Liability under NYPE Charterparty for the stowage of Dangerous Cargo. In a recent London Arbitration, the tribunal held that the Time Charterers and not the Owner have an overriding obligation to ensure that on a container ship dangerous cargo is properly stowed in accordance with the International Maritime Dangerous Goods (IMDG) Code.

Background

The Club’s Owner Members time chartered the vessel on NYPE 1946 terms. Whilst the vessel was on a voyage from the Far East to the West Coast of America with a full containerised cargo there was an explosion and fire. The vessel and cargo suffered serious damage as a result of the fire.

The Owners brought a substantial claim against the Charterers for the damage to the vessel and also for the loss of hire whilst the repairs to the vessel were carried out. The Charterers submitted similar counterclaims for the cargo claims they had settled and also for their general average/salvage costs.

It was common ground between Owners and Charterers that the cause of the damage was a container of anhydrous Calcium Hypochlorite which was stowed adjacent to a bunker tank. It was the Owners’ position that the cause of the explosion was the inherently unstable and dangerous nature of the Calcium Hypochlorite. Conversely, the Charterers’ case was that the Calcium Hypochlorite was perfectly safe and that it was the exposure to the heat from the bunker tank which caused the calcium hypochlorite to explode.

Clause 8 of the Charterparty was substantially unamended and included the wording:

"...Charterers are to load, stow, lash, secure, unlash, and trim and discharge and tally the cargo at their expense under the supervision of the Captain..."

This wording, together with additional clauses, gave Charterers the option of loading containerised “dangerous IMO cargo” under deck, providing that this was always in conformity with any local or international regulations regarding the carriage of dangerous cargo.

The main question was, given that the Charterers’ central planner originally stowed the cargo in contravention of the IMDG Code, whether the failure of the crew to take any action to change the positioning of the dangerous goods container adjacent to a bunker tank was a “novus actus” i.e. an intervening action, which broke the chain of causation and overrode the contractual provisions set out above.

Following the decision of the House of Lords in Canadian Transport Limited v Court Line Limited [1940] AC 334, it is established law that the effect of Clause 8 is to transfer responsibility for stowage from the Owners (who would otherwise be responsible for stowage at common law) to the Charterers. This, however, is subject to a number of exceptions, namely:

1. if the master actually supervises the cargo operations and loss or damage is attributable to that supervision; or
2. if loss or damage is attributable to want of care in matters pertaining to the ship of which the master was (or should have been) aware but the Charterers were not, such as, for example, the stability characteristics of the particular ship.

The Charterers said that there was a third exception which necessarily applied (notwithstanding the decision of Langley J. in The “IMVROS” [1999] 1 Lloyd’s Rep. 848) as follows:

3. Where the stowage threatens the safety of the ship/the safety of the crew and its seaworthiness, in which case the Master has a duty to intervene to correct the stowage and is liable for loss caused by a failure to do.

Exception No. 1 - “exercise of the right of supervision”

The Charterers said there was actual supervision in the stowage by the crew who should control the Charterers’ proposed stowage positions and approve them. They said that if the Owners chose to monitor, as opposed to actively intervening and altering the stowage position, they could not then turn round and blame the Charterers for the initial proposal of that position. Effectively, the Charterers said owners were estopped by what they had not done from complaining about what the Charterers had done.

The tribunal disagreed and said that if the Charterers’ position was correct, then any Master/chief officer on any ship chartered pursuant to an NYPE 1946 form with Clause 8 unamended would, by the simple fact of reviewing the stowage proposed by the Charterers, be assuming on behalf of his Owners full legal responsibility for the stowage of all cargo on board his ship.

The tribunal agreed with the Owners that if Charterers had wanted to alter the Owner’s obligations under clause 8 the Clause should have been amended to include the words “and responsibility”.

Exception No. 2 - "want of care in matters pertaining to the ship"

The Charterers’ case was that there was nothing wrong with the stowage position of the container if the bunkers were not going to be heated. They said that whilst they knew from the ship’s plan that there was a side deep bunker tank, that was all they knew. Matters such as the day-to-day distribution of bunkers between tanks, the operational schedules of usage and heating in bunkers were matters which were unknown to them and were solely within the province and knowledge of the ship.

The Owners position was that this was an overly simplistic view, given the facts of the case. They submitted that it was the Charterers’ obligation to produce an IMDG Code compliant stow. They had all the information necessary to do this, in particular, they know where the bunker tanks were. The fact that they did not know whether and, if so, when the relevant tank was to be heated was irrelevant; all they had to do was to choose a location that was IMDG Code compliant.

The tribunal agreed with the Owners’ approach and found that there was no relevant matter of which the ship was aware but of which the Charterers were not, which prevented Charterers from producing a safe and IMDG compliant stow of the container.

Exception No. 3 - “duty to intervene to avoid unseaworthiness”

It was the Charterers’ case that the crew had a duty to intervene to correct the stowage where the stowage endangered the ship and thereby
rendered ill seaworthy. They argued that if Owners did not, and there loss of damage to cargo as a consequence of unseaworthiness Owners cannot recover under Clause B. Thus, if the cause of the explosion was the heating of the bunker tanks and not the calcium hypochlorite exploding on its own, then plainly the stowage of the calcium hypochlorite next to a heat source rendered the vessel unseaworthy because the vessel was endangered by that stowage.

The tribunal disagreed. If the Charterers' argument was followed, as Langley J. mentions in The "Imvros", "the worse the loading the better for the charterers".

The tribunal decided that the Charterers should be held responsible for the incident caused by their original decision to stow the container in contravention of the IMDG Code. The charterers have sought leave to appeal.

To see an April 2006 Update on this issue, click here.