



STEAMSHIP MUTUAL

Sea Venture

Issue 30



Introduction



Occasionally someone will say that change comes very slowly in the world of P&I. There may have been an element of truth in such a statement in the past, but at present it seems far from accurate.

Our Members face a rapidly changing technological outlook. Global concerns about the environment and climate change have led to decisions about the sulphur content of fuel oil, a topic covered in this edition of Sea Venture. In the expectation that there will be more and more regulations on CO2 emissions, ship-owners are actively researching viable alternatives to fossil fuels. On the horizon is the Artificial Intelligence revolution and the potential for radical change in how ships are crewed in the future. Add to this the challenges around cyber security and it is easy to believe we are likely to see fundamental changes in ship management in the not too far future.

The nature of a P&I Club has also changed, due in part to the regulation of financial institutions. An important aspect of this change is the fact that P&I Clubs now carry far more capital than was previously the case. This has raised questions about the appropriate use of that capital. The management and governance of P&I Clubs is now very much focussed on formalised risk management systems. Regulation is also playing a part in requiring more international offices and, to a degree, regionalisation. In part this is a welcome development since it

brings the Club closer geographically to the Members. At the same time it inevitably adds to the cost base and poses challenges to effective governance structures and management oversight. Technology has an important role to play in helping us all meet these challenges.

Through all of these developments, good communication between the Club and the Members is vital. Sea Venture plays an important role here. Most of the articles in this edition of Sea Venture are addressing issues and developments in the area of maritime law. Sea Venture, together with the Club circulars and Risk Alerts, the Club's website, and social media links, are all part of our efforts to use the best technology available to improve the service we provide to our Members. And so, far from being slow to change, P&I must be at the forefront of change.

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January 2019

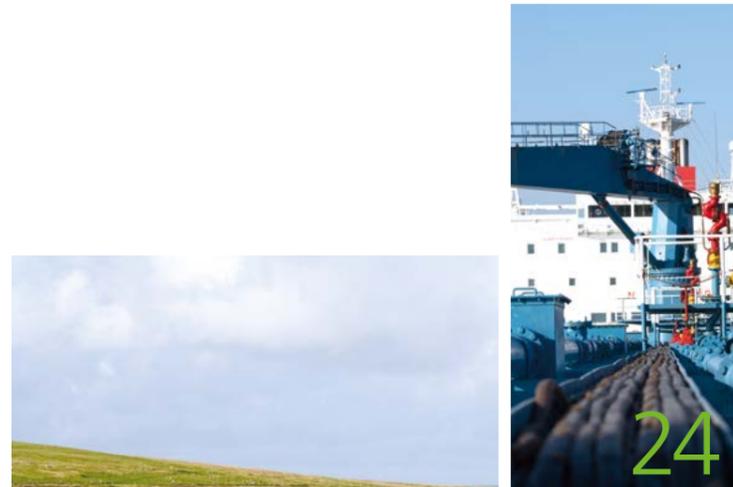
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Contract



A Tale of Two Time Bars

The English courts continue to consider time bars in shipping contracts.



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P v Q (“The Capetan Georgis”) [2018] EWHC 1399 (Comm)

No one needs reminding of the importance of heeding time bars in contracts, but this High Court decision is an example of the difficulties that can be caused in a charter chain and how parties may be held to strict contractual interpretation of a time bar clause.

The case involved four parties in a back-to-back voyage charter chain on Norgrain 1973 form. Due to the anonymity of the underlying arbitrations they are identified as P, Q, R and S. Clause 67 in each charterparty provided that any claims: *“must be notified in writing to the other party and claimant’s arbitrator appointed within thirteen (13) months of the final discharge of the cargo and where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.”* (Emphasis added).

The timeline:

- 16 October 2015 – discharge of cargo was completed.
- 16 November 2016 – the final day of the 13 month period, Disponent Owner China National Chartering Co Ltd gave notice to their Charterer (P) of a third party claim brought against them at 6:44pm when P’s office was closed. The first P knew about this was the next day on their opening, after the time bar had passed.
- 17 November – P gave notice to their Charterers, Q. When Q received this, they gave their own notice of claim and commenced arbitration against R, via the brokers. R then claimed that their brokers/agents did not have authority to accept service of an arbitration notice.
- 23 November – P’s operations department notified their legal department.
- 25 November – P commenced arbitration against Q.

- 28 November – R instructed lawyers, despite being aware of the notice from Q since 18 November.
- 29 November – R’s lawyers appointed an arbitrator.
- 30 November – to protect their position, Q served the arbitration notice directly to R.
- 1 December – R gave notice of the claim and commenced arbitration against S.

The parties all sent the notifications and commencements of arbitration after the 13 month time limit had passed. P, Q and R then applied to the High Court under two issues.

The first issue: whether each claim had been notified in time, despite Clause 67.

It was argued that there was an implied limitation on the literal meaning of this clause, in circumstances where the party was simply unaware of such a claim before the prescribed time had passed. Sir Richard Field QC, sitting as Deputy High Court Judge, rejected this. He did not see a reason to depart from the literal construction of the clause as the wording was clear and unambiguous. If the parties intended for there to be this restriction, if a party was unaware of a claim, they would have concluded the charter on this basis; for example a provision similar to the Hague-Visby Article III rule 6 bis, which extends time bars for indemnity claims. The commercial advantage of an undeniable time limit, such as Clause 67, is that parties are not at risk of validly receiving a claim outside the 13 month time limit.

The second: Alternatively, whether there could be an extension of time for each commencement under each charter under Section 12(3) of the Arbitration Act 1996.

S.12(3) provides for an extension to be granted only if the Court is satisfied that:

- The circumstances were out of the parties’ reasonable contemplation when they agreed the provision and consequently it would be just to extend time; or
- The behaviour of one party means that it is unjust to hold the other stringently to the terms of the provision.



The Court considered whether the circumstances confronted by the time barred party were ‘not unusual’ or were ‘prone to’ happen, and that this should be the starting point in the determination. Because P’s receipt of the claim was after close of business on the last day of the time bar, any other claim down the chain could only be brought out of time – but the Court decided that this did not amount to ‘not unusual’ circumstances. The issue would turn on whether each party acted expeditiously and in a commercially appropriate fashion.

- As P did not inform their legal department for six days after becoming aware of the claim, the Court found that they did not act expeditiously and in a commercially appropriate fashion. P’s claim was time barred.
- As Q gave notice to R’s brokers on 17 November, they sought an extension to 30 November, the date they served directly on R. The Court granted this extension as they were considered to have acted expeditiously as the notice was received by R on 17 November and read by them on 18 November.
- As R did not instruct lawyers until 28 November, although first notified on 17 November, the Court considered this delay as a failure to act expeditiously and suggested that R should have served the notice of claim and commencement of arbitration on S by 22 November, i.e. within 3 business days of notification. This was in spite

of R thinking that its agents could not validly accept service of the notice of arbitration.

P v Q highlights the risks of contracting parties becoming aware of claims immediately after the expiry of a time bar. The case also emphasises the limited relief available from English courts in those circumstances. Alongside the precise interpretation of the time bar clause, it is important to note how the Court exercised discretion under Section 12 of the Arbitration Act 1996, with particular thought being given to whether parties acted expeditiously and in a commercially appropriate fashion, and specifically within three days. A party to a contract needing to react quickly if a claim is presented just before or just after a time bar is something that is emphasised by the Court’s vigorous approach in *P v Q*.

Dera Commercial Estate v Derya Inc – The ‘SUR’ [2018] EWHC 1673 (Comm)

This decision, handed down one month after *P v Q*, adds a layer of complexity to time bar questions, at least until the case goes further to the Court of Appeal.

The timeline:

- 27 July 2011 – the loading of 18,000 Mts of Indian maize was completed. Bills of Lading were issued, which incorporated the Hague Rules and provided for disputes to be determined by English law and London arbitration.
- 16 August 2011 – the vessel arrived in Aqaba for discharge.

- 8 September 2011 – in a letter of this date, the Jordanian customs authorities refused to permit discharge on account of alleged ‘broken percentage, foreign matters, impurities, damaged kernels... and apparent fungus’.
- 12 September 2011 – Dera issued proceedings against Derya (Owners) in Jordan for US\$8 million for cargo damage.
- 16 September 2011 – the Owner’s P&I Club put up a US\$9 million letter of undertaking in connection to this and all disputes and differences arising under the bills of lading.
- October 2011 – the parties appointed LMAA arbitrators in relation to ‘all disputes’.
- 8 November 2011 – the vessel departed from Aqaba for Turkey without permission from Dera or the Jordanian authorities. The cargo was discharged in Turkey following the issuance of proceedings and was consequently sold, with the proceeds going to Owners. Then the vessel was scrapped.
- 23 March 2015 – the London arbitration remained dormant until the claim submissions were served, on the P&I Club’s instructions, exercising their subrogated rights. The claim was for a declaration of non-liability for the cargo claim and for the LoU to be released.
- 1 June 2015 – Dera responded and served particulars of the cargo claim relying on the Hague Rules’ obligations and the bills of lading.
- 26 August 2015 – reply submissions were served by Owners.
- 16 October 2015 – reply submissions were served by Dera.
- March 2017 – a hearing on the following preliminary issues took place and the tribunal determined that:
 - The cargo claim was not extinguished because of the Turkish proceedings, since Dera had not submitted to the jurisdiction of the Turkish court, but;

- The cargo claim would be struck out for want of prosecution under Section 41(3) Arbitration Act 1996.

Dera then raised a Section 68 challenge, alleging serious irregularity on the part of the tribunal and seeking permission to appeal under Section 69 of Arbitration Act 1996. Carr J heard the matter and handed down a detailed judgment. She held that Dera’s Section 68 challenge failed but that they succeeded with the second of their legal challenges. In considering whether there had been inordinate delay, whilst the Judge held that a contract and limitation period was a relevant consideration on the facts, a further voice arose; the question of whether the geographic deviation prevented the carrier from relying on the one year time bar created in Article III Rule 6, when the contract evidenced by the bill of lading is subject to the Hague Rules.

On the first issue, Dera had to show serious irregularity under Section 68 (2) for a Section 68 challenge. The Court had to consider whether a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased (*Porter v Magill* [2002] 2 AC 357). The Judge scrutinised the complaint and found that there was no real prospect of the Tribunal being found biased by a fair-minded but informed observer.

The second issue is more crucial. The Judge reluctantly held that she was bound by *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 41 Com Cas 350 – such that where there was a geographical deviation from the voyage, the cargo interests, Dera, were entitled to retrospectively declare themselves no longer bound by the contract terms, including the one year time bar. Owners were given permission to appeal to the Court of Appeal on this point.

Conclusion

The English courts continue to consider time bars in shipping contracts - but with one hand have provided certainty in *P v Q* and with the other have taken some away in *Dera v Derya*. Being aware of and observing time bars is vitally important and these two time bar cases have highlighted some additional areas to consider, whilst noting that *Dera v Derya* is still subject to appeal. We will report further when the result of the appeal is known. ■

“The Court considered whether the circumstances confronted by the time barred party were ‘not unusual’ or were ‘prone to’ happen, and that this should be the starting point in the determination.”

Damages for Breach of Oil Majors Clause

Whether charterers are entitled to compensation for losses relating to a potentially profitable fixture.



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A v B [2018] EWHC 2325 (Comm)

This Commercial Court decision concerns a challenge by Owners of a VLCC to an LMAA arbitration award, which had found them liable in damages for breach of an oil major eligibility clause. That appeal, under sections 68 and 69 of the Arbitration Act 1996, provides a helpful illustration in relation to the calculation of damages and in particular whether charterers are entitled to compensation for losses relating to a potentially profitable fixture against a background of an otherwise soft market, and whether they are also entitled to claim for their wasted expenditure.

Facts

On 4 July 2011, Owners’ vessel was time-chartered to Charterers and then sub-chartered into a tanker pool, with the vessel being delivered into these charters on the same day. Both charters were on amended Shelltime 4 forms. There was also a third contract between Charterers and the Pool (the “Pool Agreement”).

Under the terms of the head charterparty, Charterers should provide and pay for all fuel and a minimum daily hire of US\$15,000 per day. Owners were obliged to ensure that a valid report would be entered on the SIRE system (Ship Inspection Report Programme database) at all times, and that the vessel would be eligible as from delivery for the business of at least three named oil majors.

Under the sub-charterparty, and the Pool Agreement, Charterers were to ensure at all times the vessel has a SIRE report that was not more than six months old. The Pool Agreement also required the vessel to maintain eligibility with at least four oil majors.

In March 2012, the vessel was inspected by Statoil when discharging at Yingkou in China, and a critical SIRE report was produced. There was no other SIRE report available for the vessel before the Charterers placed the vessel off-hire on 26 October 2012.

In May 2012, the vessel was rejected as unacceptable to BP for discharge at one of its terminals, with the cargo having to be discharged offshore. On 12 September 2012 the SIRE report became six months old and the vessel was proposed and rejected by ExxonMobil. The vessel was further rejected by Total, and Petrobras. On 26 October 2012 Charterers notified Owners that the vessel was off-hire by virtue of breach of clause 50 of the charterparty. Owners took over control of the vessel from that date and on 14 January 2013, the vessel was formally redelivered to Owners under the head charter.

Arbitration

The matter was referred to LMAA arbitration with Charterers claiming damages for loss due to the breach of:

- loss of profits, calculated by reference to two realistic but hypothetical voyages during the period from 26 September 2012 to 31 January 2013, for which it was argued that the vessel would have been employed but for the breach;
- wasted expenditure for hire and bunkers incurred between 22 July and 26 October.

The total claim was approximately US\$3.5 million.

The Tribunal found that Owners were in breach of the oil major eligibility clause as the vessel was not acceptable to at least four of the named oil majors, and also because the SIRE report became more than six months old. Charterers’ claim for damages succeeded in the sum of US\$3.27million which included lost profits, bunkers and pool losses.

Appeal

Owners applied to challenge the award on the grounds of serious irregularity and on points of law, but their arguments failed to persuade the Court to overturn the arbitration award.

The Court considered two key issues:

Compensatory principle

The Court had to grapple with questions of law relating to the proper calculation of damages. The compensatory principle was considered, namely the basic rule that charterers must be placed in the same financial position they would have been had

the charterparty been performed and by extension that charterers should not be placed in a better position than if there had been no breach. Owners argued that the Tribunal had over-compensated Charterers and provided them with a windfall.

A claimant cannot normally claim loss of profits and also seek expenses incurred under the contract being performed. Claimants therefore would be expected to claim for wasted expenditure or lost profits, but not for both. The case of *The Mamola Challenger* [2010] EWHC 2026 (Comm) (Seaventure 16) was considered, which related to expenses incurred by Owners in preparing their vessel for Time Charterers, who repudiated the charterparty at the outset of the

five year period. In that case the Owners sued the Charterers for the expenses, but it was held that the Owners had made a profit from alternative employment, and to have awarded them the wasted expenses as well would have placed them in a better position than if the contract had been performed. However, it was recognised there could be situations where wasted expenses leading up to a contract's date of termination could be claimed, as well as loss of profit, where the latter is calculated net of the expenses incurred.

In the current case it was noted that the Tribunal's calculations for lost profits had used time charter equivalent rates for the two voyages, which reflected the voyage revenues less bunker and other expenses,

divided by the voyage duration in days. The Tribunal subtracted the bunker costs from 22 July 2012 to 26 September 2012, and the cost of hire from 22 July 2012 to 31 January 2013 from the total profit figure.

Consequently, it was confirmed that the wasted expenditure for bunkers and hire from 22 July 2012 to 26 October 2012 did not overlap with the lost profits; both could be claimed without contravening the compensatory principle.

The Court also considered whether it was correct in law for the accounting position under the Pool Agreement to have been ignored by the Tribunal given the difficulties of separating the accounting

and liabilities of any one vessel from the others in a pool. Since Charterers were not claiming for Pool distributions under the Pool Agreement but for what the vessel would have earned for the Pool, net of hire and bunkers, the issue did not fall to be determined.

Taking account of the market

The second issue was the relevance of an existence of an available market which is weak and loss-making and whether damages should be assessed by reference to that available market, or by reference to lucrative fixtures which Charterers contend they would have entered into but for the breach, and if a discount should apply by reference to loss of chance principles.

Against the background of an admittedly soft market where the Pool manager and Tribunal acknowledged that other Pool vessels were loss-making, the Tribunal's finding of fact was it was "reasonable to calculate" and "reasonable to assume" that the lucrative fixtures would have gone ahead. They considered there was an available relevant market but that the vessel would probably have performed those fixtures but for the breach. Therefore it was not appropriate to reduce the recoverable damages below those profits or to discount the losses on the basis of loss of chance principles as analysed on *The Vicky 1* [2008] EWCA Civ 101 (https://www.steamshipmutual.com/Downloads/Sea-Venture/SeaVenture_11.pdf).

Comment

The case provides a helpful illustration of the application of an oil majors clause. This decision shows that it can be open to claimants to seek their loss of profits and also their expenses and liabilities incurred, provided that on the facts, there is no overlap or double compensation and the loss of profits is calculated as a net figure. In addition, the Court was able to assess the probability of especially lucrative fixtures being available, even where the market was otherwise soft. ■

"Owners had made a profit from alternative employment, and to have awarded them the wasted expenses as well would have placed them in a better position than if the contract had been performed."



The Approach Voyage Revisited

The Court of Appeal has confirmed Popplewell J's first instance decision concerning shipowners' obligations when commencing the approach voyage to the load port.



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CSSA Chartering and Shipping Services S.A. and Mitsui O.S.K Lines Ltd – Pacific Voyager [2018] EWCA Civ 2413

The Court of Appeal has confirmed Popplewell J's first instance decision concerning shipowners' obligations when commencing the approach voyage to the load port.

The Commercial Court decision was considered in issue 29 of Sea Venture (<https://www.steamshipmutual.com/publications/Articles/SV29/SV29pacificvoyager0118.htm>). The Court of Appeal has recently handed down its judgment after hearing Owners' appeal. The facts of the matter and the first instance decision are recapped below, before considering the Court of Appeal's judgment.

Facts

Mitsui O.S.K Lines were disponent owners ("Owners") of the "Pacific Voyager", (the "Vessel"), who fixed the vessel for a voyage charter to 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").

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. The charterparty contained a cancelling date of 4 February 2015 and, whilst it did not provide an ETA for load port in Rotterdam, it did advise the ETAs for ports under the previous fixture. The charterparty also contained a clause which stated that the vessel "shall perform her service with utmost despatch".

During the laden voyage under the previous charter, the vessel struck an underwater obstruction and suffered damage, requiring drydocking for repairs. Whilst Charterers were kept informed of the incident and future prospects of performance, by the time the cancelling date arrived, Owners

advised that the repairs would take months. Charterers therefore terminated the charterparty and presented a claim to Owners for damages.

The Commercial Court decision

The Commercial Court considered the established case law of *Monroe Brothers Limited v Ryan* [1935] 2 KB 28 and subsequent decisions (see previous article in Sea Venture issue 29 for more details on the *Monroe* obligation) which held that when a voyage charterparty contains an obligation on an owner to proceed with all convenient speed/utmost despatch to a loading port and gives an ETA or Expected Ready to Load date ("ERTL"), 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 ETA or ETRL. This obligation is to attach when the duty to proceed to the load port arises, which the Court found was to be within a reasonable time as determined by the construction of the charterparty terms.

As there was no ETA or ETRL provided in the charterparty, the Commercial Court looked to the other terms of the charterparty to consider when this reasonable time arose. In this instance, it was held that the ETAs given for the previous voyages could be considered. The Commercial Court decided that 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. As the vessel did not commence the approach voyage within this reasonable time, Charterers were awarded damages. Owners appealed this decision.

Owners' appeal arguments

Owners submitted that the Court should not blindly follow the previous case law without considering differences in the charterparty wording in each case. Owners focused on the fact that there was no ETA or ETRL for Rotterdam and that the utmost despatch obligation could only attach when the vessel left the last discharge port. Owners argued that because the vessel did not



leave the last discharge port, the obligation did not attach, and so they were not in breach.

Owners also submitted that the itinerary from the previous fixture was only included to highlight the vessel was performing a service before this charterparty, which was evident by the dates being qualified with "bss iagw/wp".

Charterers' arguments in response

Charterers submitted that the Court should uphold the first instance decision as they are bound by the previous authorities. It cannot be right that the utmost despatch obligation is only to apply when the vessel leaves the final port under her previous charter as this would mean that even if the vessel failed to depart for reasons entirely due to Owners' fault, utmost despatch would not apply.

Charterers argued that, as the previous itinerary was included on the charterparty form section entitled "Position/readiness", this was surely to be interpreted as a statement as to when the vessel was expected to be ready. The itinerary from the previous charter assisted in showing the reasonable time that the obligation to proceed with utmost despatch was to attach. This was a time when it was reasonable to suppose the vessel would reach the load port at Rotterdam, once a reasonable time for discharge had elapsed.

Charterers also argued in the alternative that the obligation to proceed to the load port commences when it is reasonable to assume that the vessel should set sail to meet the cancelling date.

The Court of Appeal decision

The Commercial Court judgment was upheld with a focus upon the need for business certainty when considering where the allocation of risk lies before the vessel starts to perform under the next charterparty. If the obligation to proceed with utmost despatch was to have any effect at all there had to be some time indicated for sailing. The inclusion of a previous itinerary would clearly be useful to enable the parties to decide at what point in time it would be reasonable for the obligation of utmost despatch to attach. For example, in this matter, the point in time was likely to be when a reasonable time for discharge had elapsed and so the vessel would then likely leave for the load port – just as the Charterers had argued.

The Court did not agree with Owners that an itinerary would be included in a charterparty merely to let the Charterers know that the vessel was performing a previous voyage. The insertion of "bss iagw/wp" merely shows that the estimates were reasonably given. A previous itinerary was clearly of interest to Charterers and it is for that reason it was almost certainly included in the charterparty. This would give a rough date as to when the cargo would be loaded and provide some comfort to the Charterers in circumstances where there may be no ETA or ETRL. Owners appeal was therefore dismissed.

In the Commercial Court judgment, Popplewell J made an obiter comment that the cancellation date could provide the same function as an ETA (if there was no ETA information included in the charter). The Court of Appeal did not consider whether any weight could be put on the cancelling date when looking at the approach voyage and so the obiter comment therefore remains unconsidered. The Court of Appeal did however say that it would be somewhat surprising if there was a Charterparty with no ETA, ETRL or previous itinerary given, meaning that the only guide was the cancelling date.

Comment

The Court of Appeal has confirmed that when a voyage charterparty contains an obligation on an owner to proceed with all convenient speed/utmost despatch to a loading port and does not provide an ETA or ETRL, an itinerary provided under a previous fixture will be viewed as an equivalent to an ETA or ETRL for considering when the obligation attaches.

Owners are applying to the Court of Appeal for permission to appeal to the Supreme Court. Furthermore, Owners have reserved the right to challenge the already established case law (the *Monroe* obligation) in the Supreme Court.

Until that time, we would repeat the guidance issued when reporting on the Commercial Court decision, which is that whilst it has been confirmed that an itinerary/ETA for the previous fixture will suffice, to be on the safe side, charterers would be best to push for inclusion of an ETA or ETRL date when fixing new voyage charters. Likewise, Owners need to be aware of the possibility that a claim in damages could arise. ■

"...that the cancellation date could provide the same function as an ETA (if there was no ETA information included in the charter)."

Inter-Club Agreement: The Right to Counter Security

Taking care over the precise wording of charterparties.



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The recent London Arbitration Award 18/18 highlights the need for care to be taken over the precise wording of clauses used in charterparties to incorporate the Inter-Club New York Produce Exchange Agreement 1996, as amended September 2011 ("ICA 2011").

Facts

The vessel was chartered from the claimant, a Disponent Owner, to the Charterer on an amended NYPE 1946 form with additional riders.

The charterparties between Head Owners, Disponent Owners and Charterers were said to have been on essentially back-to-back terms. Each charter read:

"P&I Club/Cargo Claims

... Liability for cargo claims, as between Charterers and Owners, shall be apportioned/ settled as specified by the Interclub New York Produce Exchange Agreement effective from 1996 and its subsequent amendments."

Cargo interests raised a cargo claim against Head Owners alleging damage amounting to US\$900,000. Following a threat of arrest, the Club for Head Owners provided security in the form of a letter of undertaking.

The Head Owners demanded that Disponent Owners provide counter-security pursuant to clause 9 of the ICA 2011 which they considered to be incorporated into the charterparty.

Clause 9 of the ICA 2011 provides:

"If a party to the charterparty provides security to a person making a Cargo Claim, that party shall be entitled upon demand to acceptable security for an equivalent amount in respect of that Cargo Claim from the other party to the charterparty, regardless of whether a right to apportionment between the parties to the charterparty has arisen under this Agreement ..."

Disponent Owners in turn made a request of Charterers to provide counter-security to them pursuant to the above terms. The P&I Club for Charterers refused to provide counter-security as they considered that the words used in clause 35 of the charterparty were not adequate to incorporate the entirety of the ICA 2011, in particular the security provisions of clause 9.

The award

Disponent Owners commenced arbitration proceedings seeking an order for specific performance requiring Charterers to provide counter-security in the form of a Club letter or undertaking, alternatively a first class bank guarantee or payment into escrow.

The Charterers argued that the wording of clause 35 did not incorporate the full text of the ICA 2011. Charterers relied on a restrictive interpretation of the words "liability" and "apportioned/settled" in clause 35 to mean that only those parts of the ICA 2011 relating to the apportionment and settlement of claims were incorporated in the charter. This would not include the security provisions.

Owners argued that the terms clearly intended to incorporate the full terms of the ICA 2011 with regard to liability for cargo claims.

The Tribunal agreed with Charterers that as a matter of strict construction the charterparty only incorporated those parts of the ICA 2011 that related to apportionment and settlement of cargo claims. The wording of clause 35 was clearly restrictive and did not make provision for security for claims. Without express wording incorporating the full terms of the ICA, its full incorporation could not be assumed.

The Tribunal noted that clause 35 would have been adequate to cover both parties' interests prior to the introduction of clause 9 in 2011.

Accordingly, clause 9 of the ICA 2011 did not apply to the charterparty and Charterers were not obliged to provide security. The decision does not affect Charterers' liability regarding apportionment and settlement of the cargo claim.

It is understood that Owners sought permission to appeal to the High Court but this has been refused.



“...the words used in clause 35 of the charterparty were not adequate to incorporate the entirety of the ICA 2011...”

Amended International Group recommended charterparty clause

As a result of this decision the International Group took the opportunity to consider their recommended charterparty clause wording for incorporation of the ICA, to ensure this encompasses the requirement for security to be provided (See Steamship Mutual Circular L317 – IG – Claims co-operation).

The International Group has amended the clause as follows to include an express reference to securing claims:

“Cargo claims as between Owners and the Charterers shall be governed by, secured, apportioned and settled fully in accordance with the provisions of the Inter-Club New York Produce Exchange Agreement 1996 (as amended 2011), or any subsequent modification or replacement thereof. This clause shall take precedence over any other clause or clauses in this charterparty purporting to incorporate any other version of the Inter-Club New York Produce Exchange Agreement into this charterparty”.

Comments

It is to be expected that, following this award, where the wording of charterparty clauses is not clear or open to interpretation, the right to counter-security could become an issue for debate. The award highlights that parties need to be careful in their charterparty clauses and check the extent of the incorporation of the ICA. All owners and charterers are encouraged to review any charterparty clauses that they regularly adopt to assess whether the incorporation of the ICA therein would include the counter-security provisions. ■

“Songa Winds”: Court Rules on Time Bars

An update on the “Songa Winds” case, which recently appeared before the Court of Appeal.



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The Court of Appeal has considered the effect of a time bar contained in a charterparty clause on a letter of indemnity (“LoI”) given for delivery of cargo without production of bills of lading.

As discussed in a previous Sea Venture article (https://www.steamshipmutual.com/publications/Articles/Songa_Winds_LOI_0518.htm), the “Songa Winds” was in time-charter from her Owners to Navig8 Chemical Pools Inc (“Navig8”), who then fixed her in a voyage charter to Glencore Agriculture BV (“Glencore”). The ship discharged approximately 6,000 tonnes of crude sunflower seed oil in India, without presentation of bills of lading, against letters of indemnity issued by Navig8 to Owners, and by Glencore to Navig8, in the wording recommended by the International Group of P&I Clubs.

The receivers did not pay for the cargo, and the financing bank, who were the lawful holders of the bills of lading, brought a claim in London arbitration against the Owners. At the High Court, Baker J decided that the letters of indemnity were triggered, such that Glencore was liable to indemnify Navig8.

Glencore appealed against this decision, on the grounds that their voyage charter with Navig8 contained a clause;

“If bills of lading are not available at the discharge port, owner to release a cargo against receipt of charterer’s letter of indemnity in the form of owner’s P & I club wording but same without bank guarantee as per owners P & I club wording.”

...

“The period of validity of any letter of indemnity will be 3 months from date of issue. The period may be extended, as necessary, upon owners written request for further extension and confirmation (at time of

extension request) that 1/3 original bills of lading have not been surrendered to owner. In absence of extension requests the indemnity will expire at the end of initial three month period, or any further extension period.”

Glencore contended that the provisions of this clause should apply to the Lols that Glencore had issued, with the effect that Navig8’s claim under the Lols should be time barred.

The Court of Appeal rejected this argument, and held that the ‘period of validity’ in the charterparty clause was not applicable to the Lols issued by Glencore.

The Court considered that the charterparty and the Lols were quite distinct agreements with separate and discrete rights and obligations. Clause 5 of the Lols contained their own time-bar;

“5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.”

It was considered that the charterparty clause gave Glencore a contractual right to insist that the Lols incorporate the three-month period of validity, but Glencore had issued Lols in standard wording, without any reservation or reference to the charterparty or its terms.

In English law there is a presumption that a written contract contains all of the terms of the parties’ agreement, and the Court considered that there was nothing in Glencore’s Lols, or their actions, that displaced this presumption. Glencore’s appeal failed. ■



“...that the ‘period of validity’ in the charterparty clause was not applicable...”

Stay of Proceedings in Breach of Exclusive Jurisdiction Clauses

Singapore Court of Appeal departs from previous decision.



An exclusive jurisdiction clause (“EJC”) provides contracting parties with certainty as to the dispute resolution forum. The efficacy of an EJC is reinforced by the fact that Courts (in most Commonwealth jurisdictions) would as far as possible hold parties to their agreement and refer the disputes to the contractually stipulated forum. Typically, an EJC is enforced by staying the proceedings commenced in breach of the EJC, unless there is “strong cause” justifying departure from the EJC.

For the last two decades, the position in Singapore has been that “strong cause” can be established if the defendant does not have a genuine defence against the plaintiff’s claim (per the Singapore Court of Appeal in *The “Jian He”* [1999] 3 SLR(R) 432). In this regard, the position in Singapore is different compared to other Commonwealth jurisdictions. Simply put, under *The Jian He* principle, a Singapore court will consider whether the defendant has a “genuine defence” to the claim. If the court is able to conclude that the defendant clearly has no defence, then the court may not order a stay of the proceedings. *The Jian He* principle has been subject to various criticisms – in particular, that it does not give sufficient weight to party autonomy and that it should not fall on the non-contractual forum to examine the merits of a defence – even when it is clear that there is no defence to the claim. In the recent decision of *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65 (“*Vinmar*”), a full bench of five judges at the Singapore Court of Appeal overturned *The Jian He* (and the line of cases the followed it) and held that the merits of the defence are irrelevant in the “strong cause” test. This brings the law in this respect in line with other Commonwealth jurisdictions.

Facts and holding of *Vinmar*

In *Vinmar*, the dispute arose out of a sale contract for sale of styrene monomer (the “Sale Contract”). Prior to the Sale Contract, the appellant buyers and respondent sellers had entered into similar contracts for sale of chemical products (the “Old Contracts”). The Old Contracts contained an express EJC in

favour of London (the “London EJC”) whereas the Sale Contract did not expressly stipulate an EJC.

The appellant rejected the cargo and the respondent commenced proceedings in Singapore against the appellant to claim the losses it suffered. The appellant argued that the London EJC was incorporated into the Sale Contract by way of a course of previous dealings and on that basis applied for a stay of the Singapore proceedings. At first instance and on appeal, the Assistant Registrar and High Court Judge refused to grant a stay of the proceedings. While the Assistant Registrar and High Court Judge were satisfied that there is a good arguable case that the London EJC has been incorporated into the Sale Contract, they held that a stay should nevertheless be refused because the appellant did not have a genuine defence (applying *The Jian He*).

On appeal, the Singapore Court of Appeal agreed that the appellant had established a good arguable case that the London EJC governed the dispute. The Court found that the London EJC was incorporated into the Sale Contract by way of a course of previous dealing. As for the strong cause issue, the Court of Appeal departed from *The Jian He* line of cases. The Court held that the merits of the defence are irrelevant at the jurisdictional stage, and as such should not be considered when determining whether there is “strong cause” to refuse a stay of proceedings in favour of an EJC.

Observations

The Court of Appeal’s departure from *The Jian He* line of cases hinges on the underlying philosophy of the “strong cause” test, which is that the Courts will as far as possible hold parties to their agreement on the forum for dispute resolution. In determining whether there is “strong cause”, the Court explained that there are two paramount considerations – party autonomy and commercial certainty.

Proceeding on that basis, the Court reasoned that *The Jian He* line of cases is doctrinally incorrect and inconsistent with the central principle of party autonomy. Party autonomy requires that the party’s agreement to bring all the disputes within the scope of the EJC be respected, regardless of the merits of the defence.

The Court also found strong policy reasons to depart from *The Jian He*. The Court found that *The Jian He* would create much commercial uncertainty because the existence of “strong cause” depends on a determination whether there are any merits to the defence. This in turn depends on uncertain findings of fact and foreign law at the interlocutory stage. It follows that the purpose of an EJC, which is to provide commercial certainty and reduce the risk of being sued in an unfavourable forum, is defeated. Coulson J in *Euromark Ltd v Smash Enterprises Pty Ltd* [2013] EWHC 1627 (QB) also noted that it would be absurd for parties to the EJC to suggest that only a more arguable case should be heard in the contractually agreed forum.

The Court also explained that the law on applications for stay of proceedings on the basis of breach of EJC should be brought in line with stay applications in favour of arbitration and on the basis of *forum non conveniens*. The Court pointed out that the merits of the defence are irrelevant considerations when applying for stay in favour of arbitration or on the basis of *forum non conveniens*. The question before the Court at the stage of applying for a stay is one of jurisdiction and that comes before the substantive merits of the dispute. It must logically follow that there cannot be any determination of the merits of the dispute until the question of jurisdiction

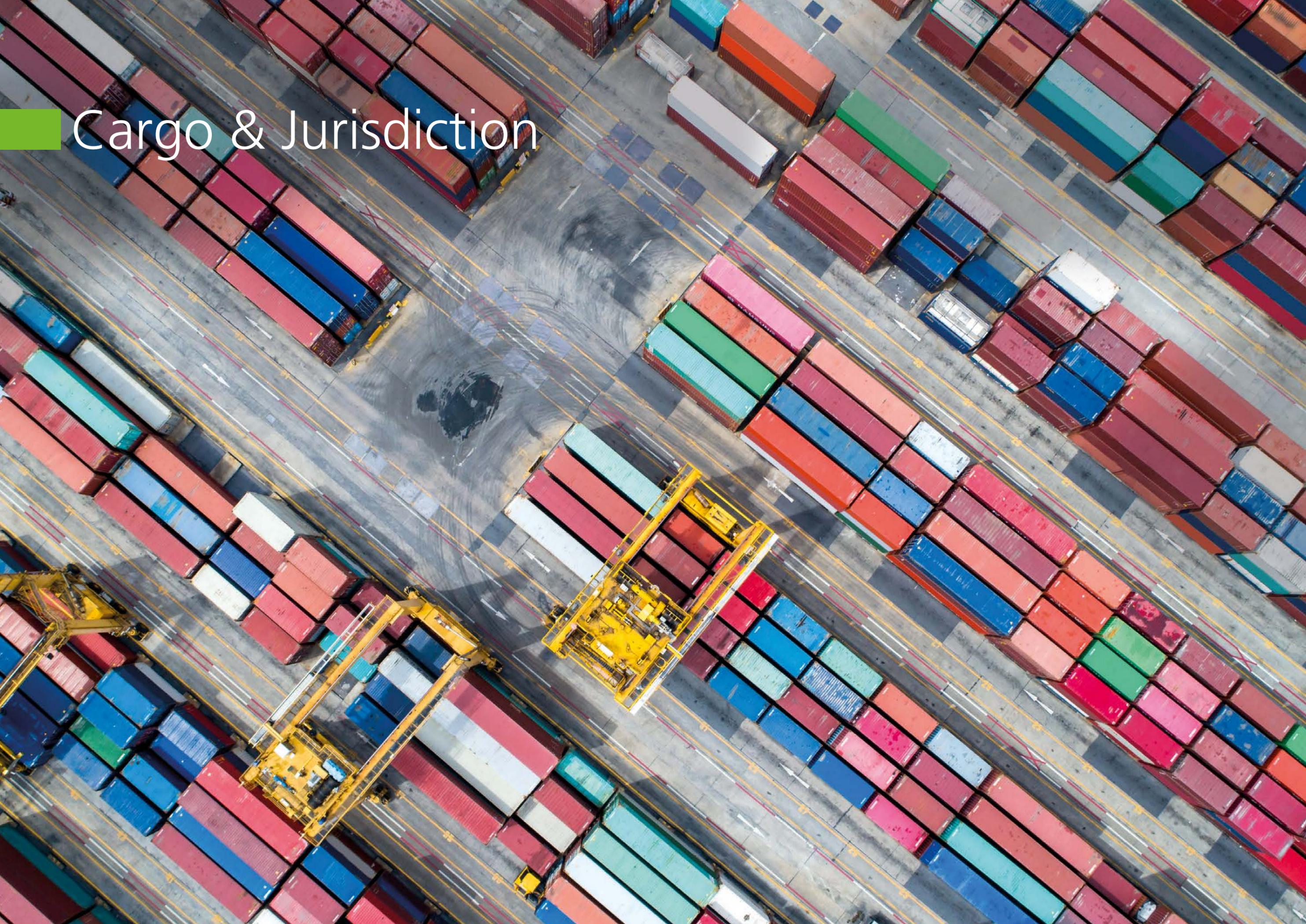
is resolved. Therefore, applications for a stay based on breach of EJC should not be any different and hence *The Jian He* should be departed from.

Accordingly, *Vinmar* brings Singapore jurisprudence on this issue in line with several Commonwealth jurisdictions such as England (see e.g. *Donohue v Armco Inc and others* [2002] 1 Lloyd’s Rep 425 and *Euromark Ltd v Smash Enterprises Pty Ltd* [2013] EWHC 1627 (QB)) and Hong Kong (see *Hyundai Engineering & Construction Co Ltd v UBAF (Hong Kong) Ltd* [2013] HKCU 2237).

Vinmar represents a victory for party autonomy and contractual sanctity and should be welcomed. In the commercial world, ensuring that parties are held to their bargain is vital. The forum where the dispute is resolved at the end of the day is not just an issue of which system of laws or which court hears the case. Practical considerations such as the right to recover costs and interests (to name a few) are significant considerations when parties negotiate the forum for dispute resolution. *Vinmar* serves as a timely reminder to contracting parties that exclusive jurisdiction clauses should never be treated as a “midnight clause”, being left until the end of negotiations. Careful thought and consideration should be put into choosing and negotiating the forum for dispute resolution. ■



Cargo & Jurisdiction



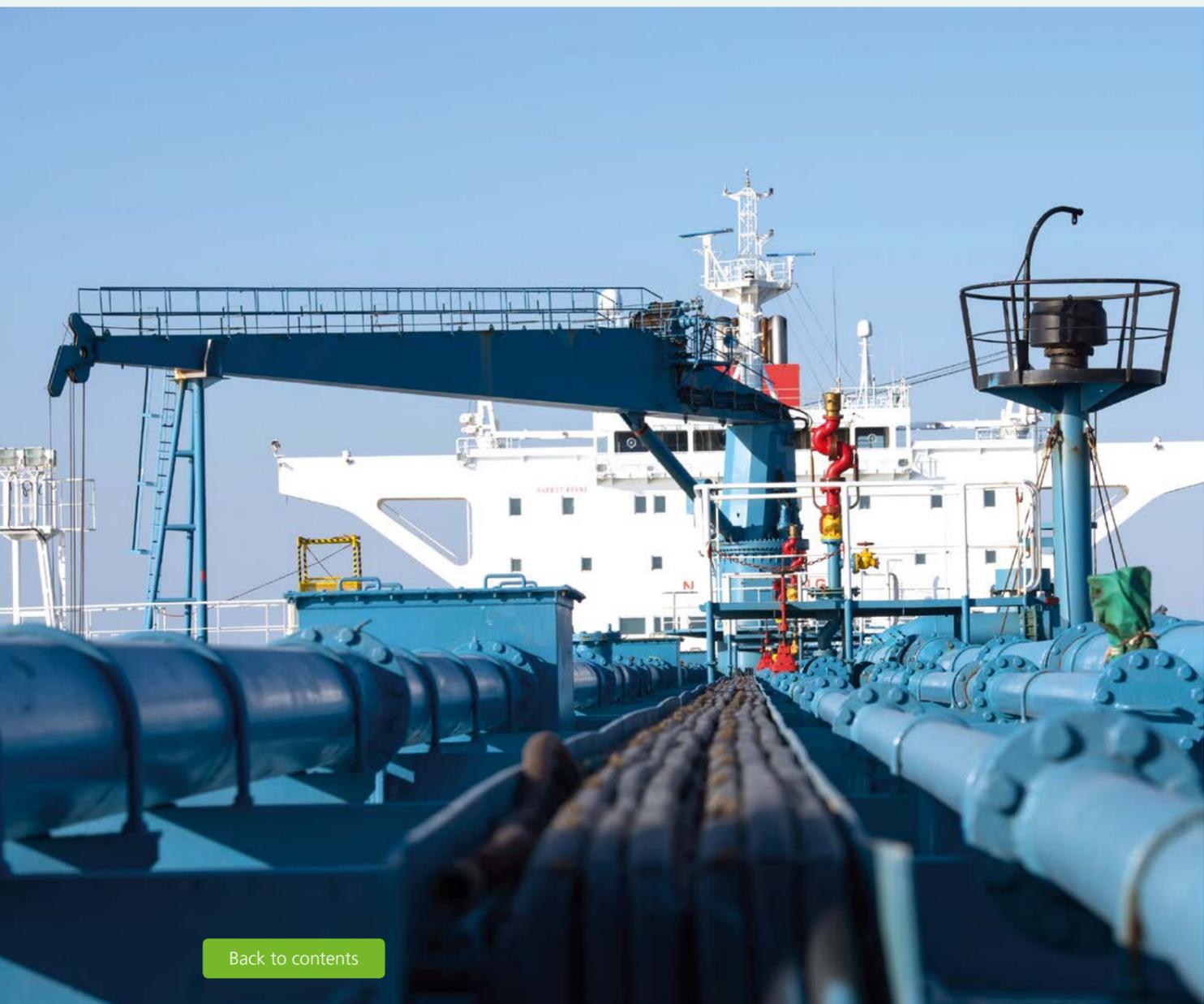
The “Alhani” – Hague Rules Time Bar Applied to a Claim for Misdelivery

Perhaps a welcome decision for shipowners, setting a limit on time for a misdelivery claim.



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The English High Court has decided that a shipowner can rely on the one-year time bar contained in the Hague Rules, where incorporated into a bill of lading, to defeat a claim for wrongful misdelivery of the cargo without production of that bill of lading.



Events

The tanker “Alhani” (the “Vessel”) loaded 4,844.901 tonnes of bunker fuel, of which some 499 tonnes was to be used as fuel for the vessel, and the balance was to be carried as cargo. A bill of lading was issued, which contained a clause paramount which had the effect of incorporating the Hague Rules into the bill of lading contract, and which incorporated the terms of a charterparty which was subject to the exclusive jurisdiction of the English High Court.

In compliance with Charterers’ orders the “Alhani” discharged and delivered the cargo, without production of the bill of lading, by ship-to-ship transfer off West Africa, on 18 November 2011. Shippers, Monjasa A/S, did not receive payment for the cargo, and in April 2012 they arrested the vessel in Tunisia and brought proceedings before the Tunisian courts. In January 2017, Monjasa arrested the vessel again, in France, and commenced proceedings there. In February 2017 shipowners commenced proceedings at the High Court in London, seeking a declaration of non-liability. Monjasa then presented their claim for damages, in contract, bailment and conversion, in London.

Whether the claim was time barred

David Foxton QC, sitting as a Deputy Judge in the High Court, held that the one year time bar at Article III Rule 6 of the Hague Rules applied in this case, and that Monjasa’s claim was time barred. He considered that:

1. The words of Article III Rule 6, that “*In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date on when the goods should have been delivered*” are wide enough to encompass this situation. Earlier Court of Appeal decisions had held that the words “in any event” in this Rule should be given their natural meaning which was unlimited in scope.
2. Monjasa argued that the carrier had other obligations towards the cargo owner in addition to those set out on the Hague Rules, and that the Hague Rules time bar should only apply to claims for breaches of the Hague Rules obligations: a claim in tort should not be caught by the Hague

Rules time bar. The Judge considered that, if this was the case, then any cargo claimant might seek to avoid the limitations and defences available to a carrier under the Hague Rules by presenting a cargo claim in tort, instead of in contract under the terms of the bill of lading. He held that any claim which was capable of being presented in contract under the terms of the Hague Rules would be subject to the Hague Rules time bar, and he considered that a claim for misdelivery, where the misdelivery occurred during the Hague Rules period of responsibility, was such a claim.

3. The Judge considered that there was no English legal precedent, and no settled understanding, that Article III Rule 6 does not apply to misdelivery claims.

Whether commencement of proceedings in Tunisia protected time

The Judge reviewed the current status of English law on this point. He considered that the commencement of proceedings in a foreign court, in breach of an exclusive jurisdiction clause which agrees English law, will not normally protect time in accordance with the Hague Rules, although there might be some exceptions to this.

Comment

While we wait to see if the case is appealed to a higher court, this decision might be welcomed by shipowners, as it sets a limit on the time for a misdelivery claim against a shipowner. While the bill of lading was subject to the Hague Rules in this case, the same arguments should apply in the case of the Hague-Visby Rules.

It should be noted that the Hague or Hague-Visby time bar might not protect a carrier where the misdelivery takes place outside of the Hague or Hague-Visby Rules period of responsibility. See our article on the “MSC Amsterdam” (<https://www.steamshipmutual.com/publications/Articles/Amsterdam0807.html>) for a case where it was decided that the delivery of a cargo, from a container terminal after the ship had discharged it, was outside of the Hague Rules period of responsibility.

We add our customary warning that delivery of cargo without production of a bill of lading prejudices the Members P&I cover. ■

“Monjasa argued that the carrier had other obligations towards the cargo owner in addition to those set out on the Hague Rules...”

Errors in the Management of the Ship, or the Management of the Cargo?

An important reminder of the controversy as to what constitutes negligence in the management of the vessel and/or the cargo.



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In *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd* the English High Court held that, since US COGSA applied to the charterparty, the Owners were entitled to rely on the exception “negligence in the management of the ship” for the Master’s negligent decision to require additional cargo strapping in one of the cargo holds of the ship.

The facts

A dispute arose between Owners and Charterers with respect to the stowage of a consignment of soya beans to be carried from New Orleans to China. The Master refused to accept any stowage plan other than one where holds number 2 and 6 were partially loaded and which required the strapping of the cargo in hold number 2. Charterers incurred additional costs in the region of US\$410,000 as a result of the strapping required by the Master.

The Charterparty

The relevant clauses of the governing time charterparty (NYPE 1946 Form) were:

- Clause 2 imposed on Charterers the burden of providing “necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo”.
- Charterers were, as per clause 8, responsible for loading and stowing the cargo.
- The charterparty incorporated the United States Carriage of Goods by Sea Act 1936 (“US COGSA”).

The arbitration

Owners commenced arbitration proceedings in London for about US\$400,000 of unpaid hire and Charterers counterclaimed for about US\$410,000 of additional costs incurred in strapping the cargo.

The arbitrators found, based on the expert evidence, that the strapping costs were unnecessarily incurred as adequate stability could have been achieved without strapping the cargo. Further, the plan could have been derived from the software the Master had available to him.

While the arbitrators found the Master to have been negligent, they held that Owners’ liability was excluded by section 4(2) of US COGSA as the neglect or default of the Master was “in the management of the ship”, rather than in the management of the cargo.

The High Court decision

Charterers appealed the decision and Cockerill J upheld the award of the arbitrators on the following grounds:

- Whilst clause 2 provided that Charterers were required to provide fittings for special trades or unusual cargoes, such a clause could not be interpreted so as to impose on Owners the duty to pay for unnecessary fittings.
- Pursuant to clause 8, responsibility for loading was transferred to the Charterers. The Master’s role in creating a stowage plan was supervisory and not primarily related to care for cargo but pertaining to the stability of the vessel.
- The Owners were entitled to rely on the US COGSA exclusion of liability for “Act, neglect or default of the master... in the management of the ship” because, although the Master’s negligence concerned the stowage/securing of cargo, his negligence was ultimately aimed at ensuring the ship’s safety and stability, which fell under the scope of “the management of the ship”.

Conclusions

The present case is an important reminder of the controversy as to what constitutes negligence in the management of the vessel and/or the cargo.

The leading case is *Gosse Millerd*, decided by the House of Lords in 1928¹. A cargo of tinplate had



been loaded into one of the holds of the “Canadian Highlander”. The ship suffered a casualty at the next port, and repairmen had to enter the hold through hatch accesses to carry out repairs. The tinplate was later found to be damaged by rainwater, which had entered the hold at this time. Owners sought to rely on the defence of errors in the management of the ship, but the Law Lords held that the failure to rig hatch tents or tarpaulins or a similar arrangement to protect the cargo at this time was a breach of the carrier’s obligation to care for the cargo.

In the leading judgment, Lord Hailsham drew a distinction between “want of care of the cargo” which might be a breach of the carrier’s obligations, and “want of care of the vessel indirectly affecting the cargo” which might allow the carrier to rely on the exception.

In subsequent cases, in *The Iron Gippisland*², the Australian courts held that a cargo contamination arising out of the failure to maintain the vessel’s inert gas system was not due to a failure in management of the ship but due to a negligent act in the management of the cargo. Even though the inert gas system of the ship was in place for the safety of the vessel, the system was primarily used as part of the management and protection of the cargo. Whilst in *The Eternity*³ the English Courts looked at a similar issue with separation valves and reached broadly the

same conclusion based on an analysis of the use to which the relevant valves were being put at the time.

In *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd*, Cockerill J, considered that “what drove the master to act as he did was a consideration of the stability of the vessel and was, hence, a care of the ship issue.” and decided that “it seems to me that it is relatively clear that the primary nature and object of the acts which caused the loss were ones which related to ship management in the sense of stability, and that what was in question was not a want of care of cargo, but a want of care of the vessel which had an effect on the cargo.”

In *Clearlake Shipping Pte Ltd v Privocean Shipping Ltd*, we were reminded that Owners could be entitled to rely on the Hague/Hague-Visby Rules or US COGSA exception of negligence in the management of the ship for the acts of the shipowners’ servants that involved cargo, provided that the primary interest the Master was protecting was the ship. ■

¹ *Gosse Millerd v Canadian Government Merchant Marine (The Canadian Highlander)* [1928] 32 Lloyd’s Rep 91

² *Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippisland)* [1994] 1 Lloyd’s Rep. 335

³ *The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v Fr8 Singapore Pte Ltd (The “Eternity”)* [2008] EWHC 2480 (Comm)

Rejection of Cargo by Receivers

A case study on cargo contamination.



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It is not uncommon that, upon arrival at the discharge port, cargo receivers may delay taking delivery or reject the cargo for various reasons, for example, damage to the cargo, delay in arrival of the original bill of lading, disputes under the sale contract, or difficulties in the market. Carriers are often caught in a very difficult position of trying to mitigate loss and finding a way to dispose of the cargo, often without any cooperation from the receivers. The urgency of the next voyage, extra cost and expenses in keeping the cargo, additional risks to the safety of the cargo and other reasons may put great pressure on the carriers. Do the carriers have to keep the cargo until the receivers finally take delivery or formally abandon the cargo, or are they free to take steps to dispose of the cargo and/or leave the discharge port?

This article, by analysing a recent cargo contamination case, tries to illustrate the difficulties faced by the carrier in a situation where receivers rejected a (partially) contaminated cargo and refused to cooperate with the carrier in finding ways to dispose of and/or salvage the cargo, leaving the carrier on its own to try to mitigate loss. We highlight the importance of exploring all possible legal and commercial options to resolve a situation which could potentially expose the carrier to substantial loss/damage and consequential loss claims.

Position under English law

Delivery is an action completed by both sides – proffering delivery and taking delivery – which together accomplish the final stage of a contract of carriage. However, this does not mean that receivers are obliged to take delivery in all circumstances. As a general rule, the receivers may

refuse improper delivery: they have no obligation to receive the cargo in any unreasonable way or in any form or manner other than what they have contracted for. For example, without legal excuse, the carrier must not deliver the cargo at a place other than the agreed destination.

What happens if the cargo is damaged? In general, the receivers must still accept delivery of damaged cargo and mitigate the loss. Under English law, if the receivers fail to take delivery of the cargo within a reasonable time they will be liable for damages, and a wrongful rejection may result in a liability for damages arising from that rejection, unless the cargo had been so badly damaged as to amount to a “change in specie”. Accordingly, receivers have a duty to accept damaged goods unless the cargo is practically or totally worthless.

Case study

In a recent cargo contamination case handled by the Club, Korean Receivers refused to accept a cargo of phosphoric acid into their refinery storage due to the cargo being contaminated by oily residue from a previous cargo. Expert advice suggested that sound cargo could be separated from the contaminated cargo by a decanting process. It would have been possible to discharge the good cargo leaving just a minimal amount of contaminated cargo in each tank to be disposed of by the vessel. Owners would therefore have been able to re-tender sound cargo to the Receivers.

Despite this, the Receivers rejected the entire shipment and claimed they could not accept even sound cargo following the proposed decanting process, on the basis of a likely risk of catastrophic damage to their and/or their end-user clients’ machinery. The Receivers even refused to participate in further sampling or testing or to provide any alternative solutions.

Notwithstanding the Receivers’ unreasonable and uncommercial refusal to participate in any

form of loss mitigation, Owners were advised that they would need to act unilaterally to avoid considerable loss of time and earnings: they had no choice but to consider a more practical and commercial approach to move forward to resolve the dispute. Any arguments raised at a later stage that such an approach was incorrect could be countered by Owners because no other realistic alternative had been proposed by the Receivers.

Owners were careful at every stage to document the actions undertaken, inform Receivers and Charterers of those actions and always invite them to participate where appropriate. Receivers were informed of the cargo analysis results so that at a later stage Owners could prove that Receivers were fully informed yet still chose to reject the cargo. This would help Owners avoid arguments later on and assist with resolving the matter faster and more cost effectively. The aim was to compile evidence to demonstrate that Owners had to take all reasonable actions unilaterally to reduce losses.

Owners also issued a formal notice to the Receivers which put them on notice that the cargo below the oily film was uncontaminated and set out the legal obligation of Receivers to receive the on-spec cargo once re-tendered, and stating that Owners were taking reasonable and justified actions to rectify the situation and reduce losses. If the Receivers still rejected the good cargo, this notice would help protect Owners’ rights.

Upon receipt of the notice, the Receiver issued a written rejection. This was considered to be a formal rejection of the cargo, meaning that Owners were clearly within their rights to take any steps they considered necessary to reduce losses. In considering the steps to be taken, Owners had to take into account their potential exposure and the available options, i.e. whether they should fight the case with the Receivers and force them to take delivery of the cargo, or alternatively proceed to explore other alternative legal or commercial options to try to reduce losses in light of the Receivers’ rejection of the cargo.

Owners’ potential exposure in this case

On the basis of contemporaneous evidence, the expert report and a scientific analysis of the source of the contaminant by an independent laboratory indicating that the only likely source of the contaminant was the previous cargo, it was considered very likely that a tribunal would come to the conclusion that Owners would be liable for the resulting direct losses, i.e. diminished value of the cargo. In addition, Owners would also be exposed to potential claims for any additional freight costs paid by Receivers for a replacement cargo as well as their consequential loss of profit, loss of end-user clients and business opportunities and reputation. In defence, Owners would argue that such losses were too remote to be recoverable as damages.

Even in light of the expert advice that the cargo could safely be discharged, the risk to the Receivers’ high-value machinery (or that of their end-users) was likely to be found by a tribunal to be the overriding factor as to why it was reasonable for the Receivers to reject the cargo. As such, the Receivers’ actions to look for a replacement cargo and continue their business dealings would likely be considered prudent in mitigating their losses and those in relation to end-users.

Another complicating factor was that, whilst it was expected that claims would be brought in arbitration against Owners under English law as per the bills of lading terms, the claims might potentially be brought locally (in contravention of the law and jurisdiction clauses in the bills of lading) and the vessel might have been arrested for security.

Mitigation actions taken by Owners

Faced with the reality that the Receivers were not going to take delivery of the cargo, Owners proceeded to investigate possible mitigation options. These included reselling the cargo back to the shippers, or a salvage sale to local buyers at the port of discharge or to buyers at another port. The returns and costs of each option had to be considered and compared. Owners were under time pressure as the longer the delay, the more loss and damage they would suffer.

As the Receivers were owners of the cargo, in order to sell or dispose of it, Owners need to get approval from the Receiver or confirmation that they had abandoned the cargo. A formal notice of abandonment, or endorsement on or return of the original bills of lading, was needed in order to re-sell the cargo. Owners were not free to deal with the cargo without abandonment or endorsement since they were not owners of the cargo and had no right to deal with it. If they had proceeded to dispose of or sell the cargo without the owner’s consent, they would have been at risk of being held liable for conversion.

There were two obvious options:

1. Commencing Arbitration and seeking an Order that the Receivers accept or abandon the cargo; or
2. Filing an application in the Korean courts requesting an Order that the Receivers accept delivery of the cargo or abandon the cargo.

But neither turned out to be viable.

An Order from an Arbitration Tribunal or from the Korean courts would require the Receivers to take some physical action: accept or abandon. However, arbitrators have little power to enforce their Orders, especially in foreign jurisdictions, and Korean lawyers advised that a Korean Court Order along those lines could simply be ignored by the Receivers without any real negative legal/commercial consequences.

“...that Owners were taking reasonable and justified actions to rectify the situation and reduce losses.”

Furthermore, even if the Receivers did comply with a Korean Court Order to accept delivery of the cargo, they likely would have sold the cargo in a salvage sale locally which would have obtained a substantially lower value than a re-sale to a salvage buyer at another port. The Korean legal approach therefore did not appear to be the best mitigation of loss strategy.

In light of the foregoing, the course of action decided upon was for Owners to engage in an amicable discussion with Receivers to persuade them voluntarily to abandon the Cargo, and endorse or return the original Bills of Lading to Owners, in exchange for an immediate settlement of the cargo's total loss, or at least the receipt of acceptable security to cover the loss.

With the above considerations in mind, Owners, in consultation with the Club, agreed with the Receivers to reimburse them in full for the value of the cargo and that all other claims, including those for consequential losses, would be dropped. Owners were then to gain title to the cargo (through an Abandonment Letter) and could sell it to a salvage buyer, thereby reducing the overall losses.

The best price for the salvaged cargo, also taking into account freight costs, was offered by a buyer in Malaysia. The sale proceeds from the salvage buyer, plus a payment by Owners which represented the diminution in value of the cargo (i.e. in total, the original invoice value of the cargo), were remitted to Korean lawyers, who then paid the entire sum to the

Receivers in exchange for a letter of abandonment. As the shipowner now had title to the cargo it could be delivered to the salvage buyers. The amount paid by Owners (representing the net loss of value of the cargo), plus the freight factor of transporting the cargo from Korea to Malaysia, were covered by the Club.

Summary

As can be seen from the above case study, whilst the general legal position is that receivers are obliged to take delivery of cargo even if it has been damaged, there are limited situations where receivers would be justified in rejecting the cargo. In some circumstances, despite legal remedies available in some jurisdictions for the carrier to try to force receivers to take delivery or formally abandon

the cargo, such action may not be feasible in practice and might even expose the carrier to more delay, loss and damage. Carriers may, in these circumstances, have no option but to take active steps to try to reduce the loss and find alternative ways of resolving the deadlock, in the absence of normal cooperation from the receivers. This is especially so when the carrier is clearly at fault for the cargo damage and also does not have a viable claim for damages against receivers for non-acceptance of cargo or delay in taking delivery.

In such cases, an owner should act quickly to obtain legal advices in all relevant jurisdictions and try to explore all possible alternatives, both legal and commercial, to resolve the dispute. ■



Cargo Claims: The Carrier's Burden

In *Volcafe v CSAV* [2018] UKSC 61 the Supreme Court overturned the decision of the Court of Appeal on the burden of proof in relation to the inherent vice defence in the Hague Rules.



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In *Volcafe v CSAV* [2018] UKSC 61 the Supreme Court overturned the decision of the Court of Appeal on the burden of proof in relation to the inherent vice defence in the Hague Rules. This decision has provided clarity on the burden of proof in actions against a shipowner for loss of or damage to cargo and will be of importance to all those involved in the carriage of goods by sea.

In upholding the appeal, the Supreme Court has held that, as a bailee, a carrier will be liable for loss or damage during the voyage unless it is able to prove that on the balance of probabilities the loss or damage was not caused by any breach of its Article III.2 cargo care duties, or that one of the defences in Article IV.2 applies. In order to rely on one of the Article IV.2 defences, the carrier must also prove that the loss or damage was not caused by its own negligence or breach of Article III.2. Therefore, for any cargo claim, the carrier has the burden to prove that the loss or damage was not caused by the carrier's negligence.

The Court of Appeal decision was discussed in detail in a previous article (<https://www.steamshipmutual.com/publications/Articles/burdenofproof1116.htm>).

Facts

By way of a recap, the claims were for condensation damage to nine consignments of bagged coffee beans carried in containers from Columbia to various ports in Northern Europe. The claimant cargo interests alleged that the carrier had failed to take reasonable care of the cargo and was in breach of its obligation to carefully load, handle, stow, carry, keep, care for and discharge.

Pursuant to the terms of carriage, the carrier's stevedores were responsible for preparing the containers and stuffing the bags into them at the loadport. Two firms of stevedores were employed to perform this task.

The coffee was stowed in unventilated containers. Coffee is a hygroscopic cargo that is likely to emit moisture during the carriage. The containers were lined with kraft paper to mitigate the effect of condensation on the walls and roof of the container and to protect the cargo from water damage. This was a common commercial practice. The cargo claimants argued the carrier had failed to apply sufficient paper to the walls of the container and that the stowage was causative of the damage.

Previous decisions

At first instance the carrier was held liable for the cargo damage. This was on the basis that, once the cargo claimants had established damage, this gave rise to an inference that the damage was caused by the carrier's breach of its obligations under Article IV.2(m). The burden of proof shifted to the carrier and the Court determined the carrier could not demonstrate that it had complied with Article III.2 of the Hague Rules as it could not evidence that the containers had been carried "in accordance with a sound system".

As discussed in the previous article, the Court of Appeal allowed the appeal after a careful review of the authorities. The key points were the expert evidence that the damage to the cargo was due to condensation and that the coffee beans themselves were the source of that condensation; this was an Article IV.2(n) defence. Once this was established, the legal burden shifted to the cargo claimant who was required to evidence negligence on the part of the carrier, but had failed to do so. The result of this being that the claim against the carrier failed.

Supreme Court decision

The Supreme Court's decision was unanimous. In reaching this decision, the starting point was to consider the nature of the contract for carriage of goods by sea. The contract of carriage is a contract of bailment, and the carrier is therefore a bailee. As a bailee, the carrier:

- i. has a duty to take reasonable care of the goods; and
- ii. has the legal burden of proving the absence of negligence.



In rejecting the carrier's argument that the positive obligations of cargo care were inconsistent with the common law bailment principles, the Court held that the Hague Rules were not exhaustive. Where those Rules are silent, English common law applies.

As the carrier bears the legal burden of proof, it must establish that the loss or damage was not caused by any breach of Article III.2, or that one of the defences in Article IV.2 applies.

The Supreme Court went on to consider the relevant provisions of the Hague Rules. It was considered that the burden of proof arises in two stages:

Article III.2

Article III.2 imposes on the carrier a general duty to take reasonable care of the cargo during carriage. However, Article III.2 is expressly subject to Article IV and a number of the exceptions in Article IV cover negligent acts or omissions of the carrier which would otherwise constitute breaches of Article III.2 (for example Article IV. 1 and IV.2(a)). It is common ground that the carrier has the burden of proving facts which bring him within an exception in Article IV. It was considered that it would be "incoherent for the law to impose the burden of proving the same fact on the carrier for the purposes of article IV but on the cargo owner for the purposes of article III.2". Therefore where cargo is loaded in apparent good order and condition and is found damaged on discharge, the carrier bears the burden of proving that was not due to its breach of the obligation in Article III.2 to take reasonable care.

In reaching this decision, the Supreme Court considered dicta in a number of other cases, notably *Albacora v Westcott & Laurence* and *The Bunga Seroja*, and concluded that "so far as they suggest that the cargo owner has the legal burden of proving a breach of article III.2, they are mistaken."

Article IV.2(m)

It is well established that the carrier bears the burden of bringing himself within any of the exceptions in Article IV.2.

A key decision relied on by the carriers was *The Glendarroch* (a pre-Hague Rules case), in which the Court of Appeal held that the burden of proving that an excepted peril had been occasioned by the carrier's negligence lay on the cargo owner. The Supreme Court declined to follow this decision and held that there was no general principle that a cargo claimant bears the burden of proving negligence.

In addition, some useful guidance was given on the meaning of "inherent vice". To establish a defence on this basis the carrier would have to prove they provided the required degree of care, or that even had they done so the damage could not have been prevented. If there was some foreseeable inherent characteristic of the cargo, and the carrier could have taken precautions to prevent damage caused by that characteristic, this was not damage due to inherent vice.

At first instance the Judge's finding of fact had been that the evidence of the steps taken by the carrier were inconclusive. This finding of fact could not be displaced by the Court of Appeal. Therefore, the carrier had not proved that they had taken reasonable care of the cargo, or that the damage that had occurred could not have been prevented.

Comment

This decision is of great importance to both carriers and cargo owners and provides welcome clarity on the burden of proof for cargo claims. Whilst the Supreme Court's decision was in relation to the inherent vice defence, it has wide reaching implications as it would be equally applicable to all of the other exceptions in Article IV.2. In addition to this, when a carrier is pleading a defence, an emphasis on how well the cargo was carried and cared for will likely be required in order to prove an absence of negligence. ■



■ People

Time Bars in International Conventions

Issues surrounding interpretation of international conventions.



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*Warner v Scapa Flow Charters (Scotland)*¹

In considering an appeal from the Scottish courts on the application of the Athens Convention time bar, the Supreme Court has examined issues of interpretation of international conventions.

Background

A claim in negligence was brought by a widow, on behalf of herself and her son, against Scapa Flow Charters (“SFC”) following the death of her husband whilst on board a dive boat operated by SFC.

The parties agreed that the Athens Convention, which provides a liability regime for passenger death, personal injury and property damage claims that arise on seagoing vessels, should apply to the claim.

The claim against SFC was lodged in May 2015, two years and 10 months after the incident. SFC defended the claim on the grounds that it was time barred under Article 16 (1) of the Athens Convention which provides for a two year time bar running from the date of disembarkation (or when disembarkation would have taken place). Article 16 (3) sets out a criteria for extension but with a longstop time bar of three years. More particularly, Article 16 sets out:

1. *Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.*

.....

3. *The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later.*

SFC’s time bar defence succeeded at the first instance. On appeal, the Scottish courts upheld the decision in respect of the widow’s claim but reversed it in

respect of the claim on behalf of her son who had been less than a year old at the time of the accident.

SFC appealed to the Supreme Court of the United Kingdom (as the highest court of appeal on certain civil claims in Scotland) on the question of whether the son’s claim was time barred.

Supreme Court judgment

The Supreme Court dismissed SFC’s appeal and agreed that the son’s claim was not time barred.

Lord Hodge opened his judgment by setting out the underlying principle that the claim should be subject to the two year time bar of Article 16 (1) unless it was extended in accordance with 16 (3) which provides that the law of the court seized (Scotland in this instance) shall govern the grounds of suspension and interruption of the limitation period. Lord Hodge made clear that if extended by the law of the court seized, the three year ‘longstop’ limitation would apply and domestic law could not extend the limitation beyond the three years.

Turning to the laws of the ‘court seized’, the claimant relied on the Prescription and Limitation (Scotland) Act 1973 which provides that where a deceased’s relative brings a claim, any time shall ‘be disregarded in the computation of the [limitation] period’ whilst the relative is under 16 years old.

SFC argued that because Scottish law ‘postponed’ the limitation period, as opposed to ‘suspending’ or ‘interrupting’ it, Article 16 (3) of the Athens Convention did not apply. SFC advanced two arguments to support this theory.

First, they said the natural meaning of the words ‘suspension’ and ‘interruption’ applied only when a period was already underway. Under the Prescriptions and Limitation (Scotland) Act, time had not started to run, instead the start was postponed.

Lord Hodge rejected this argument, concluding that the word ‘suspension’ was sufficiently broad to include rules postponing the start of a limitation period.

SFC’s second contention was that the words ‘suspension’ and ‘interruption’ had particular and technical meanings derived from certain civil law systems, including Spain and France. ‘Suspension’, SFC said, occurs when an incident pauses a



“...the Scottish courts upheld the decision in respect of the widow’s claim but reversed it in respect of the claim on behalf of her son...”

limitation period whilst an ‘interruption’ has the effect of restarting the limitation period afresh.

Lord Hodge rejected this argument, stating:

“It is not appropriate to look to the domestic law of certain civil law systems for a technical meaning of the words in an international convention which was designed to be operated in many common law systems as well.”

Furthermore, Lord Hodge concluded there was in fact no uniformity in the use of the word ‘suspension’ amongst other civil law systems.

English law – Limitation Act 1980

This case will not immediately alter the position under English law: the two year time bar under Article 16 (1) of the Athens convention would still apply.

The English Court of Appeal considered a similar issue in the case of *Higham v Stena Sealink Ltd*² and decided that section 33 of the Limitation Act could not be relied on to extend time under Article 16 (3). Section 33 of the Limitation Act gives discretion to the English courts to proceed with a claim, notwithstanding a limitation period, if they consider it equitable to do so. In *Warner v Scapa Flow Charters*, Lord Hodge said he agreed with the Court of Appeal’s view that section 33 should not be seen as a ground of ‘suspension’ or ‘interruption’ as required by Article 16 (3) of the Athens Convention.

Nevertheless, whilst section 33 may not have given rise to an Article 16 (3) extension, it is possible that other domestic provisions will give rise to an extended time limit (such as the Limitation Act’s provisions for claimants with disabilities), particularly if the English courts follow the broad interpretation principles discussed in *Warner v Scapa Flow Charters*.

Statutory interpretation

Lord Hodge’s judgment provides a useful summary of how the courts look at international conventions. The uniformity with which different courts interpret international conventions is crucial to shipping given the frequency with which such conventions are used – the Hague Visby Rules being one such example.

The Vienna Convention on the Law of Treaties of 1969 is a starting point when considering the approach to convention interpretation. Articles 31 and 32 of that Convention state:

31. (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...

32. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

resulting from the application of article 31, ... to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’

The *Warner v Scapa Flow Charters* judgment cites and expands on these key principles. Lord Hodge points to travaux préparatoires (the body of documents recording the preparatory work and discussions in preparation of a convention), case law of foreign courts and the writings of jurists as appropriate aids of interpretation.

The importance of travaux préparatoires has, in the past, been somewhat uncertain – indeed examination of the Athens Convention’s travaux préparatoires did little to inform Lord Hodge’s judgment in the case of *Warner v Scapa Flow Charters*. However, in *Fothergill v Monarch Airlines Ltd*³ it was established that reference to travaux préparatoires could be appropriate if there were ambiguities to resolve. Whilst considering an ambiguity in the Warsaw Convention following damage to an air passenger’s baggage, Lord Wilberforce said in that case that two conditions had to be met to allow reliance on travaux préparatoires – first, the material relied upon should be public and accessible and second, the travaux préparatoires had to be indisputably ‘on point’.

That view was affirmed in the case of *The Giannis NK*⁴, where the House of Lords considered the English court’s interpretation of The Hague Rules. The House of Lords held that travaux préparatoires could only be determinative if it ‘clearly and indisputably point to a definitive legal intention... Only a bull’s eye counts. Nothing less will do.’ Nevertheless, travaux préparatoires has proved useful, such as in the recently reported case of *The Aqasia* (<https://www.steamshipmutual.com/publications/Articles/theaqasia062018.htm>) where the travaux préparatoires for the Hague Rules helped the Court of Appeal confirm the interpretation of a unit.

Conclusion

The Supreme Court judgment in *Warner v Scapa Flow Charters* provides useful guidance, not only on the time bar issues surrounding Athens Convention claims, but also on how British courts might look at international conventions. The judgment suggests that a broad interpretation be given to such international conventions and that courts should give consideration to the overall purpose of a convention and place less emphasis on technical analysis and domestic approaches to statutory interpretation. ■

¹ *Warner v Scapa Flow Charterers (Scotland)* [2018] UCSC 52

² *Higham v Stena Sealink Ltd* [1996] 2 Lloyd’s Rep. 26

³ *Fothergill v Monarch Airlines Ltd* [1981] AC 251

⁴ “*Giannis NK*” *Effort Shipping v Linden Management S.A. and Others* [1998] 1 Lloyd’s Rep. 337

Mental Health and the Seafarer

Mental health is still a taboo subject amongst seafarers and as a result they are missing out on vital support and treatment at the early stages of their illness.



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Mental health issues are commented on frequently in the press, and the UK Office of National Statistics records that suicide is the leading cause of death in England in adults below the age of 50. Conditions such as anxiety, depression, eating disorders, post-traumatic stress disorder and alcohol and drug abuse can affect anyone, and can impact on work performance.

Seafarers can be particularly susceptible to mental health issues. They are often far from home, with little contact with family and friends. There may be cultural differences between the seafarer and their co-workers which make it more difficult for them to build relationships, therefore making the seafarer feel isolated.

From time to time the Club receives claim notifications of psychotic episodes, attempted suicides and, tragically, suicides of crew members. In many of these situations it is apparent that at no time prior to the specific event did the seafarer report, or receive counselling or treatment for, any mental health concerns. There are many causes of these events, including family issues and bullying by other seafarers. Whilst we are all encouraged to talk about mental health, it seems that it is still a taboo subject amongst seafarers and as a result they are missing out on vital support and treatment at the early stages of their illness.

So what should shipowners be doing?

Pre-medical Employment Examination (PEME)

The first step is to ensure you have a good quality PEME in place and to ensure the doctor is looking out for signs of mental illness. Please see the Clubs circular on Pre-Employment Medical Examination (PEME) Scheme (<https://www.steamshipmutual.com/Circulars-Bermuda/B.479.pdf>) and our Wellness at Sea Document (<https://www.steamshipmutual.com/Downloads/Loss-Prevention/Wellness%20at%20Sea.pdf>).

Preventing bullying

Seafarers who are bullied are likely to suffer stress. The Chamber of Shipping and the International Transport Workers’ Federation produced guidelines in 2016 for shipping companies, seafarers and seafarers’ organisations on how to eliminate bullying (<http://www.itfglobal.org/en/resources/reports-publications/ics-itf-bullying-and-harassment-guide/>). They encourage shipping companies to develop policies to eliminate harassment and bullying and ensure they actively encourage seafarers to report bullying.

Shipping companies should have a company discipline code to deal with bullying and actively promote that bullying will not be tolerated.

To do so there needs to be awareness, and shipping companies are encouraged to display posters and notices, and provide guides and awareness programmes showing the effects of bullying. Seafarers themselves should also be encouraged to recognise bullying and to support seafarers who are being bullied, and to report bullying.

Mental health awareness

The National Maritime Occupational Health and Safety Committee has provided guidelines to shipping companies on mental health awareness (<https://www.ukchamberofshipping.com/latest/uk-chamber-launches-guidelines-seafarer-mental-welfare-policy/>). The guidelines recommend that shipping companies should adopt a policy or review their policies against the guidelines. The guidelines provide for promotion and support of mental health awareness and recommend free access to external sources of support for seafarers. They encourage awareness among all staff of the potential

“...shipping companies should undertake regular consultations...”



United States Supreme Court to Consider Punitive Damages for Unseaworthiness

An update on the progress of the punitive damages issue through the US courts.



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Readers may recall the article "Punitive Damages and Unseaworthiness" from issue 28 of Sea Venture. That article discussed whether punitive damages can attach to an unseaworthiness claim. It involves the case of the 9th Circuit decisions in *Tabingo v American Seafoods* (<https://www.steamshipmutual.com/publications/Articles/puniteddamages0117.htm>) and *The Dutra Group v Batteredton*, where the courts ruled that punitive damages are available to a seaman in a personal injury suit based on an alleged breach of the general maritime duty to provide a seaworthy vessel.

These 9th Circuit decisions conflict with the 5th Circuit verdict in the case of *McBride v Estis Wells Services*, wherein the courts held that no such remedy existed for seafarers. This was also discussed in this article issue 22 of Sea Venture (<https://www.steamshipmutual.com/Downloads/Sea-Venture/SeaVentureWinter22Interactive.pdf>).

Following the decision in *Batteredton* the defendant ship owner filed a petition for a writ of certiorari. A party may apply for certiorari in cases where they

are seeking judicial review of a lower courts decision by a higher court. If granted, the superior court will direct the lower court to send details of the proceedings in dispute for review. The US Supreme court has now granted the ship owners request and has issued a writ to review the decision of the lower court and will provide a final verdict which will determine this issue for all courts and states.

This promises to be one of the most eagerly anticipated decisions in maritime law in modern times and it can be expected that interested parties will submit Amicus briefs to support their respective positions; such briefs would have to be submitted by 29 January 2019.

The Supreme Court's decision is expected sometime in mid to late 2019. We will report further in future editions of Sea Venture and on the Steamship website and App. ■

"...the defendant ship owner filed a petition for a writ of certiorari."



signs of mental health issues and identify factors which might indicate mental health issues such as changes in mood or their work, changes in eating habits or signs of excessive alcohol or drug use. It is recommended that training should be given at management level for signs of mental health issues.

The guidelines recommend that shipping companies should undertake regular consultations, with surveys for the seafarer to complete, relating to working conditions, communications and work life balance. Shipping companies should provide social and team

building events for the seafarers to participate in. Where a seafarer is identified as having mental health issues, he or she should be given support and encouraged to make an appointment with a doctor when possible.

Whilst the guidelines to prevent bullying and mental health awareness go some way to highlighting mental illness issues on board, to have any real impact they need to be implemented. Only then might the taboo surrounding mental illness be removed and seafarers in need can receive the correct support, and hopefully tragic outcomes can be prevented. ■



Miscellaneous

Court of Appeal Rules on Legal Privilege

Legal professional privilege and litigation privilege in a recent Serious Fraud Office case.



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The Court of Appeal has handed down judgment in *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited and the Law Society* [2018] EWCA Civ 2006, a much anticipated decision concerning legal professional privilege, and litigation privilege in particular.

What is Legal Professional Privilege?

Communications that are protected by legal professional privilege may be withheld from the opposing party and the court (though their existence may need to be disclosed). The principle underlying legal privilege is an important one: clients should, in certain circumstances, be allowed to seek legal advice and communicate with their lawyers or third parties without fearing that these communications will fall into the hands of the opposing party.

There are two types of legal professional privilege: litigation privilege (LP) and legal advice privilege (LAP).

LP applies to communications between parties or their solicitors and third parties for the purpose of obtaining information or advice connected to existing or contemplated litigation. In order to attract LP, the communication must – at the time that it was generated – have been made with the sole or dominant purpose of conducting litigation. Further, the litigation must be adversarial in nature and must either be already in progress or be ‘reasonably in contemplation’.

LAP, on the other hand, protects confidential communications between a lawyer and a client that are made for the purpose of giving or receiving legal advice.

Factual background

The claimant, the Serious Fraud Office (SFO), is a government body whose functions include investigating and prosecuting crimes involving serious fraud, bribery and corruption. The defendant, Eurasian Natural Resources Corporation (ENRC), is part of a multinational group of companies operating in the mining and natural resources sector.

In 2009/2010, ENRC became aware of allegations of corruption on the part of certain African companies that it was seeking to acquire. Concerned at the prospect of incurring civil or criminal liabilities, it instructed lawyers to investigate. The lawyers advised that an investigation by the SFO could be expected imminently. Sure enough, the SFO made contact with ENRC in 2011 after becoming aware of the allegations. A period of discussions between the parties ensued, but without any resolution.

In 2013, the SFO then announced that ENRC was the subject of a criminal investigation, and sought disclosure of the documents produced by ENRC’s lawyers in the course of their investigations, including notes of interviews between ENRC’s lawyers and its employees. ENRC refused disclosure, claiming that these communications were subject to legal professional privilege. In response, the SFO in 2016 sought a declaration from the High Court that the documents were not subject to legal professional privilege.

The High Court decision

In respect of LP, Andrews J found in favour of the SFO on two grounds.

First, she held that ENRC could not claim LP because, at the time the documents were generated, litigation was not in ‘reasonable contemplation’, the threshold for which was that of “*real likelihood rather than a mere possibility*”, in accordance with the test in *USA v Philip Morris*. This was because at the time of ENRC’s internal investigation, it was unclear whether any proceedings would be brought against it, while the discussions with the SFO – rather than being an adversarial process – were instead aimed at achieving an amicable settlement by means of the SFO’s self-reporting procedure.

Second, the Judge held that even if ENRC had been able to satisfy the ‘reasonable contemplation’ test, the documents “*were not created with the dominant purpose of being used in the context of such litigation*” (at para. 55). In doing so, Andrews J drew a distinction between third party documents created in order to obtain legal advice as to how best to avoid contemplated litigation, and third party documents created in order to settle, defend or prepare for contemplated litigation. As the documents created in the course of ENRC’s



“...the current law – which was out of sync with many other common law jurisdictions – put large and multinational corporations at a disadvantage.”

“ENRC refused disclosure, claiming that these communications were subject to legal professional privilege. In response, the SFO in 2016 sought a declaration from the High Court that the documents were not subject to legal professional privilege.”

investigations were clearly created with a view to obtaining legal advice as to how best to avoid litigation, they did not, in the Judge’s view, attract LP.

The Judge also held that LAP did not apply to the notes made by ENRC’s lawyers of their interviews with ENRC’s employees. Applying the principles set out by the Court of Appeal in *Three Rivers (No. 5)*, which decision she was bound by, Andrews J held that none of those interviewed could be said to be the “client” as they were not authorised to receive legal advice on behalf of ENRC, and therefore the communications were not subject to LAP.

ENRC appealed.

The Court of Appeal decision

The Court of Appeal disagreed with both of the grounds on which the High Court had held that the documents were not subject to LP.

The Court of Appeal held that the contemporaneous documents clearly showed that there was a reasonable contemplation of litigation between ENRC and the SFO at the relevant time. Not every manifestation of concern by the SFO would give rise to a reasonable contemplation of litigation, but in this case “*the whole sub-text of the relationship between ENRC and the SFO was the possibility, if not the likelihood, of prosecution if the self-reporting process did not result in a civil settlement*” (at para 93). Uncertainty as to whether matters would ultimately lead to litigation did not prevent litigation being in reasonable contemplation.

The Court of Appeal further held that the documents satisfied the ‘dominant purpose’ test. The High Court’s distinction that documents prepared for the purpose of settling or avoiding a claim were not created for the dominant purpose of defending litigation was held to be an error of law. The Court instead stated that “*in both the civil and the criminal context, legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings*” (at para 102).

ENRC’s appeal against the decision that these documents did not attract LP was therefore allowed.

As regards LAP, the Court of Appeal considered that it, too, was bound by *Three Rivers (No. 5)*, and that Andrews J had correctly applied the principles set out in that case. The appeal in respect of LAP was therefore dismissed.

However, the Court of Appeal went on to say that it would have departed from the decision in *Three Rivers (No. 5)* had it been possible to do so. The justification for this was that the current law – which was out of sync with many other common law jurisdictions – put large and multinational corporations at a disadvantage. This was because in large corporations, the information on which legal advice was sought was likely to be in the hands of employees who would not fall within the current definition of ‘client’, and therefore the legal advice would not be privileged.

Comment

The decision of the High Court would have had the effect of limiting the scope of LP and creating uncertainty as to its proper application. The legal community and its clients should therefore welcome the fact that it was overturned by the Court of Appeal. Indeed, the fact that the Law Society was an intervener in these proceedings underlines the importance of the issues in dispute to the legal community at large.

The decision is also significant in seemingly paving the way for a challenge to the current law on LAP. The Court of Appeal stated that this would be an issue for the Supreme Court to decide, but its comments on the law as stated in *Three Rivers (No. 5)* would suggest that if the Supreme Court were to consider this issue, a wider definition of who counts as the ‘client’ for the purposes of LAP could be expected. This would be a welcome development in bringing English common law in line with the realities of modern business, and indeed with other common law jurisdictions.

Finally, it should also be noted that, whilst this case was concerned with a potential criminal liability, the Court of Appeal’s rulings on privilege apply equally to civil matters. ■

California Ballast Water Management Laws

How vessels typically run afoul of the state’s ballast water exchange requirements, and advice on practices which, if implemented, can reduce penalties for improperly-conducted exchanges.



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This article summarises California’s ballast water management laws, describes the ways in which vessels typically run afoul of the state’s ballast water exchange requirements, and provides advice concerning ballast water management practices which, if implemented, can position vessel owners, operators, and managers to reduce the amount of penalties pursued for improperly-conducted exchanges.

California ballast water management law

California’s ballast water management law is found in the Marine Invasive Species Act (Cal. Pub. Res. Code §§ 71200 – 71271) and the California State Lands Commission’s (“SLC”) implementing and enforcement regulations (2 CCR §§ 2270 – 2299.09 (“MISA”)). MISA applies to commercial vessels of 300 gross tonnes or more. In addition to recording, keeping and reporting requirements and treatment system discharge performance standards (all of which are beyond this article’s scope), MISA approves of five ballast water management methods:

- Retaining all ballast water onboard.
- Discharging ballast water to an approved shore side facility.

- Discharging ballast water at the same location it was sourced.
- Treating ballast water using an IMO or USCG type-approved treatment system.
- Conducting mid-ocean ballast water exchanges.

California’s ballast water exchange requirements

The “Pacific Coast Region”

MISA defines the Pacific Coast Region (the “PCR”) as “*all coastal waters on the Pacific Coast of North America east of 154 degrees W longitude and north of 25 degrees N latitude, exclusive of the Gulf of California.*” (Emphasis added). MISA requires vessels relying on exchanges to treat ballast water, and whose voyages commence outside the PCR, to conduct the exchanges in water at least 2000 meters (m) deep and 200 nautical miles (nm) from “land.” Vessels whose voyages commence inside the PCR must conduct exchanges in water at least 200m deep and 50nm from “land.”

California law’s definition of “Land”

MISA defines “land” to include “*...rock outcroppings or islands located offshore.*” This definition greatly affects how far offshore exchanges must be conducted. For example, crews on board vessels which source ballast water in Mexico before sailing to California to load cargo often fail to account for islands off the west coast of

“...crews aboard vessels which source ballast water in Mexico before sailing to California to load cargo often fail to account for islands off the west coast of the Mexican mainland when determining where to conduct exchanges.”

the Mexican mainland when determining where to conduct exchanges. As a result, even though a vessel may be 200nm or more off the Mexican mainland when conducting its exchanges, it may be still be less than 200nm away from one of these islands, resulting in a violation of MISA.

California law does not include a deviation exemption

The USCG’s regulations do not require a vessel to conduct exchanges if doing so would delay the vessel’s voyage by requiring a course deviation. MISA does not contain a similar “deviation exemption.” Therefore, for example, a vessel that takes on ballast water at Los Angeles before sailing to San Francisco to load cargo must ensure that it sails at least 50nm

away from shore before conducting its exchanges, even if doing so lengthens and delays its voyage.

Civil penalties for violations of California’s ballast water exchange requirements

Violations of California law can result in costly civil penalties. For vessels sailing from outside the PCR, ballast water discharged in California that was exchanged between 180-200nm from land is subject to a \$5,000/tank penalty. Ballast water discharged in California that was exchanged between 100-180nm from land is subject to a \$10,000/tank penalty. Ballast water discharged in California that was exchanged 100nm or less from land is subject to a \$20,000/tank penalty. Ballast water discharged in California that was not exchanged is subject to a \$27,500/tank

penalty. A similar civil penalty scheme applies to vessels whose voyages commence inside the PCR.

Mitigating civil penalties for violations of California’s ballast water exchange requirements

The penalties the SLC pursues for violations of MISA’s exchange requirements are frequently six figures (USD) because they are calculated on a “per tank” basis. However, when assessing civil penalties, the SLC must consider mitigating factors such as the actual harm to the environment, the cited party’s ability to pay, and past and present efforts to prevent conditions posing a threat to public health. Therefore, even if a vessel’s exchanges were conducted too close to land, owners, operators, and managers can argue for mitigation based upon documented evidence of a vessel engaging in other ballast water management practices, which the SLC has acknowledged as effective means for preventing invasive species introductions. A non-exhaustive list of such practices includes:

- Revise ballast water management plan to address MISA’s exchange requirements, such as the definition of “land” and the lack of a deviation exemption.
- Provide separate, prior written warnings concerning MISA’s exchange requirements to a vessel’s crew before the vessel calls at California.
- Engage in regular ballast water tank cleaning, either mid-ocean or in drydock.
- Avoid sourcing ballast water in the dark (when bottom-dwelling organisms rise in the water column), near dredging operations, marine parks, preserves, sanctuaries, and coral reefs.
- Hold ballast water in tanks for long periods of time (e.g. 2 weeks) as the longer organisms are held in the tanks, the more likely they are to die.
- Conduct empty-refill exchanges as the SLC has concluded they are more effective than flow-through exchanges.
- Discharge the minimal amount of ballast water necessary for cargo operations.
- Avoid discharging near marine parks, preserves, sanctuaries, and coral reefs.
- Subsequent to a violation, if a vessel’s ballast water management plan did not address MISA, and no prior warnings regarding MISA were given to the crew, revise the plan and issue a fleet circular regarding MISA.

Vessel Incidental Discharge Act (“VIDA”)

In December 2018, the President signed the Coast Guard Authorization Act of 2018, S. 140 (the “2018 Act”) into law. The 2018 Act contains the Vessel Incidental Discharge Act (“VIDA”), which calls for the

promulgation of regulations which, when effective, will generally preempt state ballast water discharge performance standards and exchange requirements.

As an initial matter, VIDA’s exchange requirements may ultimately have no practical impact. VIDA requires the US Environmental Protection Agency (“EPA”) to promulgate regulations implementing VIDA’s discharge performance standards within two years of the 2018 Act’s passage. VIDA then requires the USCG to promulgate regulations enforcing the EPA’s implementing regulations no later than two years after the EPA issues them.

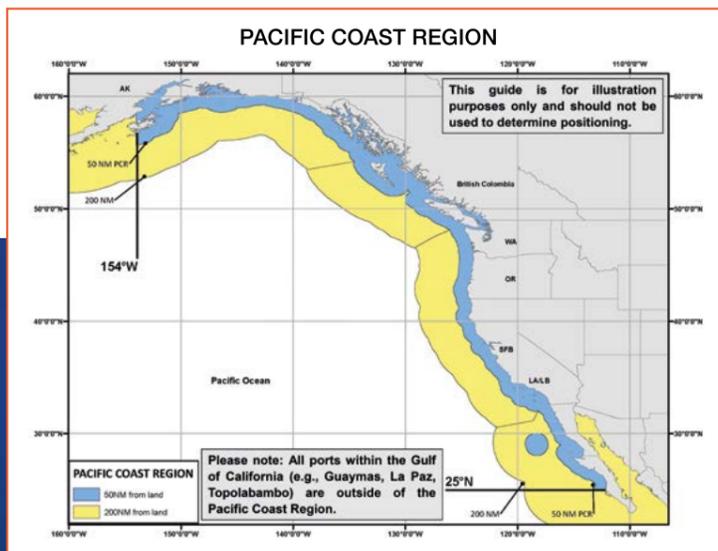
VIDA does not expressly state by when regulations implementing and enforcing VIDA’s exchange requirements must be promulgated. However, if such regulations are subject to the same four-year promulgation timeline as the discharge performance standard regulations, they may not be effective until December 2022. By then, most vessels will have USCG type-approved treatment systems installed and therefore will not be able to use exchanges to treat their ballast water.

Nevertheless, if VIDA’s exchange requirements are implemented by regulations, those will preempt MISA’s requirements. The most significant difference between VIDA and MISA will benefit those vessels which take on ballast water at certain Mexican ports. VIDA establishes a “Pacific Region” which essentially replicates the PCR. VIDA’s Pacific Region consists of federal territorial waters, including the US Exclusive Economic Zone, and state territorial waters adjacent to and extending from the shores of the states of Alaska, Washington, Oregon, and California.

VIDA requires vessels operating between Pacific Region ports, or a Pacific Region port and a port on the Pacific Coasts of either Mexico (north of parallel 20 degrees north latitude, inclusive of the Gulf of California) and Canada, to conduct a complete exchange in waters more than 50nm from shore. This requirement would be a welcome change for vessels which source ballast water at any of the ports located in the Gulf of California and/or above the 20th parallel in Mexico before sailing to California to load cargo. Vessels, especially tankers and bulkers, sailing from ports in this area commit the vast majority of violations. Again, under MISA, those ports are outside of the PCR, thus requiring vessels sailing from them to conduct exchanges 200nm off land.

Conclusion

Although cover for the civil penalties pursued by the SLC for violations of MISA’s ballast water exchange requirements is subject to the Club’s discretion, a member facing assessment with them should nevertheless contact the Club immediately, so the Club can put members in contact with suitably qualified lawyers who can begin protecting the member’s interests by working to develop evidence of facts warranting mitigation. ■



Graph details the Pacific Coast Region for illustrative purposes only. Courtesy of California State Lands Commission.



Sulphur Emissions: The Clock is Ticking

With less than 18 months to go before implementation of one of the most wide-ranging measures to affect the majority of the world's merchant fleet, we identify some of the potential issues.

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As Members will be aware, the Marpol Annex VI Regulation 14.1.3 will come into force on 1 January 2020 requiring vessels to comply with the 0.5% SOX emissions limit worldwide other than in Emission Control Areas [ECA] to which the existing 0.1% limit will continue to apply. With less than 18 months to go before implementation of one of the most wide-ranging measures to affect the majority of the world's merchant fleet, it may be helpful to identify some of the potential issues arising in consequence.

There are two principal methods available to achieve compliance:

1. To "clean" a vessel's exhaust gases so as to be able to continue to burn high sulphur fuel oil (HSFO); or
2. To change over to the use of clean fuels, Low Sulphur Fuel Oil (LSFO), distillates or liquefied Natural Gas (LNG).

The first requires the installation of an exhaust gas cleaning system or scrubber. Amongst potential considerations are:

- Feasibility. Does the vessel's design and structure permit this?
- Cost-benefit. Will the vessel's remaining service life and price differential between HSFO and LSFO enable the significant costs involved to be amortised?
- Availability. There are a limited number of manufacturers of such equipment and facilities where it can be installed. Will suppliers be able to manufacture, deliver and install a sufficient volume of scrubbers to meet demand?

- Efficiency. Will scrubbers work effectively? What will their effect be on main engine performance and fuel consumption?
- Operation. In the case of closed system scrubbers, will there be facilities for the disposal of the residues? In the case of open systems the intake seawater needs to meet alkalinity

requirements and some countries have limited overboard discharge of wash water. Crew will require training in maintenance and operation.

Whilst the second alternative avoids the issues identified above, it potentially may lead to other issues. Perhaps the most significant is the availability of LSFO. There is no guarantee that refiners will be able to produce sufficient quantities of LSFO, or that wide enough distribution can be achieved so as to meet anticipated demand. This may result in diversion becoming necessary to obtain bunkers leading to voyage deviation and delay. Alternatively, it may be necessary to slow steam to conserve bunkers.

Other potential issues include:

- Bunker quality disputes. The likelihood is that these may increase due to the critical importance of sulphur content and risks of contamination due both to the failure to ensure the supply chain infrastructure is sufficiently

segregated, and the presence of catalytic fines causing damage to propulsion systems.

- Compatibility issues with main engines and other machinery.
- Changeover procedures.

Some of these will have been partially addressed on vessels trading to existing ECAs where changeover to the use of low sulphur fuels has formed a mandatory operational procedure and going over to sole use of these will result in simplification, the one-off final changeover inevitably raises some issues. How are HSFO tanks and systems to be cleaned for future use for LSFO? How is unused HSFO remaining on board going to be disposed of?

While many of the above issues are primarily technical or operational, they may have legal ramifications. Whilst it is not possible to anticipate every issue that may arise, or provide other than general pointers since much will depend on the



precise terms of existing contracts, Members may wish to give consideration to the following.

New-Buildings

Whilst it is likely that compliance will have been given careful consideration in this context, where vessels are being constructed with scrubbers:

- Does the building contract address responsibility for/consequences of delay in delivery or installation of the scrubber?
- What is the scope of the manufacturer's warranty?
- What level of customer support is available?

Sale and purchase – (particularly where delivery will take place in the second half of 2019)

In the case of scrubber-equipped vessels:

- Is the manufacturer's warranty transferable?
- What warranties will the seller give as to the performance and operation of the scrubber?

In the case of vessels intended to use clean fuels:

- Will delivery be with conversion to the latter having been accomplished?
- If not, who is to be responsible for the changeover, cleaning costs, HSFO bunker disposal and the time used?

Time charters extending beyond 2019

Many of these may not have been drafted to address the issues identified above. A fundamental consideration is the decision as to which route to follow to achieve compliance post the implementation date.

- Can an Owner unilaterally decide to fit a scrubber and take the vessel out of service to do so?
- Conversely, can a Charterer require an Owner to do so? It is not hard to envisage Charterers attempting to argue that generalised terms requiring the vessel to comply with all regulatory requirements oblige Owners to fit scrubbers.
- If an Owner declines to fit a scrubber, can a Charterer recover additional fuel costs incurred in consequence?

- Which party will be responsible for the costs of changing over to clean fuel?
- If an Owner declines to fit a scrubber how, if at all, does this impact on a Charterer's obligation to provide bunkers? In the event of unavailability, can Charterers claim for diversion costs and delay?

Voyage charters are less likely to be impacted although it may be worthwhile reviewing the ambit of liberty clauses in bills of lading to ensure diversion to obtain bunkers of the requisite quality fall within these.

It is likely that the majority of any disputes arising will fall within the scope of Defence (FD&D) cover. The most obvious potential area for engagement of P&I cover is recovery of fines imposed for breach of the emissions limits. Whilst there appears to be no prospect of the commencement date being deferred, there are ongoing discussions regarding a pragmatic approach to enforcement during the initial implementation period. The present focus is on the role of on board ship implementation plans in compliance verification. It ought to be borne in mind that there is no guarantee that such discussions will prove fruitful and individual Port State Control authorities may, in any event, adopt a "zero tolerance" approach. Any coverage for fines for non-compliance under Rule 25 XVI (e) would be discretionary and subject to the Member satisfying the Directors that it took reasonable steps to avoid such non-compliance.

However, it is not difficult to envisage other potential P&I impacts. For example, were a scrubber to fail in service, this may result in possible deviation and delay and give rise to seaworthiness issues.

To the extent that planning for meeting the requirements has not already commenced, it would be prudent to start preparation for compliance now so as to ensure potential issues are identified and appropriate plans made to address these, in advance of the implementation date.

The Managers will continue to monitor developments and issue further guidance as necessary but, if Members wish to raise any issues arising from this article, your usual Club contact will be happy to assist. ■

"...were a scrubber to fail in service, this may result in possible deviation and delay and give rise to seaworthiness issues."

A Day in the Life of a Surveyor

Captain Guy Webster of Nortica Marine SA is an independent marine consultant who has been supporting the Club for over 12 years.



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Captain Guy Webster of Nortica Marine SA is an independent marine consultant who has been supporting the Club for over 12 years. He frequently visits Members' ships to carry out condition surveys on behalf of the Loss Prevention Department and recently sat down with Josefina Jofre, Commercial Director of Nortica Marine, to try and tie down the essence of a typical day in the life of a ship surveyor.

Can you explain who you are and what you do for the Club?

As a Master mariner, I have over 40 years of marine experience beginning with a career at sea and including command experience. Since leaving the sea I've worked as a ship's pilot and a harbour master, worked for a law firm and in the offshore energy sector before finally setting up a marine consultancy.

What does a typical day involve?

An almost impossible question to answer, with no two days being the same. It's far removed from a 9 to 5 office job and has little in common with the routines of watchkeeping aboard ship.

In South America, for example, attendance on a vessel involved a flight from Buenos Aires to Manaus via Rio de Janeiro and two hours by taxi through the rainforest to a launch jetty. Having checked for lifejackets and VHF, and with a little trepidation, I boarded a wooden launch and sat in a corner of the deck house as we set off. After 20 minutes the deckhand presented a smartphone with coordinates from an AIS website and a photograph of the ship. After agreeing this was the correct vessel he disappeared and we continued navigating the Amazon River by smartphone!

What are some of the challenges that you have to face?

Vessels operate world-wide and schedules are usually driven and affected by charters, political and economic factors and the weather.



Some surveys are programmed well in advance but many are driven by other factors that often result in short notice being given to the surveyor. With the advent of the internet, international travel can be arranged fairly easily although combining short notice with flexibility and good value can be a challenge at the best of times!

A key asset in ensuring smooth logistics is the Member's local shipping agent. In most instances good cooperation, good communication and good support is available although sadly, on some occasions, I have suffered unnecessary inconvenience, embarrassment in front of the Club and Members and additional costs due to an agent's shortcomings. Timely communication between Owners, agents and surveyors certainly helps and most agents do try their best.

Do you have any scary anecdotes that you would like share with us?

These days it is extremely rare to encounter “scary” events. Most tonnage entered, or proposed for entry, with any of the International Group of P&I Clubs will be of a certain minimum standard, classed with a recognised classification society and registered with a reputable flag state, etc.

Perhaps my most scary experience involved a container ship in Colombia. The vessel itself had no major issues but attendance was interesting to say the least! A taxi driver met me at the airport and we set off for what I thought was to be a short drive to the coast, having forgotten that the 50 mile drive was through the northern end of the Andes Mountains. A lack of crash barriers and sheer cliffs kept me awake in the back of the cab but on top of this my poor driver was suffering from a heavy cold/severe hay fever and every three minutes or so would close his eyes, grab a tissue from a large box on the passenger seat and sneeze, before again opening his eyes to correct the steering as we veered into the path of oncoming trucks or toward the ravine below!

The drive lasted over two hours with the only respite being when we were frisked at police road blocks. I have never been so grateful to have a nervous teenage guard point a machine gun at me. Welcome relief on the drive from hell!

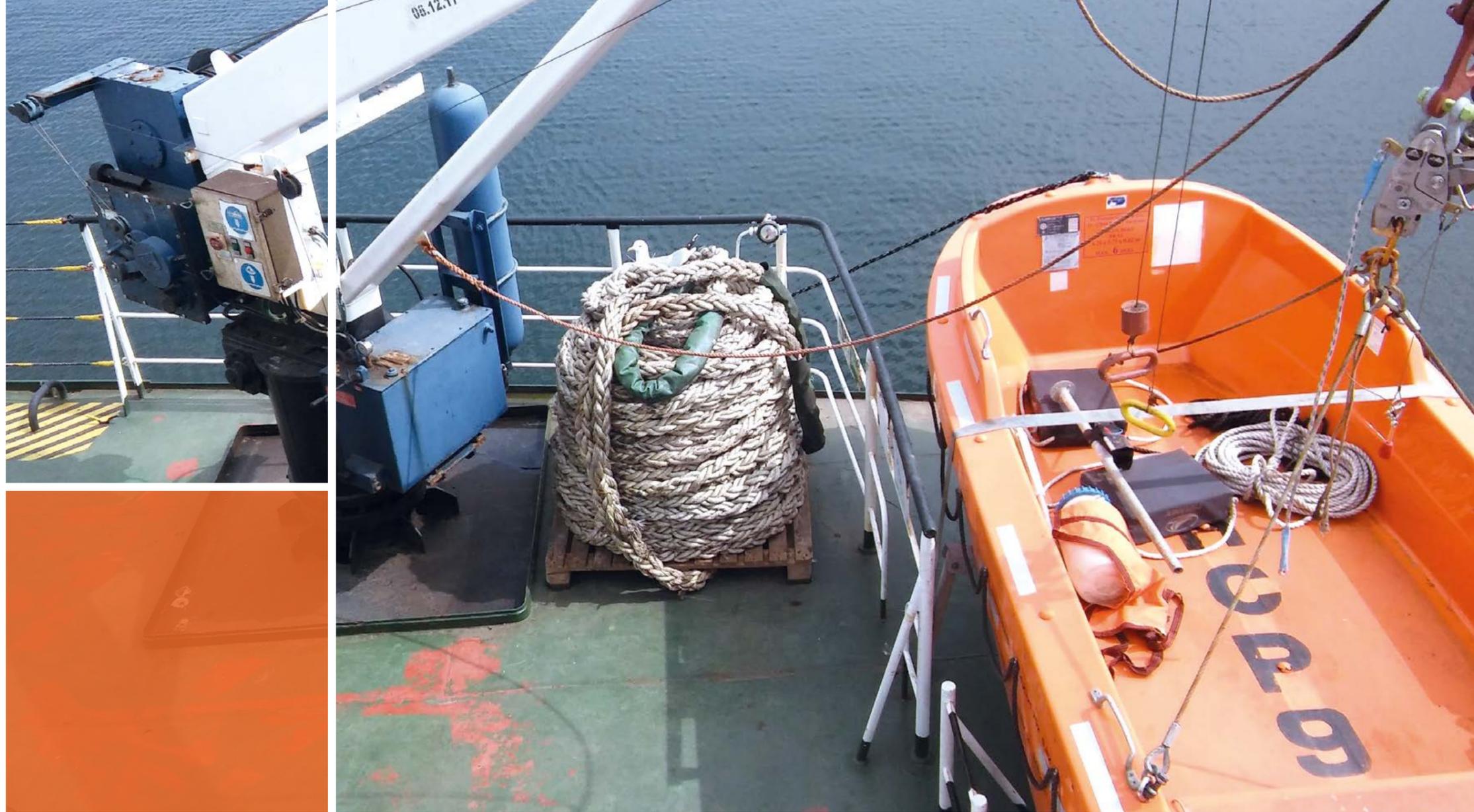
Any interesting stories from on board?

I recall surveying a Netherlands’ flagged, family operated, general cargo vessel, of which there are many still operating in Holland.

Outside shoes, never mind safety boots, were not permitted on the bridge so I entered and presented myself in safety helmet and socks. After a welcome I was pointed to a large table in the wheelhouse where I could “set up shop” and commence reviewing certificates.

As I reached under the desk to plug in my laptop I was shocked to see two large brown eyes and lots of white teeth, accompanied by a wagging tail... the ship’s dog. A rare but welcome reminder that for crews of ships that we survey, the ship is also their home and when properly looked after and with international regulations observed, there is no reason why pets cannot be carried.

Another example was an inspection of a vessel laid up in Lithuania and being asked by a somewhat embarrassed Chief Officer if I really needed to start the rescue boat engine and test the launching crane. All became clear when I saw that a gull was nesting on a mooring rope coil next to the rescue boat crane and the fledgling chicks were nearly ready to fly the nest. A dynamic risk assessment was undertaken and based upon the numerous other issues identified, testing of the rescue boat crane was not considered priority and the birds were left in peace.



What benefits are gained from carrying out surveys and inspections?

Acting as the Club’s eyes and ears it is vitally important to empathise with ships’ staff, the goal being to gain their confidence and put them at ease. This makes for a calm atmosphere and generally more information is forthcoming. I see and sense first-hand by looking, touching, testing and examining the structure, equipment and machinery of a vessel how she is being operated and whether the crew are actively engaged with their Safety Management Systems, a key tool of a safe and efficient vessel.

Finally, what do you believe the future holds for you and for ship condition surveys?

I used to be a pilot and always said that I would continue working as long as I could climb a pilot ladder. As a surveyor safe access is an integral part of my inspection and can involve pilot ladders or combination ladders. Access to cargo holds and tanks also involves a degree of ladder work so as long as I remain in reasonable shape, I plan to continue working.

Another factor is staying up to date with new technologies, I have retained a valid Master’s certificate which not only requires that I renew my medical certificate (for the ladders!) but also other certification such as GMDSS and ECDIS training. This has been invaluable as this area of technology is moving faster than legislation, particularly with ECDIS, and there are certainly potential gaps where risks exist and the surveyor needs to be alert to them.

The maritime industry continues to evolve and LNG fuels, hybrid technology, electric power and semi-autonomous and fully autonomous vessels are the future, whether traditionally trained seaman like it or not, and in this vein I recently attained accreditation to survey LNG fuelled ships.

I firmly believe that ship condition surveys will always have a place for seamanship, even in the broadest sense of the word, and the same values, including common sense and reasonableness, will apply whether surveying a sailing ship or an electric powered ferry.

The ultimate goal will always be to protect the interests of the Club’s Members by assisting their own (or other Members’) Masters and crews to maintain high standards and ideally minimise the risk of incidents and claims. ■

“As I reached under the desk to plug in my laptop I was shocked to see two large brown eyes and lots of white teeth, accompanied by a wagging tail...”

Recognition and Enforcement of Arbitral Awards in Vietnam

In a shipowner's application supported by the Club, a Singaporean arbitration award was sought to be enforced against a Vietnamese defendant.



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In a shipowner's application supported by the Club, a Singaporean arbitration award was sought to be enforced against a Vietnamese defendant. Whilst the First Instance Court in Vietnam decided to enforce the Award, an Appeal Court overturned that decision and the Supreme Court would not allow a further appeal.

The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" <http://www.newyorkconvention.org/list-of-contracting-states>) entered into force on 7 June 1959. It requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states. The Convention applies to international arbitrations and there are presently about 159 contracting states including Vietnam, Singapore and all the major maritime jurisdictions.

Vietnam has been a contracting state since 1995 with minimal reservations. As such, it ought to recognise foreign arbitration awards as binding and enforce them in accordance with local rules of procedure, and should not impose substantially more onerous conditions than are imposed on the recognition or enforcement of domestic arbitral awards.

There are no public or official databases on the recognition and enforcement of foreign awards by Vietnamese courts. Therefore, statistics are not available and this may explain why the New York Convention's website, which provides information regarding the Convention's interpretation and application by courts (containing more than 1750 court decisions from around 65 countries), shows no entries for court decisions applying the Convention in Vietnam. The member's Vietnamese lawyers, a prominent maritime firm in the country, were themselves unaware of any

other attempts to enforce a foreign ad hoc award in the shipping context, so the following case is probably a rarity, and perhaps the first of its kind.

The case was an Owner Member's claim under a voyage charterparty subject to English law, providing for arbitration in Singapore. When the Vietnamese Charterer failed to pay demurrage due to the Owner, arbitration was commenced according to the contractual provisions.

In default of the Charterer's appointment of their own arbitrator under the charterparty terms, the arbitrator appointed by the Owner was made sole arbitrator. During the proceedings, the Charterer responded to the arbitrator's directions in writing but also requested the arbitrator not to contact them any further. Despite the arbitrator's directions and reminders, as well as suggestions for the Charterer to seek their own legal advice, the Charterer failed to file any defence and finally chose not to participate in the proceedings. A Final Award was issued in Singapore in favour of the Owner based on the evidence to hand, ordering the Charterer to pay the Owner's demurrage claim plus interest and costs.

When the award was not honoured, an application was made in Vietnam (the Charterer's place of residence) for an order for recognition and enforcement of the Singapore Arbitration Award. The Court of First Instance in Vietnam made a favourable judgment allowing enforcement, but this was subsequently overturned by an Appeal Court. The Owner then appealed to the Supreme Court for a judicial review but the court refused to consider the application, holding that the local procedural law applicable at the material time (the Civil Procedure Code of 2004 – "CPC 2004") did not grant the Supreme Court jurisdiction to review an Appeal Court decision relating to the recognition and enforcement of foreign awards. As a result, over five years of attempting to enforce the Award had been rendered futile with this final, non-appealable, decision.

The reasons for the second tier, Appeal Court's rejection of the recognition can be summarised as follows:

1. The Court construed the contractual arbitration clause, which read: "All disputes, controversies or differences which may arise between the parties out of or in relation to or in connection with the charter party or for the breach thereof shall be finally settled in Singapore by English Law. The Award rendered by arbitrator(s) shall be final and binding upon both concerned parties." as an agreement between the parties that any dispute shall be settled by an arbitration conducted by the Singapore International Arbitration Centre. The Court considered there was no contractual agreement on any particular person, or indeed the arbitrator who actually issued the Award in question, to arbitrate the dispute. Therefore the Award issued by the particular arbitrator in question was not, according to the Court, eligible to be considered for recognition and enforcement in Vietnam.
2. The Court accepted the Charterer's submission that under Singaporean law, an award can only be enforced if it has been approved by a Court in Singapore.
3. The burden of proof on whether the Award is effective or not shall be borne by the Award Creditor (i.e. the Owner).

Commentary

The Appeal Court seems to have ignored the fact that, after the quoted provisions above, the contractual arbitration clause continued,

"...otherwise as per GENCON Charterparty 1994...", Part II, Clause 19(a) of which reads, in part:

"...Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final."

Reading the contractual provisions and also the GENCON 1994 provision together:

- a. the substantive law of the dispute was English law;
- b. the place of arbitration was Singapore;
- c. the procedural law of the reference was Singaporean law; and
- d. the number of arbitrators was three, although if the respondent failed to appoint their own arbitrator within 14 days, the Claimant's arbitrator would be sole arbitrator and could render an award.

The Award itself stated clearly that:

- a. the charterparty contained an arbitration clause providing for arbitration in Singapore and English law to apply;



- b. the respective notices of appointment of the arbitrator and composition of the tribunal with a sole arbitrator had been tendered to the Charterer; and
- c. the Award was issued in Singapore.

It seems that the Appeals Court did not give sufficient, if any, weight to the Owner's submissions, originally made to the Court of First Instance in the form of evidence from Singaporean and English lawyers, demonstrating the regularity and enforceability of the Award in relation to the following aspects under Singaporean and English law:

- a. the setting up and composition of the arbitral tribunal under the contractual terms;
- b. that all the procedural steps taken by the arbitrator prior to deciding the dispute were set out in the Award. The Charterer's allegation that they did not receive any notice of arbitration proceedings or other documents from the Owner or the sole arbitrator was not borne out by the documentary evidence or the terms of the Award itself;
- c. the Award was made wholly pursuant to the charterparty terms;
- d. contrary to the Charterer's argument, there was no requirement under the International Arbitration Act of Singapore to register the Award with a court in Singapore in order for the Award to be enforceable; and
- e. the appointment of the arbitrator was valid, the conduct of the arbitration proceedings was proper and the Award was enforceable as a matter of Singaporean law, being the law of the seat of the arbitration.

The grounds for refusal of recognition and enforcement are laid down in Article V of the New York Convention and consist of items such as irregularity of notice of appointment of arbitrator or of the arbitration proceedings, dealing with subject matter not falling within the agreement to arbitrate, improper composition of the tribunal or procedure, lack of finalisation of the award, and public interest considerations. None of these grounds was, on any reasonable basis, arguable in this case. Furthermore, contrary to the Vietnamese Court's conclusion, under the Convention it is clearly the respondent, not the claimant, which bears the burden to prove that one of the grounds for non-recognition and enforcement exists.

Conclusion

The basic notion underlying the New York Convention is that a contracting state should recognise and enforce an arbitration award issued in another

contracting state, unless any of the circumstances laid down in Article V arises. However, in practice the recognition and enforcement of awards under the Convention varies from country to country depending on differing factors, such as the existence of reservations imposed by contracting states in signing the Convention, local laws, procedures and practices and the experience and attitudes of local judges.

In the case described here, an arbitrator who was appointed validly was made sole arbitrator in accordance with the contractual terms. An award, which set out methodically the procedural steps taken by the arbitrator prior to deciding the dispute, was issued in the contractual jurisdiction. The conduct of the proceedings was proper and the award issued was enforceable as a matter of Singaporean law, which was the law of the seat of arbitration. The country where the recognition application was made should, in accordance with the Convention, have complied with the relevant requirements and recognised and enforced the award locally. Unfortunately, the Member's experience was not as straightforward as one would have hoped for and expected.

Amongst other issues, the Vietnamese courts incorrectly interpreted the parties' agreement as being one to settle disputes through institutional arbitration, rather than an ad hoc process. This is an undesirable finding given that most maritime disputes are resolved in ad hoc references, and not through arbitral institutions.

In Vietnam, a new Civil Procedure Code (of 2015) became effective from 1 July 2016. This replaced the previous Code, CPC 2004, under which the Appeal Court in this case rejected enforcement on grounds wider than, and in contradiction of, the terms in the Convention. It is to be hoped that the new Code will result in the recognition and enforcement of foreign arbitral awards in Vietnam being simplified, and the New York Convention being implemented in accordance with its clear terms and intent.

With thanks to Tran Ha Han and Dang Viet Anh of Dzungsr & Associates LLC (Hanoi and Ho Chi Minh City) for the general Vietnamese legal advice.

For more information on recognition and enforcement of foreign arbitration awards, please refer to the Club's previous articles: **England and Wales** (2009 and 2012 – <https://www.steamshipmutual.com/pdf.htm?id=262451&pdf=true>; <https://www.steamshipmutual.com/publications/Articles/FrontComor0212.htm>), **Dubai** (<https://www.steamshipmutual.com/publications/Articles/dubaicourtlandmarkjudgment.htm>), **China** (<https://www.steamshipmutual.com/publications/Articles/HKChinaRecog0107.asp>) and **Australia** (<https://www.steamshipmutual.com/publications/Articles/Enforcement-of-awards-in-Australia.htm>). ■

The Last Voyage of the “Sea Venture”

A brief history of our publication's namesake.



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This edition of Sea Venture is the 30th edition since its relaunch in December 2004 and the 50th edition since the publication of the first Sea Venture booklet in February 1978. Why was it called Sea Venture? By 1978 the Club was based in Bermuda, SSM Bermuda having become operational on 20th February 1975. Depicted on the Bermuda Coat of Arms is the English merchant ship “Sea Venture” which ran aground off Bermuda in 1609. The storm which sank the “Sea Venture” inspired Shakespeare to write *The Tempest*, and the shipwreck led to Bermuda being settled by the English. This article is a brief outline of these events.

The Jamestown colony, established on 14 May 1607, was England's first permanent North American settlement. It was located near present-day Williamsburg, Virginia. Attempts between 1585 and 1587 to found a colony on Roanoke Island (in North Carolina) were unsuccessful. Every available ship had been needed to defend England against the threat of the Spanish Armada, making it impossible to send reinforcements to the colony. During this period “Virginia” was the English name for the entire East Coast of North America, north of Florida. The outpost was the private enterprise of the Virginia Company of London, under a charter granted by King James I. Its aim was to find gold and silver deposits, and a river route to the Pacific Ocean for trade with the Orient.

The “Sea Venture” was acquired by the Virginia Company in 1609, as the flagship of the fleet it called the ‘Third Supply’. Many facts about the ship can be ascertained today owing to the survival of the business papers of one of her original Owners, Lionel Cranfield. Her unusual name, perhaps due to Cranfield's association with the Company of Merchant Adventurers of England, has made it easier to find traces of her. She was a three-masted carrack launched in July 1603. Carracks had a well-rounded hull for carrying large amounts of cargo, with very high fore and after castles. Prior to 1609, “Sea Venture” was employed in the cloth trade sailing between English and Dutch ports.

The Third Supply fleet was formed of nine ships of greatly varying tonnage. In addition to normal sea stores, it carried livestock, bags of seed for planting in Virginia, farming tools and goods for trading with the Native Americans. Around 500 men and women had signed on with the Virginia Company to work in the colony for seven years. In return, each received free passage, one share of stock, and at the end of their term of service, a grant of land.

Among “Sea Venture's” passengers was William Strachey, a playwright and member of London's literary set. Strachey wrote a highly detailed letter describing the storm and the shipwreck which was circulated in London in 1610.¹ William Shakespeare's last play that he wrote alone, *The Tempest*, was performed for the first time the following year. The parallels are so numerous that Shakespeare must have read and taken inspiration from Strachey's letter.

The fleet sailed from Plymouth on 8 June 1609 under the command of Sir George Somers and Sir Thomas Gates. It followed a course down to the Canaries and out to Virginia. By 24 July, it was about a week's normal sailing from Chesapeake Bay when the calm seas it had enjoyed since leaving England gave way to an Atlantic hurricane.

The storm lasted four days and nights. “Sea Venture's” decks and sides were caulked with oakum (hemp or fibres from unpicked old ropes) and sealed with pitch to make them watertight. The strain on her hull caused by the storm began opening her seams. The oakum fell out and she started to leak badly. As the ship pitched and rolled, the crew scabbled around in the half-flooded hold, with candles held high, desperately searching for the places where water was entering. Many a weeping leak was found and plugged. The carpenter ran out of oakum and resorted to hammering in tough salted beef from the ship's food supplies.

““Sea Venture” was close to sinking when Sir George Somers sighted land.”

“all on board were... resigned to their fate”

“Sea Venture” was equipped with rudimentary pumps. The entire ship’s company was forced to pump and bail for their lives for three and a half days. Smashed store cases in the hold meant the pumps had to be repeatedly stripped and cleared, as they became clogged with sodden ship’s biscuit. When the ship assumed a pronounced list to starboard, everything movable on the starboard side was jettisoned.

By the fourth morning all on board were at the point of total exhaustion and resigned to their fate, though the storm was abating. “Sea Venture” was close to sinking when Sir George Somers sighted land. Pumping and bailing was resumed frantically to keep the ship afloat long enough to reach it. About three-quarters of a mile from the shore, she struck a reef, driving a wedge between massive coral heads that tore and split the ship’s sides. However the same coral heads held the vessel fast and kept her upright.

Almost no one on board “Sea Venture” would have known how to swim. The ship’s two boats made hurried trips between the ship and the beach. All 150 men, women and children were brought ashore safely. Their salvation was a Bermudan island.

Everything possible was salvaged from the ship including charts, canvas, ropes, planks, metal fittings, and spars. Between the action of the waves and the stripping of her upperworks, within a few days “Sea Venture” disappeared from view.

The discovery of the Bermuda archipelago has been attributed to Spanish Captain, Don Juan de Bermudez, possibly as early as 1503. Depicted on Spanish maps from 1511, the islands became a landmark for Spanish ships returning from Havana and the Indies to Spain. Bermuda had a fearsome reputation as the archipelago is surrounded by a dangerous reef; in *The Tempest*, Ariel refers to “the still-vex’d Bermoothes”.

The archipelago’s abundant wildlife, fish and fruit trees sustained the survivors while the skilled labourers and craftsmen (who included a Master Shipwright, Richard Frobisher), built two small ships. Timbers and rigging salvaged from “Sea Venture” were used along with native cedar. The larger vessel was christened “Deliverance” and the smaller “Patience”. They sailed from Bermuda on 10 May 1610, leaving only three men behind who refused to leave.

They arrived in Chesapeake Bay on 21 May, almost a year after the fleet had left England. On reaching

Jamestown the settlers were horrified at the scene of desolation and misery that presented itself. The fort was falling down and houses were empty; signs of famine and death were everywhere. Although the rest of the fleet had reached Jamestown, most of the supplies it carried had been ruined in the storm. Only 60 out of 500 settlers survived the winter of 1609-1610. It would later be called the ‘starving time’.

As the food brought from Bermuda would stretch for only 16 days, the Deputy-Governor, Sir Thomas Gates, decided Jamestown should be abandoned. Their best hope was to sail for Newfoundland with its fisheries, re-provision there, and try to reach England. They left the colony on 7 June and headed down the James River. However, before reaching the open sea, they met a relief fleet arriving from England. These vital supplies enabled Jamestown to be reoccupied. Re-provisioned, and with better leadership, the colony’s survival was never again seriously in doubt.

In 1612 the Virginia Company sent 60 settlers to colonise Bermuda, joining the three who had remained from the “Sea Venture”.

On 5 April 1614, “Sea Venture” survivor John Rolfe married Princess Pocahontas, the daughter of the chief of the Native Americans in the Tidewater region of Virginia. Their marriage created a climate of peace between the Jamestown colonists and her people which endured for eight years as the “Peace of Pocahontas”. Virginia became a successful tobacco plantation and colony.

Had the “Sea Venture” survivors not arrived with their few supplies when they did, Jamestown’s residents may well have died of starvation; or they may have left earlier, and missed their meeting with the relief fleet. Sir Thomas Gates (one of the “Sea Venture” party) personally prevented angry residents from setting fire to the town before they abandoned it. Had he not been there, the settlers arriving in the relief fleet would have been without a safe haven. England’s only North American settlement might have been abandoned and the English would have lost their place in the New World.

The wreck site of the “Sea Venture” lay undetected for nearly 340 years, until its rediscovery in 1958. Her remains lie about three-quarters of a mile off the northeast coast of St George’s Island, on the reef off St Catherine’s beach.² ■

¹ Strachey, W, A True Reportory of the Wreck and Redemption of Sir Thomas Gates, Knight (written 1610, published in *Purchas his Pilgrims* 1625).

² Other sources: Doherty, K, *Sea Venture: Shipwreck, Survival, & the Salvation of Jamestown* (St. Martin’s Griffin, 2008). Petersen, MLR, *The Sea Venture* (The Mariner’s Mirror, 1988). Van Wyck Mason, F, *The Sea Venture* (Hutchinson & Co, 1962). Wingood, AJ, *Sea Venture: The Tempest Wreck* (Island Press Ltd, 1986).



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News

Steamship Mutual Offices in Asia

Steamship Mutual achieved another milestone in August 2018 when the Club received formal authorisation from the Hong Kong Insurance Authority (HKIA) to establish a branch office in Hong Kong. Whilst the Club has had a representative office in the territory for almost 30 years, the authorisation provides a platform to deliver the full range of P&I services to Members and brokers, especially underwriting and claims services predominantly for Members based in Greater China. The Hong Kong office will also continue to provide a contact point for Members who have claims or general queries relevant to the area.

The Club is the first P&I insurer to gain its authorisation from the HKIA, an independent statutory authority which was established in 2017 and took over the previous functions of the Office for the Commissioner of Insurance. The office is headed up by Rohan Bray, who also assumes the role of branch CEO. Rohan has been with the Club for 24 years on the claims side, the last 20 of those in Hong Kong. Eric Wu, the Head of Underwriting, has been at Steamship for nine years, following extensive experience as an average adjuster and with another P&I Club. The claims service is headed by Nina Jermy, who has been with the Club for 16 years in both the London and Hong Kong offices. With a staff currently totalling 11, the claims handling service is provided by seven, including three qualified solicitors to enhance the Branch's FDD capability.

The Hong Kong authorisation follows the establishment and authorisation of two other Club offices in the Far East. The Singapore office gained its licence in November 2017 and now comprises four staff, headed up by Jamie Taylor, who started with the Club in London in 2008. Jamie is responsible for underwriting functions from the office and there are two dedicated claims handlers, including Thuolase Vengadashalopathy who qualified as a solicitor in Singapore in 2013, gaining experience of a wide range of maritime and shipping disputes, including charterparty and bill of lading disputes and vessel arrests. She joined Steamship Mutual's Singapore office in February 2017 and handles both P&I and FD&D claims. Since the opening of the Singapore office, the Club has acquired new entries from Indonesia, Thailand and Singapore.

The Tokyo office is also fully authorised to provide underwriting and claims services, having gained its licence in December 2017. Captain Toshiki Kawai is the Club's Representative in Tokyo. He previously worked for 38 years for a leading Japanese hull and machinery underwriter. James Ingham joined Steamship from another International Group Club to take up the position as a Director of the Tokyo office. James is a solicitor with 14 years' experience in handling a full

range of P&I and FDD claims, including five years dealing with Japanese shipowners. The office has other Japanese staff with experience in the Japanese marine insurance market, including Ryuki Toki who assists with underwriting and joined the Club with 26 years experience in operations with a leading Japanese tanker owner. The Club's next Board Meeting will be held in Tokyo in January 2019 and the opening of the office will be celebrated at the reception dinner.

Contact details for staff in the three offices can be found from the usual sources: the website, Club App and the hardcopy Rule Book. Members are encouraged to contact any member of staff if they have enquiries or to notify the Club of any potential claims issues. An emergency phone number (+852 93061860), manned by staff from the three offices, is set up to provide an additional point of contact during weekends and public holidays. There is regular interaction across the offices, and with headquarters in London, to ensure a seamless and consistent service approach. ■

“The Club is the first P&I insurer to gain its authorisation from the HKIA.”





Image courtesy of J B Boda Group

75th Anniversary of J B Boda Group

The J B Boda Group celebrated its 75th anniversary in 2018. Established in 1943 by the late brothers Mr J B Boda and Mr D B Boda, the group began its commercial life dealing with various types of insurance; marine, fire, oil and energy. Their links with Steamship Mutual date back to their very early years when Steamship became one of Bharat Lines Limited's P&I Clubs in 1945. As the Indian marine sector grew, Boda's arranged P&I cover for more Indian fleets at Steamship Mutual. A long and close relationship between Steamship Mutual and the Boda Group was underway. In 1956 Crowe Boda & Co. Pvt. Ltd was established, specialising in P&I, and adding a Correspondent arm too. The Crowe Boda offices in Mumbai, Goa, Kochi, Kolkata and Chennai continue to provide correspondent services to the Club's Members to this day.

Speaking of the close relationship between Crowe Boda and Steamship Mutual, the current J B Boda Group Chairman Mr Atul Boda said:



Mr Atul Boda and family members

"The relationship of Steamship Mutual with Indian shipowners and Crowe Boda goes back more than six decades. Both the Club and Crowe Boda have remained loyal to each other. In 1990, Mr J B Boda passed away and his brother Mr D B Boda took over the Chairmanship of Crowe Boda & Co. and, after his sad demise in the year 2000, Mr J B Boda's son Mr Bharat J Boda took over the Chairmanship. I now have the privilege to lead the Group and it must be mentioned that all the Boda family members have enjoyed an excellent relationship with the Managers of the Club. On both sides, there is utmost trust and integrity in the relationship."

Generations of Club underwriters and claims staff have visited India and have had the benefit of dedicated support provided by Crowe Boda. Eastern syndicate Head of Underwriting, Jonathan Andrews, commented:

"The Club has enjoyed unparalleled service from Crowe Boda and many of us have had the opportunity to work closely with the Boda family. Their service and friendship have been invaluable to us and we congratulate them on their 75th anniversary." ■

"The relationship of Steamship Mutual with Indian shipowners and Crowe Boda goes back more than six decades."

Crew Quick to Assist After Tragic Plane Crash

Being alert to potential hazards is part of a ship's crew's daily routine, but one of Western Towboat Company's vessels recently witnessed an event where the danger was airborne. Steamship Mutual Member, Western Towboat Company, is a family run business operating tugs and barges from Puget Sound to the Aleutian Islands, Arctic Alaska and Hawaii. On 10 August 2018, the crew of one of their vessels saw a passenger plane pass over them followed by two air force jets. Soon after they heard a loud bang and then saw black smoke coming from a nearby island.

What the crew did not know at the time was that an airport worker had stolen a Horizon turboprop aeroplane from Sea-Tac airport and was being pursued by two F-15 jets from the United States Air Force.

Unaware of the full circumstances and the danger to which they might be exposed, the crew nonetheless immediately tried to reach the site to see what help they might safely render. Skipper Ryan Johnson and crew were among the first on Ketron Island, although the dock was still remote from the site of the crash. The local geography and the remote location of the plane crash limited the assistance they were able to give, but nevertheless skipper

Ryan Johnson and crew were promptly available and able to offer assistance to some of the residents of the island. A ferry with first responders soon arrived on the scene and Western Towboat's team were able to let them continue with the investigation.

It is good to see the prompt and safe response of Members in what was an overwhelmingly sad incident. It was widely reported in the media including this article on the BBC (<https://www.bbc.co.uk/news/world-us-canada-45153535>) and this article on Mynorthwest which includes an interview with Western Towboat's Ryan Johnson (<http://mynorthwest.com/1076945/tow-boat-horizon-plane-crash-ketron/>). ■

"Soon after they heard a loud bang and then saw black smoke..."

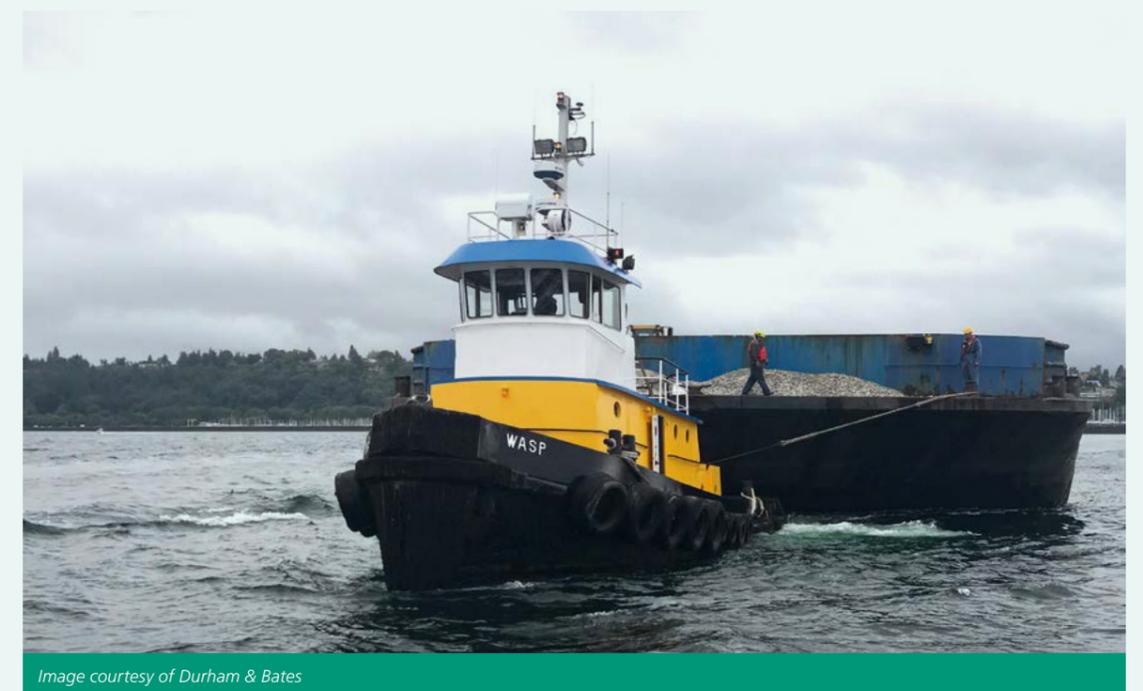


Image courtesy of Durham & Bates

Member Training Course 2019

The Club's residential training course for Members has proved to be a popular course over the years and we are pleased to announce that the sixth course will take place in June 2019. It will follow a similar pattern to previous years with delegates gathering at Steamship's London office for the first presentations as well as the opportunity to meet the staff in the London office. The delegates will then travel to Southampton where the rest of the course will take place.

There is an emphasis on the active participation of delegates by means of workshops and case studies. Delegates will have the opportunity to take part in a collision simulation, followed by seminars on claims issues resulting from collisions. Sessions on underwriting, cargo liabilities, pollution, FDD and cyber security all feature on the programme.

The social events are always popular and include a cruise on the Solent, a Maritime Museum tour and dinner at Bucklers Hard.

Comments from delegates on previous Steamship Member Training Courses included the following:

"Bar none, this was the most thorough, topical and best organised seminar I have ever attended."

"It is a good course covering major challenges faced by owners in current situation."

"Very well organised week. I found the talks very informative and the evenings very good fun."

"Combining entertainment as a part of the course was very exciting and novel."

"Mock proceedings and case studies were very useful."

"The course is a very good experience to meet the people of SSM and other Members. Also very useful and well managed."

"A very well planned and organised course. Has really helped me to upgrade and update my knowledge."

"This is a must for any person related to the vessels business. In such a short time you get to know a comprehensive view of everything you need to know about P&I."

"The course is a great learning experience and sharing forum for the Club and its Members. The knowledge gained is very valuable. A wonderful and amazing experience."

Spaces are limited to 30 delegates, so early application is recommended. The application form is on the Steamship website: <https://www.steamshipmutual.com/MTC2019.htm> ■

"Sessions on underwriting, cargo liabilities, pollution, FDD and cyber security all feature on the programme."



Students wishing from the University of Ghent

Learning with Steamship Mutual

Readers of Sea Venture 29 may recall our article about the annual visit from students studying for the Master of Maritime Science at the University of Ghent. We were pleased to welcome the latest Ghent students in November 2018.

In recent months, our staff have presented talks and contributed to seminars at Member's offices and at industry conventions on three continents.

SSM speakers have attended in Tokyo, Imabari, Xiamen, Kaohsiung, Shanghai, Taipei, Manila, Seattle, Washington DC, Montreal, Santiago, Odessa, Constanta...and London.

We have given talks and presentations describing the work of a P&I Club, and we have also given seminars on claims handling, given presentations on loss prevention, and spoken on topics including recent developments in pollution legislation, cyber security, and recent developments in maritime law.

Many of our talks and presentations include material and films available on the Team Effort

App. The Team Effort App is free to download and includes a good deal of useful claims handling material: <https://www.steamshipmutual.com/loss-prevention/a-team-effort-2017-edition.htm>.

Remember too, that from time to time Steamship staff talk about their articles and Risk Alerts in video presentations. These are available in the "Club Article Videos" section on our website and also appear on Twitter and LinkedIn, so keep a lookout!

<https://www.steamshipmutual.com/club-article-videos.htm> ■

"Steamship staff talk about their articles and Risk Alerts in video presentations."



Hong Kong Office Retirees

Steamship Mutual Management Hong Kong said goodbye to two long serving colleagues in December. Claims Manager Edmond Li has worked for the Company for 24 years. William Wong Administration Clerk has been with the Company for a similar period; 21 years. We wish them well in their retirement and thank them for their hard work over the years. They will be missed. ■



Mr William Wong (left) and Mr Edmond Li (right).



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