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Trade & Transport Bulletin

A regular publication by Wotton + Kearney's Trade & Transport Focus Group providing a brief snapshot of developments and important issues relevant to the Trade & Transport market.

Insurer's Election to Repair Takes a Nose Dive

By Simon Black, Senior Associate, Editor

The Queensland Supreme Court decision in **Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd [2010] QSC 313** suggests that insurers must be unequivocal when making an election to repair damaged property under a policy of insurance. The potential cost of not doing so is that an insurer may be forced to pay the full insured value of the property.

FACTS

In 2004 a 208 Cessna Caravan (**the Aircraft**) owned by Cape York Airlines Pty Ltd (**Cape York**) was ditched into the sea off Green Island, near Cairns, following engine failure. The Aircraft was recovered some 42 hours later and although suffering little in the way of structural damage, it had been partially submerged in salt water throughout this period.

The Aircraft was insured for AUD1.8 million, on an agreed value basis, under a policy with QBE Insurance (Australia) Ltd (**QBE**) (**the Policy**). Relevantly, the Policy provided that:

"The Company [QBE] *will at its option pay for, repair or pay for the repair of, accidental loss or damage to the Aircraft."*

Cape York made a claim under the Policy following the accident.

THE PROCEEDINGS

QBE formed the view early on that the Aircraft was repairable and obtained an estimate from Aircraft Structures International Corp (**ASI**) to repair the Aircraft for some USD691,178.

On 26 February 2004, QBE wrote to Cape York and stated that:

"We have the option to pay for, repair or pay for the repair of accidental loss or damage to the aircraft... please instruct Aircraft Structures International Corporation to proceed with the repairs to the aircraft as per their estimate..."

Cape York was not prepared to accept QBE's proposal to repair the Aircraft as a result of its concerns about whether the Aircraft would comply with Civil Aviation Safety Authority (**CASA**) standards following the repair and the potential effect on the resale value of the Aircraft.

By November 2004 the estimated cost of repairing the Aircraft had increased to some AUD1.4 million as a result of further corrosion. QBE advised Cape York that it required the repairs to proceed in accordance with the quotes they had obtained. Cape York refused to agree and commenced proceedings in the Supreme Court of Queensland seeking payment of the AUD1.8 million insured value.

THE DECISION

The Court found that the correspondence exchanged between QBE and Cape York did not constitute an election by QBE to repair under the Policy but a request by QBE that Cape York "instruct" ASI to proceed with the repairs. This was not one of the elections available to QBE under the Policy and, on that basis, the Court held that QBE had made no election at all. Daubney J therefore entered judgment in favour of the Plaintiff which, when interest was factored in, amounted to some AUD3.17 million.

In light of this decision, Insurers would be well advised to bear the following 2 factors in mind when making an election to repair under a policy of insurance:

+ the words or conduct required to constitute an election must be unequivocal; and
+ an election must be communicated to the other party within a reasonable time.

Air Freight Cartel Litigation Update

By Nick Lux, Partner and Suzi Craig, Solicitor

CLASS ACTION PROCEEDINGS

In February 2007, a price fixing class action was commenced in the Federal Court against 7 major international airlines, including Qantas, Singapore Airlines, Cathay Pacific, JAL, Air New Zealand, Lufthansa and British Airways.

The plaintiffs allege that, between 2000 and 2006, the airlines engaged in cartel conduct in which they fixed the price of fuel, security and war-risk surcharges in the provision of international air freight services. It is further alleged that the increased cost of air freight that resulted did not accurately reflect the cost to the airlines of providing such services. The plaintiffs claim damages of more than AUD200 million.

The representative plaintiff in the class action is Auskay International, a Melbourne-based vacuum importer. It has brought the proceedings on behalf of a group of persons who were resident in Australia, who paid more than AUD20,000 for the carriage of goods to or from Australia, which included an air freight component between 2000 and 2006.

Since the proceedings were commenced in February 2007, there have been a number of strike out applications brought by the airlines attacking the way in which the plaintiffs plead their case. The proceedings were struck out in 2010 after the fourth attempt by the plaintiffs to plead a proper statement of claim.

However, recently the Full Court of the Federal Court overturned the lower court's decision to strike out the plaintiffs' case. As such, the case is now continuing.

The airlines were due to file their defences by 14 February 2011 and any replies by the plaintiffs are due to be filed by 21 March 2011. The proceedings are listed for further directions on 1 April 2011.

ACCC ENFORCEMENT ACTION

In 2008, Qantas was fined AUD20 million by order of the Federal Court of Australia when Qantas agreed with the Australian Competition and Consumer Commission (**ACCC**) that it had given effect to a collusive agreement or arrangement with other airlines in respect of the provision of international air freight services.

More recently, in November 2010, the European Commission fined Qantas and 10 other air cargo carriers more than AUD1.1 billion for engaging in cartel conduct. The airlines have also received fines in the United States, Canada and Korea for the same conduct.

A class action was also commenced in the United States in respect of this conduct. Qantas recently settled its exposure in this class action for an amount of USD26.5 million.

NZ Courts Emphasise the Protection of Seafarers' Interests

By Andrew Moore, Partner, and Angela Winkler, Solicitor

In **Udovenko v The Ship: MV Pelican (8/11/10 CIV 2009-442-514)** a crewmember of the "*MV Pelican*" brought a claim for wages, superannuation and damages in the Admiralty jurisdiction of the New Zealand (**NZ**) High Court. Udovenko's claim was brought *in rem* against the vessel and *in personam* against his employer, the charterer of the ship, Van Oord Australia Pty Ltd (**Van Oord**).

Van Oord filed an application for a stay of the Admiralty proceedings arguing that the Plaintiff's claim should be ruled upon in an Australian Court or relevant employment tribunal first. Van Oord submitted that an alternative forum should be preferred because the Plaintiff's claim was based upon an "Australian Contract" for work on an Australian ship, operating entirely in Australian waters and he was employed by an Australian company.

The Plaintiff contended that NZ was the appropriate jurisdiction because his employment was subject to a NZ employment contract, the ship was registered in NZ and that the expense of litigating in Australia would make it impossible for him to proceed.

THE DECISION

The Court dismissed Van Oord's application for a stay of the proceedings.

In considering the question of which forum was most appropriate the Court considered the following factors:

+ any inconvenience or unnecessary expense identified by the parties; and
+ the comparative resources available to Van Oord and Udovenko.

The only "inconvenience" identified by Van Oord was that it intended on calling witnesses from Australia. The Court maintained that this expense could be overcome by the use of videolink. The inconvenience demonstrated by the Plaintiff (including that he would need a visa to travel to Australia and that legal costs in Australia would be considerably greater) was held to outweigh any inconvenience to Van Oord.

The Court also took into account the respective resources available to Van Oord and Udovenko, noting the traditionally benevolent and protective attitude Admiralty Courts have adopted towards seamen stemming from the disparity of bargaining power between ship owners and seamen.

The Court concluded that it was highly likely that Udovenko would not be able to pursue his claim if forced to give up the forum in which he was entitled to sue.

COMMENTS

This case highlights the jurisdictional complexities which often surround the contractual arrangements between seafarers and their employers. The Court's decision suggests that, when determining the most convenient forum, NZ's Admiralty Court will give particular consideration to the disparity of resources and bargaining power between ship owners and seafarers.

Legislative Developments

"Incoterms 2010" Take Effect January 2011

By Antonia Gleeson, Paralegal

On 1 January 2011, the Incoterms 2010 (**the Rules**), published by the International Chamber of Commerce (**the ICC**), came into effect. Key changes include:

+ a reduction in the number of Rules from 13 to 11, simplifying the rules relating to delivery;
+ the reference to "*ship's rail*" as the point of delivery has been removed and goods are now delivered when they are "*on board*" a vessel;
+ the Rules have been reclassified into 2 classes:
  - rules which pertain to any mode or modes of transport, which can be used where there is no maritime transport or where maritime transport is partly used; and
  - rules which pertain to sea and inland waterway transport, where point of delivery and the place to which the goods are carried to the buyer are both ports;
+ the subtitle of the Rules recognises that they can be applied to both international and domestic sales contracts;
+ the Rules provide for the use of electronic documents;
+ the Rules expressly provide for information duties relating to insurance cover;
+ the Rules allocate obligations between parties regarding obtaining security clearance and information; and
+ the Rules clearly outline the allocation of terminal handling costs between parties so as to avoid duplication of such costs.

These changes to the Rules take into account the developments in world trade and globalisation that have occurred over the past 10 years. Parties should be aware of these amendments to the Rules when utilising them in sale contracts. The Guidance Notes accompanying each rule will assist parties in making an informed choice about the appropriate rule to use for a particular transaction.

Air Carrier's Liability and Insurance White Paper

By Juliet Eckford, Senior Associate

The Department of Infrastructure, Transport, Regional Development and Local Government (**the Department**) has undertaken consultation with relevant stakeholders in preparation for a White Paper dealing with air carriers' liability and insurance in the aviation industry.

The Department recently published a discussion paper which proposed significant amendments to the **Civil Aviation (Carriers Liability) Act (Cth) 1959** (**the CAA**) and the **Damage by Aircraft Act (Cth) 1999**.

Some of the more significant proposed changes include:

+ the term "*personal injury*" in section 36 of the CAA will be replaced with "*bodily injury*" bringing domestic legislation in line with the international position governed by the Montreal Convention and affording domestic carriers an argument that they are no longer liable for pure mental harm;
+ the damages cap applicable to domestic carriers will be increased from the current figure of approximately $500,000 per person to $725,000 per person to reflect inflation;
+ an increase in the level of mandatory passenger insurance for domestic travel to $725,000 per passenger to ensure coverage up to the increased damages cap; and
+ the introduction of mandatory insurance for third party surface damage, on the basis that the carrier is best placed to manage this risk. Despite concerns raised by the industry, there are currently no provisions to amend the current system of strict and unlimited liability for carriers who cause damage to third parties on the ground.

The consultation period is coming to an end. Whilst no firm deadline has been set for the White Paper, the Department has advised that further action will take place in the first half of 2011.

Noting the significant delays which surrounded the ratification of the Montreal Convention there is some prospect that the Department may "cherry pick" certain aspects of the review, such as increases in the damages caps, for fast tracking. The industry should assume that the changes will be introduced sooner rather than later.

Protection of the Sea Legislation Amendment Act

By Claire Campbell, Solicitor

The Commonwealth Government recently passed the **Protection of the Sea Legislation Amendment Act 2010 (Cth)** (**the Amendment Act**) which makes a number of amendments to two existing pieces of legislation:

+ **the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)** (**the PPS Act**); and
+ **the Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008 (Cth)** (**the Bunkers Act**).

The PPS Act

The amendments to the PPS Act give domestic effect to Annex VI of the International Convention for the Prevention of Pollution from Ships (**MARPOL**), one of a number of conventions adopted by the International Maritime Organisation (**IMO**) to reduce pollution by ships. Annex VI is aimed at preventing air pollution from ships by setting emission limits on sulphide oxide and nitrogen oxide and to prohibit deliberate emissions of ozone depleting substances.

These amendments include the ability to set a maximum sulphur content by regulation which, while necessary to give effect to Annex VI, will have little practical impact in Australia as the average sulphur level in world-wide fuel oil deliveries and in Australian refined fuel currently fall below the 3.5 per cent cap.

Further amendments include:

+ the introduction of new defences to existing offences of using fuel oil with a sulphur content more than the prescribed limit; and
+ a new requirement that ozone depleting record books be retained by Australian ships engaged in an overseas voyage with a gross tonnage of 400 or more.

The Bunkers Act

The amendments to the Bunkers Act are designed to provide responder immunity to persons or organisations that, reasonably and in good faith, assist in a clean-up following an oil spill from a ship. The rationale for this amendment is to ensure that those who might otherwise provide assistance will not be deterred from doing so because they think they may incur civil liability should their actions inadvertently lead to increased pollution.

Implications

It is important for those engaged in maritime trade and transport to familiarise themselves with these amendments. In particular, close attention should be paid to those provisions which specify emission caps and record keeping. Failure to comply with these provisions can attract significant penalties.

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