STEAMSHIP MUTUAL

Sea Venture

Issue 29

Introduction

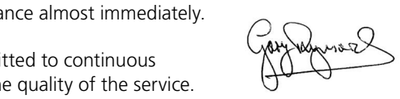
The Club's financial position remains very strong. Over the past four years the Free Reserves have increased by nearly US$215 million and now stand at US$516 million.

This has enabled the Club to avoid charging a standard increase for four consecutive years and also to return over US$50 million to the Members. Steamship Mutual's capital position is one of the strongest in the International Group.

Over recent years the Club has expanded the number of offices which now include London, Bermuda, Rio de Janeiro, Hong Kong, Piraeus, Singapore, Tokyo and soon Rotterdam. Some of the offices are required by local regulation in order to do business in a particular jurisdiction, others are part of the determination to provide the best possible service to shipowners in that region. The worldwide presence of the Club will ensure that shipowners in all the major shipping centres have the benefit of face to face assistance almost immediately.

The Club is committed to continuous improvement in the quality of the service. Sea Venture is part of that endeavour. The aim is to keep the Members up to date with developments in maritime law and best practice in ship operations. In the knowledge that Law Reports are not always the most easily digestible of documents the Club's staff are trying to explain the meaning and consequences of recent judgments in language that is hopefully more easily understood.

Many articles are available on the Steamship Mutual App as P&I Alerts on the Publications page. The Club is also exploring techniques such as video and social media channels to further improve our communication ability. A combination of face to face assistance and technology would appear to offer the best way forward for the Club. What is clear is that standing still is not an option in a demanding and competitive environment. Our shipowners demand and deserve the best.



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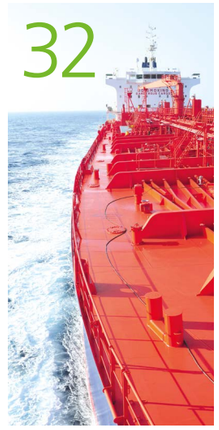

Contents

Contract

"Moscow Stars" – To Sale or Not to Sail...?

A welcome decision for Owners at a commercial and contractual impasse pending an arbitral award.

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The recent case of *Dainford Navigation Inc v PDVSA Reptroleo SA (The Moscow Stars)* [2017] EWHC 2150 (Comm) dealt with an application made by Owners of the vessel for an order for the sale of cargo, pursuant to section 44(2)(d) of the Arbitration Act 1996. In doing so, the court clarified two legal issues:

a. the legal concept of the phrase "*goods the subject of proceedings*", set out by section 44(2)(d) of the Arbitration Act 1996; and

b. the requirement for "*good reason for sale*" under the English Civil Procedure Rules ("CPR") 25.1(c)(v).

Facts

A cargo of crude oil was loaded on board the "Moscow Stars" on 14 October 2016, pursuant to a time charter between the claimant Owners and the defendant Charterers at Puerto La Cruz, Venezuela. The vessel was ordered to proceed to Freeport, Bahamas to discharge. Due to Charterers' repeated failure to pay hire (since January 2016), there was an outstanding balance of US$4.5 million due.

As a consequence, on 18 October 2016 and 26 November 2016, the Owners gave notice in order to exercise a contractual lien over the cargo. On Charterers' orders the vessel then sailed to Bullen Bay, Curacao where she remained and where Owners arrested the cargo with the permission of the local court. Although the Charterers made some payments, they remained in arrears. Therefore, Owners commenced arbitration proceedings, as per the relevant London arbitration clause of the applicable charterparty, in respect of outstanding hire and other outstanding sums totalling US$7.7 million. Owners, in the meantime, were incurring all the running costs of the vessel as well as the cost of bunkers.

On 5 May 2017, Owners applied to the English High Court to obtain an order to sell the cargo on board the vessel under section 44(2)(d) of the Arbitration Act 1996. The Court heard this would enable the vessel to be redelivered to Owners with the security rights under the lien and the arrests transferring to the sale proceeds. Charterers argued against this on the basis that the cargo was not the subject of the proceedings and in any event there was no good reason to order a quick sale of the cargo.

Legal requirements

1. As per section 44(2)(d) of the Arbitration Act 1996, English courts can order the sale of cargo on board the vessel when the goods are the "*subject of the arbitral proceedings*".

2. As per part 25.1(c)(v) of the CPR, such power can be exercised if the cargo is perishable or if there is some other "*good reason that it has to be sold quickly*".

"Goods the subject of the proceedings"

The question was whether the cargo of crude oil was the subject matter of the arbitral proceedings; only then would the Court have the power to order the sale.

Charterers argued that the phrase should be interpreted extremely narrowly requiring the goods and cargo to be the actual subject of the dispute; unlike here where the proceedings actually focused on the unpaid hire.

However, Mr. Justice Males disagreed noting that the facts of the case indicated there was an impasse between the parties which required the Court's assistance since, whilst the arbitral decision was pending, the parties were not able to determine what would happen to the cargo. Without the arbitral decision, the Owners could not enforce their lien and the Charterers could not obtain delivery and so, even if the arbitration was not about the cargo itself, it would certainly determine what would happen to it. In reality, the lien was exercised over the cargo as a security for the claim which was advanced in arbitration. On this basis, the Court held that there was sufficient nexus between the cargo and the arbitral proceedings due to the fact that the lien was exercised in support of the arbitral claim and the Court had the power to order its sale.

"Good reason... to sell quickly"

The second requirement is that the Court's power (to order the sale as per section 44 of the Arbitration Act 1996) could only be exercised if the goods are perishable in nature (which in this case they were not) or there is a good reason to sell them quickly. The Court had to decide whether it was appropriate to exercise this discretionary power.

Owners argued the cargo had been on board the vessel more than nine months and in the absence of the Court's order it would remain on board for an unknown period of time. The Owners' position was prejudiced as they were not receiving hire and at the same time they were incurring the operational costs of the vessel and could not re-employ her. Finally, deadlines to comply with Class and SOLAS requirements were fast approaching for Owners.

The Court took note Charterers had made a last-minute offer to arrange for the sale of the cargo and pay the funds into escrow, which appeared to be a belated recognition that the sale of the cargo was the only viable course; although the Court saw a number of difficulties if Charterers were to arrange a sale.

Therefore, Mr. Justice Males took a realistic approach and held that in the absence of a viable alternative (storage of cargo was held not to be a viable solution), the sale by Owners could convert the cargo to money which would benefit all parties and the vessel would be free to seek her next employment.

Comment

Despite the fact that orders for sale have been made by courts before, this decision is a welcome development for Owners. It is a fully reasoned judgment which does not enable courts to make sovereign orders for sale as a freestanding relief but sets out specific requirements by clarifying the relevant law (section 44 of the Arbitration Act 1996 and part 25 of the CPR). Additionally, it provides a possible solution for Owners when they face a commercial and contractual impasse pending an arbitral decision. However, the judgment is based on the particular facts of the case and the Court made clear they were not commenting on a situation where the cargo was owned by a third party and not by Charterers. ■

> "Even if the arbitration is not "about" the cargo, it will certainly determine what will happen to the cargo..."

The "Ocean Neptune" Demurrage Claims – Again!

In *Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Limited (The Ocean Neptune)* [2018] EWHC 163 (Comm) Popplewell J clarified whether a claim for time lost waiting for orders should be considered a demurrage claim.

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The judgment also gave further clarification on the interpretation of demurrage time bars.

For guidance on the importance of complying with demurrage time bars please refer to the Club's previous articles: 'The Adventure – Perils of Demurrage Time Bars' (https://www.steamshipmutual.com/publications/Articles/adventureperilstimebars0315.htm), 'Beware Demurrage Time Bars and Documentation (Part II)' (https://www.steamshipmutual.com/publications/Articles/Abqaiq0212.htm), and 'Demurrage Timebars – The Tide is Turning on "Sabrewing"' (https://www.steamshipmutual.com/publications/Articles/Eternity0109.html).

Facts

By means of a fixture recap dated 8 November 2013, Lukoil Asia Pacific Pte Limited voyage chartered the tanker "Ocean Neptune" from Ocean Tankers (Pte) Limited for carriage of clean petroleum products from one safe port, Taiwan, to one to three safe ports in Australia. The recap incorporated the ExxonMobil VOY2005 form and the Lukoil International Trading and Supply Company ("LITASCO") clauses, both of which were amended and supplemented in the fixture recap.

Notice of Readiness was tendered at the port of Mailiao (Taiwan) on 17 November 2013 and the hoses were disconnected two days later. Thereafter the vessel proceeded to the first discharge port, Gladstone (Australia), where NOR was tendered on 2 December 2013. The ship remained at berth between 3 and 5 December 2013, when she shifted to the anchorage. The vessel remained at the anchorage until 15 January 2014, when the vessel was ordered to proceed to Botany Bay (Australia). The delay at Gladstone was caused by the refusal of the cargo receivers to accept delivery of the cargo due to alleged contamination.

The vessel discharged part of the remaining cargo at Botany Bay between 18 and 19 January 2014, and then proceeded to Port Alma to complete discharge between 22 and 24 January 2014.

Owners sent a demurrage claim by email on 6 February 2014, in the sum of US$772,327.87. According to the calculations made by Owners the total laytime used at each port was as follows:

i. Mailiao – 57.25 hours;

ii. Gladstone - 1,048.58 hours;

iii. Botany Bay – 27.83333 hours;

iv. Port Alma – 22.9333 hours.

Charterparty terms

The arbitration award and subsequent appeal turned on the interpretation of the laytime and demurrage provisions. In particular:

LITASCO Clauses

2. *Claims*

   a. *..... charterers shall be discharged and released from liability in respect of any claims owners may have under this charterparty (such as, but not limited to, claims for deadfreight, demurrage, shifting or port expenses) unless a claim has been presented in writing to charterers with supporting documentation within ninety (90) days for demurrage and 120 days for other claims from completion of discharge of the cargo under this charterparty.*

   b. *For demurrage claims supporting documents must include whenever possible –*

      1. *owners' calculation of the demurrage due; and*

      2. *the certificate of notice of readiness tendered at each port of loading and discharge; and*

      3. *the statement of facts for each loading and discharge berth which must be signed by the master or the vessel's agents and, wherever possible, the terminal; and*

      4. *the vessel's pumping logs for each discharge berth; and*

      5. *all letters of protest issued by the vessel or the terminal. The NOR.*

3. *Statement of facts clause*

   In order to be considered an authorized document, statements of facts must be signed by the master of vessel, vessel's agents, suppliers or receivers, if possible. If not possible, then master to issue a letter of protest to the dissenting party, submitted together with owners' demurrage claim.

4. *Waiting for orders clause*

   If charterers require vessel to interrupt her voyage awaiting at anchorage further orders, such delay to be for charterers' account and shall count as laytime or demurrage, if vessel on demurrage. drifting clause shall apply if the ship drifts.

Award

Charterers rejected the demurrage claim and Owners commenced arbitration to recover these sums. Charterers defended the claim on the basis that the demurrage claims were time barred due to the failure of Owners to meet the requirements of LITASCO clause 2b, which demanded that all specified documents in support of the laytime calculations be provided within 90 days of the completion of discharge.

The Tribunal determined the point as a preliminary issue and agreed with Charterers' view. The Tribunal held that the all demurrage claims (save that in respect of the delays at Gladstone) were time barred. The Tribunal held that Owners had not met the requirements of LITASCO clause 2b as they had failed to include a statement of facts for each of the ports of Mailiao, Gladstone, Botany Bay and Port Alma countersigned by the terminal, or if it was impossible to obtain such a countersignature, a letter of protest from the Master.

The Tribunal treated the claim concerning the time waiting at Gladstone as outside of the time bar defence on the basis that it was not a demurrage claim. Although the claim had originally been pursued by Owners as a claim for demurrage, Owners subsequently re-labelled it as time lost waiting for orders under LITASCO clause 4. The Tribunal concluded that the documentary requirements of LITASCO clause 2b would not apply to this claim as, from a practical point of view, time lost waiting for orders will often involve waiting off port limits; there may be no contact with shore representatives; or no communications/documents in relation to this period.

Appeal

Charterers appealed the Tribunal's award in respect of the claim for the time waiting at Gladstone. As LITASCO clause 2b applied to "*demurrage claims*" MJ Popplewell had to decide whether a claim under LITASCO clause 4 was a "*demurrage claim*", or, as Owners submitted, that the fact that whilst the claim was to "*count as*" demurrage for the purposes of computation this did not make the claim itself one for demurrage.

The Court noted that there has been an abundance of recent authority on the principles applicable to construction of commercial contracts [see previous articles published by the Club – 'The Primacy of Language in Construction of (Commercial) Contracts' (https://www.steamshipmutual.com/publications/Articles/languageconstructioncontracts0617.htm), 'Contractual Interpretation – Commercial Common Sense' (https://www.steamshipmutual.com/publications/Articles/RainySky1212.htm) and 'A More Literal Approach to Construction' (https://www.steamshipmutual.com/publications/Articles/LiteralApproachtoConstruction04_16.htm)]. The Court's task is to ascertain the objective meaning of the language chosen by the parties. 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. It is for the Court to carry out this assessment by balancing a close examination of the language in the contract against the factual background and the implications of rival constructions.

The Court started by considering the language used in the charter as a whole. Clause 13(d) of the ExxonMobil Voy2005 form identified that the

> "The arbitration award and subsequent appeal turned on the interpretation of the laytime and demurrage provisions."

"*Charterer shall pay demurrage … for all time by which the allowed laytime specified in Part I (I) is exceeded by the time taken for the loading and discharging and* ***for all other Charterer's purposes and which, under this Charter, counts as laytime or as time on demurrage***" (our emphasis).

The Court considered that the language of the charter provided in clear terms that a LITASCO clause 4 claim was a demurrage claim as:

a. LITASCO clause 4 provided that the delay caused by waiting at anchorage shall "*count as*" used laytime or demurrage, a common drafting technique in charterparty terms to describe periods which would otherwise not form part of the laytime. In the context of clause 13(d) waiting time under LITASCO clause 4 was time taken for Charterers' purposes, therefore falling squarely within clause 13(d) and giving rise to a claim for demurrage. The Court dismissed the Owners' argument and held that claims under clause 4 were demurrage claims.

b. The construction was reinforced by the fact that a claim for waiting time under LITASCO clause 4 was not necessarily a claim for all such time. The claim was not only to be quantified at the demurrage rate but was also to be qualified by the laytime otherwise used or not used in the course of the voyage. If a claim arose under the clause it would be necessary to take account of time used as laytime at other stages of the voyage. Claims under LITASCO clause 4 would be a part of a clause 13(d) demurrage claim, but not a separate or independent claim.

c. Unlike LITASCO Clause 4 which expressly used the wording "*count as used laytime or demurrage*", clauses 5 and 7 of the Fixture Recap referred to claims being compensated at the "demurrage rate". Where the parties wanted to draw a distinction between demurrage claims and other types of delay claim they had used clear language to do so.

d. It is inferred that where the parties had made specific additions and amendments to the standard form clauses they will have carefully chosen the language used.

The Court considered a number of points but concluded there were no commercial considerations that would suggest that LITASCO clause 4 claims were not "demurrage claims" on the basis that:

a. Clause 2 listed the documents that must be submitted along with the demurrage claims within 90 days of the final discharge. This clause is a common type of clause frequently inserted in voyage charterparties that enables the parties to accurately calculate any liability for demurrage and swiftly settle demurrage claims. Courts and tribunals regularly insist on strict compliance with this type of clause.

b. There is no reason to think that the documents that clause 2b required to be provided should be regarded as any less necessary when they determine a constituent element of a clause 4 claim, especially as used laytime is an essential element in calculating claims under both clauses.

c. Even though in some circumstances the documents listed in clause 2b might be irrelevant that would not be sufficient reason for failing to give effect to the clear wording of the contract.

The High Court allowed the Charterers' appeal and in conclusion overturned the Tribunal's decision in respect of the time incurred by the delays at Gladstone. As the status of the Gladstone claims were part of a preliminary issue in the arbitration reference the Court invited the parties to submit their views as to the next appropriate steps.

Comment

The *Ocean Neptune* provides an overview of the rules of interpretation applicable to commercial contracts but also highlights the importance of strict compliance with documentation requirements and time bar provisions. These are often short to effectively protect demurrage claims between operators and careful consideration must be given to ensure a claim is lodged in time with all necessary documentation. ■

"The Court's task is to ascertain the objective meaning of the language chosen by the parties."

Back to contents

Back to contents

"Always Accessible" – What Does it Mean?

In the recent case of *Seatrade Group N.V. v Hakan Agro D.M.C.C (The Aconcagua Bay)*, the English High Court clarified the scope of a warranty in a voyage charterparty that the berth shall be "always accessible".

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Previous cases have considered what this phrase means in the context of a vessel entering a berth [see the Club's previous article: 'Competing Causes – Agreeing the Risk of Delay' (https://www.steamshipmutual.com/publications/Articles/HangTa0911.htm)], however this case discussed whether this requires that the vessel is able not only to enter the berth but to leave the berth too. The answer to this question was "yes".

Background

The "Aconcagua Bay" (the "Vessel") was chartered on an amended GENCON 1994 form for a voyage from the US Gulf to the Republic of Congo and Angola. The charterparty provided "*Loading port or place: 1 good safe berth always afloat always accessible*".

The Vessel reached the loading berth without incident but during loading operations a bridge and lock within the port channel were damaged. As a result, the Vessel was unable to leave the berth until 14 days after loading was completed.

Owners commenced English arbitration proceedings against Charterers claiming damages for detention for the period of delay, arguing that Charterers had breached the "always accessible" warranty in the charterparty.

The Arbitration

The decision of the Tribunal was that the warranty was confined to entry to the berth and did not extend to departure from the berth. This was on the basis that "accessible" naturally means "reachable". Therefore, there had been no breach by Charterers.

Owners appealed against the decision and were granted leave to appeal by the English High Court on the basis the question of law raised by the appeal was considered to be of general public importance.

The appeal

On appeal, Knowles J found that the Tribunal had erred in law in finding that the parties had intended to confine the issue of accessibility of the berth to entry alone.

Knowles J noted that in interpreting a contract, the Court must look to identify the intention of the parties by reference to "*what a reasonable person having all the background knowledge that would have been available to the parties would have understood them to be using the language in the contract to mean*". He considered that a reasonable commercial party looking at the subject of berthing would bear all aspects in mind and not confine the term to a vessel getting into berth.

In reaching this conclusion, Knowles J observed that there are a number of judgments and awards which have examined the term "always accessible" in the context of a vessel's arrival but have not needed to address the position on departure. Although the tribunal in London Arbitration 11/97 did address the position on departure, finding that the term "always accessible" did not extend to leaving the berth, the point was not decisive in that arbitration. Further, this 1997 arbitration award was not consistent with the authors of the Baltic Code 2003 (or its subsequent versions) which state that "*Where the charterer undertakes the berth will be 'always accessible', he additionally undertakes that the vessel will be able to depart safely from the berth without delay or at any time during or on completion of loading or discharge*".

> "... a reasonable commercial party looking at the subject of berthing would bear all aspects in mind..."

Knowles J considered that reference to dictionary definitions could not resolve the point of interpretation, although he agreed there was force in Owners' submission that the word "always" in the term "always accessible" conveyed a sense of continuity. This is consistent with "always afloat", which covers the whole period a vessel is in berth.

Knowles J noted that a number of textbooks treat the terms "always accessible" and "reachable on arrival" as synonymous, but in his view the two terms only have the same effect in the context of berth arrival (and not berth departure). He noted that there was a range of vocabulary from which parties can choose, if "always accessible" applies to departure as well as entry and if "reachable on arrival" applies to entry alone.

Finally, he considered that where commercial parties had addressed the question of accessibility of the berth, he could see no basis for a conclusion that they should be taken to have addressed entry alone. Importantly, in his view, the Umpire in the original arbitration had not provided an answer to this point.

In summary, Knowles J held that the term "always accessible" applied both to entry to a berth as well as to departure from it.

Comment

The case highlights two points of importance. First, there is a difference between a warranty that the berth will be "always accessible" and a warranty that the berth will be "reachable on arrival" and careful consideration should be given when choosing which phrase to use in a charterparty. Secondly, if the parties to a voyage charterparty wish to limit the "always accessible" warranty to the vessel's arrival only and therefore exclude delays arising during the vessel's departure from the berth, then additional wording will be required. ■

The "Songa Winds" – Letters of Indemnity – Again!

A shipowner seeks to enforce a Letter of Indemnity for delivery of cargo without presentation of bills of lading.

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Following the Bremen Max (https://www.steamshipmutual.com/publications/Articles/LOI1208.html) and the Zagora (https://www.steamshipmutual.com/publications/Articles/riskiflettersindemnity.htm), this is a third case where shipowners sought to enforce a Letter of Indemnity ("LoI") given by charterers for delivery of cargo without presentation of bills of lading.

Facts

The "Songa Winds" was fixed by her Owners ("Songa") into the Navig8 Chemical Pools Inc. ("Navig8") under the terms of a time-charter based on the Shelltime4 form. Navig8 fixed her in a voyage charter to Glencore Agriculture BV ("Glencore") on Vegoilvoy terms. She loaded cargoes of crude sunflower seed oil at Ilychevsk for India, including about 6,000 tonnes of cargo for which bills of lading were issued showing the notify party to be Ruchi Agritrading ("Ruchi"). The cargo covered by these bills was sold by Glencore to Aavanti in Singapore, who arranged to sell it to Ruchi.

The cargo was delivered at two ports; about 4,000 tonnes at New Mangalore and about 2,000 tonnes at Kakinada. Bills of lading were not presented, and Navig8 provided two LoIs, in the wording recommended by the International Group of P&I Clubs (https://www.steamshipmutual.com/Circulars-London/L.141.pdf), requesting that the Owners deliver the cargoes to "*Aavanti or to such party as you believe to be or to represent Aavanti or to be acting on behalf of Aavanti*" at New Mangalore and Kakinada.

Ruchi did not pay Aavanti for the cargo, and Aavanti did not pay the bank, SocGen, that was financing the trade. SocGen, as lawful holders of the bills of lading, subsequently brought a claim at London arbitration against Songa for misdelivery of the cargo and threatened to arrest the ship or others assets of Songa to secure their claim. Songa sought to enforce LoIs issued by Navig8, and Navig8 in turn sought to enforce similar LoIs issued to them by Glencore, to have Glencore secure the claim and put owners in funds to defend it.

Issues in dispute

The questions for determination at Court were;

1. Was Ruchi, in taking delivery of the cargo, representing or acting on behalf of Aavanti?
2. If not, did the Owner believe that Ruchi represented or acted on behalf of Aavanti?
3. If not, could the Owner rely on clause 4 of the LoI wording?

Court decision

Baker J decided from the facts of the case, and from a pattern of previous trades, that Ruchi were in fact acting on behalf of Aavanti. This was sufficient to decide the case in favour of Songa, who were entitled to enforce the LoIs against Navig8.

> "Where owners deliver cargo without presentation of a bill of lading, then P&I cover will be prejudiced."

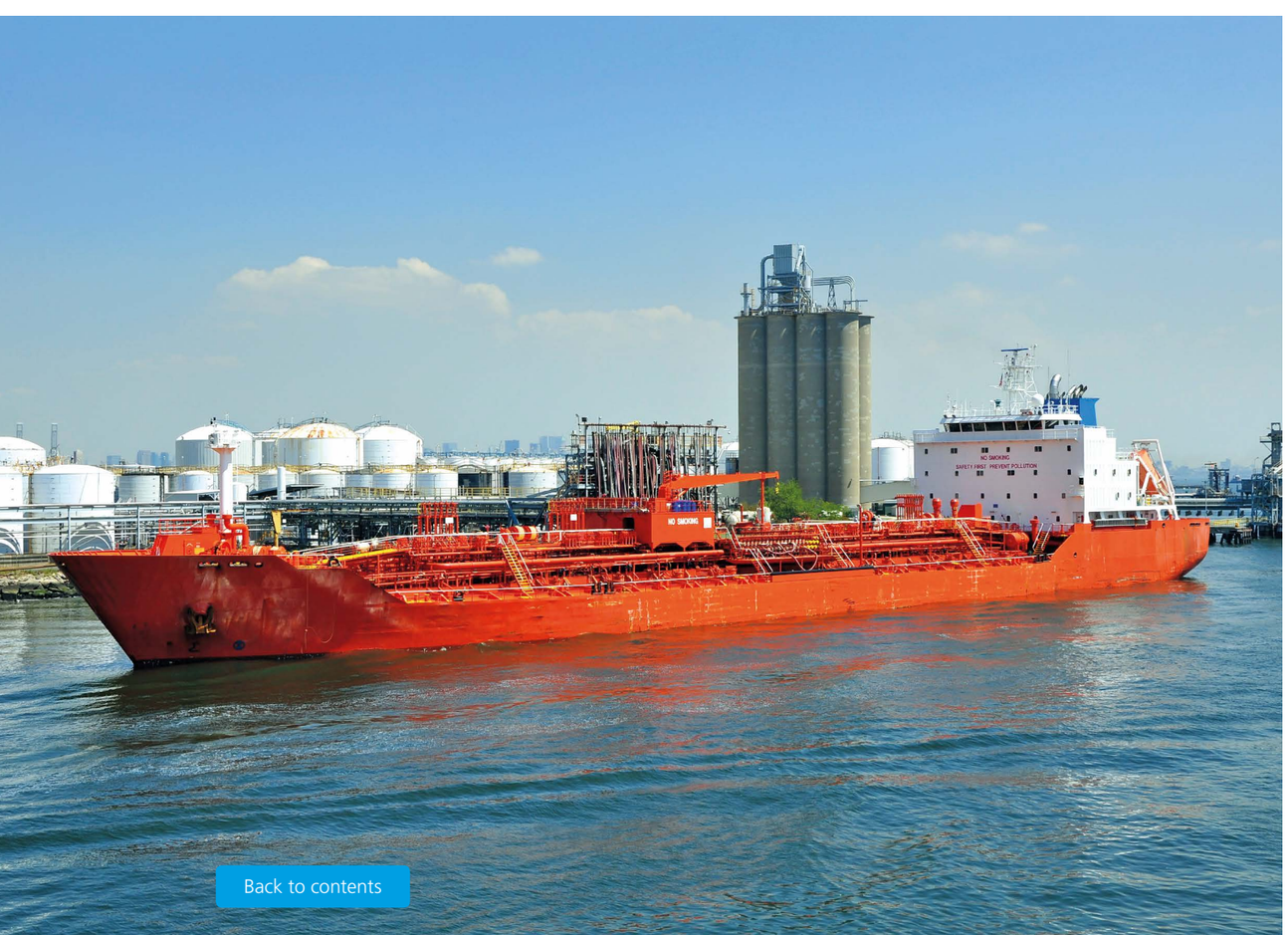
It was not necessary for the Court to decide the other two questions, but Baker J commented on them "*quite briefly, for completeness only*".

He considered that reference to "*such party as you believe to be or to represent Aavanti or to be acting on behalf of Aavanti*" referred to the belief of the Master of the "Songa Winds", who was acting as the Owner's representative in the case of the LoI issued to the Owners, and was considered to be acting vicariously for the time charterers, Navig8, with respect to the LoI issued to Navig8 by Glencore. This follows a similar finding in the Zagora case.

Clause 4 of the LoI wording states that "*If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal or facility, ship, lighter or barge, shall be deemed to be delivery to the party to whom we have requested you to make such delivery…*" Baker J considered that the LoIs requested delivery at a port (New Mangalore or Kakinada) and not a bulk liquid terminal, so that this provision was not triggered.

Comment

Where owners deliver cargo without presentation of a bill of lading, then P&I cover will be prejudiced, and the owners will be relying on the Letter of Indemnity instead of P&I insurance in case they face a large claim for misdelivery. Apart from considering the commercial risk of relying on the party who issues the indemnity, owners need to be careful to ensure that they comply exactly with the terms of the Letter of Indemnity in order to be able to enforce it. ■



> "SocGen, as lawful holders of the bills of lading, subsequently brought a claim at London arbitration against Songa for misdelivery of the cargo, and threatened to arrest the ship or others assets of Songa to secure their claim."

Back to contents

The Approach Voyage – "The Pacific Voyager"

What are shipowners' obligations when commencing the approach voyage to the load port?

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CSSA Chartering and Shipping Services S.A. v Mitsui O.S.K Lines Ltd – The Pacific Voyager [2017] EWHC 2579

In *Monroe Brothers Limited v Ryan* [1935] 2 KB 28 the Court of Appeal held that where a voyage charterparty contains an obligation on an owner to proceed with all convenient speed to a loading port and gives a date when the vessel is expected to load, there is an absolute obligation on the owner to commence the approach voyage by a date when it is reasonably certain that the vessel will arrive at the loading port on or around the expected readiness to load date (the "*Monroe obligation*"). An absolute obligation would mean that owners have no defence if the vessel does not reach the load port in time, even if they had exercised due diligence, i.e. even if they had made all reasonable efforts to reach the port in time. It was held in later cases that the *Monroe obligation* also applied to an estimated time of arrival ("ETA"), as well as an expected readiness to load date.

Facts

Mitsui O.S.K Lines were the Defendants and disponent owners ("Owners") of the "Pacific Voyager", (the "Vessel"), who fixed the Vessel in a voyage charter dated 5 January 2015 to the Claimants, CSSA Chartering and Shipping Services S.A. (the "Charterers"), on the Shellvoy 5 form for a voyage from Rotterdam to the Far East (the "Charterparty"). The Charterparty provided a cancellation date of 4 February 2015 and also contained a clause which stated that the Vessel "*shall perform her service with utmost despatch*".

When this fixture was agreed, the Vessel was laden with cargo under a previous charter and was due to call at various ports before heading to Rotterdam to load. In addition to the cancellation date, the Charterparty also advised of the ETAs for the various ports under this previous charter, at clause 1(B) of the Shellvoy 5 form, but did not provide an ETA for load port in Rotterdam.

While the Vessel was in transit through the Suez Canal on the previous voyage, on 12 January, she struck an underwater obstruction, and suffered damage, requiring drydocking for repairs. There was no suggestion that Owners were at fault for this accident. Whilst Charterers were kept informed of the incident and future prospects of performance, by the cancelling date of 4 February 2015, the Vessel was due to drydock and Owners advised that the repairs would take months. Charterers terminated the Charterparty on 6 February 2015 and presented a claim to Owners for damages.

Back to contents

The parties' submissions - absolute obligation v due diligence

Charterers submitted that the cancellation date was equivalent to an ETA and therefore the *Monroe obligation* applied in this case. This meant that Owners had an absolute obligation to commence the approach voyage to the load port at a time when it would be reasonably certain that the Vessel would arrive before, or at the very latest, on the cancellation date.

Owners submitted that the cancellation date was not an estimate given by Owners as to when the Vessel would arrive at the load port. Owners argued that the cancellation date only provides an option to cancel the Charterparty, but does not give rise to a claim in damages if the Vessel does not arrive at the port by that date. Therefore, the obligation for Owners to get the Vessel to the load port by the cancellation date was one of due diligence only.

The decision

The Court preferred Charterers' arguments. The decision focused on the need for certainty in commercial contracts and the importance of ensuring that the Court gave effect to what had been agreed between the parties. The Court considered the current position in respect of a cancellation date, which is that it allows a charterer to bring the contract to an end if the vessel does not arrive by that date – that is the only remedy to charterers which it offers; it does not give rise to a right to claim damages. This limits the provision of any certainty regarding when arrangements can be made by charterers for the cargo to be loaded. In addition, it is not certain whether charterers would have any insight into a previous voyage, and they would be unaware of the terms of the previous fixture. This allocation of risk between an owner and charterer is dealt with by way of the *Monroe obligation* with owners giving an ETA or an expected readiness to load date. This then provides a charterer with some comfort that a claim for damages can be made if the

Back to contents

vessel does not arrive in time. The Court therefore decided that if they were to agree with Owners' submission - that the obligation to proceed with utmost despatch was one of due diligence only - this would not provide any commercial certainty for Charterers.

Owners' obligations under a charter (for example, the duty to provide a seaworthy vessel and to proceed with utmost despatch) attach when the duty to proceed to the load port arises, i.e. when the approach voyage commences. This duty to proceed arises at a particular point in time, which the Court decided was to be a reasonable time. As there was no ETA provided, the Court looked to the other terms of the Charterparty to consider when this reasonable time arose. In this instance, the Court was able to look to the ETAs given for the previous voyages. The ETA given for arrival at the Vessel's last discharge port under the previous charter also carried with it an estimate that the Vessel would take a reasonable period of time to complete her discharge. It was decided that after this reasonable discharge period the Vessel would be bound to commence the approach voyage.

The Court then went one step further to say that even without these ETAs there would still be an absolute obligation on the Owners to set sail at a reasonable time for it to be certain the Vessel would arrive by the cancellation date. The cancellation date represents an expectation of the parties as to when the Vessel will arrive at the load port – and therefore would provide the same function as an ETA when considering the *Monroe obligation*.

The allocation of risk in this matter consequently fell on Owners, and Charterers were awarded damages.

Comment

This decision extends the scope of the *Monroe* obligation to a situation where the giving of an ETA relating to discharge ports under a previous charter can provide the reference point for when the vessel should commence the approach voyage, and when the owners' obligations attach. The decision also suggests that a cancellation date on its own could potentially provide this reference point.

Shipowners should be aware that if they enter into a voyage charter when the vessel in question is still performing her previous service there is a risk that if the vessel does not arrive at the load port by the cancellation date (or ETA if one has been given) that, the charterer could succeed in making a claim for damages.

During fixture negotiations, charterers may prefer to push for an ETA to be provided in any new charters. This is because permission to appeal this case has been granted, and the Court of Appeal might give further guidance on this point when the appeal is heard. ■

Back to contents

The Conoco Weather Clause – When is Bad Weather an Exception?

Practical examples of the application of the Clause in different standard form charterparties.

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The Conoco Weather Clause ("CWC") is frequently incorporated into charterparties but disputes as to its application often arise. There is no clear line of authority on its application and, as with all laytime and demurrage disputes, a careful analysis of the factual matrix including whether laytime has started and the demurrage provisions in the charterparty will be required. Assuming time has started, the cause of delay will also be a factor. This article discusses some practical examples of its application in the context of various standard form charterparties.

The clause

The CWC provides that:

"Delays in berthing for loading or discharging and any delays after berthing which are due to weather conditions shall count as one half laytime or as time on demurrage at one half demurrage rate."

Commencement of laytime

As with all laytime disputes the starting point is whether laytime has commenced, as until the clock has started the CWC will not be applicable. Whilst this will depend on the provisions agreed and the particular circumstances, the broad position under two of the standard form charterparties is as below:

Asbatankvoy – laytime

Under clause 9 of the Asbatankvoy form, charterers are required to procure a berth that is reachable on arrival ('ROA'). This absolute warranty applies equally to physical and non-physical obstructions[1] - the cause of the unreachability is immaterial and a berth is equally deemed to be not ROA in instances where there is unavailability of tugs[2], where there is congestion, or in instances of bad weather.

While the Asbatankvoy form includes an exception to laytime at clause 6 which provides that "*where delay is caused to vessel getting into berth after giving notice of readiness for any reason over which charterers have no control, such delay shall not count as used laytime*", this can only be relied on if a berth is ROA and a valid NOR has been issued with the result that laytime has commenced[3].

Shellvoy 5 – laytime

Unlike the Asbatankvoy form, Shellvoy 5 does not require a berth to be ROA. Clause 13(1)(a) of Shellvoy 5 specifies that laytime can commence in two scenarios:

1. If the vessel proceeds straight to berth then time shall commence to run six hours after the vessel is in all respects ready to load or discharge and written notice thereof has been tendered;

2. If the vessel does not proceed immediately to berth, time shall commence six hours after (i) the vessel is lying in the area where she was ordered to wait or, in the absence of any such specific order, in a usual waiting area and (ii) written notice of readiness has been tendered and (iii) the specified berth is accessible. A berth will be deemed inaccessible where there is bad weather, tidal conditions, ice, awaiting daylight pilot or tugs, or port traffic control requirements.

The fact that the vessel cannot proceed directly to the berth does not preclude laytime from commencing and therefore it follows that the CWC could apply in situations where the vessel is not yet in the berth as long as that berth is "accessible."

> "Assuming time has started to run, whether the Conoco Weather Clause then applies will be a question of fact..."

Back to contents

Accessibility under clause 13(1)(a) is a defined term and a berth will only be deemed to be inaccessible in one of the prescribed circumstances.

Establishing the CWC applies

Once it has been established that laytime has commenced, charterers are permitted to rely on the CWC in circumstances where they can prove that the delays are "*due to weather conditions*". If the vessel is in berth and bad weather causes delays, it is clear that the CWC would apply. However, even if the vessel does not proceed immediately to berth, for example as a result of congestion, providing that laytime has commenced the CWC should apply to any period of delay due to bad weather.

In order to rely on this clause, charterers would need to provide contemporaneous evidence that during the period of delay there was bad weather. This requirement could be satisfied by provision of a notice from the port or local agents that the reason for the closure of the port or stoppages in operations was bad weather and not some other cause.

However, this may not be the end of the matter. If there was more than one cause of delay or owners can demonstrate that there was a break in the chain of causation there is scope for rejecting the application of the CWC. Whether owners can prove a break in the chain of causation will require a careful consideration of the factual matrix and will be heavily dependent on the particular circumstances.

Pre-existing congestion does not restrict the application of the CWC, as even if there is another vessel in the berth the bad weather may still be the effective cause of the delay. While there is an unreported 1997 arbitration which suggests that the vessel must be at the head of the queue to rely on the CWC, it could be argued that this is not the correct position. Notwithstanding that a vessel is not first in line to berth, it would still be open to charterers to provide evidence that bad weather was the effective cause of the additional delay suffered.

It is foreseeable that where there is bad weather but the port closes for reasons entirely unconnected with the weather, such as breakdown of some of the cargo equipment, owners may have a valid argument that the CWC does not apply. It is also foreseeable that where a vessel is removed from the berth due to bad weather but is then 'queue-jumped' once the bad weather ceases, there would likely be a break in the chain of causation. While the vessel would not have been removed from the berth had the bad weather not occurred, it would be the port's decision to place another vessel ahead of it in the queue and therefore it is this decision that is the effective cause.

The CWC will only apply up to the point where the bad weather ceases. Subsequent to this the effective cause of the delay is no longer bad weather, the cause of the delay once again being some other cause, for example congestion. Subject to the application of any other exceptions, once the bad weather ceases time should run in full.

Conclusion

The CWC will only apply where laytime has commenced under the charterparty. When laytime commences depends solely on the agreed terms and it is often a source of debate when demurrage calculations arise. Assuming time has started to run, whether the CWC then applies will be a question of fact and will require careful consideration of the circumstances. If charterers can demonstrate that there was bad weather which caused a delay, the burden will then lie with owners to show there has been a break in the chain of causation such that the bad weather was not the effective cause of the delays. ■

[1] The Laura Prima [1982] 1 Lloyd's Rep. 1. and The Sea Queen [1988] 1 Lloyd's Rep. 500
[2] The Fjordaas [1988] 1 Lloyd's Rep. 336
[3] The Laura Prima [1982] 1 Lloyd's Rep. 1.

How Late is too Late?

The question of whether a Notice of Abandonment ("NOA") given five months after the casualty meant that Owners had lost the right to abandon the vessel and claim indemnity for a Constructive Total Loss ("CTL") was recently considered by the Court of Appeal, on appeal from the 2016 High Court case *The Renos* [2016] EWHC 1580 (Comm).

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The Court was further asked to consider whether Owners were entitled to take into account costs incurred prior to the NOA towards the CTL calculation. At first instance, Knowles J gave judgment for Owners.

Facts

In August 2012, a fire broke out in the engine room of the "Renos" while she was on a laden voyage in the Red Sea. The same day, Owners appointed Salvors under a Lloyds Open Form 2011 ("LOF") and the SCOPIC clause was invoked.

The vessel was insured for US$12 million on a hull policy subject to ITC – Hulls 1/10/83 and US$3 million under an increased value policy. It was agreed that the fire was an insured peril. It was common ground that the vessel was likely to be a CTL as the damage repair costs were estimated to be US$8 million or more.

In the weeks and months that ensued, Owners and Insurers carried out multiple investigations aimed at determining the extent of damage and cost of repairs. The parties held several inconclusive discussions as to whether and where the vessel should be repaired and what such repairs should entail. By the end of January 2013, the parties had failed to reach an agreement as to whether Owners were entitled to be indemnified for a CTL.

Faced with an impasse, Owners finally tendered their NOA on 1 February 2013, to which Insurers reacted with a rejection on the grounds that it had been given too late.

Insurers sought to defend the claim, inter alia, on the grounds that the vessel was not a CTL, that Owners failed to serve a NOA in a timely manner and that certain expenses should be excluded from the CTL calculation. At first instance, Knowles J gave judgment for Owners.

The court of appeal's decision

On appeal, Insurers asked the Court to consider:

1. Whether the Judge was wrong to conclude that the Owners had not lost the right to abandon the vessel and claim CTL pursuant to s.62(3) of the Marine Insurance Act 1906 ("MIA").
2. Whether the Judge was wrong to conclude that the vessel was a CTL, and, in particular, to hold that (a) costs incurred prior to the date of the NOA and (b) SCOPIC costs could be counted as "*costs of repairs*" for the purpose of the CTL calculation.

First ground

Section 62(3) of the MIA provides: "*Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.*"

In the 2016 trial the Judge considered that Owners had not received reliable information as to the loss prior to tendering their NOA. Therefore, Owners had taken no more than a reasonable time.

While it considered that, in abstract, five months is a long time, the Court unanimously took the view that the Judge at first instance was entitled to conclude that there had never been enough reliable information that the vessel was a CTL and that this remained the position when the NOA was given. There had been a wide range of repair estimates and Owners and Insurers had both prepared materially conflicting, but equally credible, repair specifications.

Notably, the Court observed that the question of how to interpret "*reasonable*" in the phrase "*reasonable diligence*" is one of fact, as stated in section 88 of the MIA. The Court accepted that this was a case

in which knowledge of the extent of damage, the scope of repair and the cost of repair were essential in order to have reliable information of the loss.

As to whether Owners had exceeded the reasonable time allowed to "make inquiry", again, the Court noted this to be a question of fact and found that Owners had reasonably attempted to resolve the contradictions posed by the Insurers' approach, which was to continually challenge the figures that would support a CTL.

Second ground

Pursuant to section 60(2)(ii) of the MIA, in the case of damage to a ship, "*there is CTL where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired*".

Section 60 further provides that, "*in estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired…*"

The Court conceded that the explicit reference to future salvage operations and future general average contributions is problematic, however it advised that section 60(2)(ii) should not be taken to mean that past expenses necessarily incurred to repair the vessel should be treated differently. The Court concluded that costs incurred prior to the date of the NOA could be taken into account for the purpose of a calculation towards a CTL. In so doing, the Court overruled two previous decisions relied upon by the Insurers, in *Hall v Hayman* (1912) Comm Cas 81 and *The Medina Princess* [1965] 1 Lloyd's Rep 361, both of which the Court considered to have only "slight" authoritative weight.

Insurers also argued that the Judge at first instance was wrong to hold that the SCOPIC costs could be ranked towards the CTL calculation, because;

1. they were not properly a cost of repair and/or

2. insurers could not be held liable for such costs due to the terms of paragraph 15 of the SCOPIC clause barring their recovery under the vessel's H&M policy.

The Court's rejection of these arguments was twofold: firstly, the SCOPIC costs were an indivisible element of the salvage remuneration that Owners had to pay to recover their vessel, and as such part of the cost of repair; secondly, because the claim was for the total loss of the vessel and not for an indemnity relating to SCOPIC remuneration.

Comment

By affirming the Commercial Court's 2016 judgment, the Court of Appeal's decision could be seen as particularly penalising on hull insurers in light of section 62(3) of the MIA. Effectively, despite the onus of reasonableness this provision places on the insured to elect whether to abandon the property insured, the insurer's conduct could lead to a wider interpretation of the rule. However, the Court here was careful to emphasise 'section 88' of the MIA, as to say that the findings in one case may not be extrapolated to cases with a materially different set of facts. The decision, nonetheless, brings clarity to the interpretation of section 63(3) and carries great interest for future CTL cases where the timing of the NOA is under dispute.

The Court's finding that SCOPIC remuneration, ultimately covered by P&I Clubs, could count as a cost of repair towards the CTL calculation would seem more controversial. Given its potential implications to the hull insurance market, it may well become the subject of a future appeal. ■

"Can an insurer avoid a claim for total loss when notice of abandonment was given five months after the casualty?"

Liabilities for Under-Performance in a Follow-On Fixture

Hull fouling is a very common problem affecting vessels trading in tropical water ports and can be a particular issue when there is an extended waiting period to berth.

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Disputes in relation to underperformance following a port stay and the responsibility for any hull cleaning can be costly and are not straightforward. The issues arising were discussed in the Club's previous articles in July 2013 (https://www.steamshipmutual.com/publications/Articles/Kos0613.htm) and July 2016 (https://www.steamshipmutual.com/publications/Articles/complianceorderscontinuingperformancewarranty0716.htm).

London Arbitration 25/17 considered the extent to which a charterer could be held responsible for underperformance under a follow-on fixture which occurred as a result of hull fouling. The conclusion reached was that a charterer could be responsible for claims arising under a follow-on fixture until such point when owners had a reasonable opportunity to rectify the situation. The outcome will of course depend on the charterparty wording and the particular facts of the situation, but this case is a useful reminder of the issues which can be encountered.

Background facts

The vessel was chartered on an amended NYPE 1946 form for a time charter from Sual in the Philippines to Singapore/Malaysia carrying a cargo of coal. The vessel arrived at her discharge port Lumut, Malaysia on 1 July 2014 and then had to wait for a berth until 31 July 2014. Three weeks into the port stay, the Master raised a concern that there were signs of marine growth and barnacles around the waterline. In response to this, Charterers ordered the vessel to proceed to sea for three hours. However, when the Master queried the effectiveness of this suggestion Charterers failed to confirm their instructions. Discharge was completed on 5 August 2014 which resulted in a total port stay of 35 days.

The vessel was chartered on 25 July for a follow-on fixture to a different charterer with delivery on dropping the outward pilot on sailing from Lumut. Following delivery, the vessel proceeded to Singapore to bunker and then to load a cargo in Indonesia, with a laycan at load port of 2 to 11 August.

Owners investigated the possibility of hull cleaning in Singapore at the same time as bunkering. However, when this proposal was suggested to both sets of Charterers, neither party responded. In any event, the hull cleaning would have taken a longer period than bunkering and would have resulted in a delay to the vessel.

The vessel arrived at the loadport on 9 August. On completion of the follow-on fixture those Charterers submitted a performance claim. This claim was settled for US$41,303.83 and after completion of the fixture the vessel underwent hull cleaning.

Owners commenced arbitration against the first set of Charterers claiming that the hull had become fouled in Malaysia and that Charterers were in breach of clauses 4 and 43 (see below). The Owners' claim was for the costs of the hull cleaning in addition to the settlement paid to the follow-on Charterers.

The charterparty

The relevant clauses in the charter were clauses 4 and 43:

i. Clause 4 related to payment of hire and provided that the vessel would be redelivered: "*in like good order and condition, ordinary wear and tear excepted… with water washed dry holds or in Charterers' option, redelivery unclean against*

> "Disputes in relation to underperformance following the port stay and the responsibility for any hull cleaning can be costly and are not straightforward."

a lumpsum of US$5,000 in like good order and condition, ordinary wear and tear excepted …"

ii. Clause 43 related to long port stays and provided: *"If the vessel, whilst under Charterers orders, is idle or remains stationary at a port or anchorage or at any other place for a period of more than 30 days leading to marine growth at vessel's hull, the Master to report same immediately to Charterers when same has been discovered. Owners will not be responsible for reduction of speed/over consumption from such fouling. However if requested by Charterers, Owners will endeavour to carry out hull/bottom cleaning at a mutually agreed convenient port/place where proper facilities are available, at Charterers time risk and expense. In any case Charterers to redeliver the vessel in the same condition (including vessels hull/bottom) as she was on delivery."*

Arbitration decision

In response to Owners' claim, Charterers put forward a number of arguments:

1. The vessel's hull was probably fouled at the time of delivery into the subject charter.

   The Tribunal held that on balance of probabilities there was no significant hull fouling when the vessel was delivered into the subject charter and that the fouling occurred whilst awaiting discharge in Lumut.

   The first sign of hull fouling was noted on 22 July and the hull condition continued to deteriorate between then and 4 August when she was redelivered. There was no doubt that the hull was seriously fouled when redelivered from the follow-on fixture. It was also noted that Charterers had not complained of an underperformance/ overconsumption in the laden voyage of the subject charter; this suggested that there may not have been any fouling at this point.

   Furthermore, Lumut is almost equatorial and a prolonged stay in these waters would have made the vessel highly susceptible to hull fouling

2. The Master should have complied with Charterers' instructions on 29 July 2014 to proceed to sea for a short period.

   So far as the orders to proceed to sea on 29 July were concerned, the Tribunal held that the Master was right to query these orders in light of his view that this would not solve the issue. Charterers accepted they did not respond to his request for confirmation of the orders and in light of this the Tribunal considered that the Master could not be blamed for not following the original orders. In any event, the expert evidence considered in the arbitration indicated that a short sea passage of three hours would not have removed or prevented the fouling.

3. Any fouling constituted *"ordinary wear and tear"* so that Charterers were not in breach of charter.

   As to whether Charterers were in breach, the key wording was the final sentence of clause 43, *"In any case Charterers to redeliver the vessel in, the same condition (including vessels hull/bottom) as she was on delivery"*, which made it clear that redelivery of the vessel with a fouled hull would not fall within the fair wear and tear exception. Therefore, redelivery with a fouled hull was a breach of charter.

4. Owners should have cleaned the hull prior to the follow-on fixture.

   As noted above, Owners did consider cleaning the hull whilst bunkering prior to proceeding to the loadport for the follow-on fixture. However, neither Charterer responded to this proposal. It was also noted that the vessel would not have had sufficient time for cleaning at this time.

5. The performance claim presented by the follow-on Charterers was not related to events at Malaysia and might have been due to engine problems.

   The Tribunal rejected this argument on the basis that there was no evidence of engine problems having been experienced. The Tribunal also came to the conclusion that the underperformance claim for the follow-on fixture was indefensible and Owners were justified in the settlement of this.

In these circumstances, the Tribunal reached a conclusion that Charterers were in clear breach of clause 43 by redelivering the vessel with a fouled hull and the damages which flowed from this were the costs of cleaning and the loss of performance until Owners had a reasonable opportunity to rectify the situation. In light of this, Owners were entitled to claim the costs of the underperformance under the follow-on fixture from Charterers.

Comment

The decision reached by the Tribunal is pragmatic, and would seem to be sensible in light of the facts and the express wording of clause 43. It also emphasises that the liabilities which may flow from a long port stay do not necessarily cease on redelivery of the vessel. It serves as a reminder that it is of key importance to carefully consider the wording of any charterparty clause which addresses hull fouling and to ensure that the set process is followed. In the event that there has been a long port stay which may have given rise to hull fouling, both owners and charterers may wish to engage surveyors to assess any consequent fouling albeit this will depend on the obligations contained in the fixture. In the event that there has been hull fouling, charterers may be liable for owners' damages which may be considerable and may include losses incurred under a follow-on fixture. ■

Speed and Performance, Pitfalls and Practice

It is common for an element of speed and performance claims to be included in final hire disputes at the end of a time charterparty. Arbitration 9/18 raises a number of important legal and commercial issues to consider when raising or defending speed and consumption claims.

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The subject vessel was chartered on an amended NYPE form, being delivered on 1 March 2005 and redelivered on 25 December 2005. Charterers made significant deductions from hire of US$729,158.76, of which some US$450,000 related to alleged under-performance in speed and over-consumption of bunkers, such claims being described in Charterers' final hire statement as *"off-hire due to under performance of speed…"*.

In September 2006 Owners started arbitration claiming for a balance of account and claim submissions were served in April 2012.

The charter

The charter contained the following provisions:

CLAUSE 15:

"…if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire. Same always to be properly documented by proper evidence…"

CLAUSE 29:

"… b) speed/consumption clause

laden speed: about 13.0 knots

laden daily consumption: about 32.0 m/t ifo + about 2.0 m/ts mdo…

Throughout the currency of this charterparty, owners guarantee vessel shall be capable of maintaining and shall maintain on all sea passages from sea buoy to sea buoy an average speed as given hereabove. The time during which there is bad weather/heavy swell or adverse current with wind exceeding Beaufort Force 4 and/or Douglas Sea State 3 will not be taken into consideration for the calculation of performance.

c) charterers shall have the option of supplying ocean routes advice to the master during the voyage. The master shall comply with the reporting procedures of the routing services. Evidence of weather reports to be taken from ship's deck log and independent weather bureau reports.

In the event of consistent discrepancy between the deck logs and the independent weather bureau reports, then the independent weather bureau reports to be taken as ruling.

In the event of a persistent dispute over a weather report and should owners decide to proceed to arbitration, charterers will agree that owners appoint a second independent weather bureau who will provide further evidence, and the arbitrators will ultimately decide which reports will be utilised."

CLAUSE 37:

"…Deductions from hire:

Charterers have the right to deduct from charter hire during the period of this charter any proven off hire time and/or deductions in conformity with clause 64. …"

CLAUSE 64:

"Without prejudice to charterers' other rights under this charter, it is expressly agreed that the charterers have the liberty to deduct from hire any damages or direct related losses suffered by charterers… for reason of the owners/disponent owners/ vessel not complying with any warranty/condition given in this charter (including any addendum) or any other charter between owners, owners' group companies, managers and charterers…"

Owners argued that Charterers' deductions had been advanced on a wrongful basis.

Arguments in the arbitration

Time bar

The final hire statement as submitted by Charterers had referred only to deductions under the off-hire provisions of the charter. The deductions were not specifically advanced as being in respect of any breach of the speed performance warranty pursuant to clause 64. It was further argued that the only other relevant provision of the charter which could allow deductions on the basis of off-hire was set out in clause 15, whereas on the facts clause 15 had not been invoked.

The Tribunal agreed that clauses 37 and 64 (which deal with deductions from hire) distinguished between a claim for off-hire and deductions in respect of damages. By the reference to the final hire statement, Charterers had deducted monies expressly for an off-hire event. At no time, prior to their defence submissions in June 2012, had Charterers asserted a claim for breach of the performance warranties set out in clause 29 and a consequent claim for damages. Had it been their intention to advance a claim for damages, Charterers should have identified the basis of their deductions in clear and unequivocal terms at the time the claim was raised.

Owners argued that any claim for breach of the performance warranty was only raised in Charterers' defence/cross-claim submissions dated 28 June 2012, with deductions prior to this time relating solely to off-hire and that this should result in the claims for breach of warranty being time barred pursuant to the Hague Rules, which were incorporated into the charter.

As an alternative, the Tribunal was also asked to apply the time bar under procedural law (i.e. The Limitation Act 1980) given that it was raised more than six years after the cause of action accrued.

The Tribunal agreed that the claim was time barred on the latter basis. However, any argument that the cross-claims had been extinguished much earlier by application of the Hague Rules was rejected on the basis that any claim in relation to the vessel's performance was not sufficiently cargo-related for the Hague Rules to be relevant.

Substantive arguments

Although the decision on time bars resolved the matter, the Tribunal went on to consider the substantive issues in dispute. In terms of the wrongful calculation of the vessel's performance, Owners argued that the speed guarantee contained in clause 29b of the charter warranted an average speed across "*all sea passages*" during the "*entire period of the charter*". It was not, as Charterers contended, an average speed "*per voyage*" from sea buoy to sea buoy. In their view Charterers would be interested in the overall performance of the vessel, and it was intended that Charterers give credit for any over-performance during the whole service. However, the Tribunal disagreed. Apart from how much hire is payable, a period time charterer is also interested in observing individual voyage schedules. On this basis it made commercial sense for Owners to be guaranteeing average speed on "*each voyage*". If Owners had intended anything else, unequivocal words should have been inserted into the charter to clarify the basis for assessing performance and to expressly set out their intentions.

In terms of interpretation of clause 29B, Owners argued that the words "*Beaufort Force 4 and/or Douglas Sea State 3*" were intended to define "bad weather", and were not intended to only apply during times of "adverse current". The Tribunal agreed and interpreted this clause by reference to what a reasonable person having all the background knowledge available in the circumstances would have understood it to mean. In their view it was inconceivable that "bad weather" would be left undefined and that Beaufort Force 4 and Douglas Sea State 3 would only apply to "adverse current".

The Tribunal also agreed with Owners' contention that on the construction of clause 29c deck log books were one of the "evidential reports" that the Tribunal should consider in determining the weather conditions.

Owners argued that on the construction of clause 29b it was quite clear that the "*continuing*" warranty related only to the speed of the vessel, and not her consumption. On this basis the vessel's performance based on consumption of fuel can only be assessed in good weather and sea conditions, either before or at the date of the charter (or at time of delivery into service). The Tribunal agreed with this approach, although their preference was to assess the consumption warranty on or before the date of delivery, given that there could be long intervals between the date of the charter and her delivery into service.

Comment

This decision illustrates the importance of identifying, with some degree of precision, and if possible by reference to the relevant contractual provision, the basis on which deduction is being made. It will not be enough to simply submit a final hire statement without any explanation as to the basis of such deductions. Otherwise charterers run the risk of falling foul of contractual and/or procedural time bar provisions. The case also serves as a useful reminder to charterers of the potential for a one year Hague Rules time bar to apply to deductions that are related to cargo.

This decision also highlights that clauses containing warranties for speed and performance should be carefully drafted to have the intended effect so as to avoid any doubt as to the parties' respective intentions and to reduce the potential for legal disputes. ■

> "Any argument that the cross-claims had been extinguished much earlier by application of the Hague Rules was rejected on the basis that any claim in relation to the vessel's performance was not sufficiently cargo-related for the Hague Rules to be relevant."

Back to contents

Cargo & Jurisdiction

The "Aqasia" – Package Limitation and Bulk Cargo under the Hague Rules

The Court of Appeal in *Vinnlustodin Hf and Another v Sea Tank Shipping AS (The Aqasia)* recently upheld the decision of the Commercial Court on the applicability of the limitation in Article IV rule 5 of the Hague Rules to bulk cargoes.

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Background

The dispute arose out of damage to a cargo of fish oil in bulk carried on board the "Aqasia" pursuant to a charterparty that incorporated into its terms the Hague Rules. That the cargo had been damaged was not in dispute. The contested issue was the right to limitation under Article IV rule 5 of the Hague Rules.

Article IV rule 5 provides that:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit…"

Charterers' claim was based on 547,309 kg of cargo amounting to a claim for losses of US$367,836, plus interest and costs. Owners argued that the claim should be subject to the limitation provisions of Article IV rule 5 and that the word "unit" could be applied to the measurement used to quantify the cargo in the contract of carriage. Freight had been paid as a lump sum. However, the cargo had been described in the charterparty as "*2,000 tons cargo of fish oil in bulk, 5% mol chopt*". Therefore, Owners argued that the limitation of £100 should be applied with the relevant "unit" being a metric ton. If Owners were correct, the claim would be limited to approximately £54,700.

The parties agreed to submit the point to the Commercial Court as a preliminary issue. The Court determined that the phrase "package or unit" referred to physical items rather than units of measurement for the purposes of freight. The Court found in favour of Charterers concluding that the Hague Rules limitation was not intended to apply to bulk cargoes. The term "unit" was meant to apply to unpacked physical items and not units of measurement.

Grounds of appeal

Owners appealed the decision to the Court of Appeal on two points:

1. The judgment failed to give effect to the intention of the parties; Owners should be entitled to limit their liability in respect of bulk cargo pursuant to Article IV rule 5; and

2. The judge had erred in concluding that the limitation of liability in Article IV rule 5 of the Hague Rules did not apply to bulk cargo in a number of respects.

It was common ground between the parties that in ordinary language the word "unit" was capable of being a physical item of cargo, a shipping unit and a unit of measurement such as weight or volume. Despite Owners' submissions, the Court of Appeal were of the firm conclusion that in the context of the Hague Rules "unit" meant a physical item of cargo and not a unit of measurement. The Court considered that:

1. The use of the words "package" or "unit" together in rule 5 pointed to both words being concerned with physical items.

2. This was borne out by Article III rule 3(b) of the Hague Rules which refers to bills of lading being issued with "*either the number of packages or pieces, or the quantity or weight …*". Whilst the phrase used was "*packages or pieces*" rather than "package or unit" it was clear that the reference was to individual physical pieces. In the context of the Rules, a "piece" was synonymous with "unit".

3. The wide definition of "goods" in Article I of the Rules did not provide any particular assistance in interpreting Article IV rule 5. It did not follow that every provision in the Hague Rules applied to every type of "goods" set out in Article I.

Back to contents

4. If the word "unit" was taken as meaning unpackaged physical items for shipment and also a unit of measurement for all purposes this could create different meanings for different types of cargo. The example used by the Court was that of cars; a bill of lading would specify the number of cars but also their weight. Which would be taken to be the "unit" for limitation purposes?

The Court of Appeal acknowledged the issue raised before the Commercial Court that the relative low value of bulk cargoes in the 1920s compared to the package limitation explained why it was not considered necessary at that time to insert any express provisions for limitation dealing with bulk cargoes. If on the true construction of Article IV rule 5 it did not apply to bulk cargo, it should not be permissible to strain the language to make it apply, even if it was desirable in a modern context of higher bulk commodity prices.

The Court of Appeal looked to the travaux preparatoires for the Hague Rules, setting out the preparatory work of the treaty and the circumstances of its conclusion. The Court took note that references to a limitation by volume or freight were removed from an earlier draft of the Rules. The addition of "unit" occurred later but was not intended as a reintroduction of the weight limit that had been abandoned.

Having also been directed to the position under US COGSA, which Owners had drawn attention to as a comparison, the Court considered the additional words "*per customary freight unit*" in US COGSA as an amendment to the position of the Hague Rules. Therefore, citing the approach under US COGSA did not assist Owners' position.

The Court of Appeal was clear in favouring an interpretation of "unit" as an unpacked item of cargo, not a unit of measurement. Accordingly, the word "unit" in Article IV rule 5 should not be considered as extending to a bulk cargo. Therefore, as the Hague Rules were incorporated into the charter by general words of incorporation, and the meaning of "unit" was such that it does not apply to bulk cargoes, Owners did not have the protection of a limit of liability under Article IV rule 5.

Comment

The Court of Appeal's judgment confirmed what had been widely considered by the industry to be the position under the Hague Rules, however, the point had not until this matter been put to the test before the English Courts. It, of course, remains open to the parties to a charterparty to agree bespoke provisions if they wish to incorporate the limitation provisions of the Hague Rules and for these to have effect by reference to a specific measurement or freight unit. ■

Clause 8(b) of the ICA: What Counts as a "Similar Amendment"?

The English High Court turns its attention to clause 8(b), which concerns responsibility for cargo handling.

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Having recently considered clause 8(d) of the Inter-Club Agreement, the "ICA", [see the Club's article on the 'Yangtze Xing Hua Court of Appeal Decision' (https://www.steamshipmutual.com/publications/Articles/apportionmentofclaimsinterclub052018.htm)], the English High Court, in its judgment in *Agile Holdings Corporation v Essar Shipping Ltd* [2018] EWHC 1055, has now turned its attention to clause 8(b), which concerns responsibility for cargo handling. Specifically, the Court considered what constitutes a "similar amendment" for the purposes of clause 8(b).

Background

The "Maria" had been fixed on a time charter that incorporated the ICA and received orders to carry a cargo of Direct Reduced Iron ('DRI') – a cargo known to be highly reactive and combustible in the presence of heat or water – from Trinidad to India.

During loading operations, a fire was observed on the loading belt. Despite the supercargo advising that loading could continue, the DRI continued to burn through the voyage and upon discharge.

The Owners commenced an arbitration seeking a declaration that Charterers were obliged to indemnify them against any liability towards cargo interests.

Relevant contractual provisions

Clause 8(b) of the ICA provides as follows:

Claims in fact arising out of the loading, stowage, lashing, discharge, storage or other handling of cargo: 100% Charterers unless the words "and responsibility" are added in clause 8 [of the NYPE form] or there is a similar amendment making the Master responsible for cargo handling in which case: 50% Charterers 50% Owners.

The charterparty was on an amended NYPE '46 form and clause 8 provided that:

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

However, clause 49 provided that:

"The Stevedores although appointed and paid by Charterers/Shippers/Receivers and or their Agents, to remain under the direction of the Master who will be responsible for proper stowage and seaworthiness and safety of the vessel…"

In light of this provision, there was a dispute as to who was ultimately responsible for cargo handling and how any cargo claim should be apportioned under the ICA and whether clause 49 constituted a "similar amendment".

Decision of the arbitral tribunal

The Tribunal found that clause 8(b) of the ICA applied as the claim arose out of the handling of the cargo. In considering whether clause 49 constituted a "similar amendment" for the purposes of clause 8(b), the Tribunal held that the words "*the Master … will be responsible for proper stowage and unseaworthiness and safety of the vessel*" in clause 49 clearly made the Master responsible for at least part of the loading process, with the result that

> "…unless there is a provision that effects a total transfer of responsibility for cargo handling to owners, claims arising out of cargo handling will fall 100% on charterers."

the first proviso to clause 8(b) was engaged and that liability should be split 50-50 accordingly.

The appeal

Owners appealed the arbitral award under section 69 of the Arbitration Act 1996, on the basis that the Tribunal had erred in law in finding that clause 49 constituted a "similar amendment" for the purpose of clause 8(b).

The key issue was what was meant by a "similar amendment". It was common ground between the parties that the clause only partially transferred responsibility for cargo handling to Owners – the responsibility for stowage. However, Owners argued that a "similar amendment" requires a total transfer of responsibility for cargo handling to Owners and failing this the cargo claim would fall to be 100% for Charterers' account.

As an alternative position, Owners argued that clause 49 only transferred responsibility for stowage leading to unseaworthiness and not stowage resulting in cargo damage.

The judge agreed with Owners on their primary argument, holding that the word "similar" was "*intended to connote a provision in the charter party which is of the same kind or is to the same effect as the addition of the words 'and responsibility'*".

On that basis, the judge held that "*the amendment must be to the effect of transferring all cargo handling responsibilities back to the owner not just some of them, because this is the effect of adding the words 'and responsibility' to Clause 8*".

This interpretation was also consistent with a purposive construction of the ICA, which is fundamentally concerned with establishing a mechanical regime for allocating liability in cargo claims between owners and charterers.

Comment

This decision is important for two reasons.

First, the meaning of "similar amendment" in clause 8(b) had not previously been considered in any reported case, and it therefore provides welcome clarity on which party bears responsibility for cargo handling. The answer is that, unless there is a provision that effects a total transfer of responsibility for cargo handling to owners, claims arising out of cargo handling will fall 100% on charterers.

Second, the decision coming hot on the heels of that in the *Yangtze Xing Hua*, further reinforces that the purpose of the ICA is to prescribe a formulaic mechanism for resolving cargo claims between owners and charterers that avoids the need for protracted and costly litigation. ■

Back to contents

The "Maersk Tangier" – A Milestone for the Definition of Unit

The decision of the Court of Appeal in *Kyokuyo Co Ltd v A.P. Moller – Maersk A/S (the Maersk Tangier)* [2018] EWCA Civ 778 upheld the judgment of the Commercial Court, which for the first time for the purposes of English law defined the meaning of 'unit' in the context of the Hague and Hague-Visby Rules.

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The judgment of the High Court

A consignment of frozen tuna loins was carried in three reefer containers from Spain to Japan for which three non-negotiable waybills were issued by Maersk Line as carrier. The cargo arrived in damaged condition and Maersk was held liable by the receivers.

The cargo interests commenced legal proceedings against Maersk, and in the Commercial Court Andrew Baker J was asked to consider: (a) whether any liability should be subject to package or unit limitation as calculated in accordance with Article IV Rule 5 of the Hague or Hague Visby Rules; and (b) how to calculate such package or unit limitation.

The Commercial Court held that the Hague-Visby Rules compulsorily applied as all that was required to satisfy Article 1(b) so as to make the Rules applicable was that, when concluded, the contracts of carriage provided for bills of lading to be issued. Consequently, the package limitation established therein was also applicable.

The Court established that in this instance each tuna loin was an individual unit or package as they were identifiable as a separate article for transportation. The waybills were also compliant with Article IV Rule 5(c) of the Hague-Visby Rules as it was not necessary to enumerate the cargo "as packed" but was sufficient to simply state the number of packages or units inside the container accurately on the bill of lading.

The appeal

The Court of Appeal was asked by Maersk to consider:

- Is liability limited pursuant to Article IV rule 5 of the Hague Rules or pursuant to Article IV rule 5 of the Hague-Visby Rules (whether applicable compulsorily or contractually)?
- If liability is limited pursuant to Article IV rule 5 of the Hague-Visby Rules, are the containers deemed to be the relevant package or unit for the purposes of Article IV rule 5(c), or are the individual pieces of tuna "packages or units" enumerated in the relevant document as packed in each container for the purposes of Article IV rule 5(c)?
- If liability is limited pursuant to Article IV rule 5 of the Hague Rules, are the relevant packages or units the containers or the individual pieces of tuna?

> "The Court upheld the comments of the Commercial Court that the Hague Rules do not require any consideration of how the cargo could have been shipped if not containerised."

Back to contents

> "Maersk argued that the judge was wrong to hold that each frozen tuna loin was a "unit". A tuna piece would only constitute a unit if these pieces could have been shipped "as is" break bulk without packaging."

Flaux LJ delivered the leading judgment from the Court of Appeal, the conclusions of which were agreed by Gloster LJ.

a. Which set of rules applied? Were the Hague-Visby Rules compulsorily applicable?

Maersk argued that the Hague Rules should have applied to the contract because sea waybills were issued, instead of bills of lading, and the Hague Rules applied contractually by virtue of Maersk's terms.

The Court of Appeal upheld the judgment of the Commercial Court and, therefore, agreed that the Hague-Visby Rules applied. Although a bill of lading was not finally issued, and a waybill provided in its place, the terms of the contract provided for a bill of lading to be issued. This was sufficient to satisfy Article 1(b) of the Rules that, absent any contractual variation or waiver and/or estoppel, the Hague-Visby Rules would compulsorily apply.

b. How is the package and/or unit limitation calculated under the Hague-Visby Rules?

Maersk argued that the Judge was wrong to hold that each frozen tuna loin was a "unit". A tuna piece would only constitute a unit if these pieces could have been shipped "as is" break bulk without packaging. Maersk claimed that each container should constitute a "package or unit".

Further, Maersk contended that the Commercial Court had been incorrect to conclude that all that was required by Article IV Rule 5(c) for a bill of lading to be "enumerated" was that the number of units in the container should be correctly stated. Maersk argued that the Judge's decision was wrong and relied on the decision of the Australian Courts in El Greco[1] to the effect that individual pieces would only constitute "units" if it was clearly indicated on the bill whether they were in packages or loose inside the container.

The Court of Appeal confirmed that bills of lading should accurately describe the number of packages or units inside the container, but did not need to use specific words or describe the cargo item by item or "as packed". The Court considered that to impose any additional or technical requirement to describe how the cargo was packed would give rise to uncertainty and could ultimately lead to uncommercial results.

In this particular case, the Court of Appeal considered that the waybills were compliant as they enumerated the number of pieces of tuna, which were capable of being "*units*", inside each container.

c. The Hague Rules position

Although the Court of Appeal had confirmed that the Hague-Visby Rules applied, the Court set out some comments on the position as to the relevant "package" under the Hague Rules. The Court upheld the comments of the Commercial Court that the Hague Rules do not require any consideration of how the cargo could have been shipped if not containerised. The decision confirmed that the definition of "*unit*" for the Hague and Hague-Visby Rules should be the same, and the tuna loins would have been "*units*" under either set of Rules.

Comments

There are a number of points to be taken from the judgment:

- The Court of Appeal confirmed that if the contract of carriage provides the shipper with the right to demand a bill of lading, regardless of whether such right is exercised, the Hague-Visby Rules compulsorily apply.
- The pieces of cargo do not need to be suitable for shipment as breakbulk to be deemed "*units*", as no particular packaging is required.
- The English Courts departed from the views of the Federal Court of Australia in *El Greco*[1] and decided that the requirements of Article IV.5(c) will be met by indicating the number of pieces inside the container. ■

[1] El Greco (Australia) Pty Ltd v Mediterranean Shipping Co S.A. [2004] 2 Lloyd's Rep 537

Back to contents

The Court of Appeal Considers Apportionment of Claims under the Inter Club Agreement

The Court of Appeal has upheld the High Court decision that Charterers of the "Yangtze Xing Hua" should fully indemnify the shipowners for their settlement of the cargo claim.

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Background

The ship had been fixed on a time charter trip to carry soya bean meal from South America to Iran. The Charterers ordered the ship to wait off the discharge port for more than four months. When the ship did discharge the cargo, receivers protested that the cargo was damaged, and claimed €5 million. Expert evidence was that the cargo had deteriorated as a result of the long delay. The Owners settled the cargo claim at over €2.6 million and sought an indemnity from the Charterers under the terms of the Inter Club Agreement ("ICA") incorporated into the charterparty, and in particular under Clause 8 (d) of the ICA which holds that:

"(d) All other cargo claims whatsoever (including claims for delay to cargo) [shall be apportioned as follows]:

- 50% Charterers
- 50% Owners

unless there is clear and irrefutable evidence that the claim arose out of the act or neglect of the one or the other (including their servants or sub-contractors) in which case that party shall then bear 100% of the claim."

The High Court decided that the word "act" in this case should have its ordinary and natural meaning, and did not require any fault of the Charterers, so that the Charterers should bear 100% of the claim because of their acts that delayed discharge for four months.

Decision

At the Court of Appeal it was noted that the ICA was devised by the International Group of P&I Clubs as a simple and mechanical method for apportioning liability for cargo claims between owners and charterers, with apportionment based on the cause of the claim rather than fault or culpability. The Appeal Court judges sought to give the ordinary meaning to the words of the ICA as incorporated into the charterparty, and were not persuaded by the Charterers' arguments that they should examine the history, or "archaeology", of the ICA, or consider any conflict with other parts of the ICA that did talk of "fault". Hamblen J held that "*The critical factual question under clause 8 is that of causation. Does the claim "in fact" arise out of the act, operation or state of affairs described? It does not depend upon legal or moral culpability...*".

"The critical factual question under clause 8 is that of causation. Does the claim "in fact" arise out of the act, operation or state of affairs described? It does not depend upon legal or moral culpability...".

Comment

This decision confirms that the ICA should operate as a simple method of apportioning cargo claims, without the need to consider complex issues of fault or culpability. Charterers, and owners, should note that they might be found liable for cargo claims even if they have not committed any wrongful or culpable act or breach of the charterparty. ■

To what Extent are Owners Liable for a Crew Member's Wrongful and Reckless Acts?

In *Glencore Energy UK Ltd and Another v Freeport Holdings Ltd (The "Lady M")* [2017] EWHC 3348 (Comm) the High Court has decided that a shipowner can rely on the fire defence in the Hague-Visby Rules even in a case where the fire was started deliberately by a ship's officer.

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Background

While on a voyage from the Black Sea to the US Gulf with a cargo of fuel oil, the "Lady M" suffered an engine room fire, and her Owners entered into a Lloyds Open Form salvage contract to have the ship towed to Las Palmas for repairs. It was discovered that the fire had been started deliberately by the chief engineer, who was said to be suffering from stress. Owners declared general average.

The cargo owners, Glencore, incurred a liability towards the salvors, and they commenced proceedings against Owners for an indemnity. This was on the grounds of an alleged breach of the contracts of carriage evidenced by the bills of lading, alternatively in bailment. Owners counter-claimed for General Average contributions.

The Court considered two preliminary issues, based on facts that were agreed between the parties:

1. whether the conduct of the chief engineer constituted barratry, and;

2. whether Owners could rely on Hague-Visby Rules Article IV Rule 2(b) (the fire defence) when the fire was started deliberately, or Rule 2 (q) (any other cause arising without the actual fault or privity of the owner or the without the fault or neglect of the agents or servants of the carrier) in defence to cargo's claim.

Decision

First issue – did the conduct of the chief engineer constitute barratry?

The Court considered the Marine Insurance Act 1906 definition of barratry as "*every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer*" and set out the test for barratry as (i) a deliberate act/omission by the servants of the owners (ii) which is wrongful (iii) to the prejudice of the interests of shipowners/ship/goods (whether or not intended) (iv) without the privity of the shipowner.

The Court defined 'wrongful" as (a) generally recognised as a crime, including the necessary mental element; or (b) a serious breach of duty owed to the shipowner, committed by the person knowingly or recklessly.

The Court deferred determination of the first issue due to lack of evidence on the seafarer's state of mind.

Second issue – did the Hague Visby defences apply to protect the shipowner?

The Court reviewed the history and purpose of the Hague-Visby Rules which had been developed at an international convention, and considered that the words agreed at that convention should be given their plain ordinary meaning. No exclusions of the fire defence were agreed at the convention, so the High Court held that the fire defence applied to fire without any qualification as to how the fire started, whether intentionally or accidentally, or who might have started it. Therefore the fire defence under Rule 2(b) was capable of exempting an owner even if a fire is caused deliberately.

Article IV 2. (q) exempts the shipowner from liability for loss or damage resulting from "*Any other cause arising without the actual fault of privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage*".

> "ellipsis the fire had been started deliberately by the chief engineer."

To determine whether or not the act of the Chief Engineer was an act of "a servant" it was considered whether or not he was acting within the scope of his duties. The Court found that, if considered under the English law principles of vicarious liability, i.e. *The Chyebassa* [1966] 2 Lloyd's Rep 1993, or if the Court was to apply its own test of whether the conduct in question occurred in the course of the servant/agent performing a function in dealing with the ship/cargo which he was performing on behalf of the shipowners [see 'The Global Santosh' (https://www.steamshipmutual.com/publications/Articles/GlobalSantosh0516.htm)], the outcome was the same. The crews' overriding purpose was to look after the ship and cargo until it arrived at its destination. In fulfilling that purpose the Chief Engineer was responsible for the management of the main engines. He had responsibility for, and access to, the engine control room at any time, whether or not he was on duty. The Court concluded that in setting fire to the control room, with intent to cause damage, the Chief Engineer was misusing his position in the direct field of activity he was employed, and so took place as an act of a servant of the shipowner, within the scope of his duties. In these circumstances, the Article IV. 2 (q) defence would not exempt the shipowner.

Comment

The Court's approach to the construction of the Hague-Visby Rules, which form part of an international convention, was to ascertain the ordinary meaning of the words and to construe them using broad principles of interpretation, and not apply any special meaning or interpretation particular to English case law. In this case, the Court was satisfied that the fire defence in the Hague-Visby Rules was not subject to any exception in the case of a fire that was caused deliberately. ■

> "...the peril of fire under Rule 2(b) was capable of exempting an owner even if a fire is caused deliberately."

The Presumption of an Ocean Carrier's Liability According to French Law

A recent claim presented at court in France has led to a review of the presumed liability of a carrier under French law and the evidential requirements necessary to establish and rebut such presumption of liability.

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Background

The subject case concerned a 40 ft laden reefer container shipped from China to Le Havre, for which the Member had issued a port-to-port bill of lading. On discharge at Le Havre the Equipment Interchange Receipt "EIR OUT" was issued clean with no operating problems reported by the terminal.

The inland transportation from the terminal to the French consignees' premises had been arranged by the cargo interests, who picked up the container and returned the empty unit the next day following the unloading of the cargo.

On devanning the cargo, reserves were made on the inland haulier's waybill but no reserves were notified to the Member in its capacity as ocean carrier. Instead, five days after delivery, the Member received an invitation to attend a joint survey. This invitation was received outside the three day notification period applicable under Article III rule 6 of the Hague-Visby Rules.

The Member declined to participate in the joint survey because no reserves had been presented to them at the time of devanning, as well as the fact that no problem had been reported on discharge and the reefer data log indicated that the container had maintained performance and temperature throughout carriage.

The critical issues for consideration were the effect of notification served outside the Hague-Visby Rules limitation period as well as the evidential value of a unilateral cargo survey report and reefer data log. These issues were considered in light of a decision issued by the French Cour de Cassation on 18 May 2017 (Cass Com n°15-22571).

In this decision, the French Cour de Cassation confirmed the position under French law that when no cargo discrepancy reserves/exceptions/remarks are notified within the Hague-Visby limitation period, the carrier is presumed to have delivered the cargo in sound condition. That presumption may be overcome if the cargo claimant can prove that the cargo was not delivered in the same condition as described in the bill of lading. In such circumstance the burden of proof falls to the claimant to establish that the cargo was damaged during carriage. It is important to note that the claimant is not obligated to positively prove that the loss/damage has arisen due to the carriers fault, only that damage occurred whilst in its custody.

Conversely, if the cargo receiver serves notice of cargo loss/damage to the carrier within the Hague-Visby limitation period the carrier is presumed to be liable. The burden then falls to the carrier to prove that such loss of/damage to the cargo is due to an exception available under the Hague-Visby Rules or as a matter of French law. This position undoubtedly favours cargo interests.

However, the evidential position of a unilateral survey report admitted to court in support of a claim is less clear.

Firstly, in its decision of 14 May 2002 (Cass.Com 99-17761) the Cour de Cassation ruled that it remains at the sole discretion of the Judges of the French Courts of Appeal as to what evidence they are willing to accept in determining the liability of a carrier including whether or not to allow the admission of a unilateral survey report as evidence.

While the Cour de Cassation will not itself consider the admissibility or otherwise of evidence allowed by the Appeal Courts, it will consider the manner in which such evidence is considered.

For example, in its decision of 8 September 2011 (Cass Civ 2 n°10-19919), the Cour de Cassation held that the findings of a unilateral survey report

may be taken into consideration provided that the parties' lawyers had been able to comment upon its content and in a decision of 28 September 2012 (Cass Mixte n°11-18710) further ruled that even in such circumstances such a unilateral report could not be the exclusive source of evidence. On 11 January 2017 (Cass Civ 1 n°15-16643) the Cour de Cassation overruled a judgment of the Court of Appeal which had condemned the defendant based upon a unilateral survey report where the defendant contested the findings of the surveyor.

Notwithstanding the above, it does appear that a unilateral survey report will likely be admissible in a situation where a carrier has been invited to attend a joint survey but has declined to accept such an invitation. By the same token, survey evidence resulting from a joint attendance will carry an increased evidential value.

As mentioned, the carrier must establish a defence under the Hague-Visby Rules or French law in order to overturn a presumption of liability. In order to achieve this, the carrier will need to prove the cause of damage and its direct causal relationship with the defence invoked.

Whilst the data logger may assist the carrier in his defence, it has been repeatedly ruled by French courts that the production of a data logger, by itself, is not sufficient to exempt the carrier from liability. It can only be used as evidence to support a defence available under the Hague-Visby Rules and/or French law.

The above position under French law leads to the following conclusions and recommendations:-

1. French law allows a cargo claimant to prove that cargo was damaged during carriage. For this reason, a carrier must carefully consider whether to participate in a joint survey even in circumstances where an invitation is served outside of a stipulated period of time and/or all contemporary evidence available to the carrier indicates that its liability is not involved. It should also be noted that a defence based solely upon invalid notification is unlikely to be successful.

2. That where a reefer data log evidences that a reefer has not suffered any malfunction and has maintained required temperature throughout the period of carriage, this should be disclosed to cargo interests at the earliest opportunity with an express request that it be provided to the cargo surveyor for confirmation within the cargo survey report that there has been no malfunction and no temperature deviation. Such measure has two purposes. Firstly, the cargo surveyor is obliged to consider causation from the outset having regard to the operation of the reefer. Such consideration may result in cargo interests being convinced that the carrier is not responsible and avoid a claim being lodged. Additionally, a court will become aware of the cargo surveyor's own factual confirmation of the reefer data in the event that the cargo survey report is submitted to court as a unilateral report. ■

People

Should We Take the Luggage?

A recent decision by the Admiralty Registrar Jervis Kay QC considers when a tender service provided by a third party forms part of the "*course of carriage*".

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The Court of Appeal recently affirmed the decision of the Admiralty Registrar Jervis Kay QC in the matter of *Lawrence v NCL (Bahamas) Ltd t/a Norwegian Cruise Line ("NCL")- QBD (Admlty Ct) (Jervis Kay QC, Admiralty Registrar* [2016] EWHC (Admlty)) – 6 May 2016.

The case addresses the meaning of paragraph 8 of Article 1 of the Athens Convention and when a tender service provided by a third party forms part of the "*course of carriage*".

Background

The claim brought by Mr Lawrence was a claim for damages for personal injury when he fell whilst on board a tender taking passengers to shore in Santorini.

Mr Lawrence booked his holiday through Flights and Packages Limited ("FPL"). The holiday included flights, a cruise on board the "Norwegian Jade", operated by NCL, and three nights hotel accommodation in Venice. Mr Lawrence paid FPL for the hotel and cruise but was invoiced separately for the flights. Mr Lawrence received an email for the booking of the cruise and the hotel which confirmed that FPL were acting as agent and had placed the booking with various tour operators.

At Santorini NCL offered shore excursions. A tender operated by the Union Boatmen of Santorini was available for the use of the passengers to go ashore. The tender, however, did not form part of the equipment of the "Norwegian Jade".

Mr Lawrence and his wife boarded the tender to go ashore at Santorini. There were no seats available on the upper deck of the tender so Mr Lawrence and his wife proceeded forward on the main deck. Whilst doing so Mr Lawrence tripped over a raised sill at the doorway leading to the cabin and suffered injury to his chin, legs and shoulder. Mr Lawrence alleged the raised area was in darkness with little discernible light.

Mr Lawrence brought a claim for damages for personal injury against NCL as carrier/performing carrier under the Athens Convention.

NCL:

- Denied that they were the carrier or the performing carrier within the meaning of Article 1 of the Athens Convention.
- Claimed that the contract of carriage was between Mr Lawrence and FPL, through whom Mr Lawrence had booked his cruise.
- Denied that they had any control over the tender or that it was a period of carriage within the meaning of paragraph 8 of Article 1 of the Athens Convention.

Admiralty Registrar Jervis Kay QC found in favour of Mr Lawrence on the basis:

- NCL was the contractual carrier under the Athens Convention.
- The incident occurred within the course of carriage.
- NCL as the "performing carrier" was responsible for the actions or omissions of the Union Boatmen of Santorini. In this respect the Admiralty Registrar noted that Mr Lawrence had not paid a specific fare for use of the tender. NCL's Guest Relations Supervisor confirmed that NCL did not charge an additional fare and it was considered a service provided within the fare paid by Mr Lawrence.
- The step on the tender was potentially hazardous and required further action to bring the step to the attention of passengers.

Application for permission to appeal

NCL sought permission to appeal on the following grounds:

1. The Judge was wrong to find that NCL was the contractual carrier under the Athens Convention.
2. The Judge was wrong to find Mr Lawrence's fall occurred in the course of carriage and,
3. The Judge was wrong to find that NCL was guilty of/responsible for "fault or neglect" by failing to adequately mark or give warning of the step.

The application for permission to appeal came before Lord Justice Hamblen on 27 November 2017.

Ground one

The Athens Convention applies to "international carriage" and provides at Article 1.1 (a) that "carrier" means:

"a person by or on behalf of whom a ***contract of carriage*** *(emphasis added) has been concluded, whether the carriage is actually performed by him or by a performing carrier;"*

Article 1.1(b) provides that the "performing carrier" means:

"a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage".

Lord Justice Hamblen observed that the Admiralty Registrar was right to say that NCL was the contractual carrier. He accepted that FPL were acting as travel agent. The booking conditions stated that a booking made through a travel agent became a binding contract with NCL when the travel agent received confirmation of the booking and reservation number. NCL provided a reservation number and two booking confirmations. One stated it was a "Travel Agent Copy" and the other a "Guest Copy". FPL made it clear at the time of the booking that they were acting as agents and not as tour operators. The booking conditions also provided that the Athens Convention applied to the cruise element of the holiday.

NCL sought to rely on the preamble of the booking conditions which provided that, where the passenger booked the cruise arrangements with the tour operator, the contract would be with the tour operator. If the passenger booked the cruise arrangements with a travel agent the contract could be with NCL or with the travel agent, depending on how the booking was made. Lord Justice Hamblen was satisfied that Mr Lawrence had contracted with NCL by virtue of FPL having made it clear they were travel agents and by NCL having provided a travel agent copy of the booking confirmation. NCL was the contractual carrier within the meaning of Article 1.1 (a), therefore, the first ground of the appeal failed.

Ground two

As to the second ground for appeal, that the judge was wrong to find that the trip occurred in the "course of carriage", Lord Justice Hamblen confirmed that the Athens Convention defines the "course of carriage" in the following way:

(a) "With regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or in or on any other port installation"

NCL submitted they were only responsible for the passenger when he is transported from the ship to port by water transportation if the passenger and his cabin luggage are being transported at the same time. This was not accepted by either the Admiralty Registrar or Lord Justice Hamblen.

Lord Justice Hamblen concluded that the purpose of Article 1.8 of the Athens Convention is to ensure that there is responsibility for both the passenger and luggage during the periods of carriage identified. Responsibility does not depend on whether the passenger is being transported with or without his luggage.

In the earlier stages of the appeal the Court had concluded that Article 1.8(a) should be read so that:

"The use of the word "and" in the relevant part of Article 1.8(a) is shorthand for the previous expression "and/or".

The Judge went on to explain that to decide that the Convention applied when the passenger had luggage with him, but would not apply if he did not, was absurd.

> "The course of carriage includes the period of embarkation and disembarkation and the period the passenger is on board the ship."

NCL had also submitted that Article 1.8 did not apply as they did not provide tender services. The Admiralty Registrar had found that on balance of probability the tender service was either organised and paid for directly by NCL or it was supplied as part of the port facilities provided to the ship. Therefore, he concluded that the tender was a vessel which had been placed at the disposal of the disembarking passengers by the carrier NCL.

Ground three

The final ground for appeal, that it was wrong to conclude NCL was responsible for the fault or neglect in failing to adequately mark or give warning of the step, was also unsuccessful. Lord Justice Hamblen found this ground of appeal was a challenge to the Admiralty Registrar's finding of primary fact and, therefore, had no real prospects of succeeding.

Lord Justice Hamblen refused the application for permission to appeal.

Comment

Pursuant to the Athens Convention, a carrier or performing carrier will be liable to the passenger for incidents in which they suffer a personal injury during the course of carriage.

The course of carriage includes the period of embarkation and disembarkation and the period the passenger is on board the ship. Carriage also includes when the passenger is transported by water from land to the ship or vice-versa. Notwithstanding the wording of the Athens Convention, it is not necessary for the passenger to also be transporting his luggage for the transportation to be considered carriage. The Admiralty Registrar pointed out in any event that even if a literal approach were to be taken, Article 1.6 defines cabin luggage as luggage otherwise in his "possession, custody or control" and a passenger was likely to have some of his possessions with him when going shoreside. ■

"Mr Lawrence tripped over a raised sill at the doorway leading to the cabin and suffered injury to his chin, legs and shoulder."

Back to contents

Back to contents

Prerequisite to Proving Cruise Line Negligence

The Eleventh Circuit Court recently affirmed the position that, in order for a cruise line to be considered negligent, a cruise passenger must prove the line had actual or constructive notice of conditions on board that caused the injury.

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The passenger had sought to appeal the decision of the District Court on the basis it had erred in not directing the jury that if the cruise line had created the dangerous condition, such actual or constructive notice was not required. For the passenger to have been successful in her appeal, the Eleventh Circuit would have had to change the law or the current understanding of maritime negligence principles.

Background

Antionette Pizzino was a passenger on board the "Norwegian Sky" and fractured both of her wrists when she tripped and fell on board. Pizzino filed suit against NCL (Bahamas) Ltd. ("Norwegian"), alleging that she slipped in an area where a Norwegian employee had spilt water.

Pizzino's accident occurred just after midnight as she was walking along an interior hallway with her husband. Both Pizzino and her husband alleged that the granite tile floor was wet and that Pizzino's accident occurred after she stepped in liquid, causing her to fall. CCTV captured a crew member carrying a bucket filled with liquid down the interior hallway on two separate occasions minutes before Pizzino's fall.

Pizzino and her husband both provided statements following the incident claiming the floor was wet. From the CCTV it was impossible to determine if there was, in fact, any liquid on the floor at the time. However the footage appeared to show Pizzino tripping over her own feet.

The crew member testified that the floor was dry at the time of Pizzino's fall and that he had not spilt any liquid whilst carrying the buckets and, had he done so, he would have immediately cleaned the area and put wet floor warning signs in place. The CCTV showed the crew member wiping the floor with a paper towel following Pizzino's accident. Although the crew member testified there was no liquid on the floor, his position was that he did this to appease Pizzino and her husband following the incident.

The claim and district court decision

Pizzino filed proceedings, alleging that Norwegian had negligently created and failed to eliminate a hazardous condition, the wet spot along the hallway, and that this negligence caused her injuries. Norwegian's liability was contingent on whether the jury believed (a) Pizzino's theory that her foot slipped on liquid spilt by the crew member, or (b) that Pizzino simply tripped over her own feet whilst walking due to her own carelessness. The trial took place in the US District Court for the Southern District of Florida before Judge Moreno. At trial Pizzino requested a jury instruction that:

"where a cruise ship operator created the unsafe or foreseeably hazardous condition, a plaintiff need not prove notice in order to prove negligence."

Judge Moreno denied Pizzino's jury instruction, alternatively giving an instruction that:

"to recover for injuries sustained in her fall, Mrs Pizzino, must prove either that Norwegian:

(1) had actual notice of the alleged risk-creating condition of which she complains or,

(2) that the dangerous condition existed for such a length of time that in the exercise of ordinary care Norwegian should have known of it."

Following a two day jury trial, the jury returned a verdict that Norwegian was not liable.

Pizzino appealed to the Eleventh Circuit Court on a sole issue; was it necessary as a prerequisite to establishing liability to demonstrate that Norwegian had actual or constructive notice of liquid having been split on the floor?

Pizzino argued that because she believed that Norwegian's employee, the crew member, had created the dangerous situation by spilling water from one of the buckets he carried, she was not required to prove that Norwegian had actual or constrictive notice.

Decision of the Eleventh Circuit Court

Liability was governed by US federal maritime law, under which the owner of a ship in navigable waters owes passengers a duty of reasonable care taking account of the circumstances as established in *Sorrels v NCL (Bahamas) Ltd.*, F.3d 1275, 1279 (11th Cir. 2015).

In order for Pizzino to succeed in her negligence claim, she was required to prove that:

1. Norwegian had a duty to protect her from a particular injury;
2. Norwegian breached that duty;
3. The breach actually and proximately caused her injury; and
4. She suffered actual harm.

In addition, the Eleventh Circuit determined it was for Pizzino to prove:

> "Pizzino filed proceedings, alleging that Norwegian had negligently created and failed to eliminate a hazardous condition."

"that Norwegian had actual or constructive notice of the risk-creating condition, at least where…. the menace is one commonly encountered on land and not clearly linked to nautical adventure."

The two leading judgments as to the requisite notice are *Keefe v Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) and *Everett v Carnival Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). Both judgments require that a cruise line be "on notice" as a threshold to imposing liability for negligence in relation to slip and fall accidents caused by transitory substances.

In *Keefe*, a passenger slipped and fell on a wet spot whilst dancing in a night club. The Court held that:

"the benchmark against which a shipowner's behaviour must be measured is ordinary reasonable care under the circumstances, a standard which requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk creating condition, at least where, as here the menace is one commonly encountered on land and not clearly linked to nautical adventure".

In *Everett*, the passenger tripped over the metal threshold cover of a fire door. The threshold had been installed by the cruise ship operator, and there was no indication that the passenger's fall was caused by anything other than the presence of the threshold. Everett argued that notice could be imputed to the cruise line because it "*created*" and "*maintained*" the threshold that caused her fall. The Eleventh Circuit commented that such *"reasoning is circular and defeats the limitation on the shipowner's liability imposed by Keefe."*

Pizzino put forward the argument that numerous District Courts – all in the Southern District of Florida – had concluded that notwithstanding the Court's comments in *Everett* a cruise ship operator can be liable, absent notice, where it created the dangerous condition. The Eleventh Circuit rejected the possibility that a cruise ship operator could be found liable in the absence of actual or constructive notice and that the District Court cases referred to had been wrongly decided.

Comment

The Eleventh Circuit affirmed the decision of the District Court in favour of Norwegian. In affirming, the Appellate Court confirmed that it is a requirement under federal maritime law that a cruise passenger must prove that a cruise line was "on notice" even when the cruise line had created the risk-creating condition.

This judgment is a landmark decision for Norwegian, and the cruise industry as a whole. The judgment makes clear that a passenger must prove actual or constructive notice for every theory of a cruise line's negligence. ■

Is Your Offshore Service Contract "Salty" Enough to Enforce an Indemnification Clause?

A recent case examines factors deciding whether or not a contract is maritime in nature.

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For US vessel owners operating in the Gulf of Mexico it is essential, before finalising a contract, that their liabilities under that contract are known, along with any limitations and defences which may be available. It is of particular importance to establish whether a contract with a service provider is considered a maritime contract because this will have implications as to whether contractual indemnities would be enforceable or if, for example, the Louisiana Oilfield Indemnity Act ("LOIA") would bar indemnification.

The test to determine whether or not a contract is maritime in nature was discussed in the recent matter of *Larry Doiron, Incorporated v Specialty Rental Tools & Supply LLP et al* (5 Cir.) No. 16-30217, Jan. 8, 2018. On 8 January 2018 the United States Court of Appeals for the Fifth Circuit heard the case en banc. The Court decided to review the case to consider modifying the criteria established in *Davis & Sons, Inc v Gulf oil Corp.* ("Davis & Sons") 919 F.2d 313 (5th Cir. 1990) for determining whether a contract for performance of speciality services to facilitate the drilling or production of oil or gas on navigable waters was a maritime contract.

By way of background, Apache Corporation ("Apache") entered into a master services contract ("MSC") with Specialty Rental Tools & Supply ("STS"). The MSC included an indemnity provision in favour of Apache and its contractors. Apache issued a work order directing STS to perform "flow-back" services on a gas well in Louisiana waters in order to remove obstructions hampering the well's flow. A stationary production platform provided the only access to the gas well. The work order did not require a vessel, and neither Apache nor STS anticipated that a vessel would be necessary to perform the work.

STS dispatched a crew to perform the work order. The STS crew determined that some heavy equipment was needed to complete the job and a crane would be required to lift the equipment into place. Apache contracted with Larry Doiron, Inc. ("LDI"), to provide a crane barge.

During the work one of the STS crew members was struck by heavy equipment that was in the process of being moved by a LDI crane operator.

In anticipation of litigation from the crew member, LDI filed a third-party complaint followed by a motion for summary judgment, seeking to rely on an indemnity under the terms of the MSC. STS filed a cross-motion for summary judgment seeking a determination that it did not owe an indemnity as the LOIA applied.

The decision turned on whether the MSC was a maritime contract. If so, general maritime law permitted enforcement of the indemnity provision. If not, Louisiana law controlled and the LOIA precluded the indemnity.

The District Court concluded that maritime law applied and awarded LDI defence and indemnity from STS. The judgment was affirmed on appeal, however, a majority of the judges voted to review the case en banc.

The Court was tasked with reviewing whether the granting of LDI's motion for summary judgment should be upheld. The Court first reviewed the three factors for determining the summary judgment:

1. If the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.
2. A genuine dispute exists if a reasonable jury could find in favour of the non-moving party.
3. All facts and evidence are viewed in the light most favourable to the non-movant.

Thereafter, the issue was whether the Court should apply maritime law or the law of Louisiana to

> "The issue was whether the Court should apply maritime law or Louisiana law to determine the validity of the indemnity provisions in the MSC."

determine the validity of the indemnity provisions in the MSC. If Louisiana law applied the indemnity agreement would be void as against public policy. If, on the other hand, the contract was "maritime" this would mean that state law would not apply and the indemnity would be enforceable.

The Court reviewed the six factor test that had been established in *Davis & Sons* to assess whether a contract is maritime in nature:

1. What does the specific work order in effect at the time of injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of injury?

This test has, however, come under criticism for being confusing, fact intensive, and unnecessarily and unduly complicating the determination of whether a contract is maritime in nature.

Applying each of the six tests the Court held that the contract was maritime in nature primarily because a vessel was essential to the completion of the job.

The Court noted that the Supreme Court's opinion in *Norfolk Southern Railway Co. v Kirby ("Kirby")* 543 U.S. 14, 2004 AMC 2705 however sets a far simpler and more straightforward method for determining whether a contract is maritime in nature.

In *Kirby*, the Supreme Court considered a claim for cargo damaged in a train wreck, which had first been transported by ship under two bills of lading. The Supreme Court had to consider whether this two-part venture would fall within the Court's admiralty jurisdiction. The Supreme Court found that bills of lading were maritime contracts because the "primary objective" of these bills was to accomplish the transportation of goods by sea.

In its reasoning the Supreme Court had broadly defined what characterised a contract as "maritime" was whether its purpose was to bring about maritime commerce. The characterisation as a maritime contract would not be defeated simply because the bill of lading also provided for some land carriage.

Following the principles set out in *Kirby*, the en banc panel created a two-pronged test:

1. Is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? The answer to this inquiry will avoid the unnecessary question from *Davis & Sons* as to whether the particular service is inherently maritime in nature.
2. If the answer to the above question is "yes," does the contract provide, or do the parties expect, that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.

This simpler test places the focus on the contract and the expectations of the parties. The test also removes those prongs of the *Davis & Sons* test that are irrelevant. Following this decision the focus of the courts should be to determine whether the service work is of a maritime or non-maritime nature, looking at, for example, whether an actual vessel is involved.

Applying this new test, the work order called for STS to perform downhole work on a gas well that had access only from a platform. Following a complication a crane barge was called upon to lift equipment, however this was considered to be an insubstantial part of the job and not work the parties expected to be performed. Therefore the contract was non-maritime and controlled by Louisiana law whereby the LOIA bars the enforcement of an indemnity provision. The Court reversed the previous decisions and granted summary judgment in favour of STS.

Comment

This decision will likely have significant impacts on future offshore oil and gas contracts in the Gulf of Mexico. In particular, if a contract is maritime in nature, acts (such as the LOIA) which bar the enforcement of indemnities would not apply. It is, therefore, of significant importance for vessel owners contracting with service providers to ensure that contracts are clear and allow both parties to fully understand their liabilities and particularly the indemnities being assumed. It is expected that the simpler test set out by the Court will provide clarity to vessel owners regarding their indemnity obligations in offshore oil and gas contracts. ■

Back to contents

Miscellaneous

The "Longchamp" – The Last Word

The Supreme Court allows the Owners' appeal reversing the decision of the Court of Appeal and restoring the decision of the High Court.

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On 25 October 2017 the Supreme Court handed down judgment in *The Longchamp* discussing the meaning of Rule F of the York-Antwerp Rules 1974 ("YAR").

The Court of Appeal decision was discussed in an earlier article: https://www.steamshipmutual.com/publications/Articles/thelongchamp1216.htm

Background

On 30 January 2009 the "Longchamp", a chemical tanker, was hijacked by Somalian pirates. The pirates demanded US$6 million for release of the vessel. Over a 51 day period, and with the assistance of a ransom expert, Owners negotiated the ransom down to US$1.85 million and thereafter paid this sum. During the period of negotiation various operational expenses were incurred, such as crew wages and bonuses, maintenance, general supplies and bunkers, in the sum of US$160,000. The General Average Adjuster allowed this sum in General Average under Rule F of the York-Antwerp Rules 1974.

Rule F of the York-Antwerp Rules 1974 states:

"Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

The High Court upheld the adjustment so that these expenses fell within Rule F because, if the Owners had paid the initial ransom, this would have been a reasonable course of action within the meaning of Rule A of the York Antwerp Rules and, therefore, the expenses "*would have been allowable as general average*" under Rule F as substitute expenses.

However, the Court of Appeal decided the expenses would only fall within Rule F if incurred in place of other allowable expenses. In this respect the reasoning was that a short negotiation with the pirates was not a true alternative to a longer negotiation to pay a smaller ransom because in both cases expenses were incurred and the difference between the two was only as to the extent of the expenses; they were not "*incurred in place of another expense*".

Decision of the Supreme Court

By a majority The Supreme Court allowed the Owners' appeal. The Supreme Court concluded that payment of the initial ransom demand was a different course of action to negotiating for 51 days, and Rule F did not require that the expenses were incurred following an alternative course of action. Hence, expenses incurred whilst the ransom was negotiated should be allowed in GA (in addition to the ransom itself). The expenses were "*extra expense incurred in place of another expense*" since the alternative would have been an extra US$4.15 million paid in ransom.

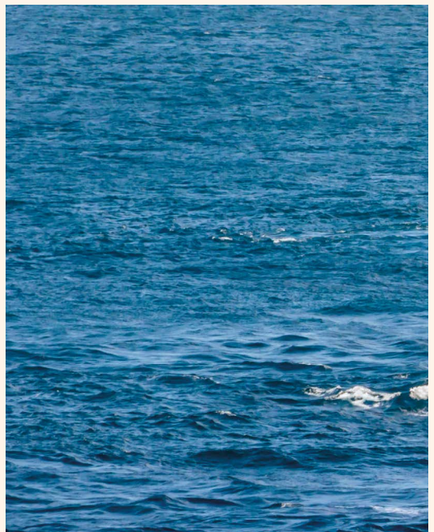
It is noteworthy that the Court ruled that expenses incurred shall be allowed "*only up to the amount of the general average expense avoided.*" Accordingly, in future cases it will be necessary to decide what general average expense has been avoided to give effect to the cap. In *The Longchamp* that was the ransom albeit Lord Neuberger, giving the main judgment of the majority, had misgivings as to whether payment of the initial demand would have been reasonable and, therefore, allowable under Rule A. However, he concluded the correct interpretation of Rule F was that the "*reference to an "expense which would have been allowable*" [in Rule F] is *to an expense of a nature which would been allowable*"; i.e. it did not matter that the expense avoided (the initial ransom demanded) would not have been allowed so long as it was of a type which in principle was allowable under Rule A.

Comment

The true meaning and effect of Rule F as decided in this case is important and potentially has wide ranging consequences. It may now be that whenever a shipowner negotiates with a third party to reduce expenses which are of a kind allowable in general average, operating expenses incurred in that period are strong candidates for Rule F allowances. Prior to *The Longchamp* this may not have been the view of all Average Adjusters.

Furthermore, difficulties may now be encountered when determining what cap to apply to expenses incurred, which are allowable under Rule F, when this is subject to identifying the accepted amount by which an allowable GA expense has been reduced by negotiation. The question being whether the reduction to be used is the overall reduction achieved, whether the initial expense or claim was reasonable or not or, as in *The Longchamp*, should the reduction be based upon what a reasonable figure might be for the expense in question. ■

> "...payment of the initial ransom demand was a different course of action to negotiating for 51 days, and Rule F did not require that the expenses were incurred following an alternative course of action."



Back to contents

Ballast Water Management

It is estimated that, on an annual basis, approximately 10 billion tons of ballast water are shipped around the world.

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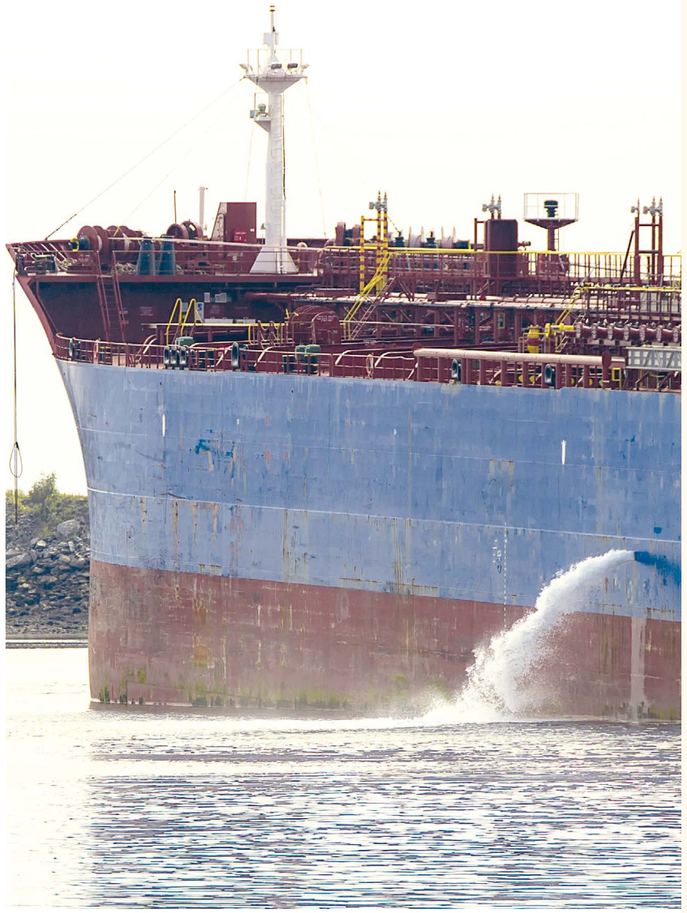
In 2004, in an attempt to combat the transfer of harmful aquatic organisms and pathogens through ship's ballast water and sediments, the International Maritime Organisation (IMO) adopted "The International Convention for The Control and Management of Ship's Ballast Water and Sediments".

The US meanwhile, having recognised the potential harm that the transfer of ballast water could cause, enacted the "National Invasive Species Act, of 1996" (NISA). This amended a previous act, the "Non-indigenous Aquatic Nuisance Prevention and Control Act of 1990" (NANPCA), which was initially intended to prevent invasive species from entering inland waterways through ballast water transfer, before being extended to include geographical regions such as the Great Lakes, Chesapeake Bay, San Francisco Bay and the Gulf of Mexico.

To assist in understanding the challenges that the marine industry faces in interpreting and aligning with the slightly differing IMO and United States Coast Guard (USCG) Ballast Water requirements, the Club has issued a Risk Alert (https://www.steamshipmutual.com/Downloads/Risk-Alerts/RA59%20Ballast%20Water%20Management%20062018.pdf), setting out in greater detail the requirements of both IMO and USCG for ballast water management when trading to the US, including the latest update of USCG Type Approved ballast water management Systems.

It should be noted that Intertanko have recently issued a paper "Ballast Water Contingency Measures for Tankers" that may be of interest. ■

"...initially intended to prevent invasive species from entering inland waterways through ballast water transfer..."



The "Peking" Returns Home to Hamburg

F. Laeisz Group's "Peking" of 1911 has returned from New York's South Street Seaport Museum for restoration work before becoming the centrepiece of a new Port Museum at Hamburg.

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Commercial sailing vessels continued to evolve throughout the 19th century, coexisting alongside the new steamships. Reederei F. Laeisz of Hamburg employed sailing vessels exclusively until 1914 and continued to employ them until 1946. The largest modern fleet of such vessels ever constructed, F Laeisz's ships were renowned for their reliability and speed. With their hulls painted in the company's black, white and red livery, and with names all starting with the letter 'P' (a company tradition since 1856), the line's record passage times on deep sea routes earned its fleet the nickname "Flying-P-Liners".

"Peking" was built by Blohm & Voss of Hamburg and completed in May 1911. She is a four-masted barque (a barque being a vessel with at least three masts, all square-rigged, except the mizzen which is fore-and-aft rigged; square-rigged refers to a ship carrying square-cornered sails set from horizontal yards or spars balanced across the mast). Built for the Europe – west coast South America service, she was designed to sail around Cape Horn in heavy weather. Her hull and decks are made of steel, her masts are continuous steel tubes from keel to truck; her spars are of steel and steel ropes are used for all her standing rigging. The spars for the three royals (the highest sails) are 175 ft above the water, and each of the three lower yards is over 100 ft long. Her length overall is 345 ft, beam 47 ft, and displacement 3,000 gt. She was steered from a raised deck amidships, with fore and aft catwalks connecting the midship platform with a raised foredeck and poop. Her crew comprised the captain, four mates, two cooks, steward, sailmaker, carpenter, blacksmith, bosun, radio operator, five regular sailors and about 50 cadets. Her design and construction marked the culmination in the development of the square-rigged commercial sailing ship.

From June 1911 until the start of the First World War "Peking" was employed in the Chilean saltpetre trade (the natural mineral source of potassium nitrate, which is used to make fertiliser and gunpowder). Her outward passages, all to Valparaiso, averaged 80 days, her best being 73, and her homeward runs averaged 90. Captain J. Hermann Piening describes a west coast South America passage in "Peking":

"A whole hellish concert roars in the rigging. Rushing come the seas over the port rail, strike the deck threateningly, wash in a fury around hatches and capstans, and run off gurgling through the wash ports. When the wind squalls hit, our vessel hauls farther over to leeward and buries our bulwarks deep under the waters that rush by, foaming. A broader stripe of spray shimmers blue-green in the inky darkness of the night. Then the storm again lets in a little air; the vessel rights herself and rushes on farther to the south. For 'down under to the south' must for a time be our watchword. Although it will be colder down there in the neighbourhood of the eternal ice, nevertheless I must try to find, on the south side of the storm's centre, the east wind that will then carry us to the west around the Cape of storms.

When morning dawns, many of our ship's boys look a little anxious. In an endless procession, the glassy gray-blue mountains are marching from the west. From their summits blow flapping manes of blinding spray, which the storm tears to shreds. A universal roaring fills the air, that seems to stop the ears as if with sand. No one can make himself understood except by shouting full-strength into another's ear. When the squalls strike, a man must turn his head away in order to be able to breathe at all. The excessive pressure of the madly rushing air forces itself through mouth and nose into the body, blows up the lungs until they are no longer in condition to breathe out. At times rain and hail showers come down; then a strange hissing and singing mingles with the roaring of the storm. The air is gray with flying water and opaque as milk glass."[1]

When the First World War broke out in August 1914, F. Laeisz ordered its nine vessels in Chilean ports to remain at anchor, including "Peking" at Valparaiso. The ships remained there for the

duration of the war and were interned by Chile in November 1918. During a storm on 12 July 1919 "Peking's" near-sister ship "Petschili" was driven ashore at Valparaiso, a total loss.

In the Treaty of Versailles, Germany surrendered its merchant ships above a certain tonnage to allied governments as reparations for vessels sunk or damaged during the war. The ships interned in Chilean ports were distributed among the allied countries in 1921. "Peking" was allocated to Italy but was repurchased by F. Laeisz in 1924.

"Peking" returned to the Europe – west coast South America route, but by 1926 it was clear that the Chilean saltpetre trade had become less profitable. Chile no longer required the previous mainstay outbound cargoes of cement in barrels, bulk coke, and boxed lump sugar; the shortage of wartime shipping had forced the country to become self-sufficient in these commodities, growing its own beets, and building sugar refineries and cement factories. A high rate of import duty was imposed on cement, while coke was used less and less. The war also resulted in the loss to foreign vessels of the Chilean coastal trade. Carriage of coastal cargoes used to compensate an owner for the coastal operating expenses of ships discharging and loading saltpetre at different Chilean ports. Wartime demand also lead to European and North American factories developing a process for the manufacture of synthetic nitrates, resulting in a slump in freight rates for organic saltpetre. The opening of the Panama Canal to steamships on 3 April 1914 made it even less necessary for commercial sailing ships to bash a way westward through the Straits of Magellan around Cape Horn.

In November 1929 an American sailor, Captain Irving Johnson, signed on to "Peking" as crew for a voyage from Hamburg to Talcahuano, in order to experience sailing in one of the cargo-carrying square-riggers before their demise. He observed how efficiently her Master, Captain Jürs, managed the ship and got outstanding performances out of her:

"There must have been a heavy gale somewhere in the North Atlantic, because we now started jumping into a big swell. This disgusted the skipper all the more, it followed so close on our delay in the North Sea where we spent seventeen days within two hundred miles of Hamburg. If the Peking made a slow passage the owners blamed the skipper; so he held onto all sail while she jumped and dove like a wild horse. The ship was driven nearly under water by the press of sail, and her main deck was full to the rails, yet the "Old Man" still hung onto the royals!"[2]

Captain Johnson had a 16mm video camera and shot one of his films from the top of "Peking's" mast with winds in the vicinity of 100 miles per hour. It shows the masthead swinging in an arc of 300 ft at some of the rolls, and the ship rolling 45 degrees in 11 seconds.[3]

Image courtesy of Jan Sieg

"The ship was driven nearly under water by the press of sail, and her main deck was full to the rails, yet the "Old Man" still hung onto the royals!"

The Great Depression of 1931 put a heavy strain on the finances of the F. Laeisz Group. The company took all its ships off the Chilean run and transferred its two newest vessels, "Padua" and "Priwall", to the Australian grain trade. The rest of the fleet was put up for sale. "Peking" was the last to be sold, in September 1932, to the Shaftesbury Homes and Arethusa Training Ship Society, a British charity providing naval training for homeless boys in London. Anchored at Lower Upnor on the Medway and renamed "Arethusa", she was a replacement for the frigate HMS "Arethusa" of 1849. The latter had served as a sail training ship since 1874 and had the distinction of being the last British ship to go into battle under sail alone in 1854 during the Crimean War. As a stationary training ship, the new "Arethusa" was stripped of much of her rigging and her sand ballast was replaced by concrete.

By 1972, a decline in the number of boys entering training in "Arethusa", as well as the rising cost of maintenance and urgently needed repairs, lead to the decision to dispose of the ship. In 1974 she was towed to New York after being purchased by the city's South Street Seaport Museum, which restored the ship to her 1911 appearance and renamed her "Peking". Over 40 years later, she was in again in need of restoration and in July 2017 she was repatriated to Germany by the semi-submersible heavy-lift vessel "Combi Dock III". "Peking" is currently at the yard of Peters Werft GmbH at Wewelsfleth on the Elbe undergoing a €26 million restoration which is expected to last three years. "Peking" will then become the main attraction in a new Port Museum in Hamburg not far from where she was launched in 1911, one of only four surviving Flying-P-Liners.[4] Today F. Laeisz Shipping Group operates a diversified fleet of around 30 ships, comprising container vessels, bulk carriers, PCTCs, gas carriers, and research vessels, and is a Member of Steamship Mutual. ■

[1] Rohrbach, P, Piening, J & Schmidt, A, FL: A Century and a Quarter of Reederei F. Laeisz, (J. F. Colton & Co, 1957) p. 182.
[2] Johnson, I, The Peking Battles Cape Horn (Sea History Press, 1977) p.80.
[3] Captain Johnson's film The Peking Battles Cape Horn is available on YouTube.
[4] "Padua" of 1926 was given to the USSR in 1946; renamed "Kruzenshtern" she is still in use as a Russian sail training ship, the only former Flying-P-Liner still sailing. "Pommern" of 1903 and "Passat" of 1911 are museum ships at Åland and Travemünde respectively.

Image courtesy of Hans Hartz / Stiftung Hamburg Maritim

Back to contents

New Zealand Biofouling – Craft Risk Management Standard

Alistair Irving and Michael McCarthy of correspondent P & I Services Ltd, Auckland, write about the new Craft Risk Management Standards that have come into force in New Zealand.

Alistair Irving and Michael McCarthy
P & I Services Ltd, Auckland

On 15 May 2018 the Craft Risk Management Standard ("CRMS") came into force. CRMS sets out the requirements for management of biofouling risks associated with ships entering New Zealand Territorial Waters. Ships which do not comply with the CRMS risk being ordered to leave New Zealand ports and New Zealand Territorial Waters.

The CRMS regime

CRMS draws a distinction between short-stay vessels and long-stay vessels with different fouling requirements for each category. A short-stay vessel is a ship in New Zealand 20 days or less and only visiting designated "places of first arrival" (which include all the main ports). Deep sea international trading ships will usually fall within the short-stay vessel category.

CRMS specifies that operators must take measures to ensure a clean hull before the ship arrives in New Zealand Territorial Waters through either:

1. Cleaning the hull less than 30 days before arrival;
2. Having evidence of continual maintenance of the hull using best practice; or
3. Carrying out in water cleaning/treatment within 24 hours of arrival at port in New Zealand. (There is no approved in water-hull cleaning/ treatment system currently available).

To demonstrate compliance, ships will need to carry on board:

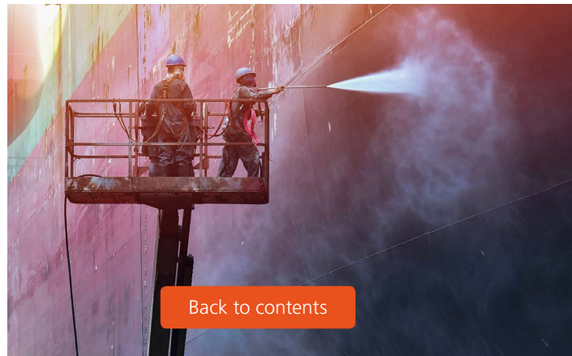
- An antifouling certificate and a biofouling management plan.
- Reports from the most recent hull cleaning.
- Records of contingency planning on clean hulls.
- A biofouling management plan.
- A biofouling record book, with reports from recent hull inspections including date stamped photographs and/or video.

In the event of non-compliance, it is likely that the ship will be ordered to leave port and New Zealand Territorial Waters and not re-enter until hull cleaning has occurred.

Comment

We understand that New Zealand is the first jurisdiction in which such stringent and compulsory biofouling measures have been introduced. Authorities might accept that there will be cases which fall into a grey area as to whether a hull is dirty or clean and have said that they will work with the operator in that case. It is however, important that owners/ operators should familiarise themselves with the CRMS and the potentially serious operational and financial impact which failure to comply can have. It is important that owners prepare both operationally and from a documentary perspective, so that they present not only a clean hull when their ship arrives in New Zealand, but also comprehensive documentary evidence as to steps taken to comply with the CRMS.

This article is an abridged version of the original – to read the article in full please see the Steamship Mutual App or visit www.steamshipmutual.com/publications/Articles/newzealandbiofouling062018.htm. ■



Back to contents

News

Club Succession Planning

In Spring 2018 the managers announced their succession plan for the immediate future.

Gary Rynsard will step down from the role of Executive Chairman in February 2019 and will be replaced in that position by Stephen Martin. Gary will remain with the management, Steamship P&I Management LLP, and will assist in the establishment of the European subsidiary company in Rotterdam.

Chris Adams will become Managing Director with effect from 20 February 2019.

Gary Field will become Head of Underwriting with effect from 20 February 2019.

Steve Ward retired from the management on 20 February 2018 and was replaced as Chief Financial Officer by Arjun Thawani, who joined the management on the same date.

Colin Williams is retiring from the management with effect from 20 February 2019. His role as Head of Claims will be taken by Charles Brown who joined the management from the law firm Reed Smith in March 2018.

Tim Alfrey joined the management on 20 February 2018 and is Head of Statistics and I.T. Services. ■

A Team Effort App

Our latest app, released in December 2017, includes the full 37 minute "A Team Effort" film as well as two shorter film items, "Revisiting the basics – video summary" and a trailer for the "A Team Effort" film.

Claims handling

After a useful "Introduction to Claims Handling", the app has sections on various types of claims including cargo, collision, people claims (crew, injury, passenger, stowaways etc), FFO, pollution, salvage and wreck removal, fines, General Average and FDD. Each section contains a link to the relevant Club Rules and an explanation of what the Club covers for that particular topic. Sections on Time Bars, Guarantees, Statements and Evidence provide further useful information.

> "Each section contains a link to the relevant Club Rules and an explanation of what the Club covers for that particular topic."

A Team Effort app

Documentation

The app contains an extensive index of documents including accident report forms; various international conventions including the Athens Convention, Hague, Hague-Visby, Hamburg and Rotterdam Rules; Collision Regulations; Inter Club Agreement; IMO/ UNHCR Guidelines on Rescue at Sea; Indemnity forms; OPA-90; PEME forms; numerous Charter Parties; Towcon/Towhire forms; SCOPIC; Stowaway questionnaire and York-Antwerp Rules.

A helpful index of useful weblinks is also available on the app.

The app is available in English, Spanish, Mandarin, Korean, Brazilian Portuguese, Russian and Japanese. It can be downloaded for free from the App Store and Google Play. ■

OOCL Vesel

Club Representatives Visit the World's Largest Container Vessel

After witnessing the maiden call of the world's largest container vessel, OOCL HONG KONG, to Felixstowe in June (as reported in Sea Venture issue 28), on 5 December, Syndicate Executive Darren Heppel and Syndicate Associate Stuart James of the Club's Eastern Syndicate were invited by the Club's Member, OOCL, to visit the vessel during its call at Trinity Terminal, Felixstowe. In the company of Mr Duncan Simmons, Senior Manager, OOCL UK, Darren and Stuart duly proceeded to the vessel's berth where the opportunity was taken to appreciate the vessel's impressive size from the quayside and contemplate the ascent of the boarding ladder.

The ladder was situated in the shadow of one of Trinity's massive gantry cranes which was working at the time. Boarding the vessel required a temporary halt to container loading operations whilst everyone proceeded upwards. This meant that, at one point, they were eye level with a container suspended some 20 feet up in the air!

On reaching deck level Darren and Stuart were first introduced to Chief Mate Dymytrenko Anatolli and taken to the bridge to meet Captain Lum. Captain Lum provided a personal tour of the bridge during which time he explained the bridge lay-out, demonstrated various items of equipment such as the ECDIS and answered questions about the complexities of operating a vessel of this size. They then had the opportunity to see him engaged in his duties as he closely monitored cargo operations.

Chief Mate Anatolli then proceeded to explain stowage operations and how the vessel coordinates with planners located in both the UK and Hong Kong to plan and manage the vessel's stowage.

In addition to being able to appreciate the size and scale of the vessel itself, the visit proved to be very interesting and highly informative and has provided a useful insight into shipboard operations from the crew's perspective.

We are extremely grateful and appreciative to OOCL for granting the opportunity to visit the vessel and to Captain Lum and the crew for their hospitality. ■

Stuart James and Darren Heppel with Captain Lum

And the Winner is... Steamship Mutual

We are delighted that Steamship's film "Cyber Security: Smart Safe Shipping" recently won the 2018 Smart4Sea Cyber Security Award. Loss Prevention Director, Chris Adams, collected the award at the 30 January 2018 ceremony in Athens. In accepting the award Chris Adams said:

"We are humbled and honoured to have received the Smart4Sea Cyber Security Award, and in achieving that accolade – of which we will be immensely proud – I would like to pay tribute to the invaluable efforts of many others who contributed so much to this success. First and foremost I extend my grateful thanks to Tom McInnes and the whole team from Callisto Productions for once more doing such a superb job of creating the programme "Cyber Security – Smart, Safe Shipping". Callisto have produced all of our loss prevention DVDs and the quality and innovative nature of these is reflected in the fact that all of these programmes have either achieved or been shortlisted for industry awards. I am also most grateful to our presenter Edward Stourton for his skill and commitment once more in conveying the message in an effective and authoritative manner. I also have to add that we received invaluable assistance in the production of this programme from HudsonAnalytix – one of our fellow finalists – and I must take this opportunity to thank them for their contribution and support. This evening's success could not, however, have been achieved without that critical element of support – votes! I am therefore most grateful to all of those who cast their votes in our favour, and also to the extremely dedicated and supportive group of individuals in our marketing team back in London who did so much to encourage and mobilise support.

I would also like to pay tribute to the other companies with whom we shared a place on the shortlist, and I know very well the disappointment they will be feeling at this moment. We have known and worked with several of those companies over the years, and I have already mentioned HudsonAnalytix in this context. We have the highest regard for the work that they do and I would like to congratulate them all on their achievements.

Cyber Security is a topic that is of ever-growing importance. Our objective in producing this DVD is to help raise awareness amongst seafarers and shipping companies of the cyber security threat, and to influence behaviour to reduce and control that risk. As with all of our loss prevention programmes "Cyber Security – Smart Safe Shipping" was produced with financial support from The Ship Safety Trust. These programmes are available to all, not just Members of Steamship Mutual, and if further information is needed, you can find it on the loss prevention page of our website."

Watch the award winning film "Cyber Security: Smart, Safe Shipping" on the Steamship website now: https://www.steamshipmutual.com/loss-prevention/cybersecurity.htm ■

Chris Adams receiving the award

Yacht Shows

Since the last issue of Sea Venture, the Yacht Team has been busy attending a number of the industry yacht shows, taking the opportunity to meet with existing Members and brokers who come together at such events, and also to learn of the latest developments, trends and changes in the industry. Members from the team attended in Cannes, Monaco, Fort Lauderdale, Paris, London, Dusseldorf and Miami – each of which hosts a well-attended yacht show.

A particular highlight came at the Fort Lauderdale Mariner's Club Seminar where Yacht Team Leader, Hugo Jacquot, spoke on the importance of class and flag state to yacht underwriters.

Steamship's superyacht business continues to enjoy steady growth with the addition of quality tonnage. Details of the Club's yacht covers are available online and can be found here: https://www.steamshipmutual.com/underwriting/yacht-facility.htm. ■

"Steamship's superyacht business continues to enjoy steady growth with the addition of quality tonnage."

24 Peaks Challenge

On the 7 July the Steamship "Steamboots" team will be following in the footsteps of the "Steamship Wanderers" of 2017 in tackling the 24 Peaks Challenge in aid of the charity Seafarers UK.

Seafarers UK is a charity that has been helping people in the maritime community for over 100 years, providing vital support to seafarers in need and their families. They do this by giving grants to organisations and projects that make a real difference to people's lives, across the Merchant Navy, Fishing Fleets, Royal Navy and Royal Marines.

The challenge itself involves crossing 24 peaks of the English Lake District, all of which are over 2,400 feet high, and endeavouring to complete this feat in a time of under 24 hours. The peaks include eight of the ten highest mountains in England; Scafell Pike, Helvellyn, III Crag, Broad Crag, Lower Man, Great End, Bowfell and Great Gable. The event is described as 'the ultimate test of endurance' and has a total ascent of over 13,000 ft!

The Steamboots team

Fundraising has already begun and is well on course to achieve the target of £6,000 and has so far included events such as a bake sale, Eurovision Song contest sweep and dress-down Friday! Events scheduled for June included a quiz night, raffle and a further bake sale.

The Steamboots team are immensely grateful for the many very generous donations that have been received, and hope that this will continue. It is your unwavering generosity that allows this wonderful charity to continue to operate. On behalf of us all, "THANK YOU SO MUCH" and please keep up the good work. ■

Members' Training Course 2019

The Club's sixth residential training course for Members will take place in London and Southampton between 24 to 29 June 2019.

The aim of the course is for representatives of the Club's Members who are involved with P&I insurance and risk management to spend time with the Managers' London Representatives to explore P&I issues in greater detail than is otherwise usually possible during the course of normal business visits.

There will be an emphasis upon the active participation of delegates by means of workshops and case-studies, as well as talks on topical P&I issues by guest speakers in addition to social events that are planned to taking advantage of the maritime heritage of the course venue. Delegate places are limited and further information will be available shortly.

A date for your diary!

Members' Training Course

Date: 24 - 29 June 2019

Locations: London & Southampton

Please watch our website and social media channels for further information.

STEAMSHIP MUTUAL

Belgian Students Visit Steamship Mutual

Training and education are important features of life at Steamship Mutual. Our staff participate in training, lectures and seminars at our various offices and also offer seminar and lectures to members. In addition, we have been pleased to assist in the training of student groups. The Law Faculty of the University of Ghent, led by Professor Eddy Somers, started the tradition of taking students to London in the late 1980s. They have been visiting Steamship Mutual since the academic year 2013-2014, and in November 2017 visited the Club for the fifth time in a row. The trip now takes place under the umbrella of the Master of Science in Maritime Science, an inter-university programme developed by Ghent University (UGent) and the University of Brussels (VUB). The course is aimed "*... at students from diverse academic backgrounds, who have a common passion for maritime transport and already hold a Master degree.*"

The trip to London is an integral part of their course and each year several employees of the Port Authority of Ghent join the students exploring the world of maritime transportation in a direct way, giving the theoretical knowledge they acquire a practical dimension. The London trip includes visits to institutions like the IMO, Intertanko, IOPCF and IMB, Lloyd's Register and INMARSAT. Included in the programme is a visit to a P&I Club and we are proud that for the fifth year in a row, the Maritime Science course chose to visit Steamship Mutual. Steamship's Correspondent & Communications Manager, Neil Gibbons, hosted the visit during which the students were shown the "A Team Effort" film (now available on the "Team Effort" App), as well as hearing presentations on claims from Syndicate Manager Alex Towell and underwriting from Syndicate Executive Fern Rogers.

Alex Towell speaks to students

"Our students would be missing a vital piece of information if we left this out of the picture."

Students from the University of Ghent

"A call at a P&I Club adds an essential link to the chain of our visits. P&I Clubs play a role which is often not fully understood, even by people who are close to the shipping business. Our students would be missing a vital piece of information if we left this out of the picture", explains Jean-Louis Vandevoorde, practical assistant at the University of Ghent. "*That is where the Steamship Mutual steps in. The presentations we are given by their people give us the touch and feel of what P&I is all about and what the issues are in their field of activity. We are always very happy – and grateful – to come back to Steamship Mutual. They always do a perfect job at bringing our group at the core of the P&I matter.*" ■

STEAMSHIP MUTUAL

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