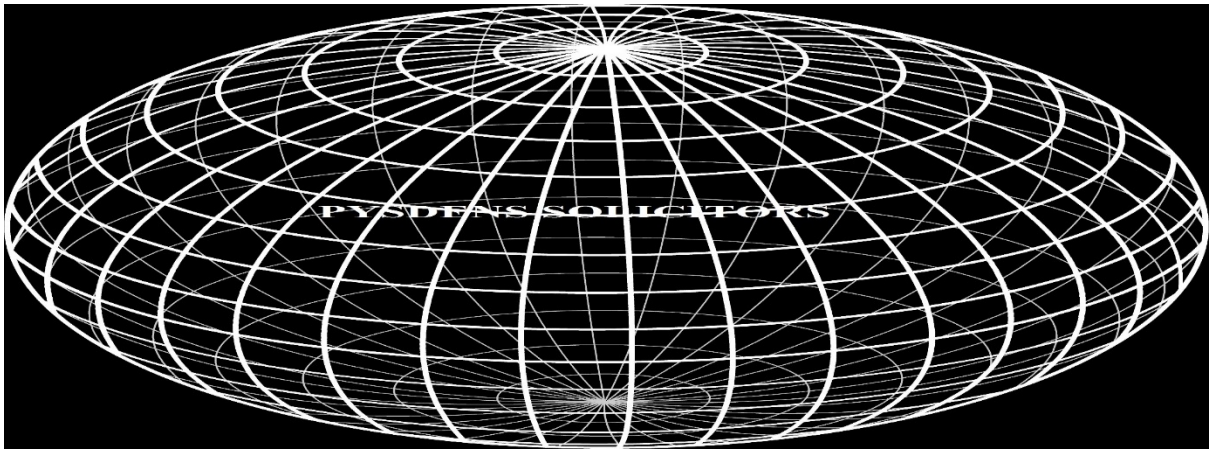

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Demurrage Ruling in MSC-v-Cottonex Anstalt Case Appealed and Partly Successful

In January 2015, Leggatt J. handed down a decision on demurrage fees which at last gave some detailed clarification on the extent to which carriers could claim demurrage when containers had been left for a substantial period of time and the ability to move them did not appear to be imminent. In this particular case the containers had been left uncollected by the receiver for three and a half years at the time of trial and MSC sought demurrage for the whole of this period. At the time Leggatt J. considered the case, the demurrage that had accrued was over USD1million and many times the value of the shipped goods in question.

In essence his findings were that an email sent on 27 September 2011 by the shipper made it clear to the carrier and that the carrier would have reasonably understood that there was no realistic prospect of it being able to arrange for the containers to be collected so the commercial purpose of the contract had become frustrated and, that in any event, even if the email had not been there to rely on, by that time, the delay of itself had become so prolonged to make it plain that the commercial purpose of the contract had been frustrated and consequently the shipper was in repudiatory breach of the contract. He also found that once it was clear that the shipper could not carry out the primary obligation of returning the containers, the carrier no longer had any legitimate interest in keeping the contract alive to keep charging demurrage in the hope that the containers would eventually be redelivered.

This was all good news for any party responsible for demurrage but that good news has been watered down by the judgment handed down on 27 July 2016 by the Court of Appeal. It was decided that the Judge's finding in relation to when frustration occurred which was based on an email from the shipper dated 27 September 2011 could not stand. This was because, in the words of Lord Diplock, in the case of "The Nema" which were to the effect that whether or not delay was sufficient to bring about frustration must be a question that is decided on an informed basis upon all the evidence that has occurred and that it was a question of degree for the tribunal seized of the matter.

The finding was that Leggatt J. had only taken into account the shipper's email and as this was only taking into account the shipper's position and not the carrier's position, the decision could be overturned. It was found that the clearest indication of frustration was on 2 February 2012 when the carrier had confirmed an offer made to sell the containers to the shipper to try and settle the dispute in another email. One of the Appeal Court judges pointed out that the earliest offer to sell the containers by the carrier was made in January 2012 in a telephone conversation with the shipper but accepted that 2 February 2012 was the preferable and pragmatic date to accept as when frustration occurred and that the question of whether or not delay was enough to bring about frustration "calls for a pragmatic judgment". It had also found that the shipper had not responded to the offer.

The Appeal Court went on to consider the effects of the repudiation by way of frustration and found that the first instance Judge had taken a wrong turn in relying on *White -v- Case* as it had not been open to the carrier to affirm the contract and as this was the case, there was no basis for considering whether there was a legitimate interest in affirming the contract or not. The reason that it was not open to the carrier to affirm the contract was because the shipper was in no position to redeliver the containers at the time of frustration and, that as such, was liable in damages being replacement value of the containers at the time of frustration. One of the Judges suggested that it should be taken into account that the Judge had found that there had been an agreement as to value at USD3262 per container. It was found that *White v Case* had no application as this related to cases where the defaulting party's obligations were in the future and here, the obligation was required now and could not be complied with, hence the contract was at an end.

How does this Change the Position from the First Instance Judgment?

The first point to note is that whilst Leggatt J's decision was factual as to frustration based on an email of 27 September 2011, he added that had the email not been there for him to rely upon, his view was in general that after the passage of three months it was overt at that stage that that the delay was sufficiently long to bring about frustration of the commercial purpose of the contract. The Court of Appeal did not agree. They concluded that on the evidence the

earliest evidence of frustration was 2 February 2012 and therefore did not accept Leggatt J's proposition that three months was sufficiently long of itself to bring about frustration of the commercial purpose of the contract.

Secondly Leggatt J left open the question of any further damages as they had to be proved and the carrier had elected not to file any evidence of loss. The Court of Appeal found that the contract had come to an end on 2 February 2012 and the Carrier was entitled to damages because at that time the containers could not be redelivered and the applicable value was the agreed value of each container agreed before the trial. The Court of Appeal effectively rejected the concept that a period of time of itself could bring about frustration and took the view that this time was one of degree and was dependent on all the evidence. Therefore, each case on this basis will be decided on the evidence available as to when frustration occurs. The carrier will also be entitled to the value of the containers if at the time of frustration the shipper is unable to redeliver the containers and the carrier is thereby entitled to damages for this failure.

Will there be an Appeal?

This case concerns an important area of contractual rights and consequent damages in international shipping. The only question is whether Cottonex Anstalt will want to take this one step further to try and reverse the Court of Appeal's decision. They may take the view that it is a worthwhile exercise as it could be found that it was wrong of the Court of Appeal to interfere with Leggatt J.'s finding on the facts, his having weighed up the evidence and taken a view on when frustration occurred. The second finding was that *White v Case* did not apply and so was a finding of wrong application of the law but was it right that the application of this case was limited to cases where obligations of the defaulting party were to be performed in the future? It does seem possible that a Supreme Court decision may well ensue and change this picture once again.

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Note: In producing this press release by Pysdens Solicitors, the model published in the book entitled "GUIDELINES TO CONSIDERATION IN RESPECT OF COMMERCIAL DEALINGS" by S. Perez-Goldzveig and K.Pysden forming part of the research and development programme "COMMERCIAL GUIDE INITIATIVE" by S. Perez-Goldzveig and K.Pysden being part of "TheHouseofBranchofGold" was used with the authorisation of the authors.

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