vessel for over 9 months and the Claimant had been incurring expenses of operating the Vessel, including payment to the crew and supply of bunkers. Further, the Vessel was required to be

cargo-free for an inspection scheduled in January 2018.

Issues

According to section 44(1) of the Arbitration Act 1996 (the "**Act**"), "…the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for purposes of and in relation to legal proceedings." From section 44(2)(d) of the Act, the matters include "the sale of any goods the subject of the proceedings".

Even it is ruled that the Court has power to order sale, such power is limited to making an order for sale of property "which is of perishable nature or which for any other good reason it is desirable to sell quickly" (Rule 25.1 of the Civil Procedure Rules).

Accordingly, the issues to be resolved were:

1. Whether the Cargo was the subject of the arbitration proceedings so that the court has power to order sale; and
2. Whether there were any good reasons to sell the Cargo quickly.

Decision

The Cargo was the "subject of the proceedings"

The Court rejected the Defendant's argument that the "subject of the proceedings" should be as narrow as limiting the Court's power to a case where there was a dispute about the goods due to the draconian nature of the order. The present case gave rise to a deadlock situation which made it necessary to invoke the assistance of the court. No one could say what should happen to the Cargo before the arbitral award was released – the Claimant would not be able to enforce its lien over the Cargo and the Cargo could not be discharged to the Defendant. It would be unsatisfactory and in nobody's interest if the court had no power to order sale, when the Cargo was deteriorating significantly in condition and value.

The Court considered there to be sufficient nexus between the Cargo and the arbitral proceedings in the circumstances, where there was a contractual lien exercised over the Defendant's goods as security for a claim for hire being advanced in the arbitration. The Cargo formed the subject matter (i.e. the lien) of the claims. Therefore, the Court has power to order sale of the Cargo pursuant to sections 44(1) and 44(2)(d) of the Act.

There were good reasons to sell the Cargo

The Act does not give the Court power to make a free-standing order for sale as a form of independence relief. As discussed, to exercise the power to order sale, the property at issue must be of a perishable nature or which for any other good reason it is desirable to sell quickly. Both parties acknowledged that crude oil is not perishable, and thus the remaining issue was whether there were good reasons to justify the court's exercise of power of sale.

One obstacle that usually arises in an order for sale is that the order significantly deprives the property owner's right of ownership. However, interestingly, the Defendant made an open offer one day prior to the hearing offering to undertake the sale of the Cargo itself and to pay the proceeds of sale into escrow. It contradicted the Defendant's earlier claim that sale of the Cargo would prejudice it. The Court interpreted such move as recognition by the Defendant that the only viable option was to sell the Cargo, and accordingly, the draconian nature of an order for sale had little effect in the present case.

The Court considered there to be substantial risk that the situation would indefinitely drag on if no order of

sale was to be made and the Cargo would remain on the Vessel for many more months. The situation prejudiced the Claimant, having to incur expenses of operating the Vessel while not receiving its hire, as well as having the Vessel occupied and unavailable for other employments.

On the other hand, the Defendant alleged the present situation was caused by the Claimant voluntarily, by permitting the loading of the Cargo instead of terminating the charter for non-payment of hire. It also pointed out there were 5 months of delay in making the present application. However, both arguments were given little weight by the court. First, the Claimant could not have contemplated the prolonged failure to pay hire by the Defendant or its right to pursue a claim in arbitration and to seek interim remedies. Second, the delay was substantially outweighed by other compelling factors in favour of an order for sale.

After considering the above factors, the Court ordered sale of the Cargo with a direction to the Defendant to sign any sale contract as the seller.

Conclusion

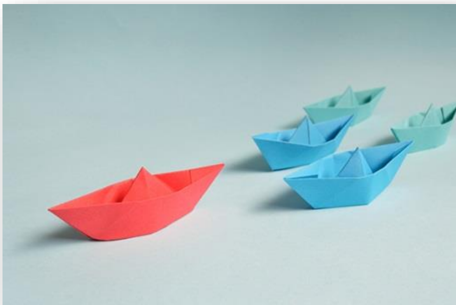
This decision is certainly appealing to vessel owners. It provides them with a viable option to get rid of prolonged situations of liened cargoes remaining on vessels. Nonetheless, the cargo owner in the current case (i.e. the Defendant) was a party to the arbitration. The position in which the cargo is owned by a third party instead of a party to the arbitral proceedings is not addressed and remains unclear.

Cosco Shipping/Orient Overseas Acquisition Deal Approved

The State-owned Assets Supervision and Administration Commission ("**SASAC**"), the Chinese regulator responsible for giving merger clearance, has given its approval to the proposed acquisition of Orient Overseas (International) Ltd ("**OOIL**") by Cosco Shipping Holdings ("**CSH**"), a listed company in Shanghai and Hong Kong. The transaction involves a sum of US$6.3 billion, and it is expected to enable both CSH and OOIL to enjoy synergy effect, profitability enhancement and sustainable growth in the long run. The transaction has also been considered to be echoed with the "One Belt One Road Initiative" of the Chinese Government to increase China's influence in Asia and Europe.

The approval of SASAC is one of the pre-conditions of the deal. Among the pre-conditions, CSH has to obtain approvals from other Chinese authorities such as the National Development and Reform Commission and the State Administration of Foreign Exchange as well as the approval of its members in the extraordinary general meeting scheduled on 16 October 2017 before it can proceed with the transaction. If the merger goes on, the merged company would become the third largest global container shipping player with its 11% combined market share.

Collision of Two Vessels in Singapore



On 13 September 2017, a Dominican-registered dredger "JBB De Rong" and an Indonesia-registered oil tanker "Kartika Segara" collided near the coast of Singapore, about 1.7 nautical miles south-west of Sisters' Island, at around 00:40 am. The right front section of the oil tanker was damaged and the ship was subsequently stationed at the Eastern Anchorage. According to the Maritime and Port Authority of Singapore (the "**MPA**"), 26 Indonesian crew members on the oil tanker were not injured, whereas only seven out of 12 crews of the Dominican dredger were rescued and sent to medical treatment. Unfortunately, two crews of the Dominican dredger were found dead and the remaining three were still missing. The MPA said that both ships had in fact acknowledged the warning given by the Singapore's Vessel Traffic Information System that they have to take actions to prevent the collision before the crash. The accident is still under investigation.

Memorandum of Understanding Signed between the UK and Hong Kong

On 12 September 2017, representatives of the UK and Hong Kong maritime communities signed a Memorandum of Understanding in London during the London International Shipping Week to agree to have cooperation in various activities such as training and sharing of practice and promotions, which marked a closer working relationship between the two maritime services providers.

According to the statistics provided by Maritime London, services provided for maritime business contribute a significant portion of the economy of both the UK and Hong Kong. Particularly, the British representative, Lord Mountevans, considered that Hong Kong, with its leading maritime expertise, serves a unique role of being a gateway to China. By signing the Memorandum of Understanding, both parties intend to collaborate to further look beyond their domestic borders and to offer world-class maritime business services and expertise to international shipowners and charterers.

Initial Coin Offerings of the Container Shipping Digital Currency

300cubits, a Hong Kong company, recognises that no-shows without prior notice are common concerns of the container shipping sector. Though various methods such as bank guarantee and security pledging have been tried to address these issues, the industry still suffers heavy losses and incur unnecessary expenses every year. This is especially so when there is no consequence for not showing up. The proposed solution by 300cubits is to use the digital currency, "TEU tokens" as the substitute. By integrating with the digital currency platform, Ethereum, TEU tokens serve as a booking deposit and a settlement currency for the container shipping community, the value of which will be lost if the token holder fails to appear with its cargo. More importantly, the value of a TEU token is linked to the value of actual freight rates and thus the market price of the tokens could also serve as an indicator for the freight rates. Ultimately, the company seeks to replace US dollars in the container shipping industry.

300cubits is now seeking to have its initial coin offering ("**ICO**"), which is a mixture of initial public offering of virtual coins and crowdfunding. What an "investor" in an ICO will acquire is not shares but virtual tokens that may increase in value and become more liquid if the currency is proven to be commercially and practically viable. Nevertheless, the China's Central Bank has asked the fundraising activity to stop as there are concerns over its legitimacy. Interestingly, 300cubits has decided to bypass the ban of the Central Bank and have the ICO conduct in Hong Kong. The founder of the company, Mr. Johnson Leung, said in the Shipping2030 conference that the ban would not affect the company's initiative and he would welcome China to participate in the ICO.

The Queen (on the application of David Knight) v Secretary of State for Transport v Edward Huzzey, Receiver of Wreck

[2017] EWHC 1722 (Admin)

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This case concerns a judicial review in the context of a salvage claim in respect of various shipwrecks in the UK. The claimant is a salvor and he recovered a number of items from the wrecks including some valuable artefacts. In April 2011, the claimant gave notice of items pursuant to section 236 of the Merchant Shipping Act 1995 (the "**MSA**"), which states that any person who finds any wreck in the UK waters must report to the Receiver. However, the claimant was subsequently charged with offences contrary to sections 236 and 237 of the MSA in 2013 for taking possessions of several vessels in 2001, 2006 and 2007 without notifying the Receiver. One of the consequences of breaching section 236 is the forfeiture of salvage claim of the offender, but there is no such rule for the section 237 offence. The claimant pleaded guilty to some charges in May 2014 and was fined by the District Judge in July 2014.

In November 2014, the claimant informed the Receiver that he should be entitled to a salvage reward in respect of certain items. Though the claimant admitted that he was not entitled to any salvage reward for those items related to his admitted section 236 offence, he nevertheless sought to argue that he should have a legitimate claim over the items associated with the section 237 offence, including 8 bronze cannon which were estimated to worth between £96,000 and £1.2 million.

The claimant issued a judicial review challenge in September 2016. The major battle line was the interpretation of the limitation period under article 23(1) of the International Convention on Salvage 1989 (the "**Salvage Convention**"), which states that the limitation period of the claimant's action starts on the day when the salvage operations end and the action will be time-barred if it has not started after the limitation period has commenced for two years. The Secretary of State contended that the claimant's claims were all time-barred; whereas the claimant submitted that as a matter of fact all his salvage operations were still ongoing.

In light of the definition of "salvage operation" in Article 1 of the Salvage Convention, the Court ruled that a salvage operation should be viewed to have ended when the salvor has stopped assisting the ship in danger. The Court also emphasised that each case must be determined on its own facts. After considering the relevant evidence submitted by the claimant, it was accepted that due to various reasons a salvage operation might not be done in one go, the Court nevertheless concluded that salvage operations conduct in two non-consecutive years should be viewed as two separate operations instead unless there was coherence, co-ordination and planning in between that can point to some evidence showing that the salvage operation was in fact continuing throughout. Without any solid evidence to substantiate his claim, the claimant's case was dismissed.

Ravenscroft v Canal and River Trust

[2017] EWHC 1874 (Ch)

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This case concerns a dispute between a boat owner (the "**Owner**") and the Canal and River Trust (the "**Trust**"), the statutory successor of the British Waterways Board. On 27 January 2015, the Owner's boat was moored on the River Trent in Nottinghamshire. The Trust considered that the mooring was illegal under sections 4(1) and 5(1) of the British Waterways Act 1971 (the "**BWA**") and thus it exercised its power under section 8 of the BWA to require the Owner to remove his boat from the river. Despite several notices had been served to the Owner, no action had been taken by the Owner. Therefore, the Trust removed the boat unilaterally and sought payment from the Owner. The amount originally claimed by the Trust from the Owner was the removal and storage fees, which were expressly permitted under section 8 of the BWA. The Trust also demanded the Owner to pay the arrears of the pleasure boat licence fee, for which the Owner had been failing to pay since June 2011. Nevertheless, the Trust later separated the demand of the arrears of licence fee from other payments. After the Owner had paid the sum, the boat was returned to him in May 2015, but he then challenged the decisions of the Trust and sought a refund on three grounds.

First, the Owner disputed that the Trust had no authority to seize his boat as the area that the boat had moored did not amount to a "main navigable channel" under section 4(1) of the BWA. Second, the Owner contended that the steps taken by the Trust, i.e. the removal of his boat, was disproportionate, unnecessary and contrary to Protocol 1 of the Human Rights Act 1998. Third, the Owner argued that the Trust had exercised its power under section 8 of the BWA unlawfully in order to distrain for the arrears of licence fees.

The major issue of the first ground of challenge was the true construction of section 4(1) of the BWA, in particular, what a "main navigable channel" (the "**Phrase**") means. The Owner submitted that the Phrase should mean the deepest part of a river used as a "fairway" or a "thoroughfare", but not the full width of the river. After considering the legislative background and the relevant provisions, the Court was of the view that the purpose of the BWA was to impose a licensing system in order to regulate the use of waterways. If the Owner's narrow construction of the Phrase was to be accepted, the entire regime could not operate because it would only require boat owners to acquire licences in respect of a narrow band of unmarked and undefined water in the centre. The fact that a thoroughfare or fairway on a river is not delineated and may change from time to time also supported a wider construction of the Phrase, since it would be rather impracticable for the Secretary of State to frequently look at the map to determine the whereabouts of the thoroughfare. The wide construction suggested by the Trust also echoed with the strict liability offences stipulated under some other sections of the BWA as the Phrase must be able to be construed in certain ways for the offences to be committed.

Further, the Court rejected the Owner's second argument by referring to the objective of section 8 of the BWA, which was to maintain proper and safe waterways. Therefore, the power to seize a vessel left in the inland waterway is directly connected with that objective. The Court noted that the boat was not permanently confiscated and it could be recovered upon payment. For the third issue, after taking into account the fact that the Trust had not levied distress, the Court considered that the removal of the boat was pursuant to section

8 of the BWA and was not related to the arrears. Accordingly, the claims of the Owner were all dismissed.

Gard Marine and Energy Limited v China National Chartering Company Limited and another

[2017] UKSC 35

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In October 2006, a capesize bulk carrier, “Ocean Victory”, (the “**Vessel**”) grounded and broke apart near the port of Kashima in Japan as a result of a very severe northerly gale and a swell arising from long-waves. The Vessel was originally chartered from Ocean Victory Maritime Inc (the “**Owner**”) to Ocean Line Holdings Ltd (the “**Charterer**”). The Charterer subsequently time chartered the Vessel to China National Chartering Co Ltd (“**CNCC**”), which further sub-chartered the same to Daiichi Chuo Kisen Kaisha. All the charterparties, i.e. the demise charterparty and the two time charterparties, contained a materially identical “safe port undertaking” by which they undertook to only trade between safe ports (the “**Undertaking**”).

In October 2008, one of the Vessel’s insurers, Gard Marine and Energy Ltd (“**Gard**”), took over the Charterer and Owner’s rights regarding the loss of the Vessel and sued CNCC for breaching the Undertaking. Such an allegation was based on the premise that the combination of the heavy gale and the swell was known to be a common concern in the port of Kashima and thus the port was not a safe one for trading purposes. The trial Judge accepted that and ruled that there was a breach of the Undertaking and thus Gard was entitled to damages. The case was reversed by the Court of Appeal, which was of the view that those events leading to the grounding and the subsequent loss of the Vessel in October 2006 were abnormal and thus the port of Kashima should be considered as a safe port. Gard appealed.

The major dispute that the Supreme Court was asked to decide was whether the port of Kashima was a port to be considered as a safe port within the meaning of the Undertaking. The Supreme Court held that the first question to ask was “whether a reasonable shipowner in the position of the particular shipowner trading the ship for his own account and knowing the relevant facts would proceed to the nominated port.” If the reply was positive “unless there is an abnormal occurrence”, then that port would be considered as safe. Importantly, the following question is whether the Vessel in the present case suffered loss as a result of the abnormal occurrence. Therefore, the difficult question was what should be the correct test to determine an “abnormal occurrence”. The Court accepted the Court of Appeal’s ruling that something was theoretically foreseeable did not necessarily mean that it is normal. In other words, foreseeability could not be a consideration for determining the normality of an incident. To ascertain whether an event was abnormal or not, one must look at the past history of the port but not merely adopt a minimum foreseeability test. After considering the submissions of the parties and the relevant evidence such as the exceptional nature of the storm in October 2006, the Court agreed with the Court of Appeal that the concurrent occurrence of the strong gale and swell in the port of Kashima was rare. Therefore, the port should be viewed as a safe one and there was no breach of the Undertaking.

What Should I Be Aware of When Buying a Second Hand Vessel? (Part II)

Introduction

As mentioned in our previous issue of The Voyage, purchasing a ship is a very important decision due to the substantive cost. When buying a second hand vessel, which might have been damaged to some extents and the concern of adverse selection, i.e. the seller possesses more information about the ship than the purchaser, buyers would certainly like to have sufficient protection under the contract. In this aspect, the Baltic and International Maritime Council (BIMCO) standard Saleform 2012 (the "**Saleform**") is of great assistance.

We have discussed several major amendments in the Saleform in our last issue, including the rights of inspection, implied conditions, title proof and the governing law. In this article, we continue to explore the major areas of changes that a purchaser should be aware of when drafting a memorandum of agreement for sale and purchase of ships.

Deposit and Payment

Comparing with the previous edition of the standard saleform in 1993, the new Saleform clarifies the mechanisms of paying deposit and the balance of the purchase price. The most significant difference between the two saleforms is that, subject to further judicial rulings or interpretation, if any, clause 3 of the new Saleform has reversed the judgment of the English High Court in *PT Berlian Laju Tanker TBK & Brotojoyo Maritime PTE Ltd v Nuse Shipping Ltd* [2008] EWHC 1330 (Comm) and thus the 10% deposit payment is now treated as part of the purchase price.

Another major amendment in clause 2 is the recognition of the use of Deposit Holders instead of joint account of the parties. The BIMCO Committee acknowledged that opening a bank account could be a time consuming and troublesome process. This may be due to the more stringent control imposed by the relevant laws and regulations over the banking industry arising from the concern of assisting money laundering activities or the implementation of the deferred prosecution agreements in the UK which could cause adverse consequences to the banking community. Accordingly, parties to a vessel transaction may prefer using institutions or entities such as law firms or ship brokers to hold the deposit in escrow, whereby the parties can bypass those complicated due diligence check by bankers. Nevertheless, in order to enjoy this flexibility under clause 2, the parties must accept that the escrow account is an interest bearing one.

In addition, though clause 2 recognises the market practice of having a 10% of the purchase price as a deposit, it only requires a purchaser to pay such deposit after the sale and purchase agreement has been signed and exchanged in original and with the confirmation from the Deposit Holder that an escrow account has been successfully opened. This provides an additional safeguard to purchasers.

Delivery and Notices

One of the very important considerations when purchasing a vessel is the timing when the vessel is to be delivered by the vendor and taken over by the purchaser. This is of particularly relevance if the purchaser needs the ship to perform its obligations under another contract or if there is a sub-sale arrangement. Therefore, time may be of the essence.

Clause 5 of the Saleform effectively imposes an obligation on a seller to keep the purchaser posted in respect of the whereabouts of the ship and to give frequent prior notices before actually giving the

Notice of Readiness and the intended place of delivery to the purchaser. The BIMCO Committee considered that these duties of the sellers would assist and facilitate purchasers in organising their arrangements for taking over the ship. Apart from those onerous notices to be given by the seller, the Saleform seems to recognise that a vessel purchaser requires more protection. As such, a buyer of a ship has a right under clause 5 to refuse to accept late delivery and thus terminate the memorandum of agreement for sale and purchase of the ship pursuant to clause 14.

If a buyer chooses not to cancel the deal but instead wishes the transaction to continue, it has a right under

clause 5 to accept the delay, but the sellers would have to propose a new date when the ship would arrive. Once the purchaser has accepted the new date proposed by the seller, such date would be deemed to be the original Cancelling Date. However, even if the purchaser accepts the new date of delivery, the seller should bear in mind that this is without prejudice to the purchaser's claim for damages against the seller for not delivering the ship on time. The BIMCO Committee also specifically mentioned that the new delivery date would not constitute to a waiver of claims of the purchaser.

Spare Parts

Clause 7 of the Saleform stipulates that a seller must deliver the ship to the purchaser "*with everything belonging to her on board and on* shore". When purchasing a second hand vessel, one may expect that lots of items are already on board. To dispute which items belong to the ship and thus should be tagged along with the sale and purchase agreement would be difficult for the parties. Accordingly, the Saleform imposes an obligation on sellers to list out the items that are not regarded as part of the sale under clause 7. Sellers are also reminded by the BIMCO Committee that items that are on hire and borrowed from other parties, such as some essential equipment like life boats, must be stated therein. The consequences of failing to specifically exclude the items under clause 7 is that the seller must at its own cost and expense replace those items before delivering the ship to the purchaser. This arrangement is to ensure that the purchaser would actually obtain what it believes that it has bought.

Regarding spare parts, clause 7 provides that a purchaser is entitled to all spare equipment belong to the ship at the time of inspection. Any subsequent replacements before the actual delivery would also be the purchaser's property. Another significant amendment of the Saleform from its previous version is the calculation of the amount that a purchaser is required to pay to the seller in respect of any remaining bunkers and unused lubricating and hydraulic oils and greases in storage tanks and unopened drums. The former saleform in 1993 stated that a purchaser must pay the current net market price at the port and date of the delivery, whereas the new Saleform has revised this position and only requires a purchaser to either pay the same or the actual net price which is supported by evidence. This amendment allows parties to a transaction to consider which is more appropriate in light of their particular circumstances.

Concluding Remarks

The above are only some of the aspects of a sale and purchase of second hand vessel to which the buyer should pay attention. There are other terms in the Saleform and in a sale and purchase contract for vessel in general that may affect the buyer's right and obligations. Readers should bear in mind that any subsequent case law may affect the interpretation and operation of the Saleform, which may be discussed in our future issues.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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