STEAMSHIP MUTUAL

Sea Venture

Issue 23

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Introduction

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Welcome to the 23rd issue of Sea Venture.

This issue marks a significant change in style and format, with the publication now including full articles instead of summaries of articles with links to the Steamship Mutual website. As such, and while the result is a significantly larger publication, there is no longer a need for readers to go to the Club's website for a full discussion of the issues that are addressed in any particular article.

The electronic version of Sea Venture will be published as normal with links to the Club's website and the articles listed at page 49.

So far as the content of this issue of Sea Venture is concerned there is the normal mix of articles discussing reported legal decisions, topical issues and Club news. Of particular interest is the article entitled Hedging and Damages on page 5 discussing damages that might be recoverable from an Owner in the event of delayed delivery of cargo where traders are also Charterers or cargo interests and have hedged to protect against cargo price movements. There is also the first in a planned series of bunker related articles at page 17 dealing with the evidential issues relevant to bunker disputes, and an article on page 22 commenting on *The Global Santosh* Court of Appeal decision. This case is of interest given the consequences for hire disputes when a vessel is arrested for acts or omissions of the charterers agents and, for the purpose of the relevant charterparty clause, who might be an agent of the charterer. Numerous other topics are addressed in the remaining articles covering, but by no means limited to, crew issues, costs protection and exposure in charter chains, damages, time bars, and bill of lading and charterparty issues.

In the Steamship Mutual News section the Managers are particularly pleased to be able to report on two notable anniversaries. On 21 May Ethiopian Shipping and Logistics Service Enterprises ("ESLSE") celebrated its 50th anniversary while a month later, on 20 June, Mingtai Navigation Co Ltd also celebrated its 50th anniversary. Both Shipowners are long standing and valued Members of the Club – in the case of ESLSE since its foundation, and almost 40 years in the case of Mingtai Navigation Co., Ltd. The Managers look forward to continuing the relationship and providing a service to both Members for many years to come.

As ever the Managers are grateful to those who have contributed to this edition of Sea Venture, and the editorial team welcomes any comments on the revised format or indeed feedback on the articles included in this publication.

M.S.

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Features

In-Transit Loss Clause

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A recent High Court decision, *Trafigura Beheer NV v Navigazione Montanari Spa* [2014] EWHC 129 (Comm) considered the effect of an in-transit loss clause in a tanker voyage charterparty.

The 'Valle Di Cordoba' loaded a cargo of premium motor spirit at Abidjan, intended for Lagos.

While waiting off the Nigerian coast, a group of approximately 15 armed men took control of the ship, and transferred about 5,300 tonnes of cargo to an unknown lightering vessel, before releasing the ship and her crew.

The balance of the cargo was subsequently discharged at Lagos.

The Charterers claimed against the Owners for approximately US$5 million for the loss of the stolen cargo under the terms of an in-transit loss clause included in the rider clauses to the charterparty, which stated that:

*"In addition to any other rights which Charterers may have, Owners will be responsible for the full amount of any in-transit loss if in-transit loss exceeds ~~0.3%~~ **0.5%** and Charterers shall have the right to ~~deduct from freight~~ **claim** an amount equal to the FOB port of loading value of such lost cargo plus freight and insurance due with respect thereto. In-transit loss is defined as the difference between net vessel volumes after loading at the loading port and before unloading at the discharge port."*

The charterparty was based on the Beepeevoy 3 form, including clause 46, which incorporated the Carriage of Goods by Sea Act, 1971, and thereby the Hague-Visby Rules Article IV, rule 2 defences, including perils of the sea and acts of public enemies.

Mr Justice Andrew Smith considered that the issues to be decided by the Court were:

1. Whether the theft of cargo by pirates constituted an in-transit loss, covered by the clause; and
2. Whether the in-transit loss clause imposed strict liability on the shipowner, or whether the Owners could rely on the exceptions and defences contained in clause 46.

"…it was held that "such expressions as "in-transit loss" connote loss that is incidental to the carriage of oil products, and does not extend to losses such as those that occurred in this case because of the action of the pirates".

The Judge held that the parties to a commercial contract are free to contract on any terms that they agree, and that the starting point in considering a clause in a contract must be to the words and phrases that the parties have chosen to use. However, he considered that "*…if apparently improbable commercial consequences flow from an interpretation of contractual wording and another is properly available, the court takes account of this…*".

He decided that the expression "in-transit loss" should be given its normal business meaning (although this was not exactly defined in the judgment), and that the second sentence of this in-transit loss clause should be interpreted as specifying how the loss should be determined, and not as a complete definition of in-transit loss.

So, on the first issue, it was held that "*such expressions as "in-transit loss" connote loss that is incidental to the carriage of oil products, and does not extend to losses such as those that occurred in this case because of the action of the pirates*".

While this decision on the first issue was sufficient to decide the case in the Owners favour, the Judge considered the second issue and commented that he did not see a conflict between the in-transit loss clause and clause 46, such that he considered that an Owner facing a claim under the in-transit loss clause could still rely on the exceptions and defences provided by clause 46.

The decision seems to follow a trend for Courts to consider a contract in its entirety and, where the wording is ambiguous and the rules of construction allow, to apply business sense as apparently intended by the parties to the contract rather than the literal meaning of particular words. In the Supreme Court case of the Rainy Sky: www.steamshipmutual.com/publications/Articles/RainySky1212.htm

Lord Clarke stated that:

"*…the language used by the parties will often have more than one potential meaning… the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*".

So, if there is doubt about the exact meaning of a charterparty or contractual term, and if there is more than one possible interpretation, it seems that a Court will be more likely to look for the meaning that a reasonable person, with shipping knowledge and background, might understand from the term, rather than trying to apply a precise, legalistic, but unbusinesslike interpretation to the words.

It is understood that Charterers have obtained leave to appeal to the Court of Appeal.

It will be interesting to see if the Appeal Court takes a similar approach in this case and/or seeks to clarify what types of loss are covered by in-transit loss clauses. ■

Hedging and Damages

David Morriss
Laura Wright

In the event of late, non or mis-delivery of cargoes, shipowners may face claims from Charterers or cargo interests. The usual measure of damage in these cases is:

- Late delivery: the difference between the market value of the cargo on the date it ought to have been delivered under the relevant contract, and the market value of the cargo on the date it is actually delivered.
- Non or mis-delivery: the market value of the cargo at the time and place where it ought to have been delivered under the relevant contract, less any expenses the claimant has avoided through the non/mis-delivery.

In certain trades, however, it is common practice for traders of cargoes to use hedging to protect against volatile markets: crucially, the oil and metal trades. Where the traders are also Charterers or cargo interests, hedging *may* have a bearing on the losses suffered and in turn, on the quantum of damages that they can recover against shipowners. It is therefore important to understand how hedging may be relevant and the key hurdles to be overcome to bring it into play.

It may be useful to recap on what hedging is. In simple terms, a trader of, say, copper, will buy a cargo based on a published reference price and will sell it on at some point in the future. To protect against the risk of a change in the price between the purchase and sale dates, he will hedge by selling an equivalent quantity of paper 'lots' at the same time as he buys the copper, at the same reference price. The same exercise will be repeated, in reverse, when the cargo is eventually sold.

Hedges are time limited. This means that when the trader sells 'lots' at the outset, he has to estimate when he expects to be able to buy them back again i.e. the date he expects to be able to sell the copper cargo. The hedge must then be 'closed out' on that future date.

What if something happens to the vessel on the way to the discharge port which delays the cargo, such as an engine breakdown? This type of scenario can lead to claims by cargo interests or Charterers against the shipowner. A delay may mean that closing time for the hedge comes around before the trader can sell the copper cargo. Once the hedge is closed, he is then left exposed to price fluctuations on the physical cargo – the price may change by the time it is eventually sold.

In this situation, a trader might do one of two things in respect of the hedge:

A. • He may take the chance of leaving the cargo unprotected. If by the time he sells it the price has fallen, shipowners may then face a claim under the usual measure of damage.

- In response to such a claim, shipowners might query why the trader allowed the cargo to become unprotected rather than to re-hedge; had he re-hedged, it might be (depending on the costs of re-hedging) that some of these losses would never have been suffered. So, hedging may be relevant in terms of mitigation.

B.
- On the other hand, as the hedge expiry approaches, the trader may decide to extend it for another period depending on when he then estimates discharge will take place. This is known as 'rolling over'.
- Depending on how the market goes, the trader might ultimately make a substantial gain on the hedge, thereby reducing his overall losses.
- The shipowner may then wish to bring hedging into play to set the gains off against the trader's claim.

Recent case law suggests that hedging can be considered in such circumstances, but as the cases show, this is likely to turn on two issues: causation and remoteness.

The first case of significance was *Addax Ltd v Arcadia Petroleum Ltd* [2000] 1 Lloyd's Rep. 493, in which the claimant oil trader purchased a cargo of oil to sell on to the defendant. Delivery of the cargo was delayed and the claimant therefore hedged to cover risks. The claimant sought damages based on the difference between the profit it would have made had delivery happened as expected and the loss it suffered as a result of the hedges, totalling US$816,000.

The Court found that the usual measure of damages applied, i.e. the difference between the value of the cargo on the date it ought to have been delivered, and the value of the cargo on the date it was actually delivered.

The Court commented that if it were wrong about the usual measure of damages applying and it ought to take account of what actually happened to assess the claimant's net position (which is what the defendant had contended), then it saw no reason why the cost of hedging instruments should not be taken into account.

Despite efforts from the defendant to categorise the hedging costs as too remote, the judge went on to say that in the oil trade it was wholly foreseeable that the claimant would have hedged.

In *Trafigura Beheer BV v Mediterranean Shipping ("The MSC Amsterdam")* [2007] 1 CLC 594, the claimant consignee of a cargo of copper cathodes brought a claim for mis-delivery against the shipowner carrier when the cargo was stolen under fraudulent bills of lading. The consignee had hedged its risks when it bought the cargo at the outset.

The consignee had to roll over its hedges as a result of the breach and it incurred a loss on those. It claimed for the value of the cargo plus the losses made on the hedges.

The consignee was awarded damages based on the value of the cargo, under TIGA 1977. Consequential losses are also recoverable under that Act, but here the Court found that hedging losses were not recoverable as they were not foreseeable from the point of view of a shipowner.

Another notable decision, and perhaps the turning point in the case history, is *Glencore Energy UK Ltd v Transworld Oil Ltd ("The Narmada Spirit")* [2010] 1 CLC 284. This was a claim by a buyer of oil, against the seller, for non-delivery.

The claimant had hedged against market fluctuations and it made a gain on those hedges, reducing its overall losses from $11 million to $8.6 million.

The claimant sought damages based on the full $11 million, being the difference between the contract price and the value on the date it ought to have been delivered. Had it recovered those, it would have gained a windfall of around $2.4 million against its actual losses. The claimant argued that this was appropriate because:

"… in the oil trade it was wholly foreseeable that the claimant would have hedged"

(a) hedging transactions were independent transactions which were *res inter alios acta*; and

(b) hedges were analogous to an insurance policy and should therefore be ignored in the assessment of damages.

The Court rejected both arguments and found that the claimant's action in closing out the hedges was taken in reasonable mitigation of its losses and should be taken into account in assessing damages. The claimant was awarded $8.6 million, not $11 million.

This is an important decision because it establishes that there is no rule of law that hedges are always irrelevant to the assessment of damages.

In *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm), Sahara, an oil trader, sold a cargo of naphtha to Choil, another trader. Choil in turn agreed to sell the cargo to Petrogal.

The cargo was rejected by Petrogal by reason of its quality. Choil then hedged and tried to mitigate its losses by finding another buyer, Blue Ocean. Interestingly, Choil sold to Blue Ocean at a higher price than it would have sold to Petrogal.

Choil brought a claim for damages based on a specific SGA 1979 measure for breach of warranty of quality: it said that although the total Blue Ocean price was higher, it achieved a lower premium above the benchmark price from Blue Ocean than it would have got from Petrogal, because of the contaminated state of the product.

It also claimed for hedging losses; when it hedged to try to mitigate its losses after the Petrogal sale fell through, it ultimately suffered a $2 million loss on the hedges.

The Court found that because Choil had achieved a higher sale price to Blue Ocean than it would have achieved in the sale to Petrogal, Choil had suffered no loss.

As to hedging losses, however, the Court, citing *Addax*, found that Sahara would have been aware of the likelihood of Choil hedging as in this trade, hedging was an everyday occurrence. It was reasonable and expected for Choil to have hedged. As the hedge was taken out after the breach, it was attributable to a reasonable attempt in mitigation.

Finally, it is important to be aware of the decision in *Transpetrol Maritime Services v SJB (Marine Energy) ("The Rowan")* [2011] 2 Lloyd's Rep. 331. This was a tanker voyage charterparty dispute, and Charterers were themselves oil traders. There were deficiencies with the vessel which resulted in its loss of oil major approvals. This in turn caused Charterers to lose their onward sale of a cargo of vacuum gas oil onboard because their buyer had agreed to buy subject to those approvals being in place.

Charterers said if they had been able to sell the cargo as planned, they would have received around $2 million more than they ultimately received for the cargo. Charterers had not hedged at any point. Owners said that Charterers had failed to mitigate their losses by failing to hedge once they knew of the potential oil major approval difficulties.

As it happened, the type of hedging in this particular market was of a complex nature. The Court found that it was too imprecise a tool and saw no reason why the Charterers should have had to use it.

It appears that this decision was fact-specific; the type of hedging under discussion was clearly complex and highly speculative, which may well not be the case for more common cargoes.

The upshot of the above decisions is that courts appear to be increasingly willing to consider the affect of hedging on the assessment of damages, but the two key issues at play will be remoteness and causation.

In terms of remoteness, to date, hedging has only been found to be foreseeable as between traders in the same trade (*Addax, Choil and The Narmada Spirit*) and notably not as between shipowners and Charterers/cargo interests. However, where hedging was found to be too remote, in *The MSC Amsterdam*, it must be remembered that this was in the context of a container vessel carrying numerous different cargoes. It is perhaps understandable that shipowners cannot be expected to know the trading tendencies of the owners of numerous different types of cargo. It is questionable, though, whether the same conclusion would apply if the vessel were, say, a tanker. A tanker owner may be familiar with how oil trading works, or at least the likelihood of hedging taking place. This is yet to be put to the test in the courts.

A further point to note is that remoteness works both ways. On the one hand the shipowner may want to say hedging losses should not be taken into account because they are too remote (as in *The MSC Amsterdam*) but on the other hand if the shipowner wants to reduce a consignee's claim by relying on hedging gains, he will presumably need to show hedging was foreseeable at the time the contract of carriage or charterparty was agreed.

As to causation, it is fairly clear that hedging can only be relevant to the assessment of damages insofar as the loss or gain in question is attributable to the breach by the shipowner. In practice though it can be difficult for traders to show that a particular hedge is connected with the late or undelivered cargo because traders will sometimes keep a book of hedges covering numerous cargoes at once. As a result it can be difficult for a cargo owner to match a specific sale/purchase transaction with a specific hedging instrument, and thus to show that a shipowners' breach caused any particular hedging loss or gain.

In conclusion, hedging is a relatively new issue in shipping disputes. How it will develop remains to be seen but considering the potentially dramatic effect it can have on the value of claims for late or non-delivery it is certainly one to watch. ■

STS Transfer – Withholding Consent

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The Commercial Court decision in *Falkonera Shipping Company v Arcadia Energy PTE Ltd (The "Falkonera")* www.steamshipmutual.com/publications/Articles/Falkonera0613.htm has now been considered further by the Court of Appeal. The Commercial Court had concluded that Owners had no reasonable basis for withholding approval for the proposed STS transfers.

The "Falkonera" (the "*Vessel*") had been chartered to perform a single voyage to carry crude oil from the Yemen to "1-2 ports far east". The charter was on the terms of the BPVOY4 charter form with certain additions/amendments. Charterers chose to discharge at Pasir Gudang, Malaysia by way of STS transfer and had nominated two other very large crude carriers ("VLCCs") which they were using as floating storage units to receive cargo by way of STS transfers from the Vessel. Owners withheld approval of these vessels for the proposed STS transfer and the Vessel subsequently discharged into other smaller vessels.

Clause 8 of the charter provided as follows:

"8.1 Charterers shall have the option of transferring the whole or part of the cargo…to or from any other vessel including, but not limited to, an ocean-going vessel, barge and/or lighter (the "Transfer Vessel")…. All transfers of cargo to or from Transfer Vessels shall be carried out in accordance with the recommendations set out in the latest edition of the "ICS/OCIMF Ship to Ship Transfer Guide (Petroleum)". Owners undertake that the Vessel and her crew shall comply with such recommendations, and similarly Charterers undertake that the Transfer Vessel and her crew shall comply with such recommendations. Charterers shall provide and pay for all necessary equipment including suitable fenders and cargo hoses. Charterers shall have the right, at their expense, to appoint supervisory personnel to attend on board the Vessel, including a mooring master, to assist in such transfers of cargo."

The charter also contained a rider clause:

"sts lightering clause":

"(i) if Charterers require a ship-to-ship transfer operation or lightening by lightering barges to be performed then all tankers and/or lightering barges to be used in the transhipment/lightening shall be subject to prior approval of Owners, which not to be unreasonably withheld, and all relevant certificates must be valid.

(ii) all ship-to-ship transfer operations shall be conducted in accordance with the recommendations set out in the latest edition of the ics/ocimf ship-to-ship transfer guide (petroleum).

(iii) all such lightering ships must have a fully working inert gas system (igs), unless the cargo flash point exceeds 60f and only with express approval of the Owners/master."

"...although there might be some merit in the contention that a VLCC - VLCC transfer was 'non standard', it did not follow that the owners had acted reasonably in withholding their approval of the VLCCs."

The ICS/OCIMF Ship to Ship Transfer Guide referred to in both Clause 8.1 and the "sts lightering clause" was the 4th Edition (2005) of the publication.

Owners had argued before the Commercial Court that discharging the cargo of a VLCC by STS transfer into another VLCC of materially identical size is not a routine or standard operation, and therefore it was not unreasonable for them to refuse approval of the vessels nominated by Charterers, on the basis that they had concerns about the STS operation itself. On appeal Owners submitted that the point was well founded and that the Judge had been wrong to reject it.

The Court of Appeal agreed with the Judge's findings, and held that although there might be some merit in the contention that a VLCC-VLCC transfer was 'non-standard', it did not follow that the Owners had acted reasonably in withholding their approval of the VLCCs. The right to transfer was a right to transfer to any vessel, including a VLCC. The fact that the transfer could be regarded as non-standard was not of itself a reasonable ground for refusal. Owners must be taken to have contractually accepted risks attendant on any VLCC-VLCC transfer.

Owners were required to approve the vessel, and not the operation itself and the Judge was right to have dismissed Owners' argument that the OCIMF Guide, in its then form, made no mention of VLCC-VLCC transfers, and that such operations were therefore not permitted by that publication.

Owners have indicated that they will be applying to the Supreme Court for permission to appeal.

It is of note that a year or so after the first instance decision a new edition of the OCIMF Guide was published containing a section dealing with STS transfers involving vessels of a similar length. The Court of Appeal did not admit the new edition as evidence, but it is noted in postscript that the Court of Appeal regarded it as underscoring the Judge's decision that the previous version upon which Owners had relied, did not intend to outlaw VLCC-VLCC transfer. ■

Chapter 15 Bankruptcy in the U.S.

Holland & Knight Christopher R. Nolan

Owners, Charterers, bunker suppliers, or other creditors may hear the bad news from a P&I Club, an industry broker, the press – their contractual counterparty just filed for insolvency protection. A mad dash of information gathering and plotting ensues:

1. Confirm how in arrears the debtor is to you;

2. When does the time charter expire?; and most significantly

3. What are your rights?

Your rights and strategy moving forward depend largely on the type of bankruptcy relief sought by the debtor. For the purposes of this article, the focus is on a debtor filing for insolvency relief in a non-U.S. jurisdiction and then filing an ancillary bankruptcy proceeding in the U.S. Why is an ancillary proceeding in the U.S. necessary? Usually the debtor seeks to marshal assets under restraint in the U.S. or prevent arrests of its fleet. During the last year, the U.S. courts have issued important decisions concerning ancillary proceedings which impact the maritime industry significantly. Before addressing them, a short primer on Chapter 15 protection is necessary.

U.S. Ancillary to Foreign Bankruptcy Proceedings Overview

In 2005, the U.S. adopted the United Nations Commission on International Trade Law (UNCITRAL), Model Law of Cross-Border Insolvency. Under the law, a Chapter 15 proceeding is brought by a "foreign representative" who is typically appointed by the foreign court. The key consideration for the foreign proceeding's recognition in the U.S. (and typically in the New York bankruptcy courts where the overwhelming majority of admiralty proceedings are filed), is whether the foreign insolvency proceeding is a "main" or "non-main" proceeding.

If it is deemed a "main" proceeding by the U.S. court, because it is found to be the "center of main interest" or "COMI" of the debtor, then it is deemed "recognised" and it gains powerful leverage over creditors. Of particular import, an automatic stay is available for assets and actions that affect the debtor within the U.S. The broad range of relief also includes seeking turnover of assets, commencing actions based on foreign law against creditors in the U.S., obtaining discovery in the U.S. concerning assets, and the ability for the U.S. judge to communicate with the foreign "main" insolvency proceeding judge to confirm their actions are consistent.

U.S. bankruptcy judges will not rubber stamp foreign court decisions but it will show a proper level of deference using principles of comity (mutual recognition of the validity of the executive, legislative and judicial acts of another nation or jurisdiction out of courtesy). The average length of a Chapter 15 case varies greatly depending on the assets in the U.S., lawsuits already filed, or affirmative suits seeking assets brought by the foreign representative. The Chapter 15 proceeding will remain open until the foreign proceeding is concluded.

"The U.S. court upheld the well-established rule that arrests post foreign insolvency proceedings by pre U.S. ancillary Chapter 15 proceedings will be summarily vacated"

Important Rulings Impacting the Maritime Industry

During the last few years courts have clarified what factors should be considered to determine if a foreign proceeding is a "main" proceeding, the scope of lawsuits that can be brought by a foreign representative, whether Charterer's interests are protected in vessels owned another, and asset discovery that can be obtained from New York banks involving shipping interests.

a) COMI and shipping – why is recognition of a foreign insolvency proceeding easier?

Shipping companies are often incorporated in "offshore" jurisdictions such as the BVI and the Marshall Islands but operated from mainland jurisdictions. Where are these companies' centers of main interests (COMI)? Will foreign bankruptcy proceedings in such entities' jurisdiction of incorporation be recognised under Chapter 15? *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d. Cir. 2013), is a non-maritime case with important maritime implications which answered these questions. In Fairfield, the appellate court upheld the recognition of a BVI liquidation of a Connecticut-based Bernie Madoff feeder fund as a foreign main proceeding using a COMI analysis. The feeder fund was heavily dependent on Madoff securities and when his fraud was uncovered, the feeder fund was decimated. The feeder fund had registered offices and agents in the BVI but its decision makers were in New York. Ten shareholders sought the appointment of a liquidator in the BVI to marshal assets and the liquidator in turn sought Chapter 15 protection in New York while winding up matters in the BVI.

When a creditor opposed the Chapter 15 recognition arguing that the center of main interest was in New York because this is where the decision makers resided, the appellate court confirmed the proper analysis. It found that the correct question is whether, as of the date of the Chapter 15 filing in the U.S., the foreign debtor is being managed by a liquidator or court-appointed professional from the place of incorporation (the registered office), the assets of the company are under the control of the foreign proceeding and preferably located in the foreign-incorporation jurisdiction, and whether the creditors have looked to the foreign proceedings and place of incorporation to submit their claims. The Court found the BVI met these considerations and recognition was granted. For shipping purposes, the location of the submission of a claim is particularly notable. Take the Marshall Islands for example. It has no established insolvency rubric. U.S. based Delaware law is followed for corporate matters, but that does not address the full panoply of issues in an insolvency matter. For Marshall Islands shipping companies, the COMI analysis is more complicated and obtaining recognition in the U.S. for the Chapter 15 less assured.

b) Affirmative Use of Chapter 15 by Foreign Representative:

In *In re The Containership Company* (TCC), 466 B.R. 219 (2012), a New York bankruptcy judge explored the scope of a foreign representative's powers. TCC was a Danish liner service from a small port in China to Long Beach, California whose operations did not last a year. The foreign main proceedings were filed in Denmark and the Danish court-appointed trustee obtained Chapter 15 recognition in New York. It then filed 77 adversary proceedings against shippers alleging breaches of service contracts for failure to meet MQC in the Federal Maritime Commission ("FMC") approved contracts. Claims varied from as little as US$10,000 to over $1 million – $24 million in total claims was sought. The shippers filed a motion to have the suits transferred from the bankruptcy court to the FMC because they alleged in counterclaims that TCC committed violations of the U.S. Shipping Act of 1984 and said claims fell within the jurisdiction of the FMC. In the first decision of its kind, the bankruptcy court rejected the shippers' request and the claims proceeded in bankruptcy court. It is an important ruling to consider because it shows the tools a foreign representative can use to obtain monies for the foreign insolvency proceeding with the expectation of paying creditors of the now defunct shipping company.

c) Are chartered vessels "property" capable of protection under the U.S. Bankruptcy Code?

In July 2013, at least one bankruptcy Judge recently said "yes." In *In re STX Pan Ocean*, the foreign representative in the Chapter 15 proceeding successfully applied for a "stay" order that extended to STX's

chartered interest in vessels. The unpublished recognition order enjoined all persons from arresting or attaching any vessel that was owned, or under charter to STX Pan Ocean. The implications of a charterer obtaining the order are significant. If a third party has a claim against the Owner of the vessel or the cargo interests, it cannot simply arrest the vessel. The lien holder or Rule B attachment seeker would have to seek relief from the Court to lift the stay where the Charterer's interests would be assessed. So much for the element of surprise in a vessel arrest…

Separately, an important lesson was learned in this case by the parties that rushed to arrest STX vessels in the U.S. after the foreign insolvency proceeding was commenced. The U.S. court upheld the well-established rule that arrests post foreign insolvency proceedings by pre U.S. ancillary Chapter 15 proceedings will be summarily vacated. The arresting or attaching party will then be left with paying custodia legis fees for a failed vessel arrest. It is important to weigh these considerations with the P&I Club and counsel before undertaking an arrest because if the target company faces too many actions in the U.S., it will surely seek Chapter 15 recognition to eviscerate the vessel arrests.

d) New filing requirements in the U.S.

In *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), the appellate court limited the eligibility of foreign bankruptcy proceedings by requiring that the conditions of 11 U.S.C. s.109 were met for a foreign debtor. That is, the foreign debtor must have a place of business or property in the U.S. at the time of filing. Courts outside of New York have disagreed with the ruling and the U.S. Supreme Court may well have to decide the issue in the years to come.

The ruling has implications for the maritime industry because during the last few years, there have been a handful of Chapter 15 proceedings filed primarily for the purposes of obtaining discovery in the U.S. A benefit is the foreign representative, through subpoenas of New York banks which acted as intermediaries of wire transfers, can trace the activities of the debtor to discern if fraudulent transfers were made to shell companies which could then be clawed back against said recipients of those transfers. The other important issue from this ruling is it calls into question the concept of preemptive Chapter 15 filings. Unless property is transferred or is already located in the U.S., the debtor may well need to wait until one of its ships is arrested or attached to be eligible for Chapter 15 relief, including the important automatic stay.

In sum, the insolvency practice in the U.S. is busier than it has ever been. This is a reflection of the global economy and the tightening of asset bases to prop up wobbly shipping companies. There are a number of considerations a soon-to-be-debtor or creditor of the debtor must undertake based largely on the contractual relationships in place and these recent decisions address some of these critical issues to address with counsel. ■

Anticipatory Breach and Third Party Conduct

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The "Bulk Uruguay" was chartered by disponent Owners, Geden Operations Ltd, to Charterers, Dry Bulk Handy Holdings Inc, on an amended NYPE charterparty, which contained a Conwartime 2004 clause and an amended BIMCO Piracy clause. The latter had been specifically amended by deletion of paragraphs (a) and (b), so that the vessel could transit the Gulf of Aden without disponent Owners' consent.

Disponent Owners were aware that this 'GOA OK' status was of significance to the Charterers in fixing business for the vessel. Under the terms of the head charter, however, disponent Owners required the consent of the head Owners for such GOA transit.

At the time the charterparty was concluded the vessel was still under construction in the Philippines. When the vessel was about to be delivered, Charterers informed disponent Owners that the vessel's maiden voyage from the Philippines to the Atlantic would be via the Gulf of Aden, and enquired as to the amount of additional premium that would be payable. Disponent Owners sought the permission of head Owners who, having initially refused permission for the GOA transit, subsequently granted permission but stressed that this would be a 'one-off' permission and would not form a precedent for future voyages. Disponent Owners asserted that the charterparty terms required their permission to transit GOA, and advised Charterers that their position in relation to giving permission would be dictated by the position taken by head Owners.

Charterers took the position that disponent Owners' insistence that prior consent would have to be obtained on each occasion was a repudiatory breach, which they purported to accept as terminating the charterparty. In their turn disponent Owners accepted the Charterers' purported termination as a repudiatory breach, and brought a claim for damages.

At arbitration a majority of the tribunal held that on its true construction, the Geden / Dry Bulk charterparty did not make GOA transit subject to disponent Owners' consent. In asserting that permission to transit GOA was subject to the position of head Owners, it did not follow that disponent Owners had thereby evinced an intention not to perform their obligations under the charterparty, nor were Charterers substantially deprived of the whole benefit of the contract. Disponent Owners were not in anticipatory breach, Charterers were not entitled to terminate, and Charterers' purported termination was itself a repudiation which had been accepted by disponent Owners, entitling them to damages of over US$6.5 million.

The Charterers appealed. Popplewell J had to consider the correct test for anticipatory breach by renunciation in a situation where a party makes it clear that its ability to perform is wholly dependent on the actions of an independent third party. The two questions which the Judge had to consider were:

a) Did disponent Owners by their words or conduct evince an intention not to perform, or expressly declare that they would be unable to perform, their obligations under the charterparty?

b) If so, did such refusal have the effect of substantially depriving the Charterers of the whole benefit which it was the intention of the parties they should obtain from the contract?

The Judge held that there is no principle of law that a party who has made his performance dependent on a discretion to be exercised by a third party is deemed to be evincing an intention not to perform. He rejected Charterers' submissions that, by the very fact of not being back-to-back, disponent Owners had put it out of their power to perform the charterparty, and had thereby evinced an intention not to perform. The correct test, he held, involved assessing the likelihood of whether or not head Owners would give consent. The arbitration tribunal had concluded that head Owners might or might not refuse an order to transit GOA, and that disponent Owners had not renounced the contract. As this was a finding of fact, Charterers' appeal under s.69 of the Arbitration Act was dismissed.

Since question (a) was answered in the negative, the Judge did not have to decide question (b), but he did observe briefly that the findings of the majority of the tribunal supported the factual conclusion that Charterers had not been deprived of substantially the whole benefit of the charterparty. ■

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"The Judge held that there is no principle of law that a party who has made his performance dependent on a discretion to be exercised by a third party is deemed to be evincing an intention not to perform."

"In order for a benefit to be taken into account in reducing the loss… it is generally speaking necessary that the benefit is caused by the breach."

Keeping the Benefits of a Breach

Eric Eyo

This Commercial Court case explores the extent to which a party is required to mitigate its loss as a matter of contract law following the repudiation of a charterparty. The Court held that the Owners of the M/V "New Flamenco" (the "Vessel") were not required to give the Charterers any credit for the benefit in realising the capital value of the Vessel in October 2007 (upon early redelivery in breach of charterparty) vis-à-vis the originally negotiated redelivery date of (up to) November 2009.

Fulton Shipping Inc ("Owners") bought the Vessel (a small cruise ship, built in 1972) from her former Owners in March 2005 and purportedly entered into a novation agreement with Globalia Business Travels S.A.U. ("Charterers"), under which they

(i) assumed the rights and liabilities of her former Owners under the relevant NYPE form of charterparty; and

(ii) extended the charter period by two years (to October 2009).

Charterers disputed that such agreement had been reached and redelivered the Vessel in October 2007.

In arbitration, the Tribunal found that an agreement to extend the charter had indeed been reached and had to decide how to calculate damages in respect of Charterers' breach for early redelivery.

The Vessel was redelivered on 28 October 2007 and, shortly before that date, the Owners entered into a Memorandum of Agreement for sale of the Vessel for US$23,765,000. Whereas had the Vessel been sold when she should have been redelivered the price that would have been realised would have been substantially less (approximately $7 million) because the market had fallen between 2007 and 2009.

The Owners advanced their claim for damages for early redelivery by reference to the net loss of profits which they alleged they would have earned during the additional two year extension. Such profits were detailed in a schedule:

(i) identifying the revenue which would have been earned under the charterparty; and

(ii) giving credit for the costs and expenses which would have been incurred in operating the Vessel in providing the charterparty service for those two years, but which had been saved as a result of the sale of the Vessel. The amount claimed was EUR7,600,000 (approximately $10.3 million).

Charterers had argued that the sale was by way of mitigation of Owners' loss and that Charterers were entitled to benefit from that mitigation.

Owners initially submitted that they were entitled to damages for a net loss of profit over the additional two years, less expenditure saved, and they should only be required to reduce their claim to take into account the would-be reduction on the re-sale value of the Vessel in 2009. In an "about-turn", Owners later sought to argue that actually the drop in the shipping market between 2007 and 2009 was irrelevant to the assessment of damages. Owners tried to retract their claim submission to the effect that credit should be given to the Charterers to take into account the would-be reduction on the re-sale value of the Vessel in 2009 but this was refused by the Tribunal.

The tribunal held that Charterers were in fact entitled to a credit, taking into account the difference between the value of the Vessel in 2007 vis-à-vis 2009. This credit amounted to €11,251,677 (approximately US$16.8 million). The effect of this on Owners claim was that it was reduced to less than zero. Owners appealed the decision of the Tribunal.

The Commercial Court

The issue for determination was whether Owners had to give credit for the capital value, having sold the Vessel upon repudiation in 2007 for a greater sum than the value of the Vessel upon the charterparty redelivery date (2009).

In essence, *Owners argued*:

- The benefit enjoyed by Charterers (i) arising out of the breach; and (ii) out of mitigation, could only be taken into account if it was the same *kind* of loss as that being claimed by Owners;
- In the above regard, capital value of the Vessel was separate and quite distinct from the loss of an income stream;
- Alternatively, mitigation could not apply to the exercise of rights obtained by Owners for their own benefit and prior to the breach (i.e. Owners' pre-existing proprietary rights); and
- Alternatively, the benefit was not sufficiently causally linked to the breach.

The Commercial Court (Popplewell J) agreed with Owners. The benefit obtained by Owners through selling the Vessel earlier than her contractual re-delivery date should not be taken into account because it was not a benefit which was legally caused by the breach:

1. The difference in the value of the Vessel was not caused by Charterers' breach. Owners' decision to sell the Vessel was theirs to make and a purely commercial consideration.
2. Owners' decision to sell the Vessel was causative of the capital benefit and it did not matter that this flowed from a mitigating step.
3. The difference in the sale prices of the Vessel was indicative of the fact that the benefit was not legally caused by Charterers' breach.
4. The sale of the Vessel was the type of transaction which it was open to Owners to enter into, irrespective of Charterers' breach of charterparty. Any profit subsequently realised could not therefore be taken into account.
5. It was the contractual right to an income stream which was lost, vis-à-vis the change in capital value of the Vessel.
6. Allowing Charterers to take the benefit of Owners' decision to sell the Vessel would be tantamount to allowing Charterers to reap the reward of Owners' investment in a way that would be unjust.
7. The arbitrator had applied the law incorrectly.

Appeal

Charterers have been granted permission to appeal this matter to the Court of Appeal.

In granting this permission, Popplewell J admitted that the law in this area could benefit from being tested "*with a sharper and clearer focus*".

It is noteworthy that Popplewell J did not consider other cases such as *The Kildare* [2011] 2 LLR and *The Wren* [2011] 2 LLR which appear at odds with his decision. These cases appear to suggest that where benefits are derived from subsequent transactions concluded by the Owners of a vessel following a repudiated charter, they are to be taken into account to reduce the damages award. ■

Preservation of Rights to Contribution and/or Indemnity

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The preservation of rights to contribution and/or indemnity from a non-settling tortfeasor is an important issue for vessel Owners to consider when drafting a release which is intended to be used to bind settlement between them and a plaintiff.

The principles have previously been established in the case of *McDermott, Inc, v AmClyde* and were again commented on in the recent case of *Savchenko v Icicle Seafoods, Inc.*, 2013 U.S. Dist. LEXIS 156946 (W.D. WA 2013).

By way of background, in September 2010, and while employed by Icicle Seafoods, the plaintiff, Paul Aaron Savchenko, was injured when a board covering a storage hold broke causing him to fall some eight feet to the floor of the hold.

Subsequently, in 2012, the injury the plaintiff suffered flared up, but at that time he was no longer employed by Icicle Seafoods. Savchenko pursued a claim for damages against Icicle who ultimately agreed to settle the plaintiff's claim for US$450,000. Crucially, Savchenko's subsequent employer (Kari Marie) was not a party to the global settlement and release of all claims.

Having settled the claim of Savchenko, Icicle then proceeded to file suit against Kari Marie for contribution and indemnity. The Court dismissed the claim.

The reasoning behind the Court's decision was due to Icicle failing to obtain a full release from the plaintiff Savchenko, who had not released his claims against any other potential tortfeasors. Accordingly, Savchenko could still sue Kari Marie who, as a consequence, would be exposed to a risk of liability to both Savchenko and Icicle Seafoods.

Previously the Supreme Court had ruled that, in the maritime context, where a party settles with a plaintiff that plaintiff can still sue another tortfeasor for additional damages. Any additional damages recovered would though be reduced by the settling defendant's proportionate share of fault.

So, by way of example, the first defendant may agree to settle with the claimant at $250,000 but the second defendant will not settle and (i) subsequently liability is split equally between the two defendants, and (ii) damages are assessed at $5 million. The non-settling defendant is only liable to pay $2.5 million to the claimant while the first defendant has no additional exposure having already settled at $250,000. Of course things can go the other way and, had the judgment been for $100,000, the first defendant would not be entitled to recover the $250,000 that they had previously agreed to pay and the claimant would still receive $50,000 from the non-settling defendant.

Multiple circuits in the United States have held that a settling defendant may not sue a non-settling defendant for contribution and indemnity if they have not obtained a release of all claims by the plaintiff against that non-settling defendant. In the Icicle case it was held that because Kari Marie were not included in the release then all that Icicle had achieved via the settlement was to extinguish only its own proportionate share of the claim.

This case serves as a very useful reminder to vessel Owners that they should always take care when considering what parties to include within a release. A further significant factor will also be the jurisdiction in which any such claim for an indemnity or contribution is to be pursued. ■

"…the problem is exacerbated by the provenance of the samples collected… It is widely accepted that sampling should be carried out using automatic samplers or continuous in-line drip sampling equipment."

Bunkering and Evidence

Steve Findlay

There are many in the shipping and bunkering industries who maintain that the quality of bunker fuels remains as good now as it did five or ten years ago. This, perhaps unsurprisingly, is generally the view of bunker suppliers. On the other hand, the position maintained by shipowners and Charterers is that the quality of the fuels delivered is deteriorating and as a consequence the number of bunker quality claims is increasing. Indeed, this also seems to be the view of at least one particular fuel analysis laboratory who say around 3-5% of all samples are found to be 'off-spec'.

In the case of a significant proportion of bunker quality disputes, the problem is exacerbated by the provenance of the samples collected during the bunkering process. It is widely accepted that sampling should be carried out using automatic samplers or continuous in-line drip sampling equipment. More often than not these days, continuous in-line drip sampling is the method used onboard ships. However, problems arise when ship's staff insist on taking samples at the ship's manifold, whilst barge staff insist that the samples are collected at the barge manifold.

ISO 8217:2010(E) (and 2012) states at Para 4: Sampling:

"The sampling of petroleum fuels for analysis shall be carried out in accordance with the procedures given in ISO 13739 or an equivalent national standard. Where specific requirements are documented in the referenced test methods, these shall be adhered to."

ISO 13739 states at s.9.2.2:

"A single sample shall be drawn continuously throughout the delivery, from either end of the bunker hose, using an automatic sampler or a continuous drip sampling device (see Annex M). The guidelines for the sampling of fuel oil for compliance with Annex VI of MARPOL 73/78 are for the sample to be drawn by the Cargo Officer, using a sampling device at the receiving vessel's inlet bunker manifold. It is recommended that the commercial sample and the MARPOL sample be derived from this single sample."

It would seem that ISO 13739 may be a little ambiguous in that, on one hand it states that the sample should be collected from either end of the bunker hose, i.e. either at the barge manifold or the ship's manifold, yet reference is made to Annex VI of MARPOL which expressly states that the sample should be collected at the ship's manifold. Little wonder ship's staff and shipowners are often confused as to where the samples should be collected. The matter is further compounded by the fact that Singapore Bunkering Procedure CP60:1996 and Code of Practise for Bunkering SS600:2008 states:

"Custody transfer sampling shall apply to all bunker deliveries based on FOB terms in the Port of Singapore. The custody transfer sample shall be taken at the manifold of the receiving vessel. Should disputes arise; the custody transfer sample shall be the official sample for ascertaining the quality of the bunkers delivered."

To make the situation more difficult, in many ports, neither the barge staff nor ship's staff are permitted to physically transfer from one vessel to another and at Gibraltar the samples have to be taken at the barge for safety reasons. Add factors such as weather and sea conditions, or the general difficulty in gaining access from the barge and the ship or vice versa, the matter becomes an almost impossible situation to overcome and this creates a plethora of difficulties when the quality of the bunkers is questioned.

ISO 8217:2010(E) expressly states:

"The fuel shall be a homogenous blend of hydrocarbons derived from petroleum refining."

In other words, the fuel delivered at the commencement of the bunkering operation should be exactly the same as the fuel delivered mid-way through and at the end of the operation. However, that is not always the case as frequently the fuel within a barge may be stored within different tanks or perhaps the fuel has been allowed to settle over a period of time before the commencement of the bunkering operation. Accordingly fuel drawn initially may be rich in heavier elements; aluminium and silicon, or water perhaps. If the Chief Engineer has arranged to bunker to a number of tanks sequentially then it is possible that the fuel in the tank filled initially, will have completely different characteristics to the fuel in the tank filled towards the end of the bunkering operation. However, continuous in-line drip sampling would not have shown the different characteristics of the fuels. If performed correctly, the drip should have remained at a constant rate throughout the bunkering operation and the sample collected within the cubitainer

would have simply been an average sample of the entire quantity. The Chief Engineer, once the average sample has been analysed and shown to have satisfactory results, may then decide to start consuming the fuel that was bunkered to the first tank i.e. the tank that could possibly have contained fuel with greater aluminium and silicon or water perhaps than the fuel in the final tank to be bunkered. Damage to the main and auxiliary machinery may be sustained as a consequence of the fuel quality, but, the 'average' samples collected during bunkering, whether from the ship's manifold or at the barge, show that the fuel is entirely satisfactory. The suppliers simply refute any claims concerning the quality of the fuel delivered whilst the shipowner pursues a claim against the Charterer. All the Charterer did was hire the vessel and purchase a quantity of fuel in good faith, yet more often than not, the Charterer is burdened through no fault of his own.

Occasionally, when samples are taken by continuous in-line drip sampling methods, errors occur with the drip rate. The theory behind continuous in-line drip sampling is to arrange that the drip of fuel into the sample container (cubitainer) remains perfectly consistent throughout the entire bunkering operation. However, often the drip is too rapid and therefore additional cubitainers are required. Ship's staff may just use one cubitainer and when they realise that after one hour of a four hour bunkering operation the cubitainer is half full they then close the valve slightly so that the remaining half of the cubitainer can be filled over the remaining three hours of the bunkering operation. Similarly, it is often the case that after three hours of bunkering, ship's staff suddenly realise that the cubitainer is only half full and therefore the valve is opened and the drip increased so that the cubitainer is full at the end of the bunkering operation and there is sufficient fuel to be decanted into the four or five smaller sample bottles.

Such errors often result in disputes concerning quality as samples collected, which are not 'average' samples, may show characteristics which deem the fuel to be out of specification. Essentially, whilst the 'average' fuel may have been within specification, the sampling errors often reveal that the fuel has been delivered in a non-homogenous condition. If the fuel had been pumped to tanks sequentially there would be a risk that the fuel in one tank would have very different characteristics from another. Even if the fuel was pumped to just one or two tanks, if it was delivered as a non-homogenous product, the fuel in those tanks would be non-homogenous. If so, difficulties may be encountered treating the fuel, or worse, machinery damage may occur.

With the progressive reduction in sulphur and the apparent corresponding increase in aluminium and silicon, it is likely that the quality of fuels delivered to ships will continue to deteriorate. Correct sampling of fuels at delivery is critical. The difficulty with continuous in-line drip sampling, whether at the barge or at the ship's manifold is that even if performed correctly it will not determine whether the fuel has been delivered as a fully homogenous product. ■

Singapore and Supporting Arbitration

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On 19 December 2013 the Singapore High Court handed down an important judgment in *Titan Unity* [2013] SGHCR 28, which affirmed the Court's commitment and support for arbitral proceedings. On 4 February 2014, in a subsequent decision, *Titan Unity 2* [2014] SGHCR 04 the Court handed down a judgment in which it re-affirmed its support for arbitral proceedings and provided important guidance on when a party can be joined to an arbitration.

Both cases arose out of the same enterprise and concerned two separate applications to stay Singapore Court proceedings, pursuant to the International Arbitration Act (Cap 143A) (the 'IAA').

In *Titan Unity* the Court addressed the threshold to be applied by the Court in determining the existence of an arbitration agreement for the purposes of a stay. The judgment also provided some guidance on the incorporation of charterparties and arbitration agreements into bills of lading.

In *Titan Unity 2* the Court addressed the issue of when a party can be joined to arbitration and gave some important guidance on the approach adopted by the Singapore Courts when considering the issue.

Titan Unity

Brief Facts

The plaintiff, Portigon AG ('Portigon') was a German bank providing trade finance facilities for oil trading to Onsys Energy Pte Ltd ('Onsys'). Portigon alleged that it had taken certain bills of lading as security and that it was the lawful holder of the bills for a cargo with a value of around US$3,700,000 carried onboard the vessel "Titan Unity".

Portigon alleged that the cargo was misdelivered, having been delivered to third parties without presentation of the bills of lading. Portigon commenced Singapore Court proceedings and arrested the vessel as security for its claims.

The demise Charterers, Oceanic Shipping Pte Ltd ('Oceanic'), applied for a stay of the Singapore Court proceedings in favour of Singapore arbitration, pursuant to s.6 of the IAA, set out below:

"*Enforcement of international arbitration agreement 6.*

(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that Court to stay the proceedings so far as the proceedings relate to that matter.

(2) The Court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

Oceanic submitted that the bills of lading incorporated an arbitration clause by express wording on the face of the bills as follows:

"*…Assigns he or they paying freight for the same as per Governing Charter Party dated – at – all the terms and exceptions contained in which Charter are herewith incorporated, including the arbitration clause… The name and place for arbitration is available upon request from the carrier…* "

Portigon argued that the proceedings against Oceanic should not be stayed because, *inter alia*, the arbitration clause had not been incorporated ('dashes' having been inserted instead of the date of the charterparty) and because the registered Owners of the vessel (not Oceanic) were the contractual carriers under the bills.

Oceanic argued that the Court should limit its determination as to whether an arbitration agreement existed between the parties to a *prima facie* level (i.e. whether on the face of it an agreement existed) and, if, on that basis the Court concluded that there was an arbitration agreement, then the matter should be referred to the tribunal to decide if the arbitration agreement was valid and binding. Portigon, on the other hand, argued that the Court should conduct a full review of the evidence to determine, on a balance of probabilities, whether an arbitration agreement existed.

The Court stated that any application to stay court proceedings in favour of arbitration must satisfy two pre-conditions, being that:

1. There exists a state of affairs to support the finding of an arbitration agreement; and
2. The proceedings which are brought fall within the scope of the arbitration agreement.

The Court confirmed that a stay must be granted if those two pre-conditions were met unless (pursuant to s.6(2) of the IAA) the Court was satisfied that the arbitration agreement was invalid in so far as it was "*null and void, inoperative or incapable of being performed*".

The dispute between the parties clearly fell within the scope of the arbitration agreement and the validity of the agreement was not in question. The issue for the Court was whether an arbitration agreement existed and how far the Court was obliged to go to ascertain this.

The Court considered authorities from Hong Kong, Canada and India (which have all given the UNCITRAL Model law the force of law), where the approach taken in general has been to adopt a *prima facie* determination of the existence of an arbitration agreement.

Having heard all of the parties' arguments and on the basis of its analysis (set out in detail in the judgment) the Court decided that it was only required to determine the existence of an arbitration agreement between the parties on a *prima facie* level for the purposes of establishing the first pre-condition under s.6(1) of the IAA (i.e. that there exists a state of affairs to support the finding of an arbitration agreement). The Court confirmed that this pre-condition would be met in all but the clearest and most obvious of cases.

Policy Considerations
For the reasons given in detail in the judgment, it is also clear that the Court was conscious that it should protect the tribunal's function as first arbiter of its own jurisdiction in accordance with the principle of *Kompetenz-Kompetenz* and that if it did not do so, this could open the door to dilatory tactics by unscrupulous litigants seeking to circumvent arbitration agreements.

Portigon had filed a cross-application requesting the Court to exercise its discretion under s.6 and 7 of the Arbitration Act (Cap 143) ('AA') to either refuse the application to stay the proceedings or otherwise to order a stay subject to certain conditions. In particular, the plaintiff requested that the Court impose conditions obliging Oceanic to waive the Hague-Visby Article III time bar defence.

The Court took the view that the proper tribunal to determine any time bar defence would be the tribunal and not the Court. In particular, the Court stated:

"*If the arbitral tribunal decided that it has jurisdiction to determine the dispute, the plaintiff can place the very same arguments before the arbitral tribunal for its consideration …. It is not for the courts to pick and determine what issues should be placed before the arbitral tribunal by way of imposing conditions to a stay of court proceedings where parties have already consented to refer their dispute to arbitration … A party to an arbitration agreement will not be allowed a backdoor way of obviating the limited scope of the court's review of an arbitral award … by cherry picking the issues which may be placed before the arbitral tribunal via a conditional stay of court proceedings.*"

Titan Unity 2

Brief Facts
Singapore Tankers Pte Ltd ("STPL"), the Owners of the "Titan Unity", entered into a demise charterparty with Oceanic Shipping Pte Ltd ("Oceanic") which in turn entered into a time charterparty with Onsys Energy Pte Ltd ("Onsys").

Portigon, the holder of the relevant bills of lading, commenced an action against STPL and Onsys for mis-delivery of cargo and succeeded in obtaining an order for the arrest of the vessel.

STPL argued that the action should be struck out or set aside as the claim was time-barred pursuant to Article III rule 6 of the Hague-Visby Rules because no competent suit had been brought within 12 months of the alleged mis-delivery of the cargo. STPL argued the Hague-Visby Rules were applicable to the bills of lading and the competent suit was arbitration as per the arbitration agreement between Portigon and Oceanic (held by the Court in *Titan Unity* where the action had been stayed in favour of arbitration).

Portigon argued that STPL was the contractual carrier of the bills which did not contain an arbitration clause as the charterparty had not been incorporated into the bills.

The Court rejected STPL's argument that the action should be struck out and refused to release the vessel. The court did however consider whether or not STPL should be joined to the arbitration between Portigon and Oceanic.

Policy Considerations
The Court found that STPL was trying to avail itself of the benefit of the arbitration agreement between Portigon and Oceanic to take advantage of the time-bar defence while not submitting itself to the arbitration jurisdiction. It also found that the very basis of Portigon's cause of action was found in the contract which contained the arbitration agreement. As such, the Court found that both Portigon and STPL had by their conduct impliedly consented to be party to the arbitration agreement contained in the Portigon contract with Oceanic.

The Court was wary of compelling STPL to be joined to the arbitration without its and Portigon's express consent because of the requirement for a written agreement under the IIA, Model Law and the New York Convention.

However, it did note that the parties to the arbitration agreement, Portigon and Oceanic, had expressly agreed upon a mechanism to join a party under Rule 32.2 of the SCMA Rules. As such, the Court indicated that it "*should defer any views it has on the parties' implied consent to joinder, the arbitration tribunal's determination of its own jurisdiction pursuant to that mechanism… if party autonomy is to be respected, and this would be consistent with the principal of Kompetenz –Kompetenz.*"

Before inviting argument on costs, the Court suggested that STPL might want to consider agreeing to be joined to the arbitral process and reminded the parties of the procedural and cost efficiencies that might be gained by a joinder.

Conclusion

These two judgments provide important guidance for litigants as to how the Singapore Courts will determine the existence of arbitration agreements for the purposes of stay applications as well as an insight into the Court's approach when considering whether a party has consented to be joined to an arbitration.

More importantly, both judgments reaffirm Singapore's commitment to support arbitral proceedings and to require parties who have agreed to submit their disputes to arbitration to do just that. ■

Part 36 Offers and Caution

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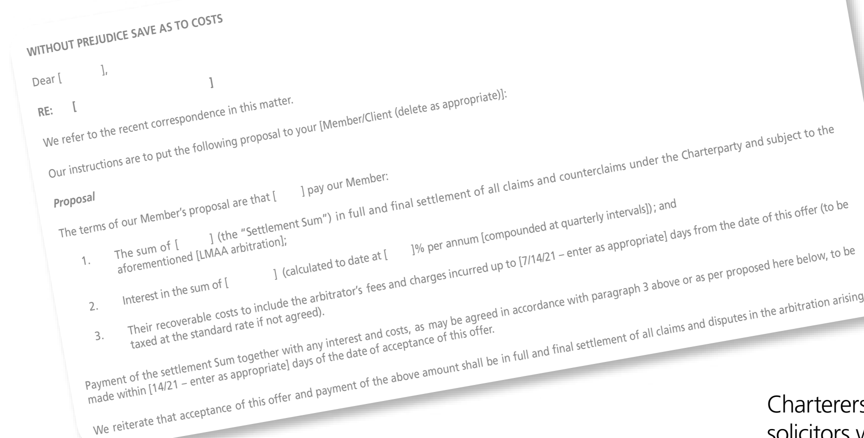
The Court of Appeal recently gave a useful reminder of the purpose of Part 36 of the English Civil Procedural Rules (CPR) [2011] EWCA Civ 80 in the case of *Walsh v Singh*, when Lady Justice Arden commented that "*the court must bear in mind the purpose of CPR 36 which is to motivate parties to make, and to accept, appropriate offers of settlement*".[1]

There is no doubt that a well-judged Part 36 offer can be a useful litigation device with which to apply pressure to an opponent to settle a case while, to some extent, at the same time protecting the party making that offer from exposure to the recoverable costs of the other party.



WITHOUT PREJUDICE SAVE AS TO COSTS

Dear [ ],

RE: [ ]

We refer to the recent correspondence in this matter.

Our instructions are to put the following proposal to your [Member/Client (delete as appropriate)]:

Proposal

The terms of our Member's proposal are that [ ] pay our Member:

1. The sum of [ ] (the "Settlement Sum") in full and final settlement of all claims and counterclaims under the Charterparty and subject to the aforementioned [LMAA arbitration];
2. Interest in the sum of [ ] (calculated to date at [ ]% per annum [compounded at quarterly intervals]); and
3. Their recoverable costs to include the arbitrator's fees and charges incurred up to [7/14/21 – enter as appropriate] days from the date of this offer (to be taxed at the standard rate if not agreed).

Payment of the settlement Sum together with any interest and costs, as may be agreed in accordance with paragraph 3 above or as per proposed here below, to be made within [14/21 – enter as appropriate] days of the date of acceptance of this offer.

We reiterate that acceptance of this offer and payment of the above amount shall be in full and final settlement of all claims and disputes in the arbitration arising

The procedure for making a valid Part 36 offer, and the consequences of doing so, are set out in the Civil Procedure Rules ("CPR"). In proceedings governed by the Arbitration Act 1996, unless the parties agree otherwise, the tribunal will, in accordance with their discretionary powers under s.61 of the Arbitration Act 1996, award costs and fees on the general principle that they "follow the event". In other words, costs will normally be awarded to the successful party. This does not of course mean that a successful party will recover all of its costs – only those costs that are either agreed between the parties to be payable or, failing such an agreement, that are awarded by the tribunal.

However, the CPR does not apply mandatorily to arbitration proceedings and the question in the recent decision in London Arbitration 17/13 was in what circumstances could a Part 36 offer apply, and if it did how was this to be reconciled with the common law principles of offer and acceptance (or in this case counter and revised offers).

London Arbitration 17/13

The parties were in dispute about the balance of an account, including which party should bear the cost of delays for hold cleaning. Owners claimed US$365,000 from Charterers who denied liability and counterclaimed $30,000.

The tribunal was asked to deal with the preliminary issue of whether (or not) the disputes had already been compromised by correspondence passing between the parties solicitors.

On 22 November 2010, Charterers' solicitors sent a fax to Owners' solicitors stating "*The purpose of this fax is to make a sealed offer on a without prejudice save as to costs' basis*". This offer also stated that it would be analogous, so far as possible, to a Part 36 offer under the CPR and was open for acceptance for a period of 21 days and would expire and "*irrevocably lapse*" at "*16:30 hrs (GMT) Monday, 30 December 2010*".

On 16 December 2010 Owners' solicitors responded by email rejecting the offer and disputing that it was in any event an effective Part 36 offer since it was expressed to be open for acceptance for a limited period of time. In the same email, Owners put forward a Part 36 offer which in contrast did not have an expiry date.

Between January 2011 and May 2011 there were exchanges between the parties and further offers and counter-offers were made. Finally, on 6 June 2011 Charterers' solicitors sent the following fax to Owners' solicitors, "*Notice of Acceptance of Claimants' Part 36 Offer….We write with reference to your letter of 16 December 2010 and…confirm that our clients accepts your clients' offer to accept $320,000 inclusive of interest plus costs to be assessed on an indemnity basis in full and final settlement of the claims*". Charterers made payment on 16 June 2011. Owners' solicitors wrote to Charterers' solicitors on the same day

stating that Charterers had rejected Owners' offer of 16 December 2011 and therefore Owners were not obliged to offer a discount on their total claim.

The matter proceeded to arbitration, where Charterers maintained that Owners had offered to accept $320,000 inclusive of interest in settlement of the charterparty dispute, that they had agreed to pay that amount and had indeed paid it in full and final settlement of the Owners' claims advanced against them.

Owners' case was that their offer to accept $320,000 inclusive of interest had been rejected and was therefore no longer available to be accepted at the time when the Charterers purported to accept it and made a payment in that amount.

The tribunal held that Part 36 offers could only apply to arbitration proceedings if the parties agreed that the Part 36 regime should apply. They considered that if the offer of $320,000 in full and final settlement was analysed on the basis of common law principles of offer and acceptance, the offer to accept $320,000 in full and final settlement was no longer available by the time the Charterers sought to accept it because there had been intervening offers and counter offers. A counter offer is a rejection of a prior offer. However, the tribunal held that as a matter of commercial reality there was, implicitly, an acceptance by the conduct of the parties in the offer of 22 November 2010 and the response of 16 December 2010 that the Part 36 regime should be applicable to the proceedings. Accordingly, they held that the offer to accept was subject to the rule governing Part 36 offers, which is that an offer must remain open indefinitely for acceptance until withdrawn – i.e. unless or until "*the offeror serves notice of withdrawal on the offeree*". As such, notwithstanding that there had been further offers and counter offers in the intervening period, on the 6 June 2011 when Charterers accepted the 16 December 2010 offer, and by payment of the sum Owners offered to accept, Charterers had settled the claim.

Accordingly, it is worth remembering that it is open to parties in arbitral proceedings to make offers that are intended to be analogous to a Part 36 offer under the CPR. However, to give effect to such an offer, tribunals would need to identify an agreement to apply CPR 36. If there is such an agreement and Part 36 offers are made it is also worth remembering that, insofar as there are any subsequent counter offers, the common law principles of offer and acceptance do not apply to that Part 36 offer – so that, unless or until withdrawn, the recipient of the Part 36 offer can accept that offer notwithstanding any subsequent counter offer. For a more detailed overview of the latest developments regarding Part 36 offers please see www.steamshipmutual.com/publications/Articles/Part36Thewlis0212.htm ■

[1] For a discussion of the mechanics of Part 36 offers see http://www.steamshipmutual.com/publications/Articles/Part360211.htm

"…the failure to unload within the laydays specified in the sale contract was an omission or default that occurred in the course of performing the obligation to discharge as delegated."

Acts of Delegates & Off-Hire

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The decision in *NYK Bulkship (Atlantic) NV v Cargill International SA* (*The Global Santosh*) was discussed in issue 21 of Sea Venture, www.steamshipmutual.com/GlobalSantosh0613.htm. That decision has now been appealed.

The case concerned the construction of a familiar additional off-hire clause providing for hire to be suspended for any period during which the vessel is arrested or detained; "*unless such… arrest is occasioned by any personal act or omission or default of the Charterers or their agents…*".

Mr Justice Field held that the reference to "agents" in the off-hire clause was not limited to those parties who had been directly instructed by the Charterers (in this case Cargill), but extended to sub-Charterers, sub-sub Charterers or receivers to whom the Charterers, by sub-letting the vessel had delegated or sub-delegated the performance of their obligations under the charter. However, that the act, omission or default had to occur in the performance of the delegated task.

Field J went on to find that IBG, the buyers of the cargo, were Cargill's delegate in respect of the obligation to unload cargo under clause 8 of the NYPE charter and that the failure to unload within the laydays specified in the sale contract was an omission or default that occurred in the course of performing the obligation to discharge as delegated. As such, the vessel remained on hire.

Field J's judgment attracted market comment for its finding that failure to unload the cargo within the laydays specified in a sale contract was a relevant delegated act under clause 8 of the timecharter. That decision has now been reviewed by the Court of Appeal.

The Court of Appeal has confirmed that the term "agents" as used within the off-hire clause is not to be limited to agents strictly so-called and that delegates of the Charterers could be agents for the purposes of the proviso. However, in a departure from the Commercial Court's reasoning, it held that where a party was a delegate of the Charterer flowing from the sub-letting of the vessel, then they remain a delegate for the purposes of the proviso regardless of the legal nature of the act or omission. Not every act or omission of the delegate will, or need be, in the course of performance of the delegated task.

In this case, the Court recognised that Cargill was under no obligation to discharge the vessel in any given time, however held that the dispute in question arose out of its trading arrangements concerning the vessel and fell on the Charterers' "side of the line". This, the Court considered, 'gives effect to the familiar division between Owners' and Charterers' spheres of responsibility'.

The decision not only widens the scope of the proviso to this frequently-met off-hire clause but may also have implications for other common charterparty clauses which include references to the parties or their agents. ■

Costs Exposure in Charterparty Chain

Matthew Montgomery

The Club regularly advises Members who find themselves in the middle of a charter chain in which a dispute has arisen. This topic has been addressed in previous articles – see 'Charterparty Chains – exposure to costs' www.steamshipmutual.com/publications/Articles/ChainCosts0909.html and 'Costs recovery in charterparty chain arbitrations' www.steamshipmutual.com/publications/Articles/Articles/ArbCosts_CharterChain0804.asp – but because of the potential cost consequences and a recent decision underlining the issues, it is worth revisiting this subject. Although the Member in such a chain may be in a neutral position in regard to the underlying claim (theoretically winning one arbitration and losing the other) Members may unwittingly find themselves out of pocket when it comes to costs. As explained below, a Member that finds itself in the middle of a charter chain dispute should speak to the Club about how to protect its position.

A Working Example

The potential exposure and risk in these circumstances is best illustrated by way of an example whereby:

- The Member has time-chartered a vessel from head Owners and then subsequently sub-chartered on voyage terms;
- A dispute has arisen and head Owners have issued a claim against the Member for breach of charter (the "Head Reference");
- The Member has, in turn, brought the same claim against the sub-Charterers in an attempt to protect its position (the "Sub-Reference");
- Head Owners refuse to agree to consolidate the proceedings so each claim is to be decided by a different London Tribunal.

Head Owners' claim in the Head Reference was unsuccessful.

As the "winning" party, the Member would be entitled to recover its legal costs from head Owners. Members' legal costs would probably be relatively modest as, in reality, the claim would have been defended by sub-Charterers with Members simply passing the defence up the line.

Provided the tribunal in the Sub-Reference reaches the same decision as the tribunal in the Head Reference, then Members' claim against sub-Charterers would also be unsuccessful. Members would be responsible

for their own legal costs incurred pursuing the claim and for the legal costs incurred by sub-Charterers defending it.

Sub-Charterers' legal costs are likely to be substantially more than Members' own costs as they have effectively been responsible for defending head Owners' claim.

Claiming Costs as Damages

As a matter of English law, parties are entitled to claim costs incurred in previous proceedings as damages in another set of proceedings, provided this is expressly included in the claim.

Where Members find themselves in a chain arbitration they should ensure they plead a separate cause of action for any costs liability to which they may be exposed. This claim would be subject to the usual rules of causation and remoteness. In the example above, Members would need to show that it was foreseeable that they would both sub-charter the vessel and that should head Owners advance a claim under the head charterparty this would lead Members to commence proceedings against sub-Charterers. Furthermore, it was foreseeable that Members would be responsible for sub-Charterers' legal costs if the sub-Charterers successfully defended the claim.

However, this is the nub of the risk to the Member because even if the Member reserved its right to claim for legal costs incurred in another set of proceedings, there is no guarantee that a court or tribunal will allow the claim. It may instead conclude that the "proximate" cause of Members' loss was its decision to commence proceedings against sub-Charterers down the chain. If Members had sufficient information to determine that the claim flowing down the chain from head Owners was a "bad" claim, and therefore that they had a good defence, they may not be able to recover the costs paid to sub-Charterers having pursued that same "bad" claim down the charter chain.

The Chada Naree

In *Occidental Chartering Inc v Progress Bulk Carriers Ltd* [2012] EWHC 3515 (Comm) (The "*Chada Naree*") the Court was asked to consider which party was responsible for paying legal costs in a charterparty chain arbitration.

Head Owners had time chartered their vessel to a company called Occidental Services Corp ("OSC"). The crucial factor in this particular dispute was that OSC had then re-let the vessel to another company in its corporate group called Occidental Chartering Inc ("OCI"). OCI subsequently time chartered the vessel to Progress Bulk Carriers ("Progress") who had in turn entered into a voyage charter with CNAN. The various charterparties were on materially identical terms. A claim was made by head Owners against OSC and was passed down the charterparty chain. In this case the references were heard concurrently by the same tribunal.

Three separate arbitrations were commenced during the course of which the tribunals and the parties treated OSC and OCI as the same company. In the head reference the tribunal found for head Owners against OSC. The associated company, OCI, then sought to claim against Progress both for the legal costs incurred defending Owners' claim plus the costs paid to head Owners in the head reference. In this regard the tribunal noted that the parties' written submissions had not dealt with the familiar issues that arise when costs in one arbitration are claimed as costs in another. It seemed therefore that there was a general acceptance that costs could be recovered as a head of damages.

Progress subsequently argued that, as the vessel had been re-let by OSC to OCI, OCI could not be considered a party to the arbitration with head Owners and so had not incurred any costs liability which could be passed on. This argument was raised very late in the procedural timetable and the arbitrators stated that this "*came as a complete surprise*". Despite that, the tribunal was persuaded by the argument and concluded that the gap in the chain of references was fatal to OCI's claim for costs as damages.

OCI appealed to the High Court under s.69 of the Arbitration Act 1996 seeking to recover as damages from Progress the costs paid to head Owners. The Court found that the various parties and the tribunal had always considered OSC and OCI collectively as "Disponent Owners" and that throughout the arbitration proceedings they had been treated as one and the same.

The Court also found that the tribunal's reasoning was flawed because it had allowed the damages claim to pass down through the charterparty chain despite the break in the arbitration references. It was the same breach of charterparty which gave rise to the claim for the costs to be recovered as damages and, according to the High Court Judge, these heads of damages (i.e. principal claim and costs) could not be distinguished.

On the basis of this reasoning the Judge allowed the appeal and concluded that OCI could recover from Progress the costs paid by OSC to head Owners in the head arbitration.

Conclusion

When Members face a claim up or down the charter line the temptation is often to immediately commence back-to-back proceedings against a third-party. While (depending on the circumstances) this may indeed be the correct choice, as can be seen from the above, this is a complicated area. Members should therefore take advice from the Club before making a decision which they may live to regret. ■

"..., if a party to a contract seeks to benefit from the terms of an exclusion, exception or exemption clause in the contract, ...then they must bring themselves clearly within its terms, without the need to extend the meaning or imply additional words."

Exception to Laytime

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The Court of Appeal has now handed down its decision, dismissing Charterer's appeal against an earlier High Court decision and reaffirming the finding that Charterers were liable to pay demurrage under the terms of a Sugar Charterparty 1999 for delays following a fire at a sugar terminal in Brazil in 2010 - *ED&F Man Sugar Ltd v Unicargo Transportgesellschaft GmbH* [2013] EWCA Civ 1449. ED&F Man Sugar Ltd had chartered the "Ladytramp" from her disponent Owners under an amended Sugar Charterparty dated 9 June 2010 to load at "1–2 safe berth(s)". The intention had been to load at Charterers' normal terminal at Paranagua, but on 14 June 2010, a week before the vessel was scheduled to arrive at the load port, a fire destroyed the conveyor belt system that linked the terminal and warehouse.

As a result, and because according to local experts the terminal was rendered inoperative for at least three months, Charterers ordered the vessel to load at a different terminal at Paranagua. The "Ladytramp" anchored off Paranagua on 20 June, tendered notice of readiness at 23:30 hrs that day, eventually berthed on 15 July, and completed loading and sailed on 20 July.

Owners claimed demurrage of almost US$400,000 for the period waiting to load at Paranagua. Charterers denied any liability for demurrage on the basis that the delay did not count as laytime because it had been caused by a fire that had destroyed mechanical loading equipment.

Clause 28 of the Charterparty provided for the following exceptions to laytime:

"In the event that whilst at or off the loading place or discharging place the loading and/or discharging of the vessel is prevented or delayed by any of the following occurrences: strikes, riots, civil commotions, lock outs of men, accidents and/or breakdowns on railways, stoppages on railway and/or river and/or canal by ice or frost, mechanical breakdowns at mechanical loading plants, government interferences, vessel being inoperative or rendered inoperative due to the terms and conditions of employment of the Officers and Crew, time so lost shall not count as laytime."

The Charterparty required disputes to be referred to arbitration in London. The Tribunal decided that clause 28 did not apply because while the original berth was inoperative they were entitled to nominate any safe berth and therefore they were only "prevented or delayed" from loading because it was impossible to do so at the intended berth. Moreover, even if Charterers could have brought themselves within clause 28, exception clauses are construed contra proferentem. The clause did not refer to fire.

The breakdown of the conveyor belt system was the result of physical damage, not mechanical breakdown, and this was not a case of government interference.

Charterers appealed, unsuccessfully, to the English High Court. However, the Court did not agree with the Tribunal that clause 28 did not apply since there was no requirement to nominate a berth as a precondition to the operation of clause 28. The appeal failed because none of the exceptions listed in clause 28 applied – for a discussion on the 'Government Interference' point, see: www.steamshipmutual.com/publications/Articles/Ladytramp0613.htm.

In their recent appeal to the Court of Appeal, Charterers tried to persuade the Court that the delay in loading the vessel at Paranagua was caused by a "*mechanical breakdown*" and was thus within clause 28. Charterers argued that it was sufficient to show that the loading machinery was unable to perform its required function to establish that there was a "*mechanical breakdown*" at the loading plant, which would trigger clause 28.

Tomlinson LJ disagreed, noting:

"*The arbitrators' finding is that there was complete destruction of the conveyor belt system, which on the approach of Robert Goff J, approved by the Court of Appeal, involves something more than a breakdown. However, in my view, by no stretch of the imagination can the arbitrators' finding be regarded as one of mechanical breakdown. The arbitrators' only finding is that the conveyor belt system was destroyed by fire. If that involves a breakdown it is not without more a mechanical breakdown. As Eder J rightly observed, this clause is concerned with the nature of the breakdown Mr Young's argument amounts to saying that if machinery does not work, there has been a mechanical breakdown. I do not agree. That is not so where the only finding is that the machinery has been destroyed by fire.*"

The reference to the approach of Robert Goff J in an earlier decision was in relation to *The Thanassis A*. In this case, the oil pier at the loading port was damaged by a tanker which collided with it and when addressing the question what was meant by "mechanical damage", Goff J said:

"*In those circumstances, I turn back to the clause again, and I ask myself whether what occurred can reasonably be described as a case of a breakdown of machinery or equipment. In my judgment the answer must be in the negative. So far as the damage to the jetty is concerned, I do not see how that can properly be described as breakdown of machinery or equipment. Plainly the jetty is not machinery; plainly it is not equipment. Furthermore, complete destruction of part of the facility would appear to involve something more than a breakdown. In those circumstances I do not see that the words in question are wide enough to embrace what happened in the present case.*"

As such, machinery destroyed by fire and a "*mechanical breakdown*" are not one and the same thing – "*I would only add that complete destruction of part of a facility is not only something more than a breakdown, it is plainly something different in kind from a mechanical breakdown, although equally plainly a mechanical breakdown might lead to complete destruction of all or part of a mechanical loading plant, whether through fire or through some other mechanism.*" (Tomlinson LJ) – and Charterer's argument that the cause of the lost time was within clause 28 was rejected. Therefore, they remained liable to pay demurrage for the time lost as a result of the delay in loading at one terminal that had its roots in an incident at another terminal.

In English law, if a party to a contract seeks to benefit from the terms of an exclusion, exception or exemption clause in the contract, such as clause 28 in this case, then they must bring themselves clearly within its terms, without the need to extend the meaning or imply additional wording. The decision in the *The Ladytramp* illustrates this and is a useful reminder of this principle – the contra proferentem rule.

Can the Matter be Remitted to the Arbitrators to Consider New Evidence?

The Court of Appeal's decision in the *The Ladytramp* also touched on an interesting side issue. Charterers of the "Ladytramp" had a different vessel, the "Ziemia Zamojska", on charter, which had also suffered delays as a result of the same fire in Paranagua. The demurrage claimed by the Owners of the "Ziemia Zamojska" as a result of the delays was subject to an entirely separate arbitration; however, subsequent to the award and appeal of *The Ladytramp*, Charterers' lawyers in the "Ziemia Zamojska" arbitration had attended in Brazil and obtained evidence that a mechanical breakdown may have started the fire. As such, because of the significance of a factual finding that the fire had been caused by a mechanical breakdown, Charterers sought to argue that it was a matter for *The Ladytramp* Tribunal whether this new evidence could be admitted for them to consider and if necessary make further findings of fact. The Court of Appeal disagreed:

"*It would be highly inappropriate to remit the matter to arbitrators…It would be doubly inappropriate for the Charterers now to be permitted to introduce fresh evidence which, had they thought it relevant, they could have obtained for use at the arbitration*".

As with any tribunal or court, decisions are made based on the facts as presented at the time of any hearing(s). However, an appeal from an English arbitration decision is only possible in limited circumstances as defined by the Arbitration Act 1996. These are set out at s.67 – substantive jurisdiction, s.68 – serious irregularity, and s.69 – on a point of law. The application for appeal had been made under s.69 alone, and Charterers had previously sought to argue that the cause of the fire was irrelevant.

What About the Recent Fire? – Santos Sugar Terminal

This recent decision is particularly relevant in light of the recent fire at Copersucar's sugar terminal at Santos. The terminal was burnt to the ground, together with 180,000 tons of sugar, and it is expected that it will be several months before operations are restored. The consequences of the fire for Owners and Charterers who have agreed to carry sugar from the Copersucar terminal, usually under the Sugar Party Charterparty 1999, are discussed in a separate article: www.steamshipmutual.com/publications/Articles/SugarFire311013.htm ■

Maritime Labour Convention 2006

Hill Dickinson
Maria Pittordis
Jack Hatcher

Following the implementation of the Maritime Labour Convention 2006 (MLC) in August last year, questions remain in relation to who is ultimately liable for its compliance. The 'shipowner' will be the party in the firing line for non-compliance – but the management of a vessel is often a complex operation with many different entities involved. Some of these entities, including those who hold a Document of Compliance (DOC) for the vessel, will wish to distance themselves from the definition of, and having the responsibilities of being, a 'shipowner' under the MLC.

There is also the issue of where the direct obligations of being the employer of the crew on a vessel lie; the registered Owner, the bareboat charterer or the technical manager.

In practice, all entities involved in a vessel's ownership, manning and management matrix will have their role to play to ensure that the ship is certified MLC compliant by her Flag State.

The MLC came into force on 20 August 2013 following ratification on the same date in 2012. In order to take effect, the Convention required ratification by at least 30 Member States with a total minimum share of 33% of the World's gross tonnage of ships. As of 11 April 2014, 57 Member States representing more than 80% of the world's tonnage have ratified the MLC.

The MLC created a single, coherent instrument embodying, so far as possible, all up-to-date standards contained in existing international maritime labour conventions and recommendations, as well as the fundamental principles to be found in other international labour conventions: www.steamshipmutual.com/publications/Articles/MLC0513.htm

The aim is to bring the system of protection contained in existing labour standards closer to the workers concerned and to improve the applicability of the system so that shipowners and governments share equally in taking the measures to ensure that protection.

The MLC expressly replaces a long list of conventions dating back to the Minimum Age (Sea) Convention (No. 7) and the Unemployment Indemnity (Shipwreck) Convention (No. 8) of 1920 to the more recent 1996 conventions on inspection, recruitment and manning.

The MLC is structured in three parts: the Articles, the Regulations and the Code. The Articles and Regulations set out the core rights and principles and the basic obligations of Member States ratifying the Convention, while the Code contains the details for the implementation of the Regulations comprising Part A

"The Paris MOU reported in October that seven ships (equating to 10% of the total detentions for the Paris MOU area) were detained in the first month following MLC implementation for MLC related deficiencies..."

(mandatory Standards) and Part B (non-mandatory Guidelines). The Regulations and the Code are further organised into general areas under five Titles:

Title 1: Minimum requirements for seafarers to work on a ship

Title 2: Conditions of employment

Title 3: Accommodation, recreational facilities, food and catering

Title 4: Health protection, medical care, welfare and social security protection

Title 5: Compliance and enforcement

While the provisions relating to Flag State and Port State Control inspections in Title 5 are based on existing maritime labour conventions, the MLC offers what is hoped will be a more effective approach to ensure standards are maintained in relation to, for example, safety, security and protection of the marine environment.

However, it is the compliance aspects of the MLC that are designed to strengthen the enforcement of the adopted standards by setting out mechanisms that are intended to operate at all levels – from seafarer, to vessel, to Owner, to authoritative body. Such mechanisms include:

- Complaints procedures being made available to seafarers;
- Owners' and masters' supervision of conditions on their ships;
- Flag States' jurisdiction and control over their ships;
- Port State inspections of foreign ships.

Furthermore, by requiring ratification, the International Labour Organisation (ILO) has ensured that Member States are required, not only to implement the MLC in their national laws, but also to document that implementation.

It is here that questions arise as to exactly how and to whom some of the provisions will apply.

The MLC appears at pains to define just who the 'shipowner' is. In the MLC, the term 'shipowner' includes not only the Owner of the vessel, but also any "other organisation or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the Owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with this Convention, regardless of whether any other organisation or persons fulfil certain of the duties or responsibilities on behalf of the shipowner." (our underlining)

The MLC therefore assumes that the 'shipowner', whether Owner, bareboat charterer or technical manager, is the employer of the crew.

Ordinarily, that would make sense as one would expect the entity holding the DOC, pursuant to the ISM Code, to be the employer. However, where this is not the case, and the employer is the crew manager, then they will have the contractual obligations and liabilities arising.

This is an especially important consideration in those sectors of the industry where the third party employment of seafarers is customary; a common example being the yacht sector, where, in addition, contracts of employment have generally not always been as detailed/extensive as compared to traditional contracts within the commercial shipping industry.

In short, the MLC's obligations regarding the receipt, issue and signing of the crew agreement (or 'Seafarer's Employment Agreement' (SEA) in the language of the MLC), are clearly the responsibility of the shipowner under the MLC. As such, in practical terms, the shipowner needs to ensure these terms are met by the actual employer of the seafarer(s) concerned.

The same applies to the insurance arrangement in relation to traditional P&I risks and contractual benefits.

As set out in the relevant Club circular, www.steamshipmutual.com/Circulars-Bermuda/B.599.pdf, the difficult issue of financial security for repatriation in the event of insolvency of the shipowner, and therefore stranding of the crew, has been dealt with by the International Group of P&I clubs. Of course, where the crew are employed by crewing managers, the latter would still have the contractual obligation to repatriate, though they may not necessarily have the advance funds from Owners or bareboat Charterers to do so.

A further difficult issue is the security for termination wages on insolvency. Again, where the employer is not the shipowner, the crew are entitled to their wages from the actual employer.

Another matter for debate is what exactly constitutes a 'seafarer' within the scope of the MLC. For example, are entertainers or concessionaires employed on a cruise ship seafarers?

The MLC definition would seem to be unequivocal: "seafarer means any person who is employed or engaged or works in any capacity onboard a ship to which this Convention applies". Indeed, the ILO FAQs state that concessionaires would need to have a contract signed by the shipowner. www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_177371.pdf.

However, arguably this may not accurately reflect the position: the intended focus should in fact be on the employment contract, rather than the identity of the contracting parties themselves, i.e. the concessionaire's employer (whoever that may be) must sign the contract and it is that contract which must be MLC compliant.

The practical effect is that shipowners must seek to ensure that their crew or the employees of others on board their ships have MLC compliant SEAs (within the ambit of MLC Regulation 2.1).

Generally, and thus far, if a ship complies with the MLC and the SEAs are compliant, the Flag State will issue the necessary documentation. However, whether that will continue to be the case as the practicalities of MLC implementation become more familiar to Flag States remains to be seen.

Aside from the issues of Flag State accreditation, how Port State Control will view compliance has been a particular topic of interest, as has the contractual and delay disputes that arise as a consequence. The Paris MOU reported in October that seven ships (equating to 10% of the total detentions for the Paris MOU area) were detained in the first month following MLC implementation for MLC related deficiencies alone: www.parismou.org/results-first-month-maritime-labour-convention-7-ships-detained-mlc-related-deficiencies

This is an area all Owners and ship managers will doubtless be watching with a keen weather eye as the implications of the MLC evolve further.

In summary, the key point to remember is not to assume that, just because the certificates are issued to the ship, only one entity has legal obligations under MLC. The MLC requires the co-operation of all the 'shipowners' and the employer (if different from the shipowner) to deliver these uniform and basic standards. Accordingly, all entities involved in the management of the vessel should not seek to distance themselves, whether by way of contract or otherwise, from the responsibilities imposed by the MLC. On the contrary, the MLC "shipowner" should consider its responsibility to ensure that all the various parties have not only contracted to deliver their obligations under the MLC, but that they actually do deliver them. The indemnities in favour of the shipowner can only go so far. ■

MLC Q&A from a Yacht Perspective

HILL DICKINSON
Maria Pittordis
Jack Hatcher
Zoe Triantafyllou

Do all yachts have to comply with the MLC?

Under Article II of the MLC, the MLC applies to virtually any ship including any yacht of any size which engages in any form of commercial activity on international voyages, unless the Flag State stipulates otherwise. As such, Members need to consult the yacht's Flag State to determine whether the MLC 2006 has been applied in those countries to yachts.

Notwithstanding the above, the Large Commercial Yacht Code (LY3) includes many elements of the MLC. All Flag States under the Red Ensign require and many others recommend that pleasure yachts not engaged in trade comply fully with LY3. Therefore, to all intents and purposes, LY3 incorporates MLC compliance into the Code. This means that to maintain full compliance with LY3 a pleasure yacht not engaged in trade must be fully MLC compliant as appropriate.

Is the MLC now in Operation?

The MLC came into force internationally on 20 August 2013 for the 30 original ratifying states. However, since the UK ratified the MLC on 7 August 2013, it only came into force for the UK on 7 August 2014.

In other words, do Owners now need to comply with the MLC obligations and pay sickness wages and medical care for no less than 16 weeks?

Prior to the 7 August 2014 the UK had already implemented the Convention by passing The Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013 ("the Regulations"), which came into force on 15 August 2013.

The Regulations implement the survey and certification requirements of the MLC with reference to the standards in Merchant Shipping Notice 1848 (MSN 1848). MSN 1848 lists the mandatory standards that ships must comply within order to receive a UK Maritime Labour Certificate, which include the sickness wages and medical care obligations under the MLC. Whilst the Regulations do not apply to "pleasure vessels", they do apply to any vessel which operates commercially (including pleasure vessels operating commercially) and to which the LY3 applies. Therefore, if a yacht is flying the UK flag and is operated commercially, Owners do need to comply with the MLC obligations and pay sickness wages and medical care for no less than 16 weeks.

What Happens if the Contract is Silent in Relation to Contractual Entitlement to Medical or Sickness Wages?

If the contract is silent, it is not MLC compliant and a Maritime Labour Certificate will not be issued. The contract also has to include the seafarer's maximum entitlement (which must be above 16 weeks). Initially such matters will be dealt by the provision of advice for compliance. On-going non-compliance following this advice may result in the possibility of prosecution and/or the vessel concerned being detained.

Do Temporary and/or Day Workers Fall into the MLC Definition of a 'Seafarer'?

In the UK implementing legislation, the definition of 'seafarer' is given as any person, including a master, who is employed or engaged or works in any capacity onboard a ship and whose normal place of work is on a ship. Under this legislation 'seafarer' does not apply to those persons whose work is not part of the routine business of the ship and whose principal place of work is ashore: for example, marine professionals such as harbour pilots, inspectors, or superintendents, scientists researchers, divers, specialist offshore technicians – and possibly temporary and/or day workers.

Current UK Guidance – MGN 471: www.dft.gov.uk/mca/mgn471.pdf – is that any individual who works on board for less than three nights is probably not a "seafarer". However, the Flag State of the yacht concerned should be consulted to see whether they adopt a similar approach. ■

Land Based Workers and Potential Jones Act Status

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On 10 March 2014 the United States Court of Appeals for the Fifth Circuit published its decision in the case of *Larry Naquin v Elevating Boats LLC*. The issue in this case was whether a traditional land based maritime worker could qualify as a Jones Act Seaman with, as a consequence, significantly increased potential exposure in the event of injury to land based workers employed by shipowners.

By way of background, Naquin was a vessel repair supervisor working for Elevating Boats LLC (EBI) at a shipyard facility in Houma, Louisiana. Naquin's primary responsibility was the maintenance and repair of EBI's fleet of lift boat vessels. Usually work would be carried out whilst the vessels were moored, jacked up or docked in EBI's shipyard canal. Naquin's work consisted of repairs, cleaning, painting and general maintenance on the vessels. It was estimated that about 70% of his time was spent working aboard these vessels with the remainder of his time spent working in EBI's land based workshop and operating the shipyards crane.

On the day of the incident Naquin was using the crane to lift a heavy load, when it suddenly failed, causing the boom and crane to topple over onto a nearby building. Naquin jumped from the crane but suffered severe injuries to both feet.

Naquin started proceedings against EBI claiming Jones Act Status. A District Court jury concluded that Naquin was a Jones Act Seaman as his work contributed to the function of a discrete fleet of vessels and because he had a connection with the fleet which was substantial both in terms of duration and nature.

EBI appealed the decision arguing, amongst other things, that Naquin should not have been classified as a Jones Act Seaman.

The Fifth Circuit Court of Appeals considered the two-prong test to determine seaman status as established in *Chandris v Latsis* (1995). Firstly, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Secondly, a seaman must have a connection to a vessel in navigation or to an identifiable group of such vessels that is substantial in terms of both duration and nature.

The purpose of the test is to distinguish between sea-based maritime employees who are entitled to Jones Act protection and those land based workers who only have sporadic connection to a vessel and, therefore, do not regularly expose themselves to the "perils of the sea".

The Supreme Court previously endorsed the general rule of thumb that a worker who spends at least 30% of his time in the service of the vessel in navigation should qualify as a seaman under the Jones Act.

EBI argued that Naquin did not qualify as a Jones Act Seaman because he was rarely required to spend the night aboard a vessel, the vessels he worked on were ordinarily docked, and he almost never ventured beyond the immediate canal area or onto the open sea. Therefore, his duties did not regularly expose him to the perils of the sea.

In a split decision the Fifth Circuit Court of Appeals decided that, a vessel repairman that serviced lift

"This is an important decision as it has the potential to broaden the scope for land based workers to qualify as Jones Act Seaman…"

boats, while they were docked shore-side, would qualify as a Jones Act Seaman.

This was because Naquin's connection to the lift boat fleet was substantial in terms of the nature and duration of his work cleaning, maintaining and repairing the vessels, even whilst they were docked, which contributed to the mission of the vessel. In addition Naquin's work on these vessels accounted for nearly 70% of his working time which was far in excess of the established 30% rule of thumb threshold required for a person to qualify as a Jones Act Seaman.

This is an important decision as it has the potential to broaden the scope for land based workers to qualify as Jones Act Seaman and, therefore, be afforded the relaxed standards of care that apply to seaman in relation to negligence and unseaworthiness claims under the Jones Act that are often described as 'featherlight'.

It is understood that EBI has filed a petition for a rehearing en banc. This process is usually granted when it is felt that the case concerns a matter of exceptional public importance. If granted, all active and senior judges of the Fifth Circuit Court of Appeals will rehear the appeal and give a superseding opinion. If the en banc rehearing is denied then it is expected that the decision will be appealed directly to the U.S. Supreme Court. A further article will be published discussing developments. ■

Cargo Convention book containing a comparison between Hague, Hague-Visby and SDR protocol, as well as the 1996 and 2011 ICA's, Hamburg and Rotterdam Rules.

Download PDF
http://www.steamshipmutual.com/Downloads/Publications/Cargo%20Conventions %20Book/CargoConventions2014.pdf

To obtain a copy please contact publications@simsl.com

No "Free Ride" for Litigants

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A recent High Court decision in the case of *Summit Navigation and others v Generali Romania Asigurare Reasigurare* ([2014] EWHC398) has given much needed guidance as to how strictly procedural time limits must be complied with and underlines the need for litigation to be conducted efficiently and at proportionate cost.

The claim arose against a background of the recent "Jackson" reforms of April 2013 which brought in reforms to civil litigation funding and costs in England and Wales and took effect from 1 April, 2013. In general terms the approach of the English civil courts was to excuse non-compliance with procedural timetables if potential prejudice to the opponent party could be remedied, particularly by an appropriate costs order. Previous reforms had attempted to encourage the courts to adopt a less indulgent approach and the Jackson report concluded that a still tougher and less forgiving approach was required.

Since those reforms came into force over a year ago, there has been a tendency towards very strict compliance with the procedural timetable for court cases, with a view to speeding up the conduct of litigation and ensuring costs are kept at a minimum. This has been achieved by a general requirement that courts adopt a more robust approach to granting relief to parties who default on court rules, practice directions and court orders.

Whilst those aims are broadly to be encouraged, there has been considerable uncertainty as to how strictly the courts will enforce those reforms and much comment on the approach the courts are likely to take and have taken when applying the reforms. For example, in *Mitchell* ([2013] EWCA 1537), the Court of Appeal refused relief from sanctions against lawyers representing Andrew Mitchell, a member of the UK Parliament, in his libel action against a newspaper. The Court set out the consequences of Mitchell's solicitors' failure to comply with a practice direction relating to the filing of a costs budget with the Court seven days in advance of a hearing. The budget had been filed the afternoon before the hearing. The appeal was against the High Court's decision that the Claimant should be treated as having only filed a costs budget made up solely of the applicable Court fees. Mitchell's appeal had been fast-tracked to the Court of Appeal to allow the senior judiciary to hand the lower courts necessary guidance on the approach they should take in the light of the Jackson reforms. However, the Court of Appeal

"...the Court of Appeal refused relief from sanctions against lawyers representing Andrew Mitchell, a member of the UK Parliament, in his libel action against a newspaper."

upheld the High Court's decision. The Court was determined that relief from sanctions would not be granted where deadlines were overlooked and so solicitors should not take on so much work that they were unable to meet those deadlines. The sanction applied in the case was significant – it meant that the claimant could only rely on a costs budget limited to court fees, therefore excluding over £500,000 of the claimant's own estimated legal fees. Accordingly, even if Mitchell's libel action succeeded his legal costs would not be recoverable.

The rationale behind the decision in *Mitchell* was that a robust approach to the enforcement of procedural time tables and orders should mean that litigation is pursued more efficiently in terms of time and costs to litigants.

However, the tension created by focussing on streamlining the judicial process is that one party could tend to be unfairly penalised in certain circumstances if the court takes a strict approach and imposes a sanction that could be considered disproportionate to the breach in conduct of rules applying to litigation. A consequence of this more robust approach has been that some parties have seen a missed deadline as an opportunity to take advantage, which may be in stark contrast with the stated aims of the Jackson Reforms Contract for litigation to be conducted efficiently at with proportionate cost.

For example, while in the more recent case of *Summit Navigation* the decision of the Court of Appeal in *Mitchell* was acknowledged as being a "game changer", Mr Justice Leggatt stressed that it "*is important for litigants to understand, however, how the rules of the game have been changed and how they have not*".

This case involved a claim under a H&M policy of marine insurance. The defendant underwriters had sought to rely on *Mitchell* to turn a short delay on the part of the claimants in providing security for the underwriters' costs, which in itself had no material impact on the efficient conduct of the litigation, to their advantage. The defendants had argued that the consequence of the claimants' failure to provide security should be that the claim was stayed indefinitely.

The underwriters were able to take this position because, on 26 November 2013, the claimants were ordered by the Court to provide security for costs by 5 December 2013, failing which their claim would be stayed. However, security was provided on 6 December. As such, so the underwriters argued, that failure to provide security in time triggered an automatic stay of the proceedings which they refused to agree to lift, on the basis that *Mitchell* required a robust approach to the application of sanctions.

Therefore to lift the stay the claimant was forced to make an application to the Court. That application was successful. The Court took the view that the claimants' failure to provide security in time was immaterial and fitted with one of the categories set out by the Court of Appeal in *Mitchell* as a breach "*where the party has narrowly missed the deadline*

imposed by the order, but has otherwise fully complied with its terms". Furthermore, whereas the claimants' failure was minor, the underwriters' response had a very serious impact on the litigation. The whole timetable for the proceedings was effectively derailed, significant costs were incurred and Court time wasted to the detriment of other Court users.

In other words, the reliance on *Mitchell* by the underwriters had the very consequence that the new approach enunciated by the Court of Appeal in *Mitchell* was intended to avoid. Also, this was certainly not a case where the claimant's solicitor simply overlooked the deadline, or let it pass without attempting to comply with the order.

As Mr Justice Leggatt noted:

"*The defendants seem to have viewed their opposition to the stay being lifted as a potentially free ride whereby, if successful, they would obtain a fortuitous dismissal of the claim without a trial and, if unsuccessful, would still have their costs paid by the claimants as the defaulting party. It is important to discourage that approach.*"

As well as the claimants being the successful party, the ensuing order for the defendants to pay the claimants' costs reflected the defendants' unreasonable conduct in refusing to agree to the stay being lifted and the waste of time and money which followed.

It is hoped that the decision in *Summit Navigation* will temper some of the strictness imposed since *Mitchell* by making clear the costs risk to any party seeking to take advantage of any failure by an opponent to comply with procedural and/or court imposed timetables or orders, whilst leaving in place a clear message to the lawyers conducting litigation. In this respect it is noteworthy that in three related cases recently heard together in the Court of Appeal – *Denton*, *Decadent* and *Utilise* – the Master of the Rolls and Vos LJ jointly said "*It is clear that the guidance in Mitchell needs to be clarified and further explained*". The Court of Appeal's decision in these cases will be discussed in a further article as the Jackson Reforms continue to make their effects felt on the English Judicial system. ■

General Average Security – "Pay Now, Argue Later"

holman fenwick willan hfw

Andrew Chamberlain
Jean Koh
Laura Wright

The recent case of *St Maximus Shipping Co. Ltd v A.P. Moller-Maersk A/S1* is the latest in a run of judgments regarding the effect of guarantee instruments. In the context of general average ("GA"), the decision will be of particular interest to adjusters, Owners, insurers and admiralty practitioners alike and should be borne in mind when negotiating the wording of GA security.

The case arose out of the grounding of the "Maersk Neuchatel" off Tema in 2007. At the time, the claimant was the bareboat charterer and the defendants, Maersk, the time Charterers.

In addition to initial bottom damage suffered on grounding, the vessel was subjected to further bottom damage during numerous refloating attempts. GA was declared. In GA the cost of repairs for the latter is recoverable, but not the former.

The appointed average adjusters sought GA security in favour of the claimant in the usual way. For commercial reasons, Maersk provided a blanket GA security on behalf of all cargo interests in the form of a letter of undertaking (LOU). The obvious advantage of this was to avoid delays to the onward carriage of the cargo which would otherwise have occurred if the adjusters had to collect separate securities from each of the numerous cargo interests directly.

The GA adjustment was issued sometime later, following which the claimant sought payment from Maersk under the LOU of cargo interests' GA contribution as ascertained by the adjusters. Maersk refused to pay on the basis that they did not agree with the adjusters' conclusions on the proportion of damage caused by refloating attempts.

The claimant was, therefore, forced to bring High Court proceedings to enforce the terms of the LOU.

The critical provision in the LOU provided by Maersk read:

"*…we hereby undertake and agree as follows*:

1. To pay the proper proportion of any General Average and / or Special Charges which may hereafter be ascertained to be due from the Cargo or the Shippers or Owners thereof under an Adjustment prepared by the appointed Average Adjusters in accordance with the Charterparty, dated 16th August 2004, and / or the Bills of Lading issued by us or SCL…".

The claimant's position was that the LOU was in effect a demand guarantee and the wording of the LOU obliged Maersk to pay up once the triggering events specified in the LOU occurred. Maersk's obligation to pay was regardless of the rights and wrongs arising under the adjustment, but the LOU did not affect cargo interests' right to challenge the adjustment if they wished to do so. In other words, this was a "pay now, argue later" guarantee.

Maersk's position, on the other hand, was that they were only bound to pay what was properly and legally due from the cargo interests. The underlying basis of their argument was that as GA adjustments are not binding on the parties to the maritime adventure, they were entitled to challenge the adjustment.

In his judgment, Hamblen J agreed with the claimant's construction of the LOU, concluding that the claimant's construction reflected not only the natural and ordinary meaning of the LOU, but also the legal authorities.

The Judge went on to say as to the LOU:

"*The parties' agreement reflects a bargain made between two parties in good commercial relations, with benefits and drawbacks for both sides. Further, there are reported examples of like agreements being made in the General Average context – see, for instance, the General Average Guarantee in Tharsis Sulphur & Copper Co. Ltd. v Loftus (1872-73) LR8 CP1 and the insurance policy guarantee in Attaleia Marine Co Ltd v Bimeh Iran (Iran Insurance Co), The "Zeus" [1993] 2 Lloyd's Law Rep. 497. It is similar to an on-demand guarantee dependent on certification, a far from unusual contractual arrangement.*"

In coming to his decision, the Judge found that the words "proper proportion", when used in the context of GA is to be understood as a reference to cargo interests' pro-rated general average liability, i.e. it's appropriate proportion of the overall liability.

He also observed that the sum ascertained to be due in the adjustment might in fact be an overpayment or an underpayment by Maersk. If it was an overpayment, then Maersk might have means of recourse against the claimant; if it was an underpayment, then they were free of any further liability and the claimant was left with unsecured claims against the various cargo interests for the balance.

This case demonstrates the Court's eagerness to hold parties to their contractual bargain and for commercial sense to prevail. It is also a lesson for those drafting security instruments. The form of GA security wording, whether or not standard forms are used, should be reviewed carefully in each case to ensure that it properly reflects the intentions of the beneficiary and the guarantor. Indeed, the Judge commented that there is a clear and well established precedent as to how to achieve the effect contended for by Maersk in a GA security - by the addition of specific phrases/words – but such wording had not been used in the LOU.

Thus, if the security is not intended to be a "pay now, argue later" instrument like the Maersk LOU, then changes may need to be made to ensure this is clear. Equally, if a guarantor wishes to preserve the entitlement to challenge the underlying contract/adjustment, then specific wording will need to be included. As this case shows, it will be the security wording itself that will be put to the test should a dispute arise, and background circumstances are unlikely to come to the parties' assistance to argue for a different meaning. ■

"This case demonstrates the court's eagerness to hold parties to their contractual bargain and for commercial sense to prevail."

A Twist on the Thorny Issue of Time Bars

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A vessel was chartered for the carriage of cargo from the Mediterranean to the UK on voyage terms. Clause 11 provided as follows:

"Any dispute arising from and in respect of this Charter Party shall be referred to and settled by arbitration in London… Any claims must be made in writing within 3 (three) months of final discharge and where this is not complied with, the claim shall be deemed to be waived and absolutely barred."

Cargo was never in fact loaded. Charterers had terminated the charterparty on 24 November 2009 alleging the vessel was not in every way fitted for the voyage. Owners considered Charterers' termination was wrongful and accepted the repudiatory breach on 27 November.

On 8 February 2010 Owners appointed an arbitrator and in response Charterers appointed an arbitrator on 26 February. However Charterers asserted that the claim was time-barred. On 1 March 2010, Owners for the first time indicated the nature of their claim, whilst at the same time denying that it was time-barred.

Whilst Owners accepted that no claim had been made "*in writing*" within the meaning of clause 11 until 1 March 2010 (i.e. more than three months after the latest date on which the charterparty was purportedly terminated), they contended that clause 11 would not be applicable to the claim as no cargo was loaded so there was no "*final discharge*". In the alternative, they argued that time would run from the date on which discharge would have been completed as if the voyage had been performed.

Charterers argued that the words "final discharge" had to be given some other meaning when discharge never occurred.

The Tribunal held that the claim was in time.

The Charterers, inter alia, had sought to argue that it was the clear commercial intention of both parties that they would know within three months after the charter concluded whether any claims existed. But that was not what the clause said. It referred to final discharge and not the ending of the charter. It was not always the case that the two dates were the same. In the context of a contract of carriage, "final discharge" on any view meant of cargo. The conclusion that a six year limitation period would apply when there was no discharge of cargo was far from absurd and could not lead the tribunal to find the parties did not intend what the clear words imported. There was no basis for implying any additional terms or wording. Since no cargo was loaded, there was no final discharge (of cargo) and the clause did not operate.

As has been discussed in a number of articles on the Steamship Mutual website, the draconian nature of time bars means they are more often than not, read strictly. Very clear words have to be used, and any ambiguity will be applied against the party seeking to rely on the provision.

The decision in this case – "*London Arbitration 10/14*" – is yet another example of time bar clauses (which seek to promote certainty) being construed in-line with their precise wording.

But what if the claim had been by Charterers against Owners? The finding of the tribunal would have been the same because there was no "final discharge" but would that have been an end to it? The answer confusingly is not necessarily.

Charterparties often incorporate a Clause Paramount into the charter itself. If that is the case, a Charterer needs to ask in relation to any category of loss or claim – is it connected to or would it likely be pleaded on the basis of breach(es) of Hague and Hague-Visby obligations of seaworthiness (which might arise at each port) or duties of care in loading carrying caring for and discharging the cargo?

If the answer is that it would, then there is a potential for that claim to be subject to a one year time limit.

Article III Rule 6 of the Hague Rules can cover proceedings by the Charterers against the Owners (albeit not claims by Owners against their Charterers). This Article provides:

"*In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.*" (our emphasis)

As alleged breach(es) of seaworthiness obligations tend to be the foundation stone on which many types of claims are laid then this can bring the operation of the Hague Rules one year time bar into more general effect.

In this respect it is noteworthy that Article III Rule 6 includes the words "*or the date when the goods should have been delivered*" which expressly deals with the point Charterers had sought to make in London Arbitration 10/14 – that the words "final discharge" should be given some wider meaning so as to deal with situation when no cargo is loaded.

In "*The OT Sonja" [1993]* 2 Lloyd's Rep. the Court of Appeal held that Article III Rule 6 applies to claims in relation to goods even if not shipped. This decision was affirmed in *Linea Naviera Paramaconi SA v Abnormal Load Engineering [2001]* 1LLR 763.

"As has been discussed in a number of articles on the Steamship Mutual website, the draconian nature of time bars means they are more often than not, read strictly"

So what does that mean? Probably that if Charterers had brought a claim, even though the three month time bar in clause 11 would not have been applicable, had the Hague or Hague-Visby Rules been incorporated into the charter, their claim would have been subject to a 12 month time bar, not the much longer six year statutory time bar that might otherwise have been thought (and would for a claim brought by Owners) to apply.

This risk of different applicable time bars emphasises the need for Charterers to consider the nature of their claim and to take the following into consideration:

1. Does the contract have general words of incorporation of a Clause Paramount or provision incorporating the Hague or Hague-Visby Rules or variant in the standard form, or as an additional clause? Are there specific time limits incorporated for certain types of claim?
2. If Hague or Hague-Visby incorporation does exist, then a comprehensive analysis of the claims that may already exist or potentially might be made should be conducted.
3. Any claims that are sufficiently closely connected to cargo may be subject to a 12 month time limit.

By way of example below are some of the claims that have been held to be sufficiently connected to cargo ("pure" cargo claims will of course be included) and therefore subject to the one year Hague or Hague-Visby Rules time bar:

(i) loss and delay at the loadport subsequent to hold failure;

(ii) additional cleaning expenses and stevedore standby time after vessel's hold failure;

(iii) the costs of investigating an alleged contamination;

(iv) financial losses on an alternative fixture to that originally proposed but with the same cargo onboard;

(v) additional port costs of a substitute voyage;

(vi) the cost of hire of specialist loading equipment and expertise.

Another context in which the issue of time bars rears its head is where the Inter-Club Agreement ("ICA") is incorporated into the relevant charterparty, see page 45 of the recently published Cargo Conventions book. Clause 6 of the ICA provides for a time bar of 24 months from the date of delivery of the cargo or the date the cargo should have been delivered. Clause 2 states that the terms of the ICA "*shall apply notwithstanding any provision of the charterparty or rule of law to the contrary*".

The operation of time bar clauses and the ICA 1996 was considered in *"The Genius Star 1" [2011]* EWHC 3083 (Comm) (www.steamshipmutual.com/publications/Articles/GeniusStar0212.htm). This case involved a claim for indemnity under the ICA. The charterparty incorporated the ICA 1996 (with its 24 month time bar and clause 2 conflict provision as above), contained an amended Centrocon arbitration clause which required a claim to be made in writing and an arbitrator to be appointed within 12 months of final discharge, and contained a Clause Paramount incorporating the Hague Rules.

Applying a "reasonable man" test, it was held that by operation of clause 2 of the ICA, the 24 month time bar in clause 6 prevailed over any other time bar provision incorporated into the charter, including any Hague or Hague-Visby time bar.

The result of that case is that while in disputes not covered by the ICA other time bar provisions may take effect, where a cargo claim is to be apportioned under the ICA the 24 month time bar in clause 6 will prevail.

As ever time bars are potential traps for the unwary and have the propensity to raise many a thorny issue. ■

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No Bill of Lading and U.S. COGSA Package Limitation

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In a recent decision in the case of *OOO Garant-S v Empire United Lines Co*, 5 February 2014, the U.S. Second Circuit upheld a lower court's summary judgment applying the U.S. COGSA package limitation of US$500 per package to a loss that occurred prior to loading and before a bill of lading had been issued.

Cargo interests OOO Garant-S ("Garant-S") brought a claim against Empire United Lines Co., Inc. ("Empire"), a non-vessel owning contractual carrier, for breach of contract and various tort claims under New Jersey state law, arising from the theft of motor vehicles from a storage facility utilised by Empire. The cars had been delivered by Garant-S to the facility where they were to be loaded into containers and then carried by Empire to Europe. In March 2013, the District Court for the Eastern District of New York granted a motion for summary judgment brought by Empire to limit their liability to $500 for each car under the U.S. COGSA package limitation. Garant-S appealed the District Court's decision, contending that

(i) U.S. COGSA should not apply because no bill of lading had been issued;

(ii) that Empire's unreasonable actions should deprive them of the benefit of limitation; and

(iii) U.S. COGSA package limitation was not applicable because Garant-S had been denied fair opportunity to declare a value in excess of the limitation amount.

However, the Court of Appeals for the Second Circuit upheld the District Court's decision, allowing Empire to limit their liability to a total of $1,000, in part due to the established customs and practices of the longstanding business relationship between the two parties.

No Bill of Lading had Been Issued

At the time of the loss, Empire had not issued a bill of lading. Garant-S therefore argued that, in the absence of a bill of lading, U.S. COGSA should not apply. However, based on the facts of many previous shipments involving the two parties, the only reason that a bill of lading had not been issued by the time the loss occurred was that it was prior to the stage at which Empire customarily issued them to Garant-S.

As such, the Appeal Court concluded that Empire's house bill of lading would have been issued at a later stage, and was therefore the governing contract of the relationship. Empire's bill of lading expressly incorporated U.S. COGSA for the duration of the carrier's period of responsibility, which the bill of lading defined as being from the 'place of receipt' through to delivery as opposed to the normal more limited period of responsibility under US COGSA – "*the period from the time when the goods are loaded on to the time when they are discharged from the ship*" (COGSA §1(e)). As the vehicles were stolen after they had been delivered to the place of receipt, U.S. COGSA applied at the time the loss occurred.

Unreasonable Actions of Empire

Garant-S contended that the unreasonable actions of Empire deprived them of the benefit of limiting their liability under U.S. COGSA on the basis that there had been an "*unreasonable deviation*" from the contract. Garant-S alleged that Empire had '*participated in or facilitated*' the theft of the cars and argued that Empire should therefore be deprived of the package limitation defence available under U.S. COGSA. The Appeal Court rejected this argument on the basis that only the specific acts that fall under the doctrine of '*unreasonable deviation*' would deprive Empire of the U.S. COGSA limitation defence. In previous cases, the Second Circuit had established these specific acts to be:

(i) unjustifiably departing from the vessel's scheduled and anticipated route,

(ii) stowing cargo on-deck without authorisation or

(iii) issuing bills of lading incorrectly stating that goods had been received onboard.

Any of these can deprive a carrier of the defences available under U.S. COGSA. However, affirming earlier Second Circuit decisions, the Court declined to extend the doctrine of unreasonable deviation beyond the foregoing, because to do so '*would require inquiry into the carrier's culpability and thereby defeat COGSA's purpose of establishing clear and administrable rules for allocating loss*'. That being the case, U.S. COGSA applies even when a carrier is alleged to have engaged in conduct prohibited by U.S. criminal law, meaning the allegation against Empire was irrelevant to the validity of their package limitation defence.

Denial of a Fair Opportunity to Declare a Cargo Value

Garant-S argued that if U.S. COGSA was applicable, the package limitation defence was not available to Empire because Garant-S had been denied fair opportunity to declare a value in excess of the U.S. COGSA package limitation amount. The argument was in part based on the fact that there was no designated space on Empire's house bill of lading for such a value to be inserted. However, Empire's house bill of lading did include a provision stating that the carrier would not be liable for amounts exceeding the U.S. COGSA package limitation unless the nature and value of the goods had been declared before shipment and that consent had been given by the carrier to insert the value on to the bill of lading. The Appeal Court stated that the provision '*unambiguously notifies the shipper both that COGSA applies to limit liability and that a higher value may be declared*'. Furthermore, although they had not done so on this occasion, Garant-S, by their own admission, had previously declared cargo values in compliance with the bill of lading provision, demonstrating an awareness of the opportunity available to them. The Appeal Court stated that whilst it may be best practice for such a provision to be accompanied by a designated space where a value can be inserted, this was not necessarily required when the bill of lading contained a separate provision notifying the shipper that a higher value may be declared.

The Appeal Court's decision on each of the arguments made by Garant-S is encouraging, but it should be noted that the outcome may have been different if there had not been an established custom and practice governing the relationship between the two parties. In particular, if it could not have been shown that specific bill of lading terms were to apply, either through customary practice or preferably through express agreement, it is doubtful that the carrier would have been able to rely on the U.S. COGSA package limitation. ■

> "As the vehicles were stolen after they had been delivered to the place of receipt, U.S. COGSA applied at the time the loss occurred."

Steamship Mutual News

ESLSE Golden Jubilee

The Lalibela Grand Ballroom of the Sheraton Hotel in Addis Ababa was the glittering venue on 21 May 2014 for a gathering of over 400 international guests, in the presence of the President of the Federal Democratic Republic of Ethiopia, to celebrate the 50th anniversary of the foundation of Ethiopian Shipping Lines, now known as Ethiopian Shipping and Logistics Services Enterprise (ESLSE).

It was a privilege and honour for the Managers to represent the Club at this function and to mark the Golden Jubilee of one of its most longstanding Members. Ethiopian Shipping Lines and its successors in title have been continuously entered with Steamship Mutual since the company's foundation, and the Managers are very proud of the strong relationship with ESLSE that has been built over the last five decades. From its foundation in the 1960s with three ships; the cargo liners "Lion of Judah" and "Queen of Sheeba", and the tanker "Lalibela", the company has grown significantly. The fleet now comprises 15 mixed vessels – tankers, general cargo, and multipurpose vessels – totalling 290,529 GT, nine of which are less than two years of age, and ESLSE were represented on the Club Board between 2004 and 2012.

In 1992, Ethiopian Shipping Lines Corporation (ESLC) as they then were, established legal precedent in the English Court of Appeal on the issue of safe ports following the decision on "The Saga Cob" [www.steamshipmutual.com/loss-prevention/Piracy0908.html], a vessel which was on time charter to ESLC. In September 1988 the Master was injured and the vessel suffered substantial damage following an attack by Eritrean guerrillas whilst at anchor off the port of Massawa.

The Managers look forward to being of continued service to ESLSE for many more years to come. ■

24 Peak Challenge

On 12 July at 04:30hrs several teams from across the marine industry gathered at the foot of Red Pike in the English Lake District in preparation for the 24 peak challenge. The course stretched 32.5 miles crossing 24 peaks, each over 2,400 feet, and included eight of the ten highest mountains in England: Scafell Pike, Helvellyn, Ill Crag, Broad Crag, Lower Man, Great End, Bowfell and Great Gable.

The teams, which included a joint team from Steamship Mutual and Hill Dickinson (pictured right: Jamie Taylor, Will Baynham, Ben Johnson, Martin Turner, Jack Hatcher and Phil Haddon), were raising funds for Seafarers UK. Seafarers UK provides support and assistance to those in the Merchant Navy, fishing fleets, Royal Navy and Royal Marines in times of need. On the eve of the event the collective fundraising total stood at £62,000 of which the Steamship and Hill Dickinson team contributed approximately £4,000.

The team overcame changeable weather conditions, and the adversity of one team member's shoes disintegrating, to complete the challenge with enough time to spare

before the Sunday evening presentation dinner to soothe the aches and pains in the hotel's hot tub.

The team would like to express their gratitude for the generosity of those who supported and sponsored them. ■

Mingtai Navigation 50th Anniversary

Mingtai Navigation Co., Ltd., a long standing loyal Member of the Club, celebrated its 50th anniversary on 20 June 2014.

Over the course of half a century, Mingtai has grown from strength to strength under the leadership of its founder and chairman Mr. Michael Hsiao, and has diversified from its origin in regional log trade to operating a fleet of modern bulk carriers trading worldwide.

Mingtai has been a Member of Steamship Mutual for almost 40 years and we are proud to be associated with it and are grateful for its unwavering support over the years.

To mark the anniversary Mingtai hosted a banquet in Taipei which was well attended by both local and overseas guests. Steamship Mutual was represented by Edward Lee, Managing Director of the Club's Hong Kong representative office, who is seen in the photo to the right presenting a souvenir to Mr. Michael Hsiao.

We wish Mingtai success and prosperity for many more years to come. ■

Gold Awards for Steamship Mutual and Videotel

For over 20 years, with the financial support of the Ship Safety Trust, the Club and Videotel Marine International, the leading producer of high quality onboard marine training programmes, have co-operated in the production of more than 80 video and computer based training programmes. Through this association, and Steamship Mutual's extensive experience of claims, and risk assessment and management, effective and award winning training programmes have been developed on a wide range of subjects, which promote safety of life at sea and aid loss prevention. One of the more recent productions was an interactive training programme on the International Regulations for the Preventing Collisions at Sea (COLREGS) and the International Association of Marine Aids and Lighthouse Authorities (IALA) Buoyage System. Further details of this can be found in Club Circulars B.612 and L.221 www.steamshipmutual.com/Circulars-London/L.221.pdf issued in November 2013.

The Managers are delighted to report that the COLREGS & IALA Buoyage Training Course, achieved gold awards in the web-based training category from both the Horizon Interactive Awards and the World Media Festival (Hamburg). ■

Residential Training Course for Members 2015

The Managers are pleased to announce that the next Members Training Course will be held on **15–20 June 2015** at The Grand Harbour Hotel, Southampton, U.K.

An application form is available from our website or if you would like to find out further details about the Course please contact karen.clarke@simsl.com

ASHNA Visit in Dubai

There are only a few times in the year when the Club's Managers get the opportunity to visit an entered vessel so, when Jonathan Andrews and Michael Hird of Steamships Eastern Syndicate were in Dubai in May 2014 the invitation from the Managing Director of ESSAR Shipping, Mr A.R. Ramakrishnan and Mr P. Ramesh their Head Commercial & Procurement, to be shown around a VLCC was not to be missed.

Other than the experience of being transported to the deck of the vessel in a basket, a ship visit is an opportunity to be reminded of the challenges posed in operating vessels and the dedication and professionalism of those responsible for their safe passage.

The vessel, ASHNA, is operated by ESSAR Shipping a longstanding Member based in Mumbai. Essar Shipping is among the largest shipping companies in India providing global transportation logistics solutions. ■

Mr A.R. Ramakrishnam and Jonathan Andrews

127km Walk Through Bavaria

In the first bank holiday weekend in May, Steamship Mutual Underwriter, Lyndy Souster, and 40 other members of the Leigh-on-Sea Striders running club embarked on a 127 kilometre journey along the King Ludwig Way in Bavaria, Germany.

Their goal was to raise over £20,000 for the Lady McAdden Breast Screening Unit, an Essex based charity targeting Breast Cancer, by providing screening services to the local community on a donation basis. The team were proud to have "smashed" their sponsorship target by raising over £24,000. The fundraising was critical to the charity's continued success and raised money towards a digital imaging system costing £250,000.

As described by Lyndy; "*this route usually takes 6–8 days to complete, but we aimed to do it in just three days, which is the equivalent of a marathon a day! It was extremely tough, and it did involve some tears, but the scenery was spectacular and it was all for a good cause, which is close to my heart*".

Lyndy is now looking for her next challenge but in the meantime we can only congratulate her for meeting her twin goals of completing the course while raising such a substantial sum. ■

The Marine Challenge Cup – Semi Final Shoot Out

This summer's football World Cup in Brazil has been rightly lauded as one of the most entertaining in recent times and unparalleled in terms of the quality of football on show. While perhaps not attracting the same level of interest an equally entertaining, albeit with slightly less skillful players, football tournament also took place this summer – the Marine Challenge Cup, with over 30 teams from across the maritime sector including Steamship Mutual FC.

Typically for an English summer's day, weather conditions were mixed, and so too were the fortunes of the Steamship Mutual team comprising; Dean Forrest, Paul Brewer, Felix McClure, Tom Kavanagh, Francisco Carvalho, Jose Calmon, Avnish Jani and Marius Vitas. As the tournament kicked off the rain lashed down, and so did the ball into the Steamship net! However, as the rain stopped and the sun broke through, Steamship Mutual FC found its form and a spirited team effort helped the team to fight back to reach the final stages of the plate tournament.

In the semi-finals Steamship Mutual FC faced the marine intelligence consultants Gray Page. Notwithstanding that they had done their research on the Steamship team… Steamship took a well-deserved one-nil lead and looked all set to reach the final of the tournament for the second year running. Sadly though, an uncharacteristic mistake in defence in the final seconds of the game allowed Gray Page to sneak an equaliser to take the game to a penalty shoot-out. Even then, with the cat like Felix McClure as goalkeeper, and with hours of pre-tournament penalty taking practice under their collective belts, Steamship Mutual FC were confident of success. However, such confidence was misplaced as… and without naming any names… a weakly struck penalty was saved by the opponent goalkeeper ultimately preventing progress to the final. ■

Member Vessel Christens the New London Gateway Port

It's the project that has taken nearly six years to complete, and cost an estimated £1.5 billion. Its distribution park covers 740 acres and has the capacity to handle 3.5 million containers a year. It is home to the largest cranes in the UK, each of which stand at 453ft high, more than twice the height of Nelson's Column.

The London Gateway is without doubt one of the most ambitious projects in UK commerce in recent years. The deep-water port officially opened in November 2013 welcoming its first vessel, the 64,000mt MOL Caledon owned by KG MS "Santa Regula". The Korean built vessel is entered with Steamship Mutual and was laden with fruit and wine from South Africa. The port has the ability to accommodate ships as large as the 18,000-TEU Maersk Triple E class, a feat that no port in North or South America can yet achieve. The MOL Caledon will not be the biggest vessel to use the London Gateway but it can nonetheless take pride in being the very first vessel to dock at what is sure to be one of the most influential ports in Europe.

London Gateway boasts the ability to cater to up to seven 18,000-TEU Maersk Triple E class vessels at any one time and will provide stiff competition to the two largest ports in the UK, Southampton and Felixstowe, both of which have very limited capacity for such large vessels. The UK is currently the world's eleventh largest exporter, having slipped from fifth in 1990, now behind Belgium, Italy and Russia. London Gateway is certainly a signal of intent to rectify this dip, and with the aid of newly signed EU free trade agreements with Colombia, Peru and several Central American countries, and similar agreements potentially on the horizon with China and Singapore, it would appear that the MOL Caledon is the start of something special. ■

Run Steamship Run!

For the past four months, a steady stream of Steamship Mutual employees have been pounding the streets surrounding the office training in preparation to earn the right to wear the prestigious Steamship Mutual colours in the annual JP Morgan Chase Corporate Challenge 3.5 mile race.

Prior to the race the atmosphere in the office had been tense – battle lines were drawn in IT between Jason D'Souza and Simon Peet. Meanwhile Richard Harrison from Finance was worried that he might lose his fastest runner title – a title he has held for as long as anyone can remember – to a number of new runners, and unsure whether to wear his new running shoes. Similarly Lisa Jenkins from the Eastern Syndicate was under pressure from the record number of female entrants to keep her first Steamship Mutual female finisher trophy.

On the day everyone's hard work paid off with a number of personal-best times. Simon Peet was victorious in IT and Richard Harrison, albeit quite a bit slower than in previous years and under pressure from Michael Archibald from the European syndicate, kept his crown. Several debutants made their mark too, including David Ragan from Compliance finishing in front of an extremely large home crowd.

The race between IT and Reception was a close call too, with Jan Meldon-McSweeny just edging IT's Brian Goldsmith to the post. ■

Spanish Students

Steamship Mutual regularly hosts visits from students of maritime studies at several universities interested to learn about the role of P&I Clubs in the shipping industry and the service provided to the Club's Members. The Club is happy to present to these students both on the general subject of P&I as well as topical issues. In fact tailor made presentations on particular issues of interest to the students are often provided by the Club's claims and underwriting departments.

On 3 April 2014 Steamship Mutual received a visit from fifteen students from the Masters in Shipping Business Degree at Barcelona University accompanied by the Director, Mr German De Melo, and Professor Concepción Girona. This was the third consecutive year that the Barcelona students have visited Steamship Mutual.

Juan Zaplana, a claims associate, and Ben Burkard an underwriting executive from the Club's European syndicate gave presentations to the students. Juan and Ben explained to the students the basis of the P&I structure, organisation of the International Group and the different challenges and in consequence service that the Club provides to its shipowner and charterer Members. ■

Piraeus Office Open House Party and the Navigator

The frequency and severity of casualties that are caused by navigational error continues to be an area of concern. The Club's loss prevention DVD "Groundings - Shallow Waters, Deep Trouble" was produced in response to the very considerable liabilities that arise from such incidents, many of which are caused by navigational error. Further, the review of claims incurred in 2013 has identified collision as being the predominant cause of the large claims arising in that year, and again the actions of watch-keeping officers have a direct part to play in the causes of these casualties. In view of this, the Managers concluded that there was considerable loss prevention benefit to be derived from supporting the Nautical Institute's 2014 Command Series of seminars, for which the theme is navigational competence. With finance from the Ship Safety Trust, the Club is sponsoring and participating in the Nautical Institute's programme of seminars which will be held in Sydney, Manila, Limassol, London and Glasgow between June and November this year. In addition, and in recognition of the important role played by young professional navigators and the need for specific resources relevant to them, the Club is also sponsoring, again with funding from the Ship Safety Trust, the production of versions of the Nautical Institute's publication "The Navigator" in languages other than English. The first of these, a version of the magazine in Greek, was launched with the Nautical Institute at Posidonia on 3 June 2014. This publication is directed towards improving the knowledge and skills of young professional navigators and reflects the need for that role to be recognised, valued and supported. It is self-evident that improved navigational competence will aid loss prevention in relation to the incidence of grounding and collision. Copies of these publications are available from the Club's website.

David Patraiko and Chris Adams

The occasion of Posidonia was also the opportunity for SIMSL's office in Piraeus to extend its hospitality to the local and visiting shipping community with an open-house reception. On Monday 2 June we opened our doors to our friends operating within the Greek market with an invitation to join us for cocktails and canapés for a most enjoyable afternoon.

Steamship Mutual's hosts, Francis Vrettos, Mia Antonopoulou, Tatiana Sinani, Chris Adams, Ben Dyer and Darren Webb were overwhelmed by the level of support shown by the Greek shipping market, with some 250 guests attending the function, including many shipowners, brokers, lawyers and others from the local community; plus many overseas visitors from as far afield as China, South Korea, the Philippines, Turkey, the United Arab Emirates, the United States of America, Cyprus, and the United Kingdom. It was greatly reassuring to see this level of support for the most recently opened of the Club's overseas offices, which became operational in July 2012.

The Managers would like to extend their sincere thanks to all who attended and supported this function, and we very much look forward to developing the Club's business in Greece and celebrating progress in this area at the next Posidonia in 2016. ■

Steaming Dragons OSCAR Boat Race

Teams from across the marine industry recently gathered at the Docklands Sailing and Watersports Centre in order to raise money for the Great Ormond Street Hospital Children's Charity by competing in Ocean and Shipping Community Advancing Children's Health and Research Dragon Boat Race (OSCAR).

Led by Head Dragon Ben Dyer, the Steamship team, renamed for the afternoon as the "Steaming Dragons", consisted of a mix of employees drawn from across the company. Ben Burkard, Felix McClure, Dominic Newman, Ben Johnson, Marius Vitas, Rona Parker, Sara Bennett, Yasmeen Rouhani, Amy Lloyd and drummer Madeleine South made up the rest of the crew.

The team competed in two heats, the first of which resulted in a comfortable win by a couple of boat lengths, and despite improving on their time in the second heat, the "Steaming Dragons" came a very close second to the eventual winners of the competition.

Although competitive scores were posted, the team was unfortunate not to progress to the final race where the fastest six teams raced for the podium and bragging rights over their colleagues in the industry. The team's final standing was a creditable 13th out of 23 teams.

The final race of the day involved Directors from those companies present competing in an individual kayak race in which Ben Dyer came a very close second.

The team would like to thank those who helped them to raise £1,030 for the Great Ormond Street Hospital Children's Charity. ■

Clay Shooting Event on Board the Lady Daphne

The idea of a boat on the Thames with a compliment of P&I brokers and Steamship Mutual underwriters together with a "cargo" of guns and ammunition did initially raise a few eyebrows. But when the brokers were informed that they were invited to a clay pigeon shooting competition most were quite happy to board the boat!

The "Lady Daphne" set off from London Bridge Pier on what turned out to be a perfect day for cruising down the Thames and, after a pleasant journey up river anchored for the shooting competition to begin!

Whilst the completion was underway one of the "clay crew" provided further entertainment by introducing additional fire arms to shoot including a pump action shotgun and blunderbuss.

The overall competition was fierce but the eventual winner after a "quoit-off" was Josh Robertson from Price Forbes.

On the Steamship Mutual front, it was a tale of two Bens. Ben "both barrels" Burkard was by far the best shot from the Club whilst Ben *"dear, oh dear"* Dyer was a little less accurate...

A final surprise on the way back was the lifting of Tower Bridge for the boat – this was a great sight and appreciated by all the sharp shooters on board.

It was an enjoyable day and very well supported by our friends in the market. ■

On-line Articles

Further published articles that are available on-line include:

Ian Freeman
Steamship Mutual
ian.freeman@simsl.com

Wreck Removal
www.steamshipmutual.com/publications/Articles/wreckremoval0814.htm

Oliver Goossens

Implied Term to Employ Competent Stevedores
www.steamshipmutual.com/publications/Articles/implied-to-employ-competent-stevedores.htm

HWL EBSWORTH LAWYERS

Joe Hurley
Jesper Martens

Arrest in Australia: Ownership Test Revisited
www.steamshipmutual.com/publications/Articles/arrestaustralia0614.htm

Diana Sailor
Steamship Mutual
diana.sailor@simsl.com

MSC Orchestra
Whether the European Fuel Directive or Marpol VI determines low sulphur content.
www.steamshipmutual.com/publications/Articles/mscorchestra0814.htm

Andrew Hawkins
Steamship Mutual

MV Atlantik Confidence
Limitation fund constituted by Club LOU
www.steamshipmutual.com/publications/Articles/atlantikconfidence0814.htm

Jo Cullis
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Norwegian Saleform Dispute – Damages v Deposit? – Appeal
www.steamshipmutual.com/publications/Articles/failuretopayappeal0814.htm

Lisa Jenkins
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Discharging Dry Cargo at Ports in the Republic of Korea
www.steamshipmutual.com/publications/Articles/dischargingdrycargokorea0814.htm

Jamie Taylor
Steamship Mutual
jamie.taylor@simsl.com

The Importance of Vessels Being Fit for the Voyage
www.steamshipmutual.com/publications/Articles/vesselsfitforvoyage0914.htm

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Michael Volikas
Jeremy Biggs
Beth Bostock

How do you Calculate Loss of Earnings Following a Collision?
www.steamshipmutual.com/publications/Articles/calculatinglossofearnings0514.htm

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Stephen Askins
Michelle Linderman
Victoria Ogden

Shipping Issues Arising out of the Ebola Outbreak in West Africa
www.steamshipmutual.com/publications/Articles/shippingissuesebola0814.htm

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