



STEAMSHIP MUTUAL

Sea Venture



Issue 24

In this issue

- 07 *The Astra* Reconsidered
- 10 The Art of Camouflage
- 22 Barbetta Rule Overturned
- 23 Consequences of Late Redelivery
- 28 "Friendly Discussion" Clauses

Introduction



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Welcome to the 24th issue of Sea Venture.

Our Members continue to experience a difficult freight market and it is not possible to see an immediate or quick improvement to the situation. The supply and demand equation for ships militates against a speedy resolution of the problem and until greater balance is achieved allied with strong economic performance in the world's major economies continuing pressure on shipowners must be anticipated. Given this stressed situation the Club's Board was delighted to be able to announce a zero standard increase at the 2015 renewal. Any assistance the Club can give to its Members in such difficult times is important.

The announcement of the Club's financial results www.steamshipmutual.com/Circulars-London/L.254.pdf explained why the Club was in a position not to need to raise the level of premiums charged. An outstanding operating performance, a combined ratio of 78.6%, and an increase of Free Reserves of \$75 million to \$376.2 million marked a substantial strengthening of the Club's capital base. With such a performance in prospect the Members reaped the benefit. The hope of the Club's Board is that continuing financial strength will enable the Members to benefit by way of premium levels and rating in the future.

The good financial year operating performance was due in part to releases from prior years' outstanding claims estimates, and in part from a favourable current year's claims experience. A number of factors may have contributed to the good claims experience in the 2014 year. The incidence of large claims in particular is largely random and there may be an element of good fortune in that year's experience. Indeed it would not be sensible to read too much into one year's result. At the same time the Club's Board have consistently emphasised that financial stability takes precedence over tonnage growth; the Managers have used their best endeavours to ensure good risk selection. It would seem that a prudent approach to tonnage growth has contributed to the result.

The 2015 renewal saw several high quality fleets join the Club. The Managers are grateful for the confidence these fleets have shown in the Club and in turn are sure that they will enhance the strength of the Club. As always, the Managers are very grateful for the continued support of all Members who renewed with the Club and who indeed in many cases decided to increase the proportion of their fleets entered in the Club.

20 July 2015

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09
The Ocean
Victory – Court
of Appeal
Decision



07
The Astra
Reconsidered



35
Yacht Liability
Cover



50
Seatrade: *The Navigator* –
Investors in
People (Winner)



45
1840 – 2015:
Cunard 175th
Anniversary

Contents

Features

- 04 Maritime v Statutory Liens in England and Wales
- 07 *The Astra* Reconsidered
- 09 *The Ocean Victory* – Court of Appeal Decision
- 10 The Art of Camouflage
- 12 Maritime Refugees: Obligations on the Merchant Navy
- 14 *The Adventure* – Perils of Demurrage Time Bars
- 17 So You Thought the Fuel was “On Spec”...Think Again!
- 20 Arresting a Ship to Enforce a Maritime Arbitration Award
- 22 *Barbetta* Rule Overturned
- 23 Consequences of Late Redelivery
- 25 Deepwater Horizon Update
- 26 Judgment on Fraudulent Device – Beware the Insured
- 28 “Friendly Discussion” Clauses – Giving ADR Clauses a New Perspective
- 30 A Year of Performance Claims
- 33 Contractual and Common Law Liens in Australia
- 35 Yacht Liability Cover
- 36 *Valle Di Cordoba* – Court of Appeal Decision
- 38 Adoption of Amendments to Increase the Limitation Amounts in the 1996 LLMC Protocol
- 40 Right to Enforce an ‘*in rem*’ Claim Transfers to the Proceeds of Sale
- 42 The ‘Pay to be Paid’ Rule – A Protected Right?

Steamship Mutual News

- 45 1840 – 2015: Cunard's 175th Anniversary
- 46 24 Peaks Challenge 2015 – Team Steamship!
- 47 Korean Cocktail Reception
- 47 New Flagship for P&O Cruises
- 48 Hong Kong Cocktail Reception
- 48 Opening of Resolve's Singapore Office & Warehouse
- 49 Crowley Honoured for Outstanding Marine Safety with ECOPRO Environmental Award
- 49 Steamship's Marathon Man
- 50 Seatrade: *The Navigator* – Investors in People (Winner)
- 50 Awards for Steamship and Videotel Training Programmes

On-line Articles

- 51 Further Published Articles

Features

Maritime v Statutory Liens in England and Wales



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Maritime liens are very important for shipping claims as they allow certain rights of securing or enforcing claims against a vessel, in addition to the usual methods of obtaining security from or enforcing claims against the person or company (i.e. the Owner) alleged to be liable for a claim. In certain circumstances they can provide valuable security which *may* have priority over other claims and charges.

This article sets out a summary of how the different types of maritime lien over a vessel arise in England and Wales. The position varies from jurisdiction to jurisdiction. Subsequent articles will discuss the position in other key jurisdictions. However, this is a complex area of law and therefore when maritime liens and the rights of security they give rise to are being considered, local law advice will invariably be necessary.

'True' Maritime Liens

Maritime liens are complex instruments, but for practical purposes they may be considered to be a charge upon maritime property (i.e. a vessel), arising by operation of law and binding the property even in the hands of a bona fide purchaser for value and without notice. They can only be enforced by an Admiralty claim *in rem*, meaning issuing a claim form naming the vessel as defendant and for service on the vessel when it comes into English jurisdiction.

True maritime liens are very useful tools. They are unusual in that they give rise to rights against a vessel which survive the sale of that vessel and have priority against registered mortgages. Therefore, even where a vessel has been sold and has been mortgaged, a maritime lien will take priority over other claims secured against that vessel.

They are also "invisible" as there is no registration requirement. As a result, sale and purchase contracts for ships will usually include a warranty by the seller that there are no maritime liens over the vessel. If this turns out to be incorrect, the purchaser will have a damages claim for losses suffered.

In English law, there are four categories of claim which give rise to a maritime lien:

- i. Salvage costs (not including towage)
- ii. Damage done by a ship
- iii. Seamen's wages, master's wages and disbursements
- iv. Bottomry.

Any other category of claim which gives rise to a maritime lien in another jurisdiction cannot be enforced by way of a maritime lien in England and Wales. In contrast, some jurisdictions will enforce the maritime liens of another country even though the claim in respect of which that lien is exercised does not constitute a maritime lien in the country of arrest. Therefore, it will always be necessary to obtain local law advice in the jurisdiction where a maritime lien is to be enforced.

Where the total amount of claims exceeds the proceeds of sale, the court must determine the manner in which the proceeds should be distributed. As noted above, maritime liens will have priority over

mortgages and other claims secured against the vessel. Where there is more than one maritime lien attaching to a vessel, there is no clear rule on which maritime lien takes priority. However, they will usually rank in the order set out above. The court has also commented in the case *Carbognade v Ruta* [2001] 1 All ER 450 that they will do what is just in the circumstances but this will depend on the particular facts giving rise to those maritime liens.

A maritime lien attaches to a vessel from the time of the incident, for example the date on which the damage is caused by that ship, and continues to be binding until it is discharged. A maritime lien can be discharged in the following circumstances:

- i. When payment of the claim has been made
- ii. The ship has been permanently destroyed
- iii. When the ship has been sold by the Admiralty Court for proceedings *in rem* or a foreign court in like proceedings

"A maritime lien attaches to a vessel from the time of the incident, for example the date on which the damage is caused by that ship, and continues to be binding until it is discharged."

- iv. The sale of the ship to the Crown or a foreign sovereign who has immunity from suit.

Statutory right of action *in rem* (statutory lien)
These are often described under the broad term of 'maritime lien' but it is important to distinguish statutory liens from maritime liens. Statutory liens are not 'true' maritime liens and do not share all of the characteristics of maritime liens.

S.20(2) of the Senior Courts Act 1981 (SCA) sets out the nineteen heads of claim over which the English Courts have jurisdiction and that give rise to statutory liens.

The claims that give rise to statutory claims under s.20(2) of the SCA are set out below (with those that also give rise to true maritime liens highlighted in **red**):

- a. Claim to the possession or ownership of a ship/ share of ship
- b. Question arising between co-owners of a ship as to possession, employment or earnings for that ship
- c. In respect of a mortgage or charge on a ship
- d. For damage received by a ship
- e. **For damage done by a ship**
- f. Loss of life/personal injury sustained in consequence of any defect in a ship or her equipment or in consequence of any wrongful act/default/neglect of Owners, Charterers, persons in possession or control of a ship, or Master or crew or persons for whose acts Owners or Charterers are responsible

- g. Loss of or damage to goods carried in a ship
- h. Claim arising out of an agreement relating to carriage of goods in a ship or use/hire of a ship
- i. **Salvage** (under Salvage Convention 1980, or under contract for salvage services, or in the nature of salvage)
- j. Towage
- k. Pilotage
- l. In respect of goods or materials supplied to a ship for her operation or maintenance
- m. In respect of construction, repair or equipment of a ship or in respect of dock charges or dues
- n. **By Master or crew for wages**
- o. **By Master, shipper, Charterer or agent in respect of disbursements made on account of a ship**
- p. Any act which is or claimed to be a general average act
- q. **Bottomry**
- r. Claim for forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship or for the restoration of a ship or such goods after seizure.

There are three important points to note about statutory liens.

Firstly, they do not have priority over mortgages. Therefore, if there are competing claims against the vessel, a statutory lien will rank below both maritime liens and any mortgages. As a result, there may not be enough residual value to satisfy these claims once the mortgagee has been paid.

Secondly, most statutory liens are extinguished by the sale of the ship although this may not be the case where the ship is sold by the Admiralty Court – see *The Sanko Mineral*: www.steamshipmutual.com/publications/Articles/in_rem_claim_transfers0115.htm.

Thirdly, the statutory lien does not arise until the claim form is issued (in contrast to the position with maritime liens which arise on the date of the incident). Therefore, if the vessel is sold before a claim form is issued, the statutory lien will be lost.

Unlike maritime liens which attach to the particular vessel, statutory liens can be enforced against sister ships. This may be a useful way of enforcing a claim if an Owner has a fleet of vessels in common ownership.

Exercise of Admiralty Jurisdiction

The SCA sets out how the Admiralty jurisdiction, as described above, may be exercised. This is not

straightforward but there are two key provisions to be aware of.

There are certain statutory claims in respect of which a claim *in rem* may be commenced against the ship in respect of which the claim arises, irrespective of who owns the property at the time the claim is commenced, and irrespective of who may be liable on the claim *in personam*. These are set out in s.21(2) and include claims (a), (b), (c) and (r) of s.20(2) as set out above. In addition to this, as explained above, ‘true’ maritime liens can be commenced regardless of ownership.

S.21(4) provides that claims (e) to (q) as set out above may only be brought *in rem* against the ship in connection with which the claim arises if certain conditions are met. The most important of these are that: (i) the person who would be liable for the claim *in personam* must have been the Owner, or the Charterer or in possession or control of the ship when the cause of action arose; and (ii) at the time when the claim is brought that person must also be the Beneficial Owner of all the shares in the ship or the Charterer by demise.

When does a Maritime or Statutory Lien need to be Enforced?

Under English law claims that give rise to both maritime liens and statutory liens need to be commenced within the applicable time limit. Therefore, particular time limits, for example the two year time bar for a collision claim and six years for master’s wages and disbursements, will need to be considered to ensure that the claim against the ship does not become time barred.

However, in some other jurisdictions whose laws incorporate the 1926 Lien Convention, a maritime lien may need to be enforced within a one year time period.

Comment

This article only sets out a broad overview of what is a complex area of law. In each case, the particular facts and circumstances will need to be considered to determine what sort of lien(s) arise and the most appropriate way of enforcing these. Key points for Members to keep in mind are, the fact that maritime liens may not be capable of enforcement in some jurisdictions after one year or if one of the other events discussed in this article occurs, and that statutory liens only arise once a claim form is issued. Therefore the Club should be notified at the earliest opportunity to ensure that the claim is enforced and secured within the applicable time limit.

There are other liens – contractual liens – that are granted under Charterparties giving an Owner rights to retain possession of cargo and intercept sub freights or sub hires. Whilst a discussion of this subject is outside the scope of this article see *The Bulk Chile*: www.steamshipmutual.com/publications/Articles/RighttoFreight1113.htm and *The Sanko Mineral* (page 40/41) in relation to enforcing an *in rem* claim. ■



“...Spar Shipping essentially takes matters back to the position before *The Astra*. Owners are likely to have to prove a repudiation or renunciation by Charterers if they wish to claim damages for loss of profit.”

The Astra Reconsidered

ReedSmith **Andrew Taylor**
Alexandra Allan

In *Kuwait Rocks Co v AMB Bulkcarriers Inc (The Astra)*, Flaux J determined that the obligation to make punctual payment of hire under an amended NYPE time charter, whether on its own or in conjunction with an anti-technicality clause, was a condition of the contract. The breach of this condition entitled the vessel Owners to both withdraw the vessel and claim damages for loss of profit for the remainder of the charter period. See Reed Smith’s earlier article discussing *The Astra* www.steamshipmutual.com/publications/Articles/Astra0613.htm.

On 18 March 2015, judgment was handed down in *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd*. Popplewell J disagreed with Flaux J’s analysis in *The Astra*, finding that payment of hire was not a condition of the contract.

The facts of *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd*
The Claimant Owners had let three vessels to Grand China Shipping (Hong Kong) Co Ltd on amended NYPE 1993 forms. The charters were on materially identical terms. They included provisions allowing Owners to withdraw the vessel “*failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever*” of the charter, and an anti-technicality provision requiring Charterers to be given a three banking day grace period where there was “a failure to make punctual and regular payment of hire due to oversight, negligence, errors or omissions on the part of Charterers or their bankers”.

The Defendant Guarantor provided guarantees in respect of Charterers’ performance under all three charters. Substantial arrears accrued, causing Owners

to withdraw the vessels and terminate the charters. Owners claimed against the Guarantor under the guarantees for (i) the balance due under each charter prior to termination; (ii) damages for loss of bargain in respect of the unexpired term of the charters; and (iii) their costs of arbitration proceedings against Charterers.

The court was required to determine various issues, including whether the Guarantor was bound by the guarantees and the correct method of calculating any damages due for the unexpired charter periods. However, it was the question of whether Owners were entitled to those damages which was the focus of the majority of Popplewell J’s detailed judgment.

The Guarantor’s position was that although Owners had a contractual option to withdraw the vessels, in order to claim damages for loss of bargain there had to have been a breach that gave right to damages for repudiation or renunciation. There had been no such breach. Owners contended that payment of hire was a condition of the charters, such that breach entitled them to damages for loss of bargain. Alternatively, if payment of hire was an innominate term, Charterers’ conduct was repudiatory and/or evinced an intention not to pay hire on time, which constituted a renunciation of the charters. The question of whether the obligation to pay hire punctually and regularly in advance was a condition of the contract was precisely the one which Flaux J had considered (albeit *obiter*) in *The Astra*.

Flaux J’s findings in *The Astra*

The charterparty in *The Astra* was also on an amended NYPE form. The provisions regarding payment of hire were on materially identical terms to those in the instant case. Flaux J determined that the obligation to make punctual payments of hire, whether on its own or in conjunction with the anti-technicality provision, was a condition of the contract. Breach therefore entitled the Owners to withdraw the vessel and claim damages for loss of bargain. His main reasons for reaching this conclusion were:

1. Failure to punctually pay hire was sufficiently serious to allow the Owners to terminate, indicating that such failure went to the root of the contract. On that basis, the provision was a condition.
2. In commercial contracts, where time is of the essence (i.e. where something must be done, or payment be made, by a specified time), such a provision is a condition of the contract.
3. Certainty is essential in commercial transactions, and there would be no certainty if the Owners could only claim damages after withdrawal where the Charterers' conduct was repudiatory. Proving Charterers' repudiation would not always be straightforward. The Charterers also required certainty, in that they should know they would be liable for damages for loss of bargain if the Owners withdrew the vessel after their failure to pay hire promptly.

Popplewell J's findings in *Spar Shipping AS v Grand China Logistics Holding (Group) Co., Ltd* Like Flaux J, Popplewell J conducted a thorough review of the authorities on all relevant issues, in particular the classification of contractual terms as conditions and the question and effect of time being of the essence. He concluded that the obligation to pay hire was *not* a condition of the contract, and so breach alone did not entitle Owners to damages for loss of bargain for the unexpired charter periods.

Popplewell J disagreed with Flaux J on each of the three points set out above.

1. The provision of a right to terminate on breach of a particular term is not indicative that the term in question is a condition. To have such effect, any agreement between the parties must entitle the defaulting party to treat the contract as repudiated, not simply to terminate. A contractual right to terminate may constitute such an agreement, or it may simply be an option to cancel. On this basis, the fact that the option to cancel is triggered by a breach says nothing about whether the term breached is to be characterised as a condition.
2. The presumption in commercial contracts is that stipulations as to time of payment are *not* of the essence, unless there is a clear indication to the contrary. The cases which comment on the Owners' commercial interest in punctual advance payment provide a basis for a stringent approach to a contractual option to terminate. However, they provide no additional reason to treat such a term as a condition conferring a right to terminate, which would have very different financial consequences. If Owners invoke an option to cancel, they are no longer obliged to fund the operation of the vessel and their interest in punctual payment disappears.
3. It is correct that Owners may face uncertainty in having to continue with a charter until such time as

they can say that Charterers are in repudiatory breach. However, this is no more than any commercial party faces as a result of English law's requirement that only repudiatory breaches of innominate terms allow a party to put an end to contractual obligations. The principal function of conditions and termination provisions is to ensure certainty so far as the right to terminate is concerned. This can be achieved by an option to cancel without conferring an unmerited right to damages.

Unless and until the question comes before a higher court, it is likely that Popplewell J's decision will be followed in subsequent cases. He referred in his judgment to a general principle that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred, if it has been reached after full consideration of the earlier decision.

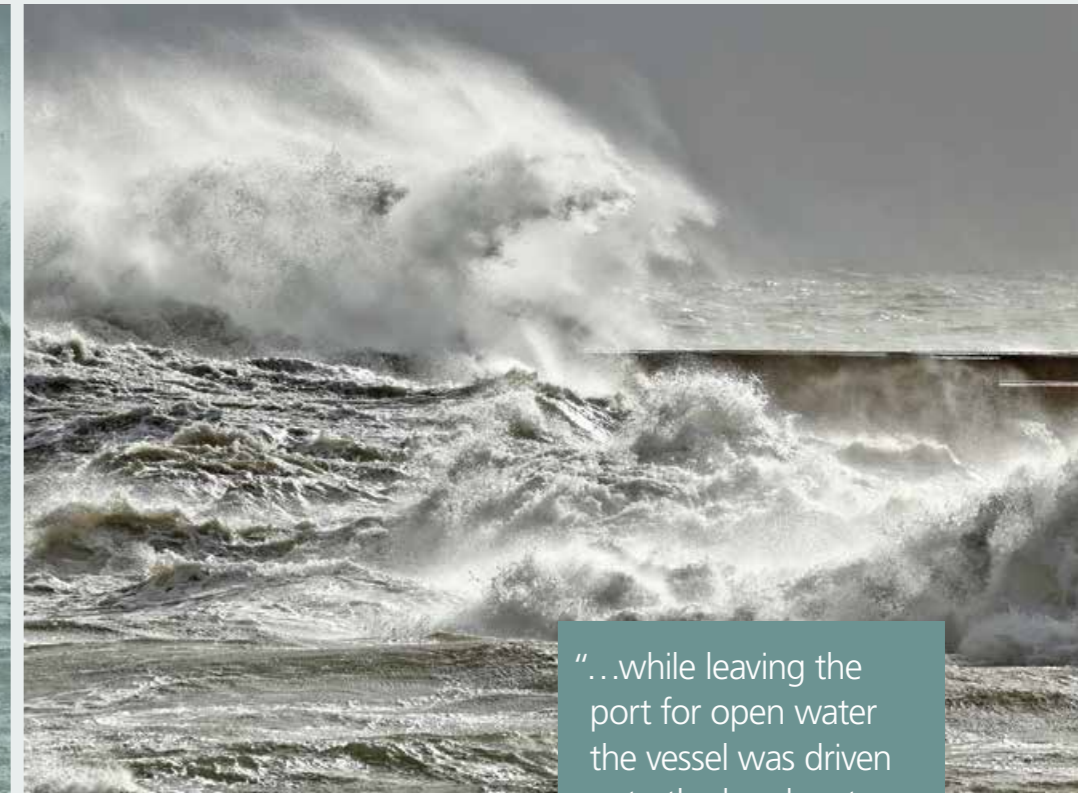
Payment of hire: where are we now?

The issue of whether Owners can claim damages is often crucial to their decision as to whether to withdraw a vessel or to continue with a charter. After *The Astra*, Owners were arguably in a stronger position to give a legal basis to a decision to withdraw their vessel from Charterer's service and claim damages for loss of profit after only a few missed or part hire payments, or even a single such payment.

Owners' position was also strengthened where charterers sought to make deductions from hire, on the basis that the threat of withdrawal and a damages claim could encourage charterers to pay and claim back alleged deductions, rather than deduct them from an initial hire payment. Although the decision in *The Astra* was not universally welcomed, it was generally seen as providing some long overdue certainty to a controversial area of debate.

The decision in the present case essentially takes matters back to the position before *The Astra*. Owners are likely to have to prove a repudiation or renunciation by charterers if they wish to claim damages for loss of profit. A mere failure by Charterers to pay, and consequential exercise by Owners of a right to withdraw, is unlikely to be sufficient. Owners will need to show that Charterers have either evinced an intention not to be bound by the charter terms, or have expressly declared that they are or will be unable to perform their obligations in some essential respect. This raises difficult questions such as the number of missed or short hire payments that amount to an "intention no longer to be bound", and places a higher evidential burden on Owners.

The decision in this case does not affect Owners' right to withdraw the vessel from Charterers' service, if the charter gives them that right, nor does it affect their entitlement to claim unpaid hire that has already fallen due. What it will affect is Owners' entitlement to damages for loss of bargain for the unexpired charter period. The temporary strengthening of Owners' position arguably provided by *The Astra* may now have come to an end. ■



"...while leaving the port for open water the vessel was driven onto the breakwater wall and became a total loss. A claim in excess of US\$135 million was brought..."

The Ocean Victory – Court of Appeal Decision – Unsafe Port or Abnormal Occurrence



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The High Court decision in *The Ocean Victory* was discussed in 'A Reasonably Safe port?' www.steamshipmutual.com/publications/Articles/SafePort1113.htm

The vessel was discharging her cargo of iron ore at Kashima in Japan but had to stop due to strong winds and heavy rain. The berth was affected by considerable swell caused by winds of up to Beaufort Force 9 and while leaving the port for open water the vessel was driven onto the breakwater wall and became a total loss. A claim in excess of US\$135 million was brought against the Time Charterers for breach of the safe port warranty.

Teare J decided that there had been a breach of the safe port warranty because the port of Kashima did not have a safe system to make sure that vessels forced to leave the port in deteriorating weather conditions (which the judge concluded were not "abnormal") could do so safely, and that safe

navigation out of the port required more than good navigation and seamanship. The definition of safety was set out in the *Eastern City* (1958) 2 LLR 127 by Sellers LJ in negative terms as:

"... a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship."

On 22 January 2015, the High Court's decision in *The Ocean Victory* was overturned by the Court of Appeal.

Charterers had appealed the decision on three grounds. With respect to the Port's safety these were:

1. Whether there had been a breach of the safe port warranty; and
2. If unsafe whether there was a break in the chain of causation flowing from the navigation of the vessel.

Following a thorough analysis of the facts and relevant case law, Charterers' appeal was allowed. It was held that the court at first instance had erred in relying

simply on the foreseeability of an event, rather than taking into account the port's history, the frequency of such events and the combination of factors resulting in the severe nature of the storm in question to establish whether it was an abnormal occurrence. Teare J had looked at the swell and the gale separately, concluding that neither was rare and both were characteristics of the port which meant that the event was not an abnormal occurrence. However, the Court of Appeal held that was the wrong approach. What mattered was the combination of events giving rise to the vessel effectively being trapped, not if an event was theoretically foreseeable because of a Port's location. As such there was no basis for the conclusion that it was no surprise the combination of swell and northerly gales occurred, nor that it was a clear risk.

The Court of Appeal concluded that the correct analysis of an abnormal occurrence should take into account the evidence relating to the past frequency of such an event occurring and the likelihood of it occurring again. Undisputed evidence was given that the storm on the day in question was exceptional in terms of its rapid development, duration and severity. It must therefore have been an abnormal occurrence and consequently there was no breach by Charterers of the safe port warranty.

Accordingly, because there had not been a breach of the safe port warranty it was not necessary to decide there was a break in the chain of causation as a result of the Master's navigational decision to leave port in extreme weather.

Whether this matter is now at an end remains to be seen. The third issue on appeal was, assuming a breach of the safe port warranty and no break in the chain of causation, whether the Demise Charterers had any liability to the Owners in respect of insured losses. If not then the Demise Charterers had not suffered a loss that could be claimed from the vessel's Time Charterers. The problem was the bareboat charter required the Demise Charterer to effect and pay for marine and war risks insurance in respect of the vessel in their joint names to protect both the Owner's and Demise Charterer's interests. The Court of Appeal construed the relevant clause of the charter as excluding a right of recovery by the Owners from the Demise Charterers which meant the hull insurers pursuing the claim against the Time Charterers did not have any rights of subrogation against the Time Charterer. That is in the event of loss or damage to the vessel by insured risk the bareboat charter provided for an insurance-funded result such that liability between the Owner and Demise Charterer was discharged.

This decision is being appealed to the Supreme Court on three grounds – was there an abnormal occurrence, the loss of the vessel and joint insurance, and on a question that had been reserved below the Court of Appeal, the right of a charterer to limit its liability (see www.steamshipmutual.com/publications/Articles/Articles/Charter_Limit0304.asp). ■

The Art of Camouflage



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The seventh of May 2015 marked the centenary of the sinking of *RMS Lusitania* during the First World War. Following the outbreak of war, *RMS Lusitania* had remained in civilian service on the Liverpool to New York route, but many other passenger ships were requisitioned for use as troopships, auxiliary cruisers and hospital ships, including her sister ship *RMS Mauretania* which served in each of these roles at different stages during the war. This article discusses one of the more unusual approaches employed to protect requisitioned merchant vessels of all types during wartime.

Although requisitioned vessels were given an overall coat of grey paint in order to make them less conspicuous, their lack of armour plating and other defences meant they were highly vulnerable if attacked. By 1917 the extent of Allied shipping losses to German U-boats threatened the collapse of the entire war effort. This perilous situation was saved by the introduction of convoys, but the Admiralty also turned its attention to developing more effective camouflage.

In June 1917 a special section of the Admiralty's Directorate of Naval Equipment called the Dazzle Section was established at the Royal Academy of Arts' Burlington House in London, under the leadership of the famous marine artist Norman Wilkinson. A Lieutenant Commander in the Royal Navy Volunteer Reserve, Wilkinson had observed first-hand how darkly-painted troop transports made easy targets, and had some revolutionary ideas for alternative camouflage. His theories were based on the fact that ships viewed from a periscope were seen not against the sea but against the sky at the horizon. Conditions of light, atmosphere and weather changed constantly so it was impossible to render ships invisible or indistinct. Once this was accepted, the only other option was to try to disrupt a vessel's outline in order to make her harder to identify, remembering that targeting usually had to be done quickly with the target semi-obscured by the motion of the waves.

Wilkinson's team of 15 artists, 3 modellers and 11 painters spent months experimenting with different hues and patterns, which were then tested on models observed through a periscope in a viewing theatre. They developed highly-sophisticated disruption patterns that used bold contrasting colours in strong geometric shapes to make it harder for a U-boat to determine a ship's identity, course or speed. As Wilkinson himself explained:

"The primary object of this scheme was not so much to cause the enemy to miss his shot when actually in firing position, but to mislead him, when the ship was first sighted, as to the correct position to take up. Dazzle was a method to produce an effect by paint in such a way that all accepted forms of a ship are broken up by masses of strongly contrasted colour, consequently making it a matter of difficulty for a submarine to decide on the exact course of the vessel to be attacked".¹

Dazzle Section officers were stationed in ports around the UK in order to adapt the disruption patterns to suit individual ships. Judging the correct scale was especially difficult: too large a painted area would reveal the outline of the ship; too small an area and the dazzle scheme would fail to confuse at a distance. To begin with dazzle paint was applied to fifty troopships but soon hundreds of Allied ships were given dazzle treatment. The US Navy set up its own Dazzle Section in conjunction with the Eastman Kodak Company.

"Say! You should see our fleet! It's camouflaged so it looks like a flock of sea-going Easter eggs. It was an English guy who thought of it first, and his name's the first toast now at all the paint-makers' social reunions."³



Above: *RMS Olympic*
Left: *RMS Mauretania*
Paintings reproduced with the kind permission of artist Duncan Hannah

Although the limited data collected by the Admiralty suggested that benefits of dazzle paint were marginal, more extensive American research showed that dazzle painting had been extremely effective: by 1 March 1918 approximately 1,250 US vessels had been camouflaged; of the 96 US ships of all types lost after that date, only 18 were camouflaged; of these 18 ships, only 11 were sunk by torpedo, the other losses being due to collisions or mines.² Statistics aside, crews and troops felt much safer on dazzled ships.

With a few exceptions, dazzle paint schemes were not revived during the Second World War by which time ships faced a much greater threat from the air and radar made it possible to detect ships even when they were invisible to the eye. Merchant shipping was never again as dazzling as during the First World War. ■

¹ Tim Newark, *Camouflage* (Thames & Hudson / Imperial War Museum, 2007)

² David Williams, *Liners in Battledress* (Vanwell, 1989)

³ Jan Gordon R.N.V.R., Extract from unknown American paper, *The Art of Dazzle-Painting* (Land & Water, 12 Dec 1918)

Maritime Refugees: Obligations on the Merchant Navy

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2015 has seen increased reporting of maritime casualties in the Mediterranean, as vessels carrying refugees from North Africa and the Middle East get into difficulties. The problem is not new but the scale of the problem appears to be increasing exponentially, with the burden of search and rescue falling ever increasingly on the merchant navy.

Background

Prior to 2013-4 there were relatively few reported incidents involving merchant vessels deviating to assist migrant vessels in the Mediterranean. Since then and in particular from Christmas 2014 there has been a distinct increase in the number of incidents. One of the first widely reported incidents was that of the "Blue Sky M" which involved the rescue of over 600 migrants from a position off of Corfu in late December 2014.

Subsequently, over 2000 migrants were rescued from 12 separate vessels during the weekend of 14-15 February 2015. More recently, the office of the United Nations High Commissioner for Refugees (the UNHCR) has reported that in the week ending 17 April 2015 some 13,500 migrants were carried across the Mediterranean (of 31,500 this year). Tragically, many hundreds of migrants are feared dead after one vessel capsized on 19 April 2015. The International Organization for Migration (the IOM) puts the figure for arrivals in Italy at 25,703 this year with 1,780 reported deaths (up from 96 last year).

It is not an issue that is limited to the Mediterranean with much of the framework for dealing with such incidents having been developed in light of the attempts of Asian refugees trying to reach Australia (e.g. the *Tampa* in 2001).

The International Legal Framework

The leading convention which addresses the issue of rescue at sea is UNCLOS. Pursuant to Article 98 of UNCLOS, the Master of a merchant vessel has a duty "in so far as he can do so without serious danger to the ship, the crew or the passengers" to "render assistance to any person found at sea in danger of being lost". Similar obligations may be found within the text of the International Convention on Maritime Search and Rescue 1979.

This obligation is replicated under SOLAS Chapter V Regulation 33. Regulation 33 makes clear that a Master is obliged to respond on receipt of "information from any source that persons are in

distress at sea" and is "bound to proceed with all speed to their assistance". It does not matter therefore whether the Master receives or hears a direct order from the coastguard, a naval vessel, the vessel in distress or indeed another member of the merchant navy. In each situation they must respond. It may even be this obligation amounts to a principle of customary international law.

The only circumstances in which the Master can elect not to do so is, if they are "unable" to or in "the special circumstances of the case" they consider it "unreasonable or unnecessary to proceed to their assistance".

It is unclear what might amount to a special circumstance. However a Master should exercise caution before trying to rely on such circumstances and certainly purely commercial reasons are unlikely to be sufficient.

As a matter of English law, the above is afforded the force of law by virtue of The Merchant Shipping (Safety of Navigation) Regulations 2002 (SI 2002 No. 1473) – specifically s.5(2) (as amended). Under Schedule IV paragraph 18, the sanction for breaching this obligation is a fine and/or up to two years imprisonment.

An over burden on Commercial Shipping?

Under Regulation 33 (above) contracting States are obliged to release Masters providing assistance in migrant rescues "with minimum further deviation from the ship's intended voyage". This is echoed by Resolution MSC 167(78), 6.3 which provides that a "ship should not be subject to undue delay, financial burden or other related difficulties" and the coastal state should "relieve the ship as soon as practicable". If followed, this will hopefully mean the burden should not be as great as some might fear.

However, whilst presently vessels are being permitted the opportunity to disembark refugees relatively promptly this has not always been the case, for example the "Salamis" in 2013 was refused permission to enter territorial waters having rescued 102 migrants. A repeat would add weight to concerns that the merchant navy is being overburdened.


The Regulation is also at odds with some of the political statements made by many within the EU prior to the recent upsurge in incidents. For example, Baroness Anelay, stated last year that: "We do not support planned search and rescue operations in the Mediterranean" as the prospects of assistance was a "pull factor ... encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths". The lack of a governmental naval presence makes it almost inevitable that the merchant navy will bear the financial burden and other risks associated with managing the problem.

Should the above political stance prevail, it is likely that commercial shipping will need to continue to go to the

aid of migrant refugees in distress where national authorities have not targeted sufficient resources at this problem.

Summary guidance for Owners and Masters

As noted above, in most situations, the Master of a merchant vessel is under an obligation to assist with migrant rescues at sea. At a practical level, this leaves open the question of how an Owner or Master should meet this obligation. One of the best sources of information available to inform the merchant navy are various publications issued by the International Chamber of Shipping available via www.ics-shipping.org/free-resources/refugee-rescue-crisis.



"Should the ... political stance prevail, it is likely that commercial shipping will need to continue to go to the aid of migrant refugees in distress where national authorities have not targeted sufficient resources at this problem."

This guidance sets out in varying degrees of detail the plans and procedures which should be developed in order to respond in a search and rescue situation, the risks such operations may pose and points to consider when conducting such operations. Perhaps the most useful documents within this material are the Checklists for Owners and Masters within Appendix A and B of "Large Scale Rescue Operations at Sea" www.ics-shipping.org/docs/default-source/refugee-migrant-rescue/large-scale-rescue-operations-at-sea.pdf

Commercial issues that may arise

The migrant issue poses many immediate issues for a shipowner, particularly where States do not offer immediate assistance to relieve the burden on merchant shipping. These include practical, safety, commercial and legal concerns, such as the following:

1. The vessel's certificates which regulate authority to carry passengers/limits on number of people safely permitted onboard may be compromised, although usually there are exemptions for vessels engaged in rescue operations

2. The presence of numerous additional persons onboard may nonetheless call into question the vessel's seaworthiness
3. There is a potential security threat posed to the crew both in terms of physical safety (in the face of overwhelming numbers) but also to the crew's health and other concerns
4. The vessel may have insufficient supplies to cater for the additional people onboard
5. If nearing the end of a voyage, the vessel may have insufficient remaining bunkers to engage in a lengthy rescue operations
6. Delay will impact time sensitive cargoes or even render them dangerous
7. As a minimum, the vessel will almost certainly experience commercially significant delays, or will need to deviate, giving rise to potential disputes under contracts of carriage. For example, disputes may arise as to whether hire is payable for the period during which rescue operations are conducted.

The presence of migrants onboard may further expose an Owner to additional issues, for example immigration issues when arriving at a port of refuge and the duty to care for those rescued until they are disembarked ashore (e.g. to provide medical support, food, water and clothing) – many rescued person may well be suffering from hypothermia and/or dehydration. Potentially, some of the above, for example, insufficient bunkers might amount to a “special circumstance” within the meaning of SOLAS Chapter V Regulation 33, although many will not. This is likely to depend on the precise facts of a given case.

Presently, there is no ready source of reimbursement available to the merchant navy who intervene in line with their obligations in place of the presently limited response from the various EU navies, meaning that potentially disputes such as those above could arise after the event. This should not however detract from the essential life saving work being carried out in line with the SOLAS and UNCLOS obligations. Perhaps one potential solution could be a “Fund” system which responds to reward those who perform this vital service. ■

NB: Port and Deviation expenses solely consequent on attempting to save or saving life at sea, or in landing refugees or other persons rescued at sea, are potentially covered under the Club's Rules as set out in Rule 25 ii g.

“Owner Members should therefore ensure strict compliance with time limit provisions – this case is a clear reminder of the risks of non-compliance. The purpose of these clauses is to enable the parties to finalise accounts swiftly, with any disputes resolved quickly with facts still fresh in the parties' minds.”

The Adventure – Perils of Demurrage Time Bars



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In this recent English High Court decision Owners of *MT Adventure*, found their demurrage claim time barred against Charterers. The decision in *Kassiopi Maritime Co Ltd v Fal Shipping Co Ltd* [2015] EWHC 318 (Comm), is significant for both Owner and Charterer Members of the Club.

The facts

The relevant provisions of the *BPVoy4* charterparty were: *Clause 20.1*

“Charterers shall be discharged and released from all liability in respect of any claim for demurrage... which Owners may have under this Charter unless a claim in writing has been presented to Charterers, together with all supporting documentation substantiating each and every constituent part of the claim, within ninety (90) days of the completion of discharge of the cargo carried hereunder”.

and Clause 19, which so far as relevant provided that:

19.7: No claim by Owners in respect of additional time used in the cargo operations ... shall be considered by Charterers unless it is accompanied by the following supporting documentation;

19.7.1: the Vessel's Pumping Log signed by a senior officer of the Vessel and a Terminal representative showing at hourly intervals the pressure maintained at the Vessel's manifold throughout the cargo operations; and

19.7.2: copies of all NOPS issued, or received, by the Master in connection with cargo operations; and

19.7.3: copies of all other documentation maintained by those on board the Vessel or by the Terminal in connection with the cargo operations.

Owners brought a claim for demurrage in the amount of US\$364,847.78 as a result of delays at both the load port, Sitra, and the discharge port, Port Sudan. Charterers argued that Owners had breached Clauses 19.7 and 20.1 of the Charterparty because they had failed to provide “all supporting documentation” within the 90 day time limit. The matter was then referred to arbitration.

The arbitration decision

The tribunal concluded that Owners' demurrage claim was time barred by virtue of their failures to provide supporting documentation as required under Clauses 19.7 and 20.1. Owners therefore appealed the tribunal's decision.

The High Court Appeal

The most notable elements of the judgment are as follows:

- Owners had asked the court to consider whether this Clause 19.7 was significantly broad to require Owners to provide with their demurrage claim copies of all documents which Owners would be required to disclose in an arbitration reference, such that the disclosure obligation which applies in the normal course of an arbitration reference, in fact arises at the time of submitting the claim within the time required by Clause 20.1. As to whether full “disclosure” was required, the court concluded that the obligation on Owners was not so broad stating: “The obligation of disclosure if likely to go far wider than merely “supporting documentation” and require a search which is more rigorous than that contemplated by a clause such as this...”
- The court was also asked to interpret the obligation to provide “copies of all other documentation maintained by ... the Terminal”. The tribunal concluded, and the Judge did not disagree, that this would only include those documents within Owners' possession and control. The Judge commented on the Clause 19.7 generally that “in my judgment the clause cannot have been intended to impose such a far reaching and potentially unworkable obligation on the owners”.
- The meaning of 19.7.3 was therefore not as far reaching as the tribunal had considered – but it was a sweep up provision focusing on “contemporaneous records kept by the vessel

relating to the cargo operation”, which had not already been covered by Clauses 19.7.1 and 19.7.2. The Judge considered that “the Pumping Log is the most obvious example of such a document but some vessels may keep similar but different records”.

- The Judge considered the case *The Eagle Valencia* [2010] 2 Lloyd’s Rep. 257, in which guidance was given as to the documents which would generally support a demurrage claim: “(1) a summary demurrage report, plus detailed demurrage reports for Freeport and Singapore, (2) notice of readiness, port log, statement of facts, discharging log, timesheet, Master’s letter of protest and pumping log for Singapore”.
- In the case of the *Adventure*, Owners had supported their claim for demurrage with the following documents: an invoice for demurrage, a laytime/demurrage calculation for load port and discharge port, Notices of Readiness for load port and discharge port, Statements of Fact for load port and discharge port, Letters of Protests load port and discharge port, Pumping Records and an Empty Tank Certificate for the discharge port. However, they failed to provide: (1) port logs and timesheets which had been referred to in the Letters of Protest at the load port and (2) an email with a manuscript note from the Master confirming that free pratique had been granted to the vessel over VHF at the discharge port. The latter document was relevant because under the Charterparty the notice of readiness only became effective when free pratique “has been granted or is granted within 6 hours of the Master tendering NOR”.
- The Judge concluded that Clause 20.1 did not only require “essential” supporting documentation to be submitted. The Judge agreed with the tribunal that the port logs, timesheets and email recording that free pratique had been granted were relevant to the claim and therefore failure to provide these put Owners in breach of the requirement to provide “all” supporting documentation. The Judge commented that he considered these documents to be “primary documents containing factual material which should be made available to the Charterers so that they may satisfy themselves that the claim is well founded, consistent with the purpose of the clause” and cited *Tomlinson J in The Abqaiq* [2012] 1 Lloyd’s Rep 18: namely “documents which objectively [the charterers] would or could have appreciated substantiated each and every part of the claim”.

On the basis of this, the Judge held the tribunal had reached the correct decision (albeit he disagreed with some of the reasoning) and concluded that Owners’ claim was indeed time barred. Owners’ appeal was therefore dismissed.

Comment

This decision is a stark reminder to Owner Members of the risks of failing to adequately support their demurrage

claims within the stipulated time limits. In some recent cases, the court has taken a less strict approach:

- In *The Eternity* www.steamshipmutual.com/publications/Articles/Eternity0109.html the court held that if documents were not provided for one part of the claim, this would not necessarily time bar another part of the claim.
- In *The Abqaiq* www.steamshipmutual.com/publications/Articles/Abqaiq0212.htm the court held that although the claim and supporting documents must be presented in time, they need not be presented simultaneously. The court also stated that if certain supporting documents come into the charterers’ possession from a source other than Owners, this is probably sufficient.

However, *The Adventure* follows the stricter approach taken in *The Eagle Valencia* www.steamshipmutual.com/publications/Articles/Eagle0211.htm (where Owners failed to produce a second notice of readiness upon which they ultimately relied).

Owner Members should therefore ensure strict compliance with time limit provisions – this case is a clear reminder of the risks of non-compliance. The purpose of these clauses is to enable the parties to finalise accounts swiftly, with any disputes resolved quickly with facts still fresh in the parties’ minds. Charterers need to be put in possession of factual material which they require to establish whether the claim is or is not well founded. Therefore, these clauses have an important commercial purpose and will be enforced strictly by tribunals and the courts, providing they are clear, even if the result appears severe.

In a case such as this, where the clause requires “all supporting documentation” to be provided, this must include documents supporting both the claim and the quantum. Further, where other parts of the contract specify documents to be provided in support of a claim, Owners should ensure that such documents are included. Owners should therefore take a cautious approach to provision of supporting documents, which will include, at the very least: Notices of readiness (and documents referred to within these); Notices/Letters of protest (and documents referred to within these); Timesheets; Statements of Fact; Loading/discharging Logs; Pumping Logs; Port Logs; Demurrage Reports.

However, the appropriate documents to be submitted will of course depend on the claim being advanced, the relevant contractual provisions, the factual circumstances and the documents in Owners’ possession and control. If there is any doubt, Members should contact the Club to seek guidance on supporting their demurrage claims to ensure that the necessary documentation is submitted before any time bar.

Charterer Members should carefully assess that claims are indeed properly supported in accordance with the contractual requirements. ■

So You Thought the Fuel was “On-Spec”... Think Again!



After receiving bunkers, most shipowners and operators will send a sample to the laboratory or a bunker advisory service for analysis. The tests carried out on these samples are usually against the minimum characteristics, as set out in Tables 1 and 2 of ISO 8217 (typically the 2005, 2010 or 2012 edition), together with testing for a fairly standard range of elements. Usually, these basic tests will reveal that the fuel satisfies ISO 8217 and it is therefore declared ‘on-spec’. On receipt of these basic test results, the fuel is consumed; usually without any problems.

However, occasionally problems are encountered whilst consuming fuel which was found to be ‘on-spec’ following basic testing. The shipowner, operator and, in many cases, the Charterer, are then faced with the task of determining why these problems have occurred, and whether some other quality aspect could have caused the problems. The supplier will likely point to the basic analysis results which suggest that the fuel was entirely satisfactory and ‘fit for purpose’, perhaps asserting it is the vessel operations that have caused the problem (i.e. the purification process on board is flawed; that the fuel was comingled with existing fuels; or, perhaps, that sludge and waste products have been added to the fuel after delivery).



Typically argument then turns to whether the sample collected on bunkering was actually representative of the product supplied. That could lead to further debate as to the laboratory to be used for any referee analysis,

and which samples should be subjected to that referee analysis. The supplier will insist that a Bunker Delivery Note (BDN) sample is analysed, and the shipowner and operator will argue that the samples, as noted on the BDN, were likely not witnessed by a member of ship’s staff and, therefore, the provenance of the BDN samples cannot be confirmed. BDN samples, in the past, were notoriously unreliable and this is why it became important for shipowners to take their own samples. The systems in place for sampling, on both the delivery and receiving side, have improved enormously over the years, when properly carried out, but there are still occasions where the reliability of (even drip) sampling is questionable. For example, drip samples are designed to take a homogeneous sample of the bunker being delivered. If the product is being delivered in a non-homogeneous way, however, then properly taken drip samples cannot highlight this. (ISO 8217 requires a homogeneous delivery.) This was discussed in more detail in the previous Sea Venture article, ‘Bunkering and Evidence’ www.steamshipmutual.com/publications/Articles/Bunkering_collecting_samples0514.htm.

Upper, middle, lower and bottom samples can be taken directly from vessel’s storage tanks on board, provided there is suitable access, and further ISO 8217 analysis can take place on the collected samples. The analysis of vessel’s storage tank samples can sometimes highlight limitations in drip sampling, but may be inconclusive in identifying a specific reason for problems encountered in use. The results may simply confirm whether a ship’s manifold sample or the BDN sample was representative of the product actually delivered to the vessel.

This type of investigation is time consuming and analysis can be costly. It is often the case that the analysis cannot provide a ready and realistic conclusion and indeed, in many cases, it can raise more questions than it answers. The shipowner is left with two options: either the fuel has to be consumed (with the risk of damage to the machinery, ship and crew), or the fuel is simply de-bunkered. Either option could lead to a lengthy, costly legal battle against the supplier or, as is often the case, the Charterer, who was the party that purchased the fuel.

However, many shipowners are now turning to more detailed analysis of fuels to determine whether the fuel contains chemical products or deleterious waste material. These types of ‘contaminants’ should not be in the fuel according to ISO 8217, but are usually not identified by the typically tested properties listed in Tables 1 and 2 of the specification. In fact, one laboratory seems to offer this service routinely, as part of the overall analysis service provided.

This more detailed analysis includes the use of Gas Chromatography and Mass Spectrometry (GCMS) and Fourier Transform Infrared Spectroscopy (FTIR) techniques. GCMS is an instrumental technique, comprising a gas chromatograph (GC) coupled to a mass spectrometer (MS), by which complex mixtures of chemicals may be separated, identified and quantified. FTIR is a less-sensitive technique, used

to obtain an infrared spectrum of the oil mixture, which can highlight the presence of some classes of contaminants. Basically, FTIR can tell you if some forms of contaminant are present, and GCMS can tell you what that contaminant actually is.

GCMS and FTIR are useful in identifying whether a fuel contains chemical products or deleterious waste material. However, the problem is that almost every fuel will contain something that someone will argue 'shouldn't be there' according to ISO 8217. Perhaps the issue, therefore, is to determine the quantities involved and then to establish whether the presence of such material can reasonably be attributed to the problems encountered whilst consuming the fuel. It is one thing to say that a fuel contained dicyclopentadiene (DCPD), dihydro-DCPD, styrene or indene, for example, but it is another thing to attribute damage (say to piston rings or liners) to such materials. There is a research group trying to establish this very project and it is hoped that future editions of ISO 8217 may assist in determining these limits. For the time being, however there is no definitive published literature or experience on this subject; given the enormous diversity of possible 'contaminants', it is, perhaps, unlikely that this will ever be definitive.

Some of the laboratories of the fuel advisory services simply state that a fuel contains 'chemicals' (such as DCPD, styrene or indene for example) and then state that such material should not be present according to ISO 8217. The shipowner will then pass that information on to the charterer who will, in turn, pass this on to the supplier. The supplier will likely adopt the view that his fuel satisfies the basic ISO 8217 characteristics and is, therefore, 'on-spec' dismissing the fact that chemicals may be present, possibly on the basis that they are largely hydrocarbons in any event, (i.e. made up from carbon and hydrogen molecules). The supplier will also say that, historically, such chemicals have always been added to fuels (e.g. DCPD, styrene and indene from ethylene cracker residue) and this is widely accepted.

If the supplier is correct, and historical data may suggest that he is, then it really does come down to the quantities of such chemicals in the fuel. It is one thing for a fuel to contain trace levels of chemicals but it is another for a fuel to contain copious amounts.

ISO 8217:2005(E) states:

"The fuel shall be a homogeneous blends of hydrocarbons derived from petroleum refining. This shall not preclude the incorporation of small amounts of additives intended to improve some aspects of performance".

Chemicals such as DCPD, styrene or indene, are not considered to be 'additives intended to improve some aspects of performance'. However, the words 'small amounts' was rather curiously deleted from ISO 8217:2010(E) and ISO 8217:2012(E). Does this slight, albeit somewhat deliberate deletion, give suppliers carte blanche to include large amounts of additives,

some of which could be considered to act like chemical waste? Typically, additives for fuel oils could include items like combustion improvers, anti-oxidants, flow improvers and sludge dispersants. Sludge dispersants, for example, are designed to simply homogenise dirt in the oil, while vessel's purification systems are designed to remove dirt. Can sludge dispersant additives, therefore, be considered to 'improve performance'? At the moment there is no laboratory test for additives in bunker fuels.

Unlike the 2005 edition of the standard, ISO 8217:2010 (E) (and the 2012 edition) included an Annex B, which served to further address deleterious materials:

'This International Standard precludes the incorporation of deleterious materials as stipulated in Clause 5. Such materials should not be present, mixed or blended in marine fuels.

Determining the harmful level of a material or substance is not straightforward given that:

- Each fuel is a unique, complex blend of hydrocarbon species*
- A wide range of materials from different sources can enter the marine supply chain from the production, handling and transport systems*
- Varying levels of contamination can be present in the fuel due to the use of common equipment or pipelines in refineries, fuel terminals or other supply facilities*
- Various analytical techniques are used to detect these contaminants and specific chemical species with no standardized approach, and*
- In most cases, sufficient data are not available with respect to the effects of any one specific contaminant, or combinations thereof, on the variety of marine machinery systems in service, on personnel or on the environment.*

It is, therefore, not practical to require detailed chemical analysis for each delivery of fuels beyond the requirements listed in this International Standard. Instead, it is required that a refinery, fuel terminal or any other supply facility, including supply barges and truck deliveries, have in place adequate quality assurance and management of change procedures to ensure that the resultant fuel is compliant with the requirements of Clause 5 of this International Standard with regard to the exclusion of deleterious materials'.

It would seem that Annex B was introduced, primarily, as a means of addressing the issue of chemical wastes being identified in the fuel delivered to a vessel. Item c) of Annex B is particularly interesting in that there is acknowledgement that "various analytical techniques

are used to detect these contaminants and specific chemical species with no standardized approach". This summarises the present position with regard to detection of deleterious materials. Individual laboratories of the fuel advisory services have different methodology in detecting and determining deleterious materials by techniques like GCMS and FTIR. As there is no standard methodology, this seems to provide protection to a supplier but the last sentence of Annex B indicates that it is not incumbent on shipowners to have to find deleterious materials by standard methodology, it is incumbent on suppliers to ensure it is not in their delivery in the first place. This is also a difficult position for suppliers, who are usually simple 'blenders' of oils from a variety of sources. In a way, the legislation for disposal of waste by burning at sea is simply



"...whilst chemicals may be present within a fuel, it cannot be presumed that the problems encountered are caused by the chemicals found."

catching up with the legislation for disposal of waste on land. Annex B seems to indicate that suppliers need to be more certain of the quality of their blendstocks.

So, where does this leave the shipowner or charterer who simply ordered a specific grade of fuel and expected that fuel to be 'fit for purpose'? In theory, fuel is purchased in accordance with s.5 of the standard and specifically para 5.2 of ISO 8217:2010(E) which states:

"The fuel shall be a homogeneous blends of hydrocarbons derived from petroleum refining. This shall not preclude the incorporation of additives intended to improve some aspects of performance".

In recent years, fuels have been found with various waste chemicals, and it is no doubt the case that there has been piston ring damage, blocked, seized and damaged fuel pumps and injectors, filter and separator blockages, were chemical waste products were present in the fuel.

However, such problems could also be encountered as a consequence of many other factors such as poor maintenance, co-mingling of fuels, poor separator efficiency, or simply the manner in which the machinery is operated. In other words, whilst chemicals may be present within a fuel, it cannot be presumed that the problems encountered are caused by the chemicals found.

The problem now is that some laboratories are offering to perform GCMS and FTIR analyses routinely alongside the basic ISO 8217 range of tests. If presence of chemical waste is found the shipowner might demand the fuel is de-bunkered, regardless as to whether any of the fuel has been consumed. It is not known, therefore, whether the chemicals would have had any detrimental affect or otherwise. The supplier then adopts the position that unless the fuel was shown to present problems, then there is no evidence that problems would have been experienced. Further, the supplier will produce evidence to show that many vessels were supplied fuel from the same barge/batch at the same time and no problems were encountered. This raises a further issue of whether such generalisations can be made, as not all the vessels supplied will have the same engine systems on board. Although it may seem like a 'defence' for suppliers, the charterer is obliged to provide fuel for the particular vessel that is 'fit for purpose'.

The shipowner can be left in an unfortunate position if there is a finding of waste chemicals or other materials in the fuel. The ISO specification states that bunker fuel should not contain any additive, added substance or chemical waste that "jeopardizes the safety of the ship or adversely affects the performance of the machinery". If the finding of deleterious materials by non-standard methodology is not accepted by all parties as reason to reject the fuel for use, then the shipowners are left in the unpalatable position of having only one certain test available: use the oil and see if it affects vessel's machinery. The risks involved in that are obviously significant. ■

Arresting a Ship to Enforce a Maritime Arbitration Award: *The Alas* Provides a Welcome Clarification

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The right to arrest a ship as security for a maritime claim is an extremely valuable right, which has a long history dating back to the time of King Edward III. There has however been doubt as to whether the right extends so far as to allow for an arrest to obtain security for a pre-existing maritime arbitration award, even if the original claim giving rise to the award is itself one that falls under the admiralty jurisdiction of the court (*The Bumbesti* [2000] QB 559 and *The Chong Bong* [1997] 3 HKC 570). But does this mean that a plaintiff's right to arrest a defendant's ship will be extinguished once an award is issued? Is a plaintiff's right to arrest a defendant's vessel only available pre-award or pre-judgment, but not post-award or post-judgment? These were questions that His Lordship Mr Justice Peter Ng, Judge of the Admiralty List in Hong Kong, had to answer in a recent Hong Kong decision of *The Alas* [2014] 4 HKLRD 160.³

The facts

As to the facts, the plaintiff owners (Owners) had time-chartered their vessel "MT Beth" to the defendant charterers (Charterers) for a period of five years on the terms of a Shelltime 4 Form. Following the notorious freight and commodities markets crash in 2008, Charterers defaulted on their hire payments to Owners. With no prospect of future payment from Charterers, Owners terminated the charterparty and withdrew the "MT Beth" from service. Owners then (represented by Hill Dickinson) promptly commenced LMAA arbitration against Charterers, and caused an *in rem* writ to be issued against Charterers' vessels in Hong Kong (with a view of arresting, so as to obtain security for Owner's claims for unpaid hire). The Hong Kong writ was carefully drafted so as not to refer to any arbitration proceedings in respect of the underlying claim.

Proceedings in the LMAA arbitration then took some three to four years before a final award was published by the tribunal in March 2013. There had in the meantime (i.e. prior to the publication of this award) been no opportunity for Owners to arrest a vessel of Charterers in Hong Kong as security for its claims. It was not until about one year after the final award was published by the tribunal that the defendant's ship, "MV Dewi Umayi", sailed into Hong Kong on 26 April 2014, where she was promptly arrested by Owners.⁴



In the affidavit leading arrest, lawyers for Owners (mindful of the principles stated in the decisions of *The Bumbesti* and *The Chong Bong* and mindful also of duties of full and frank disclosure in ex-parte applications) had made it clear that Owners were not seeking to arrest so as to obtain security for and/or to enforce on the final award published by the tribunal, but were arresting as security for Owner's original claims under the time charter (independent of the award), in the *in rem* court proceedings.

Charterers moved swiftly in applying to set aside the arrest, arguing that once an arbitration award was issued, Owner's original claims under the charterparty are extinguished due to the doctrine of merger, and that therefore Owners were only entitled to sue in personam on the arbitration award. It was further argued on behalf of Charterers that the right of arrest (to obtain security) was only a right available pre-award or pre-judgment, but not after an award or judgment has been issued.

The Honourable Justice Peter Ng and – in October of this year – the Court of Appeal disagreed with the submissions of the Charterers.

The judgment

The Court of First Instance held that Owners were entitled to pursue their original claims in the *in rem* proceedings, even if an arbitration award was already published by the tribunal (so long as, and to the extent, that the arbitral award remains unsatisfied). On Charterers' argument that the right of arrest was only available pre-award or pre-judgment, the court

expressed the view that it would be "extremely odd that the right of security by the arrest of a vessel is available to a plaintiff who merely asserts a claim whereas it is lost when he finally obtains a judgment in the action".

This decision given by the Honourable Justice Peter Ng is a robust and sound one. It cannot be mere fortuity that a maritime plaintiff's right to arrest a vessel is extinguished once a tribunal publishes its' award, especially since a plaintiff has no control over (i) when a tribunal publishes its' award; and (ii) when the defendant's ship will sail into a jurisdiction where the plaintiff may arrest her.

In the latest development following His Lordship's first instance decision in July 2014, Charterers applied successively to both Mr Justice Peter Ng and to the Court of Appeal for leave to appeal. Both appeal applications were decisively dismissed by both His Lordship Mr Justice Peter Ng as well as by the Court of Appeal.

His Lordship Mr Justice Barma, sitting in the Court of Appeal on 22 October 2014, indicated that written grounds will be released for the Court of Appeal's decision in due course. This will be a decision which the international maritime community will be awaiting with much anticipation.

Comment

This decision in *The Alas* provides a welcome clarification of the right to arrest in Hong Kong when arbitration proceedings have been concluded in a

foreign jurisdiction. It also facilitates generally the enforcement of maritime arbitration awards; facts that have already been decided by the Arbitration Tribunal might be accepted by the Hong Kong Court in the later *in rem* proceedings, such that summary judgment may be quickly obtained by the plaintiff in the *in rem* court proceedings (without having to go through a full trial) after an arrest.

Out of an abundance of caution, a practical tip for a plaintiff who has successfully obtained a maritime arbitration award in his favour, is as follows: when drafting the Indorsement of Claim in a writ and in the affidavit leading arrest, a plaintiff ought to refer to the claim as being one based on the original underlying *in rem* cause of action (that falls under the Court's Admiralty jurisdiction), and not a claim that is based on the award issued by the tribunal. ■

³ Reported in Lloyds Law Reporter (11 August 2014), also available online at www.hkliv.hk/eng/hk/cases/hkcfi/2014/1281.html

⁴ Although the vessel arrested is the Dewi Umayi, the decision has become known as *The Alas*, because she was the first of several sister vessels named on the Writ.

Barbetta Rule Overturned



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This article looks at a recent Eleventh Circuit Court of Appeal decision and the departure from the *Barbetta* Rule that applies to passenger claims against shipowners for the medical malpractice of onboard doctors and nurses.

It has routinely been the case, since the Fifth Circuit decision in *Barbetta v S/S Bermuda Star 1988* (*Barbetta*), that cruise lines cannot be held vicariously liable for the medical malpractice of the shipboard medical team. However all this changed on 10 November 2014 when, in the case of *Patricia Franza v RCCL (Franza)*, the Eleventh Circuit Court of Appeal reversed the District Court's order which was to dismiss the plaintiff's allegations of actual and apparent agency against Royal Caribbean for the negligence of its onboard medical providers. The basis of the District Courts' decision at first instance was that *Barbetta* determined that shipowners cannot be held vicariously liable for the negligence of the onboard medical team.

Whilst other circuits, including the Second, Fifth and Ninth have refused to apply vicarious liability to shipowners in the medical context, the Eleventh Circuit departed from this trend. Neither the Supreme Court nor the Eleventh Circuit had ever previously decided whether a passenger may pursue a claim against a shipowner in these circumstances. For this reason the Eleventh Circuit had no precedent to follow and noted that for many years the Supreme Court and all of the Federal Circuits had applied agency rules across many varied maritime cases. Therefore *Franza's* requests to be able to proceed on the basis of actual and apparent agency claims against the shipowner were described by the court as being quite modest by comparison.

In the *Franza* case the court held that the complaint did establish an agency relationship because (i) it was acknowledged that the medical staff acted on the cruise lines behalf and (ii) that these medical personnel accepted the undertaking to do so. In addition to this the medical staff were paid by the Owner and the medical facility was created and owned by the cruise line who marketed it and described it in their advertising as their medical centres. The cruise line also provided medical staff with uniforms with the cruise lines name and logo, and represented to immigration authorities that the medical staff were members of the ship's crew.

The court emphasised that allegations of vicarious liability raised fact bound questions and, if a claimant

could show sufficient evidence of an agency relationship then the claim must be allowed to proceed, and any motion to dismiss should be denied. In *Franza* the court decided that the plaintiff had established that an agency relationship might exist.

The logic behind *Barbetta* has been that a shipowner does not have the skill or expertise to interfere in the patient/doctor relationship and cannot control the actions of the medical team. That is for an employer to be vicariously liable for the acts or omissions of an employee the employer must have the requisite degree of control over the employee's actions before the employer can be responsible – as a so called respondeat superior – for the employees negligence. *Barbetta* held that a shipowner can have no such control over the ship's medical staff.

However, for a number of reasons the Eleventh Circuit disagreed:

- If there was no such control virtually every professional expected to exercise independent judgment would have to be deemed an independent contractor;
- While a shipowner might not have influence over the doctor/patient relationship a shipowner can exert influence through hiring criteria, training, formal practice guidelines, hierarchical supervision structures, and disciplinary measures; and

- While at sea a passenger has little choice but to submit to onboard care.

The decision in *Franza* means that if a claimant can show a basis for their allegations of actual or apparent agency then they may be able to pursue the cruise line directly for damages in relation to allegations of medical malpractice. Factors such as the promotion of medical staff through the cruise lines brochures/internet, direct billing by the cruise line to passenger for medical costs, and whether the medical staff are held out to be members of the crew, and/or wear uniforms with the cruise lines name and logo will be relevant to the existence of any agency relationship between the medical practitioners and cruise line.

The filing of a petition for en banc review of this decision is likely and will be reported in due course. In the meantime cruise operators, subject to the jurisdiction of the Eleventh Circuit, may be vicariously exposed to medical negligence claims unless any such medical personnel onboard are independent contractors and are not held out to be, or cannot be perceived to be, employed as agents of the cruise line. ■

"The court emphasised that allegations of vicarious liability raised fact bound questions..."



Consequences of Late Redelivery



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This recent decision by the Commercial Court in the matter of *Maestro Bulk Ltd v Cosco Bulk Carrier co Ltd, 'The Great Creation'*, involving losses arising from the failure of a time charterer to redeliver a vessel in compliance with the redelivery notice provisions contained in the charterparty, serves as an interesting example of the application of principles relevant to the assessment of damages.

The vessel was chartered on an amended NYPE time charter for a minimum of four months and a maximum of five months, plus 15 days in Charterers' option. The earliest redelivery date was 29 March 2010 and latest 14 May 2010. The relevant clause of the charterparty read as follows: "On redelivery charterer has to tender 20/15/10/7 days approximate and 5/3/2/1 days definite notice."

Delays on a sub-chartered voyage led to the vessel's final voyage taking longer than anticipated, and when it became clear that the vessel would not complete that voyage in time to arrange a further fixture within the charter period, the Charterers on 13 April issued what purported to be an approximate 20 day notice of redelivery. The vessel was then redelivered on 19 April.

Following redelivery the Owners managed to fix the vessel on 21 April, but the best they could achieve was a time charter trip which required a nine day ballast voyage, thereby reducing the effective daily hire rate.

It was accepted by the parties that, on normal principles of English law, the damages for the Charterers' breach in redelivering on 19 April with just six days' notice should be such as to put the Owners back in the position they would have been in, had it not been for the breach. However, there was a disagreement as to the way in which the 'no breach' situation should be assessed.

The Owners argued that it should be assessed by reference to the date on which the 20 day notice should have been given based on the actual redelivery on 19 April – i.e. a period of 20 days commencing on 31 March. Had such notices been given, they would have been able, they argued, to fix the vessel for a more profitable voyage. Their claim was for the lost earnings of this notional voyage.

The Charterers, however, maintained that the 'no breach' situation should be assessed by reference to a 20 day period running from the date on which the

first redelivery notice was issued, on 13 April. On this basis, the Owners' claim should probably be for the difference between the charter rate and what the Owners' would have earned if proper notices had been given and the charter had continued until 1-3 May, with hire payable at that rate, less any hire earned in mitigation.

In arbitration the tribunal held in favour of the Owners, and awarded damages based on a notional lost voyage which could have been carried out had they received contractual notice on 31 March. The Charterers appealed to the High Court under s.69 of the Arbitration Act 1996 on a question of law as follows: "Where a time charter party provides for charterers to give notice of redelivery, what is the correct approach to damages when redelivery takes place with insufficient notice(s)?"

High Court decision

Cooke J. took the view that, since on 31 March there was no intention by the Charterers to redeliver the vessel on 19 April, if the Charterers had on that date issued a 20 day notice of redelivery it would have been neither honest nor reasonable, and would in itself have been a breach or anticipatory breach. "The true nature of the breach did not lie in a failure to give an approximate notice on the 31st March, but in a failure to give that notice as at 13th April".

On the facts as found by the Arbitrators, proper performance of the contract by the Charterers would require them to issue a 20 days' approximate notice on 13 April for redelivery on 1 May, and to keep the vessel on hire for that period.

The loss to the Owners should therefore be regarded as the hire which would have been payable for the period from 19 April to 1 May, the latter being the earliest date at which the 20 day approximate redelivery notice would have expired. This measure of damages best reflected the loss by reference to that period, and which would have been within the contemplation of the parties at the time of fixing the charter.

The Charterers' appeal was upheld, and damages were awarded based on 12 days loss of net hire, a sum which best represented the Owners' loss as a result of the short notice.

It was acknowledged by the Judge that the tribunal, in considering the principles relevant to the assessment of damages, had considered the appropriate tests set out in the authorities, including those relating to remoteness of loss in *The Achilles* [2008] 2 Lloyd's Rep 275 www.steamshipmutual.com/publications/Articles/AchillesHL0908.html and *The Sylvia* [2010] 2 Lloyd's Rep 81 www.steamshipmutual.com/publications/Articles/Sylvia0810.html. However, he concluded that instead of correctly characterising the claim as one analogous to early redelivery under the Charterparty, which was the basis on which damages

"The loss to the Owners should therefore be regarded as the hire which would have been payable for the period from 19 April to 1 May, the latter being the earliest date at which the 20 day approximate redelivery notice would have expired."



should have been assessed, they had characterised the loss as one relating to a notional voyage fixed on the basis of a failure to provide a contractual notice on 21 March, and the tests had therefore been incorrectly applied. ■

Deepwater Horizon Update



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The implications of a Fifth Circuit ruling of March 2013 arising from the *Deepwater Horizon* litigation involving issues of contractual indemnity and additional assured status were discussed in an earlier article www.steamshipmutual.com/publications/Articles/ContractualIndemnity1113.htm

BP America Production Company (BP) had entered a drilling contract with Transocean to employ the *Deepwater Horizon* and various BP companies were named as Additional Assureds under Transocean's policy of insurance. The Fifth Circuit had decided that it was the insurance policy rather than the service contract that determined the extent of the cover available to the additional insured party, and there was nothing to prohibit or limit the cover available to BP under Transocean's insurance policies.

However, in its decision published in February 2015, the Supreme Court of Texas disagreed and held that while BP was an additional insured under Transocean's liability policies this was only to the extent of the liabilities that Transocean assumed via its drilling contract with BP. These did not include the sub-surface well pollution that resulted in the spill from BP's deepwater well.

The Supreme Court had been asked to consider two questions posed by the Fifth Circuit:

1. Whether BP was covered as an additional assured based solely on the language of the insurance policies if, and so long as, the additional insured and indemnity provisions of the drilling contract are 'separate and independent'; and
2. Whether the doctrine of *contra proferentem* requiring words in contracts (in this case the insurance policies) to be construed against the person who put those words forward (in this case the insurer) applies to sophisticated parties.

With regards to the first question, the court ruled (8-1) that:

- i. Transocean issued insurance policies that included language that necessitated consulting the drilling contractor to determine BP's status as an additional assured.
- ii. Under the terms of the drilling contract, BP's status as an additional assured was inextricably intertwined with limitations

on the extent of coverage afforded by the Transocean insurance policy.

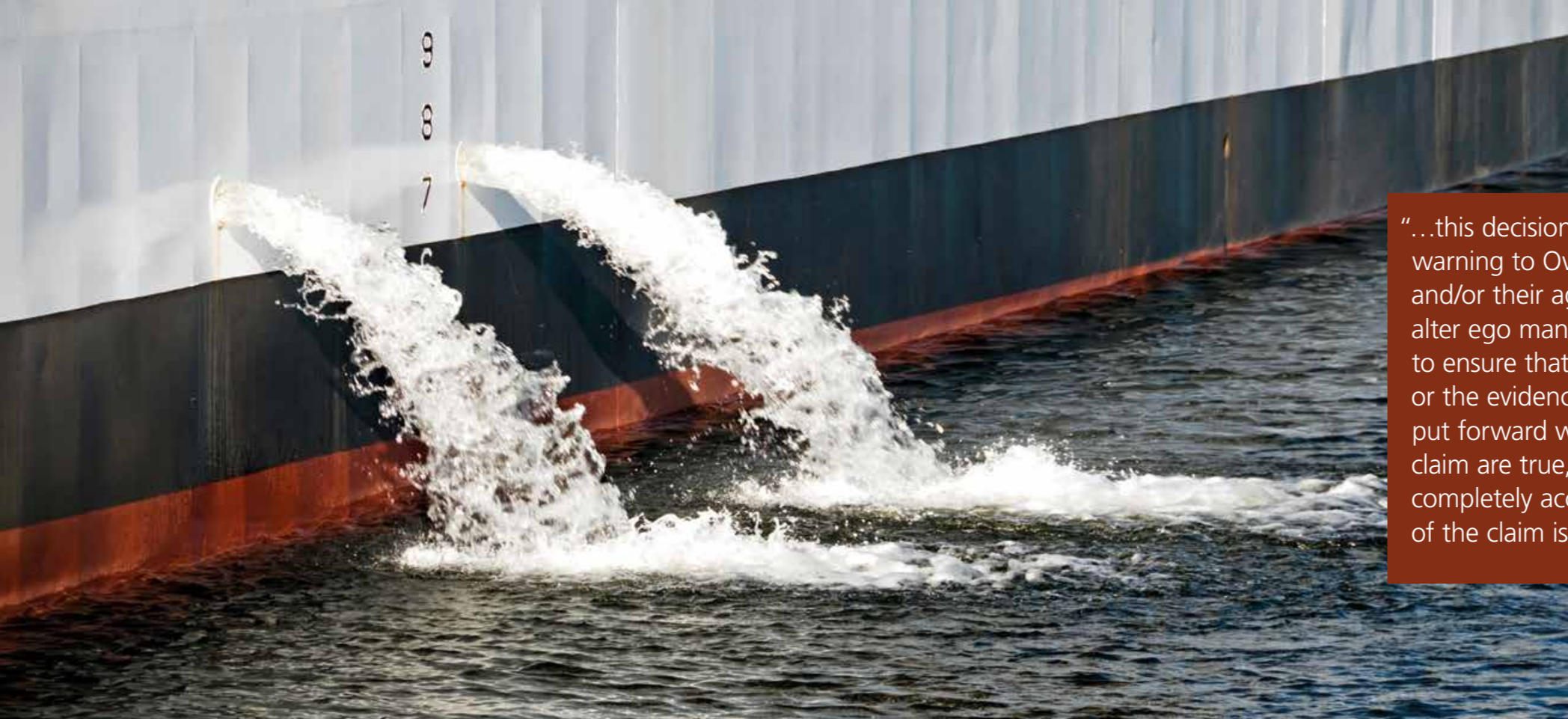
- iii. The only reasonable construction of the additional assured provision was that BP's status as an additional assured is limited to the extent of the liability assumed by Transocean under the drilling contract.
- iv. BP and not Transocean assumed liability for damages resulting from sub-sea pollution claims and BP was not therefore entitled to coverage under Transocean's policies for such liabilities.

The court declined to respond to the second question concerning the interpretation of coverage under the policies in question.

While the decision is a welcome one for those in the marine industry, the case highlights the need for those with an interest in these matters to ensure that the terms upon which they contract and the language within their policies of insurance are carefully reviewed and understood. When Texas law applies, the language of an assured's insurance policy should be carefully considered to determine the extent to which a court may look to the underlying service contract to determine the scope of additional assured coverage.

The Club is available to discuss any concerns the Member may have regarding specific contract terms, the extent of coverage provided by the Club and the interaction between the two. ■





“...this decision acts as a timely warning to Owners or Charterers and/or their agents and/or their alter ego managing companies to ensure that the statements or the evidence that they put forward with an insurance claim are true, and that a completely accurate picture of the claim is presented.”

Judgment on Fraudulent Device – Beware the Insured

BENTLEYS Sarah Allan

In *Versloot Dredging v HDI Gerling* [2014] EWCA Civ 1349 the Court of Appeal (Christopher Clarke - who gave the leading judgment – Vos, L.J., Sir Timothy Lloyd) has dismissed the appeal of an insured whose legitimate claim was held forfeit, as it was proven that the insured's general manager had made a fraudulent statement in support of the claim. This decision clarifies an area of uncertainty in English law.

The claimants were the Owners of a dredging vessel insured under a marine policy. The vessel took on water, the source of which was not located for some time, causing the engine room to flood. The Owners brought a substantial claim including the cost to repair the engine.

At first instance, although Popplewell, J. decided the claim was a good claim as the loss was caused by an insured peril of the sea, namely the fortuitous entry of seawater caused by crew negligence; Popplewell, J. also found that the general manager of the management company had made false claims.

In a letter responding to initial enquiries posed by the underwriters' solicitors during the investigative stage, the general manager stated that: (i) the bilge alarm had gone off at about noon on 28 January 2010; (ii) it had been ignored because its sounding was attributed to the rolling of the vessel in heavy weather; and (iii)

he had been told both of these things by the Master and the crew. Not only did the evidence disclosed by the Owners cast doubt on this statement, but Popplewell, J. considered that an alleged conversation between the general manager and the master was an invention.

He concluded that the statement was an untruth told recklessly and the letter was a fraudulent device. Popplewell, J. felt bound to follow the Court of Appeal's decision on *The Aegeon* [2002] 2 Lloyd's Rep. 42 (see page 27) and consequently the whole claim was forfeited. However, he conceded that he made his decision regrettably because “*In a scale of culpability which may attach to fraudulent conduct relating to the making of claims, this was at the low end*”. Nevertheless he was bound by the materiality test in *Agapitos V Agnew* [2003] QB 556 (i.e. a “not insignificant improvement”) where an insured gives a false statement to improve (not insignificantly) the facts of a genuine claim.

Leave to appeal was granted.

It is well understood that as a matter of English law, and often by express terms in insurance contracts, that fraudulent claims, i.e. deliberately self-inflicted or pretended losses, or claims which are knowingly or recklessly exaggerated, are forfeited in their entirety including both the fraudulent part of the claim and the good part.

The question considered here was whether a fraudulent “device”, being a statement which was known by the insured to be untrue or which was made recklessly, not caring whether it was true or false, in support of a claim honestly believed by him to be good both as to liability and amount, would also result in forfeiture of the whole claim.

The Court of Appeal's decision on *The Aegeon* provides guidance on this concept. In his judgment in that case, Mance, L.J. had suggested that a fraudulent device was to be treated as a sub-species of fraudulent claims, attracting the same sanction, subject to three provisos: -

1. The device must be directly related to the claim as opposed to a dispute with a third party.
2. The device must have been intended by the insured to promote his prospect of success.
3. To yield a not insignificant improvement in the insured's prospects – whether they be prospects of obtaining a settlement, a better settlement, or of winning at trial (referred to as the “*limited objective element*”).

However, this part of Mance, L.J.'s judgment was not necessary for the decision in that case, as the fraudulent device had arisen in the context of the claimants' statement of case and not prior to the commencement of legal proceedings. A key issue, therefore, was whether the comments of Mance, L.J. in the *Aegeon* correctly reflected the law.

In *Versloot*, the Owners maintained that the consequence of forfeiture was a disproportionately harsh sanction. They also submitted that the general manager's statement, i.e. that the crew had given that account, did not in any event satisfy the materiality test; it did not directly relate to the claim, and it would not satisfy the limited objective element.

The Court of Appeal had little difficulty in coming to the conclusion that Popplewell, J. was correct to find

that the letter was a fraudulent device. Clarke, L.J. also decided there had been no error in the application of the materiality test where Popplewell, J. found on the facts that “*The false statement was directly related to the claim and intended to promote the claim*”. The Court of Appeal affirmed the decision in *The Aegeon*, and on the grounds of public policy confirmed that there was no proportionality requirement. Clarke, L.J. said, “*On the contrary the drastic effect of the forfeiture rule is what gives its deterrent effect and its justification rests on that basis*”. On the premise that the sanction was proportional, the Court of Appeal also found that the decision did not fall foul of the Human Rights Act 1998.

What are the consequences of this decision?

This is a decision that will be welcomed by insurers. However, for the benefit of the insured, it was emphasised, “*The rule is only applicable in the case of fraud, from which no insured should have any difficulty in abstaining. The careless or forgetful insured is not affected, nor is the insured who tells some irrelevant lie or whose lie is not told in order to induce payment*” (Clarke, L.J.).

The above said, this decision acts as a timely warning to Owners or Charterers and/or their agents and/or their alter ego managing companies to ensure that the statements or the evidence that they put forward with an insurance claim are true, and that a completely accurate picture of the claim is presented. This decision proves it will not avail an insured to say, as was tried here, that the statement in the letter was simply an attempt by the general manager to explain what had happened i.e. that the alarm must have sounded. Indeed, to the contrary, it was considered that a factual account supported by the crew's recollection would be markedly more significant than one based on a theory and not so supported.

A final and important point is that once a fraudulent device has been used in support of a claim, the forfeiture sanction bites, even if at a later stage the insured seeks to correct his wrongdoing or wishes to resile from that position.

The Insurance Act 2015 received Royal Assent on 12 February 2015, introducing the most significant changes to English insurance contract law since the Marine Insurance Act 1906. This legislation will come into force in August 2016. The Insurance Act 2015 provides that an insurer is not liable to pay a fraudulent claim, but the concept of a fraudulent claim is deliberately not defined. The explanatory note to the Insurance Bill before it received Royal Assent shows the legislative intention to include fraudulent devices: “*if a claim is tainted by fraud, the policyholder forfeits the whole claim.*” This position should, therefore, remain good law when the Insurance Act 2015 comes into force. ■

“Friendly Discussion” Clauses – Giving ADR Clauses a New Perspective



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“Arbitration can be expensive and time consuming. It is far better if it can be avoided by friendly discussions to resolve a claim”.

Last year the English Commercial Court delivered an interesting decision enforcing a dispute resolution clause that required *friendly discussion* as a condition precedent to commencing arbitrations. This appears to be contrary to previous decisions where the English courts have taken the view that an “agreement to agree” or “agreement to negotiate” or “to settle disputes amicably” is unenforceable because they lack certainty and are too difficult to police.

Given the fact that both arbitration and court proceedings are becoming increasingly expensive, and with courts encouraging parties to settle their disputes by alternative resolution means, does the decision in *Emirates Trading Agency LLC (“ETA”) v Prime Mineral Exports Private Ltd (“PMEPL”)* [2014] EWHC 2014 (Comm) signal a change in approach to the enforceability of “agreements to agree” (or similar type of agreements)?

Background facts

ETA had entered into a long term contract with PMEPL for the purchase of iron ore. During the first year of shipments ETA failed to lift all of iron ore which they had been expected to ship with the result that PMEPL claimed damages of US\$1.5 million. Nothing was shipped in the second year and PMEPL terminated the contract claiming US\$45.5 million in damages and stated that if their claim was not paid within 14 days they reserved the right to start arbitration in accordance with Clause 11.2 of the contract without further notice. Clause 11 of contract read as follows:

11. Dispute Resolution and Arbitration

11.1 *“In case of any dispute or claim arising out of or in connection with or under this LTCthe Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consultation to resolve a dispute or a claim. If no solution can be arrived at ...for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration.”*

11.2 *“All disputes arising out of or in connection with this LTC shall be finally resolved by arbitration in accordance with the Rules of Arbitration of International Chamber of Commerce. The place of arbitration shall be London (UK). The arbitration shall be conducted in the English language.”*

There were several meetings between the parties after the claim for US\$1.5 million was served as well as after the contract was terminated prior to PMEPL starting arbitration.

Arbitration

ETA argued that Clause 11.1 was a condition precedent to be satisfied before the arbitrators would have jurisdiction to hear and determine the claim and that where such condition precedent was not satisfied the tribunal did not have jurisdiction. The condition precedent was “a requirement to engage in time limited negotiations” and that requirement was not satisfied because there had not been “a continuous period of four weeks of discussions to resolve the case”.

PMEPL on the other hand argued the suggested condition precedent was unenforceable because it was a mere agreement to negotiate and if it was enforceable it had been satisfied and, therefore, the arbitrators had jurisdiction.

The arbitrators found that the clause was not an enforceable obligation requiring the parties to engage in *friendly discussions* but that, even if it was, that obligation had been complied with by virtue of the parties’ discussions. Accordingly the arbitrators had jurisdiction.

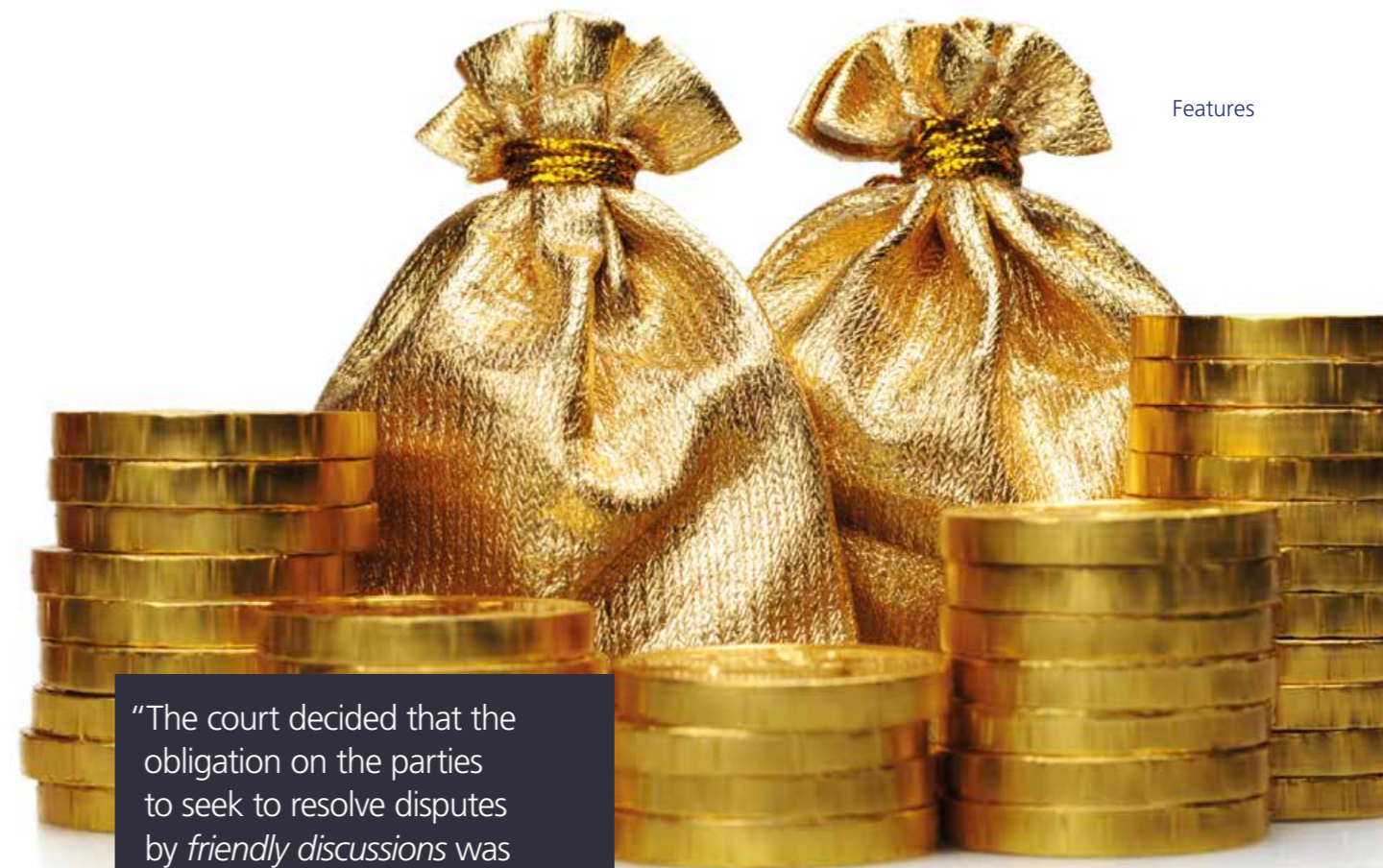
ETA filed an application seeking an order from the English High Court that the arbitrators lacked jurisdiction to hear the dispute due to PMEPL’s alleged failure to comply with s11.1 of the contract.

High Court Decision

The court decided that the obligation on the parties to seek to resolve disputes by *friendly discussions* was an enforceable condition precedent to arbitration on which the facts had been satisfied.

In reaching this view Teare J said *“where commercial parties have agreed a dispute resolution clause which purports to prevent them from launching into an expensive arbitration without first seeking to resolve their dispute by friendly discussions the courts should seek to give effect to the parties’ bargain. Moreover, there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation.”*

And interestingly that an *“obligation to seek to resolve disputes by friendly discussions must import an obligation to seek to do so in good faith”*, where *“good faith connotes an honest and genuine approach to settling a dispute as Alsopp P said in United Group Rail Services v Rail Corporation New South Wales.*



“The court decided that the obligation on the parties to seek to resolve disputes by friendly discussions was an enforceable condition precedent to arbitration...”

In reaching his decision Teare J. was able to distinguish a House of Lord’s decision in *Walford v Miles* [1992] 2AC 128 where it was decided that “agreements to agree” (or similar type of agreements) are unenforceable as they generally lack any objective certainty. Instead the court was persuaded by case law from other jurisdictions, in particular the Australian case of *United Group Rail v Rail Corporation New South Wales* [2009] NSWCA 117, which held that good faith agreements to negotiate (as distinct from to agree) should be given the enforceability which they deserve, and concluded that Clause 11.1 was not incomplete or uncertain and that *“...an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty”*.

As such the clause was enforceable and provided both for *friendly discussions* to resolve disputes and a period of time within which to do so before which arbitration could be started. Those discussions could last for four weeks or less but arbitration could not be before that period of four continuous weeks had elapsed.

Comment

Subsequent to the decision in *ETA v PMEPL* another *friendly discussion* provision has made its way to the court; *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited*². The dispute resolution provision stated that the parties were to

seek to resolve any dispute by *friendly discussions* failing which the arbitration clause could be invoked (the dispute resolution provisions were similar in both cases). Although in this case Popplewell J decided the jurisdictional issue – that is whether or not the *friendly discussions* requirement was an enforceable condition precedent to the tribunal’s jurisdiction – had been disposed of in the partial award, which was final and binding on the parties, and therefore that there was no need for him to comment, he did provide some interesting points as to what discussions might fall under the *friendly discussion* provision. For example discussions that sought to resolve a dispute or claim prior to the claimant putting forward a quantified claim should be sufficient and these did not need to refer to legal rights or the parties’ obligations.

Although the attitude of the courts to these types of clauses may have changed, and a commercial view of what amounts to *friendly discussions* may be taken if these clauses are condition precedents to arbitration, it remains to be seen whether the *ETA v PMEPL* case will be followed. Accordingly contracting parties who wish to agree a contractual requirement that seeks to conclude disputes prior to arbitration or court proceedings should consider carefully and define the process through which this is to be achieved in clear and unambiguous language. Ultimately, whether such an agreement will be enforceable will be a matter of construction but if there is an agreement to negotiate and that it clearly defines the discussion process and time period in which negotiations should be conducted, such a clause may now be enforceable. ■

¹ [2014] EWHC 2014 (Comm) Teare J

² 2015 EWHC 1452 (Comm), Popplewell J

A Year of Performance Claims – a reminder to Owners to check their performance warranties

ARBIS SUTHERLAND Carlo Sammarco

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Performance issues are a consistent presence in the relationship between an Owner and Charterer. Performance (speed/consumption) claims remain a common complaint from Charterers and a common source of deductions from hire. The frequency of such claims over the last five-six years (since the crash in hire rates in early 2009) is more often than not attributed to the increase in bunker prices as well as technological advances in monitoring vessels adopted by Charterers. That said with hire rates not increasing dramatically and the current drop in bunker prices a drop in performance claims might have been anticipated. However, this does not seem to the case, with performance remaining a real issue on both a small and large scale. Perhaps what has changed is the cause of such claims with e.g. hull fouling being a commonly cited cause for both reduced speed and over-consumption.

Unfortunately, performance claims do not often appear in English case reports with the majority of these claims being settled at an early stage or resolved in arbitration. Arbitrations are sometimes reported but they will be a short summary of the award and are unlikely to give an insight into the reasoning of the tribunal. However, they do provide some assistance in ascertaining the direction that arbitral tribunals are taking with performance disputes.

2014 saw three reported decisions in London arbitration: LMLN 1/14 www.i-law.com/ilaw/doc/view.htm?id=332490 (27 Jan 14); LMLN 12/14 www.i-law.com/ilaw/doc/view.htm?id=337264 (29 May 14); and LMLN 18/14 www.i-law.com/ilaw/doc/view.htm?id=347513 (16 October 14). The first two decisions clarify already established principles regarding the operation of a performance warranty: the timing of the warranty and the criteria required to satisfy the warranty as to good weather. The latest decision – LMLN 18/14 www.i-law.com/ilaw/doc/view.htm?id=347513 – instead looks at the effect that hull fouling has on performance and emphasises the importance of ensuring the accuracy of a vessel's

performance figures whenever an Owner and /or Disponent Owner enters into a new charter. This is perhaps the most significant of the three decisions with repercussions also as to how one looks at off-hire claims relating to performance.

Looking at each decision briefly:

LMLN 1/14 www.i-law.com/ilaw/doc/view.htm?id=332490 (27 Jan 14)

A new building had recently entered into service and was chartered for one short time charter trip on an amended NYPE (1946) form. Lines 9-10 were unamended with details as to the vessel's performance being set out in the riders at Clause 29. Clause 29 contained Owners' performance warrant. Charterers alleged a breach of this warranty following over consumption in-port at four different ports during the charter.

There was no argument as to the existence of the warranty only as to whether it was a continuing warranty and at what point would Owners be considered in breach. Owners argued that in accordance with established principles (set out in *The Apollonius* [1978] 1 LLR 53 www.i-law.com/ilaw/doc/view.htm?id=147670) the warranty in Clause 29 applied - in the absence of an express stipulation that the warranty is to apply throughout the duration of the charter – no later than the time of delivery of the vessel under the charter. The Charterers, however, said that the ongoing maintenance provisions in Clause 1 (as amended) applying to *"the service and at all times during the currency of this Charter"* implied a continuing warranty as to performance.

The tribunal agreed with the Owners that an express provision was required to impose a continuing warranty as to performance and that, in the absence of such, the warranty applied only at the time of delivery into the charter service. However, Owners were nevertheless found to be in breach of the warranty in that *"in a relatively short time charter trip"*, the vessel's performance of the service for the duration of the charter (during which she had over consumed) *"might be considered good evidence of its capability at the time of delivery"*.

The charter lasted approximately 14 days. There is, however, no indication from the tribunal at which point a "time charter trip" stops being "short" nor indeed whether it makes a difference at what point the measurement of performance occurs. Each case will turn on its own facts but there will still be some debate as to whether there is a breach – at the time of delivery – if the measurement of performance (e.g. by reference to "good weather days") can occur only in the last couple of days of, say, a three week voyage. It is not clear whether such evidence at this point of the charter will be sufficient to establish a breach as "at delivery".



LMLN 12/14 www.i-law.com/ilaw/doc/view.htm?id=337264 (29 May 14)

This decision looks at the nature of the performance warranty itself and the preferences that a tribunal will show as to how a breach and subsequent loss is assessed.

This time charter was on an amended NYPE (1993) form. The standard performance warranty found in lines 19/20 was deleted. However, there were express performance provisions contained in the riders to the charter at Clauses 63 (description), 100 (Speed consumption) and 113 (Ocean Routes clause). Notably the vessel's description and the warranty provisions made no specific reference to the warranty applying in "good weather conditions" other than to the deleted line 20. The Charterers argued therefore that the performance warranty was absolute and was to apply in *"all weather conditions"*.

Owners argued that the repeated references to and definition of "good weather conditions" in Clauses 100 and 113 were enough to indicate that performance was subject to such conditions. Further, that no commercial owner would agree to the warranty applying in *"all weather conditions"*.

The tribunal preferred Owners' submissions stipulating that, the repeated reference/definition of "good weather conditions" was a *"strong indication that, in accordance with general practice"*, the vessel's performance was only to be measured in such conditions; and that if it was intended that the warranty was to apply in all weather conditions then *"stronger wording would be needed in the charterparty"*. One could argue therefore that the default position is simply that performance will be measured in good weather. However, in the absence of a good weather definition it is not clear whether a tribunal will imply the standard criteria (i.e. BF 4 & DSS 3 etc.) or impose an absolute warranty without any "stronger" or additional wording. This is an unlikely scenario but it does leave open to debate as to what wording (and in what circumstances) will be enough to impose an absolute warranty on an Owner.

LMLN 18/14 www.i-law.com/ilaw/doc/view.htm?id=347513 (16 October 14)

This final decision highlights the importance of reviewing performance warranties especially where external factors affect the vessel's performance during her service; in this matter specifically hull fouling – a common influence on performance.

Owners' vessel was chartered to the same Charterers for two time charter trips. The vessel was fixed under two separate charters (on identical terms based on an amended NYPE (1946) form), the second being in direct continuation of the first.

The vessel was delivered in Shanghai under the first charter proceeding thereafter in ballast to Morowali, Indonesia, to load a cargo of nickel ore. Loading took some 48 days during which time the vessel's hull, propeller and rudder became fouled. Consequently the voyage to the discharge port in China showed not only reduced speed but also overconsumption.

Upon completion of discharge the vessel was redelivered under the first charter and delivered under the second charter. However, no underwater inspection could be carried out nor the hull cleaned prior to redelivery under the second charter. Predictably, the vessel also underperformed/overconsumed on the voyage under the second charter. Charterers, accordingly, claimed damages in respect of a breach by Owners of their performance warranty under both charters.

The tribunal found that Charterers' claim under the first charter failed. The charter contained an express clause (Clause 128(1)) providing that where a prolonged stay at a port for more than 28 days results in bottom fouling Owners would not be responsible for a subsequent reduction in the vessel's speed or increase in consumption. Further, the vessel performed as per warranty on the ballast leg after delivery in Shanghai.

The performance claim under the second charter was, however, different. Owners argued that as the second charter was taken in direct continuation of the first, the Charterers did not allow the hull to be cleaned following the long stay at Morowali and as such were "estopped from claiming under performance under the second voyage". The tribunal rejected this argument simply on the basis that Owners were aware of the likelihood of hull fouling when they delivered the vessel under the second charter (having protested to Charterers prior to delivery), yet Owners fixed the vessel with identical performance warranties to the first charter running the risk that the hull fouling may make them in breach of such warranties. Although the tribunal indicated that neither party had turned its mind to the effect that the hull fouling may have had on the performance of the vessel, it appears that the burden was on the Owners to take steps to revise its performance warranties in anticipation of such an issue arising.

As mentioned above, the restrictive nature of reports on arbitration means that it remains unclear what arguments may have been put to the tribunal in relation to the claims. Notably, the sums involved in both this case and LMLN 1/14 www.i-law.com/ilaw/doc/view.htm?id=332490 fall within the usual threshold for the LMAA Small Claims Procedure (SCP) and therefore, if it applied, the restrictions of the SCP (including the lack of a right to appeal) may mean that certain arguments may not have been investigated or argued in great detail. The decision in this case should be looked at with this mind.

The claims in this case are presented as ones for damages flowing from Owners' breach of their

performance warranty. The question arises whether Charterers could, in the alternative or in principal, have argued that the vessel was off hire under Clause 15 of the standard NYPE form, in that delivery of the vessel with her hull fouled was a "defect in hull" for the purposes of that clause. Staughton, J.'s judgment in *The Ioanna* [1985] 2 LLR 164 www.i-law.com/ilaw/doc/view.htm?id=148854 would suggest that as the vessel was delivered with her hull fouled the vessel would likely have been off hire for any time lost resulting from any reduction in speed and Owners liable for any additional bunkers consumed. Presentation of the claim as one for off hire would not here have made much difference to the ultimate liability for the vessel's performance but there may be other circumstances where an off-hire claim may be larger than one in damages. An owner in the latter scenario may be able to set off any savings in bunkers from Charterers' damages claim for under-performance whereas for off-hire claims under Clause 15 any bunker savings can only be set off between the types of bunkers (i.e. IFO and MDO) and cannot be used to reduce the off-hire claim.

In short, irrespective of how the claim is presented – in damages or as off-hire – this decision is a timely reminder to Owners that when a vessel is delivered under a charter, even with the same Charterers, the obligation is on Owners to ensure that the vessel is in a condition to meet her performance warranties. Hull fouling is a common issue yet Owners often do little, when they have the opportunity to do so, to minimise their exposure to performance claims by revising the vessel's performance capabilities. ■



April 2015 saw the launch of the Steamship Mutual newly developed Extranet. Registrations are welcomed from the Club's Members and broking community. To register please visit our website and complete the registration form.

www.steamshipmutual.com/Extranet/extranet-registration.htm



"...the court confirmed the right of a carrier to exercise a contractual lien over cargo for non-payment of freight and other charges and also the ability of carriers to secure their freight, costs, and expenses against cargo..."

Contractual and Common Law Liens in Australia

HWL EBSWORTH
LAWYERS Glenn O'Brien
Laura Kunde

The Federal Court of Australia recently considered the issue of contractual liens over freight. It is a widely held view that in the event of non-payment of freight and other charges due to them, carriers have the right to exercise a lien over cargo either as a matter of contract or in limited circumstances at common law.

In its decision, the court confirmed the right of a carrier to exercise a contractual lien over cargo for non-payment of freight and other charges and also the ability of carriers to secure their freight, costs, and expenses against cargo notwithstanding a third party demand for delivery on the basis of an asserted right to ownership.

Existence and Effectiveness

The existence of a lien entitles the carrier to retain possession of particular goods until the debts associated with those goods have been paid. The lien exercisable by the carrier is of a specific nature only and is distinctive to a general lien which would enable the carrier to retain possession of all goods until debts are paid. To prevent a carrier from exercising a lien at loading or mid-journey, a lien will generally only be valid once the carriage of goods is complete, that is, once the cargo has arrived at the discharging port named in the bill of lading.

The effectiveness of a lien on cargo will depend on how it arises. In the absence of any express agreement between the parties, the lien will take on the form of a common law possessory lien and may only be enforced against the cost of the freight. Common law

liens in this context are often misunderstood and generally have limited application. Unless the carrier is a common carrier a common law lien is unlikely to give rise to a right to retain possession of goods in most circumstances.

Where the carriage is pursuant to contract, usually evidenced by a bill of lading, the carrier has the ability to broaden the scope of possession and recovery to include costs such as cranes, and storage fees within a contractual term of the contract. This is to account for any costs the carrier may incur as a result of keeping the cargo safely in its possession as the lien will ordinarily cease to exist if and when the carrier loses possession of the goods.

Carriage performed pursuant to contract also allows the carrier to include provisions for a lien on cargo for demurrage. It should be noted that in order for a carrier to successfully make out such a claim, the carrier must specify who is legally obligated to pay the demurrage. Simply stating the rate of demurrage payable will not be sufficient to allow recovery of these costs against a third party on assertion of a lien.

The advantage of a properly drafted contractual lien is that it allows the carrier to retain possession of the goods not just against the contracting parties but as against third parties. It may also extend its potential recovery beyond that of the common law which means that in addition to recovery of unpaid freight, a carrier may include provisions allowing them to sell the cargo for a sum which meets the outstanding freight and charges due to them.

Enforceability

At common law, the position has long been that a carrier is able to maintain a lien against the rightful owner of the goods, regardless of whether or not the owner arranged delivery of the goods or delivered the goods to the carrier. The question of who a lien is enforceable against under contract depends largely on

the way in which terms and conditions of carriage are constructed. In the recent matter of *US Shipping Limited v Leisure Freight & Import Pty Ltd (In Liquidation) & Anor* 2015 FCA 413 the Federal Court of Australia highlighted the fundamental importance of ensuring appropriate terms and conditions are in place to deal with non-payment of freight.

The cargo was a 1989 Sea Ray 400 Flybridge vessel (the Sea Ray 400) purchased by or for the second respondent from a vendor in the United States. The second respondent arranged freight of the vessel through the first respondent, Leisure Freight & Import Pty Ltd (in liquidation) (LFAI) who in turn contracted with the applicant/carrier for the transport of fourteen different pleasure craft (including the Sea Ray 400) from the USA to Australia.

The agreement between the applicant and the first respondent consisted of a Conline booking note for deck space (with terms) and a subsequent bill of lading. The terms of the booking note included that freight was payable within five banking days after the completion of loading and provided that a cargo lien was to apply if freight was not paid.

The terms and conditions of the bill of lading further specified that the carrier shall have a right to sell the goods (being the Sea Ray 400) to satisfy any outstanding sums payable to the carrier.

LFAI failed to make the payments due to the applicant and on arrival in Australia the Sea Ray 400 was discharged at the Port of Brisbane into the possession of the applicant. The second respondent was notified that a lien was being exercised over the cargo and requested payment of the amounts due for freight, crange and various other discharge expenses in order for the Sea Ray 400 to be released into his possession.

The second respondent alleged that due to an exchange of e-mails between US Shipping and LFAI amending certain terms on the booking note that the terms and conditions of carriage had not been accepted. The second respondent also alleged that as no contractual relationship existed between the applicant and the second respondent, the applicant was not able to enforce the lien over the vessel to defeat a claim of ownership.

The court dismissed both claims stating that “[O]bviosly enough, US Shipping was not in the business of carrying cargo to Australia under a contract with Leisure without being paid for the costs of carriage and the fees, costs and charges associated with that activity”.

It was found that a contractual lien existed between the applicant and the first respondent which entitles the applicant to assert dominion over the Sea Ray 400 against both the first and second respondents. Notwithstanding the second respondent asserted he was unaware that LFAI had entered into a contractual



relationship with US Shipping the court said “[T]here can be no doubt that [the second respondent] understood and agitated for arrangements to be made by Leisure with US Shipping for the carriage of the Sea Ray 400 to Australia. [The second respondent] must be taken as a layperson to have understood that Leisure and US Shipping would enter into contractual arrangements for that purpose according to the terms and conditions which would be struck by those participants in the ordinary course of their dealings within the shipping freight industry”.

Most lien cases turn on the facts and the wording of the particular clause. This case however highlights the need for careful drafting of lien clauses in bills of lading so as to ensure they extend to the likely costs incurred in maintaining the lien and the cargo as well as ensuring that, as a matter of contract, the terms are incorporated so as to bind the parties. ■

Yacht Liability Cover



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The Club’s Yacht Facility cover has recently been enhanced and now has dedicated Yacht Liability Terms and Conditions. These have replaced the Club’s Rules as the governing terms and renewing yachts will be subject to these conditions which are more relevant to the yacht industry. The Managers’ have also published a brochure that explains the Club’s Yacht Liability Cover. This brochure is available in English, French, Spanish and Italian from the Club’s website www.steamshipmutual.com/underwriting/yacht-facility.htm.

A dedicated Yacht Team has been formed in order to offer the best service possible to the Club’s Yacht Owner Members. The yacht team is comprised:

- Hugo Jacquot joined Steamship Mutual in 2014 and is responsible for the management and underwriting of the yacht portfolio worldwide. Hugo started in the yachting industry in 2009, obtained an Insurance degree from the French National School of Insurance, and speaks fluent French and Spanish.

- Chris Durrant with more than 25 years of experience in underwriting acquired at Steamship Mutual has responsibility for underwriting the yacht portfolio alongside Hugo.
- Paul Brewer joined Steamship Mutual in 2003 and as well as being the Manager of the Yacht Claims team is responsible for service and claims management for Members in Florida and the US West Coast. Paul is a member of the Sea Venture editorial team, contributes articles to the USA Cruise Line International Association and has spoken at their seminars.
- Danielle Southey joined Steamship Mutual in June 2014. She is a qualified solicitor and handles both FD&D and P&I claims. Danielle is a member of the Royal Ocean Racing Club. She has competed in a number of international regattas.
- Kristina Larsson joined Steamship Mutual in November 2011 and holds a Swedish law degree and a Master of Laws in Maritime Law (LL.M) from the University of Lund, Sweden. Since joining the Club she has dealt with a variety of P&I claims.

The Yacht Team is supported by Gary Field (Head of Americas Underwriting), Rupert Harris (Head of Reinsurance and European Underwriting) and Mark Underhill (Head of European Claims). ■



Valle De Cordoba – Court of Appeal Decision



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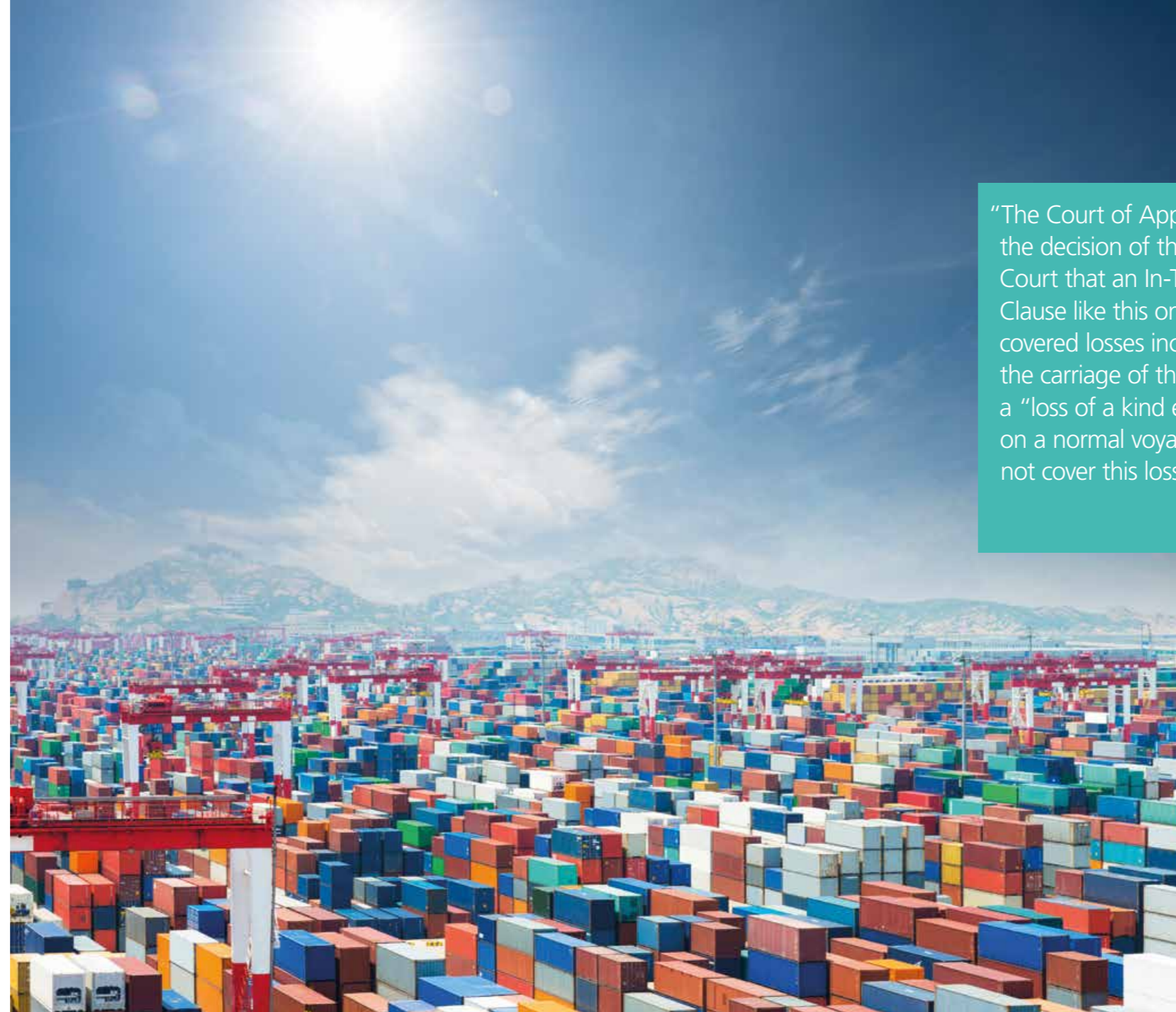
The Court of Appeal has now confirmed the High Court decision in *Trafigura Beheer BV v Navigazioni Montanari SpA* (the “Valle Di Cordoba”) (our article on the High Court decision is at www.steamshipmutual.com/publications/Articles/lossincidentalto carriage0714.htm).

5,291 tonnes of a premium motor spirit cargo were stolen from the *Valle Di Cordoba* by pirates operating off the West African coast. The Charterers, Trafigura, claimed that the shipowners were liable for the loss, under the terms of an In-Transit Loss Clause incorporated into the charterparty, which stated that:

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

The Court of Appeal confirmed the decision of the High Court that an In-Transit Loss Clause like this one only covered losses incidental to the carriage of the cargo, or a “loss of a kind encountered on a normal voyage” and did not cover this loss by piracy. The court held that any other interpretation would not make commercial sense: the result could be that a shipowner might be held strictly liable for all loss in-transit, without even common-law defences, for example defences against claims for damage to or contamination of the cargo during the voyage. In the leading decision Longmore LJ suggested that if a Charterer really wanted to hold the Owner strictly liable for all cargo loss whatsoever, then the Charterer could draft a clause to that effect, but he considered that the present clause was not clear enough to achieve that result.

The decision on this point alone was sufficient to defeat the Charterer’s appeal, but the Court of Appeal also considered the second issue that had been discussed at the High Court, as to whether the In-Transit Loss Clause would have imposed strict liability, or whether, if he had been found liable under the clause, the shipowner could still have relied on other defences and exceptions contained elsewhere in the charterparty (Clause 46 had the effect of incorporating the Hague-Visby Rules Article IV rule 2 defences).



The court considered an earlier Court of Appeal decision, the *Olympic Brilliance* [1982] 2 Lloyd’s Rep 205, which had considered an In-Transit Loss Clause which stated that:

“If there is a difference of more than 0.50% between B/Lading figures and delivered cargo as ascertained by Customs Authorities at discharging port, Charterers have the right to deduct from freight the C.I.F. value for the short delivered cargo. Owners have the right to appoint independent surveyor in order to check cargo figures in conjunction with Custom Authorities.”

It had been decided that this clause gave the Charterer a right to make a permanent deduction from freight when it was triggered. The Court of Appeal distinguished between the two clauses: the clause in the *Olympic Brilliance* charterparty gave the Charterer a right to deduct from freight, but the clause in the *Valle Di Cordoba* only gave the Charterer a right to claim for the loss of cargo, and Longmore LJ considered that the

“The Court of Appeal confirmed the decision of the High Court that an In-Transit Loss Clause like this one only covered losses incidental to the carriage of the cargo, or a “loss of a kind encountered on a normal voyage” and did not cover this loss by piracy.”



“Unless and to the extent that the Directors in their discretion otherwise determine or special terms have been agreed in writing by the Managers, there shall be no recovery from the Club in respect of any liabilities, costs and expenses which would not have been incurred or become payable by the Member if the cargo had been carried under a bill of lading or other contract of carriage incorporating terms no less favourable to the carrier than the Hague Rules or Hague-Visby Rules.”

The judges’ comments in the Court of Appeal suggest that an In-Transit Loss Clause which entitles a Charterer to make a straight deduction from freight in the case of an in-transit loss would probably rule out Hague-Visby defences. This is in contrast to an In-Transit Loss Clause that only allows the Charterer to make a claim for cargo loss which might still entitle the shipowner to rely on Hague-Visby defences, depending on the exact wording of the clause, and on other provisions in the charterparty.

The distinction between these two types of clauses is important so far as Club cover is concerned. This is because in the former case it is very unlikely that Club cover will be available for the sum deducted as the contract of carriage will not have complied with the proviso to the Club Rules described above. However, in the latter there might be cover available if the clause and Charterparty as a whole gives:

- The Charterer a right to claim only; and
- The Owner a right to rely on Hague-Visby defences.

If these criteria are satisfied and the Charterer is able to recover under such a clause a Member’s subsequent claim for reimbursement from the Club is likely to be based on the normal measure of damages for cargo loss; that is not the mechanism set out in the clause. ■

court would have applied the Hague-Visby Rules to exempt the Owner of the *Valle Di Cordoba* from liability for a claim for loss of cargo by piracy.

The case was decided on the first issue, that the In-Transit Loss Clause only applied to loss of a kind encountered on a normal voyage, and that the Charterer was not entitled to bring a claim for theft of cargo by pirates under it, so that the courts’ findings on the second issue would probably be considered as obiter, and not creating binding law for future cases. However the courts’ considerations on the second issue might be very relevant to a shipowner’s P&I cover for claims under In-Transit Loss Clauses.

Most P&I Clubs require, as a condition of cover for cargo liabilities, that Members contract for the carriage of cargo on terms no worse than the Hague or Hague-Visby Rules. Steamship Mutual’s Rule 25.xiii, setting out the Club’s normal cover for cargo claims, has a proviso that:

Adoption of Amendments to Increase the Limitation Amounts in the 1996 LLMC Protocol



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The Club previously reported on the amendments to increase the limits of liability in the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims 1976 which were adopted by the Legal Committee of the International Maritime Organization (IMO) in April 2012. www.steamshipmutual.com/publications/Articles/LLMC96inc0412.htm

The proposed increases were adopted under the 1996 Protocol's tacit amendment provision, whereby amendments proposed by the IMO's Legal Committee enter into force, unless sufficient objections to the amendment are received from a specified number of

parties within a specified period of time. In the absence of sufficient objections to the proposed increases, IMO have now confirmed that the amendments will enter into force as of 8 July 2015.

Under the amendments to the 1996 Protocol, the limits of liability are raised by 51%, as follows:

1. Claims for loss of life or personal injury on ships not exceeding 2,000 gross tonnage 3.02 million SDR (up from 2 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 1,208 SDR (up from 800 SDR);
- For each ton from 30,001 to 70,000 tons, 906 SDR (up from 600 SDR);
- For each ton in excess of 70,000, 604 SDR (up from 400 SDR).

By way of example, for loss of life or personal injury an 18,000 TEU container ship of 195,000 GT would see the limit of liability increased from SDR 98,398,200 to SDR 148,581,282 calculated as follows:

2,000 tons –	3,020,000 SDR
2,001 to 30,000 tons ie 27,999 tons x 1,208 –	33,822,792 SDR
30,001 to 70,000 tons ie 39,999 tons x 906 –	36,239,094 SDR
70,000 tons plus ie 124,999 tons x 604 –	75,499,396 SDR
Total	148,581,282 SDR

2. Property claims for ships not exceeding 2,000 gross tonnage is 1.51 million SDR (up from 1 million SDR).

For larger ships, the following additional amounts are used in calculating the limitation amount:

- For each ton from 2,001 to 30,000 tons, 604 SDR (up from 400 SDR);
- For each ton from 30,001 to 70,000 tons, 453 SDR (up from 300 SDR);
- For each ton in excess of 70,000 tons, 302 SDR (up from 200 SDR);

By way of example, for property claims, an 18,000 TEU container ship of 195,000 GT would see the limit of liability increased from SDR 49,199,100 to SDR 74,290,641 calculated as follows:

2,000 tons –	1,510,000 SDR
2,001 to 30,000 tons ie 27,999 tons x 604 –	16,911,396 SDR
30,001 to 70,000 tons ie 39,999 tons x 453 –	18,119,547 SDR
70,000 tons plus ie 124,999 tons x 302 –	37,749,698 SDR
Total	74,290,641 SDR

The daily conversion rates for SDRs can be found on the International Monetary Fund website: <http://www.imf.org/>

It is noteworthy that the limits of liability for property claims can apply to both bunker spills and wreck removal. Historically, the few claims not fully compensated by virtue of the limits imposed by the 1996 Protocol were bunker spills and the subsequent clean-up costs. With ever more elaborate wreck removal operations being contemplated due to technological innovations in the salvage industry, the probability that future wreck removal costs will exceed the limit of a shipowners' liability for property claims inevitably increases. However, the Convention provides for a virtually unbreakable system of limiting liability. A shipowner or salvor may limit their liability unless: *'it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result'*.

The amendments are applicable only to those states which have adopted the 1996 Protocol and will not affect those States which are party only to the 1976 Convention without adopting the 1996 Protocol, nor will it affect any State which is party to the earlier 1957 Convention on limiting liability. Furthermore, States which have tacitly accepted the amendments to the 1996 Protocol are, nevertheless, required to enact legislation in order to bring the amendments into force in their respective jurisdictions. Should a State fail to have enacting legislation in place when the amendments come into force on 8 July, then in the short term at least, there is scope for further fragmentation of the International limitation of liability regime. Long term, however, it is hoped that these significant increases in the limits of a shipowners' liability will further cement the principle of limitation of liability for maritime claims. ■

“With ever more elaborate wreck removal operations being contemplated due to technological innovations in the salvage industry, the probability that future wreck removal costs will exceed the limit of a shipowners' liability for property claims inevitably increases. However, the Convention provides for a virtually unbreakable system of limiting liability.”



Right to Enforce an “*in rem*” Claim Transfers to the Proceeds of Sale



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In the recent case of *Bank of Tokyo-Mitsubishi UFJ Ltd v Sanko Mineral (The MV Sanko Mineral)*, the English Court considered the requirement of section 21(4) of the Senior Courts Act 1981 (SCA). This provides that a condition for commencing an *in rem* claim is that the person liable in personam is the beneficial owner of the vessel at the time when the action is brought. The court reaffirmed the long standing principle that a claim *in rem* could be enforced against the proceeds of sale.

Facts

In May 2012, Glencore filed a claim in the US District Court against Owners for breach of its contract of carriage as a result of delays to the voyage whilst the vessel was under arrest. The Bill of Lading under which the claim was brought incorporated a time bar of 12 months from date of discharge for London arbitration proceedings to be commenced.

Subsequent to this, as a result of financial difficulties, Owners entered into a reorganisation under the Japanese Corporate Reorganisation Act in July 2012. This was recognised by the English Court as the foreign main proceedings under the Cross-Border Insolvency Regulations 2006.

The cargo was delivered in September 2012 and following this Glencore submitted its claim in the Japanese reorganisation proceedings. The basis of its claim was that it had suffered losses of US\$3,850,000 as a result of the vessel's four month delay.

In April 2014 the claimant mortgagor (the Bank) commenced *in rem* proceedings against the vessel in the English Admiralty Court. Shortly thereafter the vessel was arrested. The Bank obtained judgment and a court order was issued for the vessel's sale, the order for this provided that any party with a claim *in rem* should apply to the court to commence the claim within 60 days. The vessel was subsequently sold and the proceeds paid into court.

Within this 60 day period Glencore applied for permission to commence an *in rem* claim. Glencore argued that under Japanese law, its security interest, derived from its maritime lien under US law and/or from the status of the claim under Japanese law as a statutory lien, would take priority over the Bank's



“...it was a well-established principle that when a vessel is sold by the Admiralty Court, rights *in rem* are transferred to the proceeds of sale...”

mortgage. As a result, Glencore also requested a caution against the release of the proceeds of sale.

An order was issued for payment of the proceeds of sale less US\$3,850,000 which was to remain in court pending determination of the dispute as to priorities between the Bank and Glencore.

In October 2014 the trustee of Owners applied for an order that the caution be withdrawn or struck out and the proceeds of sale remaining in court be paid out to the trustee. This was on the grounds that:

- (i) Glencore had no claim as no arbitration had been commenced within 12 months of discharge;
- (ii) an *in rem* claim had not been issued prior to the sale and as such it was no longer able to satisfy the conditions of the SCA.

Judgment

Firstly, it was held that as a matter of English law Glencore's claim was time barred as a result of arbitration not having been commenced within 12 months of discharge. However, it was noted that,

subject to Japanese law, Glencore's claim in the reorganisation proceedings may succeed.

As to the second issue, Glencore's claim was an admiralty claim within section 20(2)(h) of the SCA and therefore it must meet the conditions set out in section 21(4). The condition of particular concern to this claim was 24(b)(ii) which provides that at the time when the action is brought the person who would be liable in personam is either the beneficial owner of that ship or the charterer by demise.

The Judge noted that *it was a well-established principle that when a vessel is sold by the Admiralty Court, rights in rem are transferred to the proceeds of sale* provided that the person liable in personam is the beneficial owner of those proceeds. Whilst it may be arguable that the wording of section 21(4) is clear and should therefore be given its natural meaning, where a vessel has been sold by the Admiralty Court, the operation of section 21 of the SCA must be understood in that context. As such, if a holder of a maritime lien has not issued a claim before the vessel is sold, he may still do so afterwards by obtaining permission to commence a claim within the time

period set by the court and enforcing against the sale proceeds.

Therefore, Glencore had not lost its statutory right of action *in rem*. Although its claim for breach of the contract of carriage was time barred under English law, given that the reorganisation claim may still succeed, payment out of court to the trustee would only be ordered on terms that the proceeds be kept in a separate US dollar account to the order of the Tokyo Court.

Comment

Insolvency of vessel owners continues to be a concern to the shipping industry and creditors will look to enforce any claims against vessels or proceeds of sale. This case provides useful guidance and confirmation of how a claim *in rem* may be enforced when proceedings have been issued for the vessel's sale. It also provides an important reminder that taking steps to enforce a claim *in rem* is not sufficient to protect time and a separate claim must also be filed in accordance with any contractual jurisdiction provisions and time bars. ■



“Teare J held that the proceedings in Turkey were vexatious and oppressive because the effect would be to deprive the Club of its right to have claims brought against it in arbitration in London...”

The ‘Pay to be Paid’ Rule – A Protected Right?

sh Mike Phillips
STEPHENSON HARWOOD Teah Sloan

In *Shipowners’ Mutual v Containerships Denizcilik* (2015) the Commercial Court granted and maintained an anti-suit injunction against Charterers who had sued a P&I Club in Turkey. Charterers had tried to avoid the effect of the ‘Pay to be Paid’ rule by relying on a right of direct action against insurers under Turkish insurance law.

This is good news for P&I Clubs in a world where jurisdictions are increasingly permitting rights of direct action against insurers.

The facts
Charterers time chartered the vessel, a container ship, and employed it on a liner service between Turkey and North Africa. The vessel grounded off Mykonos and became a total loss. Cargo claimants brought claims under the bills of lading, which provided for Turkish law and which had been issued by Charterers.

Charterers started arbitration proceedings against Owners in London under the charterparty. They also started proceedings against the P&I Club in Turkey, under Article 1478 of the Turkish Insurance Contract Law of 2012, which permits third parties to sue insurers directly in order to recover under the insurance contract between the insurer and the assured. The Turkish proceedings were a clear attempt to circumvent the ‘Pay to be Paid’ rule contained in P&I Club rules, whereby a Member can only be reimbursed for claims it has actually paid.

The P&I Club obtained an anti-suit injunction restraining Charterers from continuing the Turkish proceedings. The court’s reasoning is set out below, but, in brief, Teare J concluded that the anti-suit injunction should be continued.

The court’s reasoning
The first point that the court had to decide was, whether the right of direct action under Turkish law was a right to enforce the contract between the Club and its Member or, whether it was an independent right of recovery.

Teare J held that the right of direct action was a right to enforce the contract between the Club and its

Member. This was because the statute, as a matter of interpretation, referred back to the contract of insurance contained within the Club’s terms for details such as the insured perils, limits, contract period and time bar.

The second point that the court had to decide was, whether to grant the anti-suit injunction, given that Charterers’ claim under the Turkish statute was based on a right to enforce the insurance contract.

Teare J held that the Turkish proceedings were not in breach of the London arbitration agreement within the Club rules, as the case involved direct rights of action. In order for the anti-suit injunction to continue, the Turkish proceedings therefore had to be considered by the court as vexatious and oppressive.

Teare J held that the proceedings in Turkey were vexatious and oppressive because the effect would be to deprive the Club of its right to have claims brought against it in arbitration in London and because there was a real risk that the Club would not be able to rely on the ‘Pay to be Paid’ clause in the Club rules.

The implications
The decision highlights the problems faced by P&I Clubs, where other jurisdictions provide for rights of direct action against insurers, thus providing an opportunity to circumvent the ‘Pay to be Paid’ rule. Notable examples outside of Europe include most US states, Tunisia and Turkey.

Within Europe there has also been a move towards rights of direct action. Norway, Sweden, Denmark, Finland and Spain permit such action and not only within the context of compulsory insurance.

Closer to home, the Third Parties (Rights against Insurers) Act 2010, once in force, will provide for a right of direct action against insurers. However, there is an exception for marine insurance contracts, except in death or personal injury claims. This reflects the current position, as, in line with the warning given by Lord Goff in *The Fanti and the Padre Island (No.2)* (1990) that as a matter of policy, P&I Clubs should avoid relying on the ‘Pay to be Paid’ rule when dealing with death or personal injury claims, Club rules do not, subject to certain conditions, apply the ‘Pay to be Paid’ rule for such claims. Several International Conventions also confer direct rights, notably within the context of pollution.

The decision in *Shipowners’ Mutual v Containerships Denizcilik* is relevant for all P&I Clubs and is a significant reminder that the courts will act to protect a Club’s right to rely on the provisions of its rules including the ‘Pay to be Paid’ rule. We understand, however, that this may go to appeal and we await seeing the outcome. ■

New Loss Prevention Posters

The Club has produced a new ‘Work Safely’ poster series, which addresses safe working practices with a view to avoiding unnecessary personal injury.

Copies of these posters and many more can be obtained on request from the Manager’s London representatives, or downloaded in PDF from the Club’s website.

www.steamshipmutual.com/loss-prevention/loss-prevention-posters.html

Steamship Mutual News



Painting of RMS Britannia by Pat Nevin courtesy of The Dan Dare Corporation Limited

“You may sleep,
you may dream,
you may travel
by steam...”

1840 – 2015: Cunard’s 175th Anniversary

2015 is a special year for one of the Club’s longest established Members. On 4 July the Cunard Line marked the 175th anniversary of the maiden voyage of RMS Britannia, the first ship built for the Line. On that day in 1840, Britannia left Liverpool, bound for Halifax and Boston, carrying Her Majesty’s mail and inaugurating the first truly regular steam-powered transatlantic service.

Officially called the British and North American Steam Packet Company, the company soon became known as the Cunard Line after its founder, Samuel Cunard. A year earlier he had emigrated to Great Britain from Nova Scotia, after reading a newspaper advertisement placed by the British Admiralty inviting tenders for a fortnightly Atlantic mail service. Having won the contract, he ordered the first of four steamships from the yard of Robert Duncan on the Clyde, and named her Britannia after his adopted land.

A wooden paddle steamer, 207 feet long with a beam of 34.2 feet, Britannia had three masts and was about 1,150 tons. Her engines were side-lever machines built by Robert Napier and Company, with more than 400 horse power, and were capable of driving the ship at a speed of 8 1/2 knots on 38 tons of coal per day. She was a two-decked ship with the officer’s cabins, galley, bakery and cow-house located on the upper deck, and two dining saloons and passenger accommodation on the main deck. Britannia carried 115 passengers and 225 tons of cargo, with 82 crew and 3 cats.

An account of what it was like to sail in Britannia can be found in American Notes by Charles Dickens who made the Atlantic crossing in January 1842: “To one unaccustomed to such scenes, this is a very striking time on shipboard. Afterwards, and when its novelty had long worn off, it never ceased to have a peculiar

interest and charm for me. The gloom through which the great black mass holds its direct and certain course; the rushing water, plainly heard, but dimly seen; the broad, white, glistening track, that follows in the vessel’s wake; the men on the look-out forward, who would be scarcely visible against the dark sky, but for their blotting out some score of glistening stars; the helmsman at the wheel, with the illuminated card before him, shining, a speck of light amidst the darkness, like something sentient and of Divine intelligence; the melancholy sighing of the wind through block, and rope, and chain; the gleaming forth of light from every crevice, nook, and tiny piece of glass about the decks, as though the ship were filled with fire in hiding, ready to burst through any outlet, wild with its resistless power of death and ruin.”

As the weather deteriorated, Mr Dickens’ enthusiasm for steamship travel waned: “what the agitation of a steam vessel is, on a bad winter’s night in the wild Atlantic, it is impossible for the most vivid imagination to conceive. To say that she is flung down on her side in the waves, with her masts dipping into them, and that, springing up again, she rolls over on the other side, until a heavy sea strikes her with the noise of a hundred great guns, and hurls her back – that she stops, and staggers, and shivers, as though stunned, and then, with a violent throbbing at her heart, darts onward like a monster goaded into madness, to be beaten down, and battered, and crushed, and leaped on by the angry sea – that thunder, lightning, hail, and rain, and wind, are all in fierce contention for the mastery – that every plank has its groan, every nail its shriek, and every drop of water in the great ocean its howling voice – is nothing. To say that all is grand, and all appalling and horrible in the last degree, is nothing. Words cannot express it. Thoughts cannot convey it.

Only a dream can call it up again, in all its fury, rage, and passion." This may explain why the ship's wine and spirits bar opened at 6am.

Britannia made Boston in 14 days 8 hours, a significant reduction in the travel time compared with the sailing packets, meaning steamships became the preferred mode of transatlantic travel for those who could afford it. A song written by a 'Mr Andrews' sung at a public dinner in Boston, US, in Samuel Cunard's honour summed up the communications and transport revolution that resulted from the introduction of steam navigation between England and America:

**"You may sleep, you may dream, you may travel by steam,
For the outcry is still to go faster;
And what does it reck, should you e'en break your neck,
If 'tis steam that brings on the disaster?
How timid and slow, but a few years ago,
The world hobbled on in its motion;
Old Europe seem'd far as the fix'd Northern Star
On the boundless expanse of the ocean.
But though it were hard - at the word of Cunard,
Britannia herself is a rover;
Old England awhile, that fast anchor'd isle,
By steaming is now half-seas over."**

Samuel Cunard directed that the other three vessels specified in the mail contract, *Acadia*, *Caledonia* and *Columbia*, should be identical to *Britannia*, and it is this decision, combined with a solid safety record, that ensured the company was a success. The steamships which had made the Atlantic crossing before them were often superior to the first Cunard ships but they failed to secure a popular following because they were so

varied in design. Passengers wanted to know something of what they were in for and although they sometimes got a surprise, like Charles Dickens in *Britannia*, they at least had a chance when all the Cunard Line ships were of the same design. When all four Cunarders were in service, Great Britain, the US and Canada had a regular mail and steamship service for the first time.

The maiden voyage of *Britannia* occurred 5 years before that of Brunel's *Great Britain*, the first iron-hulled steamship to cross the Atlantic and the first iron ship fitted with a screw propeller, and 20 years before the maiden voyage of Brunel's other famous ship *Great Eastern* in 1860. Almost three decades would pass until the formation of the Cunard Line's great rival on the North Atlantic, the Oceanic Steam Navigation Company, known as the White Star Line, in 1869. Having served the Cunard Line well, *Britannia* was retired in 1848. She is still remembered on board Cunard Line ships today; the main restaurants on the *Queen Mary 2*, *Queen Elizabeth* and *Queen Victoria* are called the Britannia Restaurant.

Steamship Mutual's links with Cunard date back to 1990, when the Club took on their P&I cover from the Liverpool & London with whom they had been entered for over 75 years. The subsequent 25 years have seen Cunard become part of the Carnival group, and indeed Steamship has had a relationship with Carnival Cruise Line itself since 1994, and now has entries for all the cruise operators within the group including P&O Cruises, *Princess*, *Holland America*, *Costa*, *Aida* and *Seabourn*. Steamship Mutual is proud to have partnered these pioneers of the cruise industry as they have grown to such an influential position in the world maritime industry. ■

Article by Patrick Britton, Syndicate Associate

24 Peaks Challenge 2015 – Team Steamship!

Over the weekend of 11/12th July 2015, six staff members from Steamship took part in the 24 Peaks Challenge to raise funds for Seafarers UK. The challenge itself involves crossing 24 mountains, all of which are located in the English Lake District and which are over 2,400 feet high. The aim is to complete the Challenge in less than 24 hours. The peaks include eight of the ten highest mountains in England; Scafell Pike, Helvellyn, Ill Crag, Broad Crag, Lower Man, Great End, Bowfell and Great Gable.

The Challenge is organised to raise funds for Seafarers UK a charity providing support for members of the Merchant Navy, Fishing Fleets, Royal Navy and Royal Marines during times of need.

The Steamship team, was comprised of representatives from underwriting and claims in the European, Eastern

and Americas Syndicates – Lynn Crossey, Michael Archibald, Anna Yudaeva, Danielle Southey, Felix McClure. The team was supported throughout by Ken Robson of the Club's Loss Prevention department with the all-important role of support driver and sustenance provider!

To support the Steamship Team and Seafarers UK please visit www.justgiving.com/SteamshipMutual-24Peaks/. ■



(left to right) – Mr By Kim (Wilson Korea); JS Kim; Stephen Martin; Mr Sh Lee (Sinokor); Mr Dewey Kim (Mutual Services Korea)

Korean Reception

The Managers held a reception in Seoul prior to renewal. Despite it being a cold winter's evening (-14 degree celsius), the reception was very well attended with more than 120 guests from the Korean shipping community. They were welcomed by Stephen Martin, Chief Operating Officer, and JS Kim, Eastern Syndicate Underwriting Director.

The Korean Membership is very important to the Club. Steamship is delighted to work with the Korean shipping community and values the relationship that has been built over many years.

The Club's commitment to the Korean market is supported by two local correspondents Mutual Services Korea and Korea Universal Marine Co Ltd. ■



New Flagship for P&O Cruises

On 10 March this year P&O Cruises' new flagship *Britannia* (pictured above) was officially named at Southampton by Her Majesty Queen Elizabeth II. It is the third time the name has been used in P&O's history. The line's first *Britannia* entered service in 1835 for The General Steam Navigation Company (which became The Peninsular Steam Navigation Company), while the second *Britannia* of 1887 was named to mark the Golden Jubilee of Queen Victoria and the P&O Line itself ¹.

passengers and crew. The new ship has been given P&O Cruises' patriotic new livery: a 308 feet Union Flag adorns her bow and, in a departure from traditional P&O yellow, her two funnels are blue with an illuminated rising sun, the symbol of the Oriental part of the Peninsular & Oriental name. Her diesel-electric propulsion system produces a total power capacity of 62.4 Megawatts allowing for a cruising speed of 22 knots. We wish her a long and happy career. ■

At 1,082 feet long and 141,000 tons, the third *Britannia* is the largest cruise ship built exclusively for the British market and has a total complement of 4,997

¹ *Britannia* has always been a traditional name for both Royal Navy and Merchant Navy ships, as well as the name of the last Royal Yacht. The General Steam Navigation Company's *Britannia* of 1835 is a different vessel to the Cunard Line's *Britannia* of 1840.

Hong Kong Reception

Edward Lee (Managing Director Hong Kong office), Stephen Martin, Chief Operating Officer and JS Kim, Eastern Syndicate Underwriting Director, hosted a reception in Hong Kong at renewal. The event was an opportunity for the Managers to thank the Members and brokers for their continued support. Amongst the guests were Mr. C.C. Tung, a Trustee of the Club, and Mr. Alan Tung, a Member of the Club's Board of Directors (pictured right). ■



(left to right) Mr C.C. Tung; Stephen Martin; JS Kim; Mr Alan Tung

Opening of Resolve's Singapore Office & Warehouse

Resolve Marine Group, a valued Member of Steamship Mutual, specialises in worldwide marine salvage, coastal recovery, firefighting, OPA-90 compliance, wreck removal, deep water diving, shipboard fire and hazardous materials response. Resolve Salvage & Fire, Inc., a subsidiary of Resolve Marine Group, operates Resolve Marine Group's various salvage barges, tugboats, firefighting equipment and other assets dedicated to meeting the challenges of maritime salvage, fire or wreck removal projects worldwide. Resolve Marine Group have been involved in many high profile projects including the "Rena" wreck removal, "Costa Concordia" tow to the Genoa ship yard and the "Deepwater Horizon" emergency response and oil spill recovery operation.

On 24 April 2015, during Singapore Maritime Week, the new location for Resolve's Singapore office and warehouse officially opened. The office and warehouse is based in West Singapore on the waterfront by the Pandan River Estuary – spectacular views of the port can be seen from the wheel house.



(left to right) – Captain Farhat Imam, Chief Operating Officer Resolve Marine Group; Nina Jermyn, Steamship Mutual; Mohamed Kamsani, Technical Supt. Resolve Salvage & Fire (Asia) Pte Ltd



(left to right) – Martin Marini, General Counsel Maritime and Port Authority of Singapore; Captain Anuj Sahai, Managing Director Resolve Salvage & Fire (Asia) Pte Ltd; Nina Jermyn, Steamship Mutual; and John Curley, Commercial Director Resolve Salvage & Fire (Europe)

To mark the grand opening Resolve Salvage & Fire (Asia) hosted a reception which was well attended by both local and overseas guests including key figures in the shipping industry. 230 people were in attendance and the official opening was a success; clients and friends had a great evening. Steamship Mutual was represented by Nina Jermyn, a Syndicate Manager based in the Club's Hong Kong office. Whilst the reception was in full swing Nina was treated to a personalised tour of the office and warehouse. Many thanks to Captain Farhat Imam, Chief Operating Officer, Captain Anuj Sahai, Managing Director and Zhenyu Gong, Operations Manager for taking the time during a busy function to take Nina on the tour and also give detailed explanation regarding the use of specialised equipment required for salvage, fire and wreck removal operations.

Nina also attended The Asian Marine Casualty Forum – an event arranged by LOC Marine and Engineering Consultants of which Resolve Salvage and Fire was a contributing sponsor. The Salvage Master / Director of Operations Francis Leckey of Resolve Salvage and Fire was a guest speaker at the conference and gave a paper on present day salvage facilities.

Examples of Resolve Marine Group's current jobs include the removal of a capsized vessel in South America also the salvage of a grounded ferry in Chile.

We wish Resolve Marine Group prosperity and continued success in the future. ■
Article by Nina Jermyn, Syndicate Manager, HK Office

Crowley Honoured for Outstanding Marine Safety with ECOPRO Environmental Award

Steamship's Florida based member, Crowley Maritime, has been honoured by The State of Washington's Department of Ecology with the Exceptional Compliance Program (ECOPRO) award in recognition of excellence in marine safety and environmental stewardship. The ECOPRO program represents a unique, non-regulatory environmental protection program for tank vessels, recognising operators who demonstrate exceptional compliance with the program's strict criteria.

Crowley-operated tankers and articulated-tug-barges (ATBs) regularly trade in the Pacific North West and safely transport and deliver petroleum to terminals up and down the West Coast. Crowley is one of the largest independent operators of tank vessels in the U.S.

"Companies that achieve this award are operating their tank vessels at what we believe is the highest level of marine safety in the world today," said Ecology Prevention Manager Scott Ferguson. *"While our ECOPRO standards are higher than those required under state and federal laws, we know our standards are ultimately achievable. Washington's environment is clearly worth the effort."*



(left to right) – Dan Smith, director, SSQE, Crowley; Carl Fox, senior vice president and general manager, corporate services, Crowley; Federal Maritime Commission Chairman Mario Cordero; and Bill Pennella, executive vice president, Crowley

Crowley first received this award in 2005 for its ATB division: joining an elite group of tanker and tank-barge operators which have earned ECOPRO recognition from Ecology since the program's inception in 1999. To gain membership, companies must meet industry best practice standards and undergo rigorous Ecology inspections encompassing a wide range of operational and safety best practices.

Congratulations to all at Crowley from Steamship Mutual. ■

Steamship's Marathon Man

There are a number of 'athletes' at Steamship that have completed sporting or other challenging events ranging from half marathons and The 24 Peaks Challenge (see page 46) to Ironman Triathlons and the Marathon des Sables. Steve Ward, Steamship's

Financial Director, is the latest to have finished, together with his daughter Lucy, the London Marathon earlier this year in a very respectable 4 hours and 45 minutes. Steve was running in support of Revitalise, a charity that provides holidays for disabled people and their carers'. ■



Seatrade: *The Navigator* – Investors in People (Winner)

Over the last year the Managers have been strongly supporting The Nautical Institute in their efforts to distribute as widely as possible copies of the publication *The Navigator*. This magazine is produced by The Nautical Institute in association with The Royal Institute of Navigation and is directed towards improving the knowledge and skills of young professional marine navigators. Each issue focuses upon one particular aspect of navigation such as passage planning, the use of radar, collision avoidance, and communications. All of these issues are vitally important to the control of risk and loss prevention, particularly in relation to the risk of groundings and collision. For this reason the Managers have been very pleased to assist The Nautical Institute with its campaign to have copies of *The Navigator* placed onboard every SOLAS-sized vessel. In addition, with funding from The Ship Safety Trust, the Club and the Managers supported the production of a copy of *The Navigator* in Greek and further work is being done to provide translations to other languages of the "Take 10" summary page of the key points that are covered in each edition.

The important contribution that The Nautical Institute has made to assist young navigating officers through the medium of *The Navigator* was recognised at a ceremony attended by industry peers at London's Guildhall in May with success in attaining the 2015 Seatrade Award in The Investors in People category. The Managers were delighted to be represented as guests of The Nautical Institute and to share this moment of well-deserved success.



(left to right) Emma Ward, Agnie Arapopoulou, Chris Adams, Phil McAllister, Rachel Miller, Martin Fothergill, Andy Norris, Claus Hyltdager, David Patraiko

Members are reminded that all copies of *The Navigator* published to date can be found at the following link to the Club's website, and the Managers strongly encourage Members to make these publications available onboard their vessels.

If hard copies of *The Navigator* are required, these can be obtained on request from the Managers' Loss Prevention Department.

www.steamshipmutual.com/publications/Articles/The-Navigator.htm. ■

Awards for Steamship and Videotel Training Programmes

Working with Multinational Crews, *It's a Cultural Thing!*

This DVD features individuals from eight different nationalities who 'role play' a range of typical on board scenarios.

Working with Multinational Crews, *It's a Cultural Thing!* has been recognised and achieved the following prestigious awards:

- The Horizon Interactive Awards (Silver)
- WorldFest-Houston, International Film & Video Festival (Platinum)



- MCA-I Media Festival (Media Communications Association-International) (Silver)

- Questar Awards (Silver)

Ebola – Staying Safe

Achieved an award of distinction (silver) at the 21st Annual Communicator Awards (USA – 2015) in the category of 'Film/Video: Health and Wellness'.

Produced with the assistance of medical and subject matter experts, a definitive maritime training package for this critical health threat facing mariners.

On-line Articles

Further published articles that are available on-line include:



Patrick Britton
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Laytime and Demurrage Issues Concerning Part Cargoes – A London arbitration answers some questions about readiness
www.steamshipmutual.com/publications/Articles/partcargoes.htm



Caro Fraser
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MSC Mediterranean Shipping Co SA v Cottonex Anstalt – right to affirm a repudiated contract
www.steamshipmutual.com/publications/Articles/mscmediterraneanshippingcottonex-anstalt.htm



David Morris
Jenny Salmon

Channel Ranger – incorporation of Charterparty law and dispute resolution clauses into bills of lading.
<http://www.steamshipmutual.com/publications/Articles/channelranger1214.htm>



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Bunkering Concerns and the Way Forward
<http://www.steamshipmutual.com/publications/Articles/theowbunkerdilemma0715.htm>



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Maritime Arbitration: Recent Developments In Brazil
www.steamshipmutual.com/publications/Articles/maritime-arbitrationinbrazil0515.htm



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Previous Employer's PEME Still Valid?
www.steamshipmutual.com/publications/Articles/pemestillvalid0515.htm



Scott Yates
Director/Solicitor of Myton Law.

Low Value Personal Injury Claims in England and Wales
<http://www.steamshipmutual.com/publications/Articles/lowvaluepersonalinjuryclaims0615.htm>



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Indian Satellite phones – the perils of satellite phones in Indian Waters
<http://www.steamshipmutual.com/publications/Articles/satellitephonesindianwaters.htm>



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Visit itunes.apple.com to download the App
Visit play.google.com to download the Android App

