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FOIL UPDATE 16th June 2022

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Interpreting Clause C of 'ASG 2'

M/V Pacific Pearl Company Limited v Osios David Shipping Inc (2022) EWCA Civ 798

This appeal was concerned with clause C of the Collision Jurisdiction Agreement devised by the London Admiralty Solicitors Group and known as "ASG 2". The purpose of this agreement is to provide for claims arising from a collision to be determined in the English court in accordance with English law and for security for those claims to be given in order to avoid the costs and delays caused by an arrest. Clause C of the standard form provides:

"*Each party will provide security in respect of the other's claim in a form reasonably satisfactory to the other. [Each party agrees to waive its rights to apply to arrest or re-arrest to obtain further security under the Civil Procedure Rules 1998 Part 61.6.]*"

The second sentence of this clause is optional and, in the present case, the parties chose to delete it.

ASG 2 is intended to be used in conjunction with ASG 1, which is a draft Letter of Undertaking (or "LOU") to be given by the parties' respective P&I Clubs. It provides, in short, that in consideration of the beneficiary

IN BRIEF

The Court of Appeal held that it was clear in the present case, whether as a matter of construction or implication, that shipowners who entered into an agreement on the terms of ASG 2 agreed that, if reasonable security was provided pursuant to clause C, it was not open to the receiving party to seek alternative or better security.

of the LOU giving up the right to arrest in order to obtain security, the P&I Club agrees to pay whatever is agreed or determined to be due.

Following a collision in the Suez Canal the claimant/appellant (the owner of a ship called PANAMAX ALEXANDER) offered to provide security to the defendant/respondent (the owner of a ship called OSIOS DAVID) in the form of an LOU from its P&I Club, the Britannia. However, the respondent refused to accept the security offered, insisting that the inclusion of a sanctions clause meant that it was unsatisfactory. Instead, it preferred to maintain the arrest of a ship in associated ownership which it had obtained in South Africa. The judge at first instance found that the security offered by the PANAMAX ALEXANDER was in a reasonably satisfactory form for the purpose of clause C. But he went on to hold that although the appellant was obliged to provide security in a reasonably satisfactory form, the respondent was free to reject that security and to take whatever steps it saw fit to obtain or maintain alternative security elsewhere.

Allowing the appeal, the Court of Appeal held that it was clear in the present case, whether as a matter of construction or implication, that shipowners who entered into an agreement on the terms of ASG 2 agreed that, if reasonable security was provided pursuant to clause C, it was not open to the receiving party to seek alternative or better security by means of an arrest; and that if a ship had been arrested, it must be released once reasonable security was provided.

As a matter of construction, it could be seen that the way in which the agreement was intended to work was as follows:

(1) Clause A of ASG 2 deals with the question of jurisdiction for the parties' claims and the law to be applied; instead of arresting the ship in whatever jurisdiction it can be found, and applying whatever law would be applied in that jurisdiction, the parties agree on English jurisdiction and applicable law.

(2) Clauses D and E deal with the identity of the parties to be sued; they ensure that the registered owners of each vessel are the correct defendants to the claims.

(3) Instead of having to arrest a ship and serve proceedings *in rem* on the ship itself, the parties agree in clause B that proceedings may be commenced by service on their respective solicitors.

(4) Clause C deals with the provision of security; a straightforward reading of the clause that the security to be provided by each party will be *the* "security in respect of the other's claim"; there is no room for the seeking of alternative security; if a party were free to seek alternative or better security, there would be no need to stipulate that the security to be provided under clause C should be "in a form reasonably satisfactory to the other".

(5) Clause C also avoids the need to enter cautions in multiple jurisdictions in order to avoid an arrest. While clause B contains an undertaking to accept service, clause C contains the undertaking to provide security which must be given in order to obtain the entry of a caution.

(6) Finally, the combination of clauses C and F means that if there is a dispute about whether the security provided is "in a form reasonably satisfactory to the other", that dispute is to be determined not in the foreign court where a ship has been arrested (as would be the position absent this agreement), but exclusively in the English court.

(7) This ensures that, contrary to what may be the position in some jurisdictions, security in the form of an LOU from a member of the International Group of P&I Clubs will be acceptable; and that any issue about the terms of the security are to be determined here in accordance with English law and practice.

Thus, the effect of clauses C and F was to transfer any dispute about the sufficiency of security from a foreign court where the ship had been arrested to the English court. But the consequences when reasonable security had been provided were unchanged. Once reasonable security had been provided, there was no justification for an arrest and, if the ship had been arrested, it must be released.

Alternatively, if necessary, the court would have concluded that the same result should be reached by way of an implied term that a party offered security in a reasonably satisfactory form would accept that security within a reasonable time (which in practice was likely to be a short time). Such a term was necessary as a matter of business efficacy and because such a term was so obvious that it went without saying, for much the same reasons as already indicated in relation to construction.

Therefore, and subject to the Respondent's Notice, the correct analysis was that the respondent was under an obligation to accept the security offered and that it was in breach of the Collision Jurisdiction Agreement for refusing to do so.

By the Respondent's Notice it challenged the judge's conclusion that the LOU offered by the appellant's Club was in a reasonably satisfactory form. It took issue with the wording of the proposed LOU, submitting that:

(1) the sanctions clause should have provided for the Club to use "best endeavours" rather than "reasonable endeavours" to obtain permission to make payment; and

(2) the judge gave too much weight to the fact that the LOU was to be provided by a reputable P&I Club which was a member of the International Group.

There was nothing in these points. Whether the proposed LOU was in reasonably satisfactory form required an evaluation by the judge of its terms and of the identity of the Club which was to provide it. The judge considered in detail the respondent's specific objections but concluded that, whether considered individually or collectively, they did not enable the respondent to say that the LOU was not reasonably satisfactory to them. That was a conclusion which he was entitled to reach and with which this court would not be prepared to interfere.

The full judgment may be found at: M/V Pacific Pearl Co Ltd v Osios David Shipping Inc [2022] EWCA Civ 798 (14 June 2022) (bailii.org)