



STEAMSHIP MUTUAL

Sea Venture

Issue 32





Introduction

This edition of Sea Venture is the first to be produced only in soft copy due to distribution issues arising from the COVID-19 pandemic.

Of course COVID-19 has affected everyone in our industry and will continue to do so into the foreseeable future. The Club's staff, and all our service providers, have adapted to different ways of working as we strive to maintain the service levels Members expect. Travel for the usual face to face meetings that we value so highly is missing, but in its place video conferencing has come to the fore, and been used both internally and with our Members, brokers, and correspondents. We are thankful for the help we receive all around the world from our correspondents. They are an invaluable resource, and the Club's eyes and ears around the ports of the world. We hope that they, and all our readers, stay safe.

Not surprisingly there are a number of articles in this issue with information related to COVID-19. Questions about Club cover are addressed, alongside other articles addressing contractual and crew issues. Of particular significance to the wellbeing of seafarers is the film "Coronavirus – Stay Safe On Board" https://www.steamshipmutual.com/loss-prevention/stay_safe_on_board_0420.htm published by Marine Media Enterprises with the support of Columbia Shipmanagement,

ISWAN, and the Club. Versions with Brazilian Portuguese, Chinese, Korean and Tagalog subtitles are already on the Steamship website. A follow up film on Mental Resilience is also now available https://www.steamshipmutual.com/publications/Articles/mental_resilience_on_board_0520.htm and a further film on how crew can protect themselves in port will be available shortly, after the publication of this edition of Sea Venture. Announcements about their release will be made on the Club's website, as well as Twitter and LinkedIn.

Amongst other subjects in this issue, there are also articles discussing Sulphur 2020, when guarantees are callable, salvage, damages, and deviation in the sense of what is a contractual route.

The Club will continue to publish articles on its website with video presentations on Twitter and LinkedIn. We hope these continue to be of interest and as always welcome feedback.

The Sea Venture Editorial Team
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Editorial Team

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COVID-19: Guide for Members on Contractual Issues

While general guidance can be provided, advice in any given situation will depend heavily on individual circumstances and the terms of the applicable contract.



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Highlights

- As matters currently stand, it is unlikely that a port would be considered “unsafe” due to COVID-19, but that could change in the case of blacklisting, or quarantine resulting in inordinate delays (§1)
- Vessels may be off-hire if there are delays due to actual or suspected crew illness, but probably not otherwise, unless “whatsoever” is added to the off-hire clause. But even if technically off-hire, charterers may have to indemnify owners for losses resulting from following charterers’ orders (§2.1)
- Regarding the commencement of laytime, Whether in free pratique or not (“WIFPON”) clauses might not assist owners as the vessel may still need to clear quarantine before Notice of Readiness (“NOR”) can be tendered. Specific clauses can be used to avoid this problem (§2.2)
- Deviations for the purpose of saving the life of a sick crew member will usually be allowed, but continued payment of hire will depend on the charterparty terms. Where there are restrictions on entry / berthing at a discharge port, unloading of cargo at an alternative place may be allowed in some cases (§4)
- Frustration is unlikely to occur in anything other than extreme cases. Force majeure clauses may be relevant, but this will depend on their precise terms and adherence to legal requirements (§5)
- Bespoke clauses such as the BIMCO Infectious or Contagious Diseases Clauses or Intertanko COVID-19 Clauses are generally recommended

In January the Club published a website article touching on important aspects of the COVID-19 outbreak

in the context of time charterparties. As COVID-19 has subsequently escalated into a global pandemic, a more detailed advice on wider aspects of vessel chartering and the carriage of goods by sea should be helpful for members. For other aspects of the COVID-19 situation, the COVID-19 / Coronavirus page on the Club’s website carries links for information on precautions for crew, what to do if a crew member is suspected of contracting the virus, and port and country summaries of various restrictions.

The advice given below assumes contracts subject to English law and containing basic industry standard wordings. The focus is on charterparties and contracts of carriage, although the basic principles can be extended to other contracts such as shipbuilding and ship sale and purchase. It is, however, not intended to be a comprehensive statement of the law covering all cases: what is appropriate advice depends on individual circumstances and contractual terms and could change frequently as the general situation develops.

1. Loading Ports: Charterers’ Orders and Contractual Agreements

The first issue which may confront an owner will be whether they are obliged to accept instructions from a time charterer to proceed to a load port at which there may be an outbreak of COVID-19 and/or where an authority has imposed restrictions on entry. At this point in time a number of ports have said they will impose a quarantine period on vessels arriving from other countries.

The answer will depend largely on whether the port would still be considered legally “unsafe” under English law. If that were the case, the owner could legitimately refuse to follow orders to sail to the port. There is no legal impediment to a port being unsafe because of a contagious disease, but whether it is unsafe will depend on the relevant facts in existence at the time the order is made (including, for example, statistical and medical evidence). At present it seems unlikely that any port would be considered unsafe because of COVID-19, considering the degree of likelihood of crew being infected and the likely consequences if they were.

Another factor when looking at the safety of the port is whether the vessel might be subject to blacklisting, boycotts or quarantine at subsequent ports of call, or could suffer an inordinate delay at the nominated port. Regarding delay, a 14-day period of quarantine, or being required to wait at a place off the port for a similar period, is very unlikely to be considered “inordinate” such that the nominated port could be considered unsafe. Any blacklisting or boycotting (i.e. a complete bar on entry or berthing for a considerable period) would also have to extend to a wide range of ports and thereby reduce considerably the vessel’s future earning capability.

It should be noted that a port which is prospectively safe when an order is given can subsequently become unsafe if circumstances change. In that case the owner can demand fresh orders from the charterer. If the owner nevertheless decides to proceed to an unsafe port in accordance with the charterer’s instructions, they would normally be entitled to an indemnity for any extra costs and expenses incurred as a result of following the order.

Where the load port has been agreed in a voyage charter, there will normally be no choice but to make the approach voyage and wait for a berth unless performance can be excused due to frustration or force majeure (see below at §5).

2. At the Loading or Discharging Port: Who pays for lost time?

2.1 Time Charters

In the absence of any breach by the owner, a time charterer is obliged to pay hire unless it can bring itself within the terms of an off-hire clause. The commonly used wording found in Clause 15 of

the NYPE 46 and Clause 17 of the NYPE 93 forms states that the vessel will be off-hire by reason of “deficiency (and/or default) of men” fire, breakdowns or damage to the vessel, drydocking or “any other (similar) cause preventing the full working of the vessel”. The English High Court has said (in *The Laconian Confidence* [1997] 1 LLR 139) that legal or administrative restraints on a vessel can qualify as an “other cause” if they relate to the physical efficiency or condition (or suspected condition) of the vessel or crew. On this basis, a vessel which has been delayed by quarantine restrictions due to actual or suspected crew illness is likely to be off-hire, but if the quarantine applies generally to vessels arriving at the port and is not directed at individual cases then it may be arguable that hire should continue to accrue as the physical efficiency or condition of the vessel or crew has not caused the quarantine. On the other hand, if the word “whatsoever” has been added after “any other (similar) cause” charterers would almost certainly be entitled to claim off-hire.

Having said all that, where the quarantine is a natural result of following the charterer’s orders, the vessel should remain on hire even if “whatsoever” has been added. Unless an owner has, by implication or express term, agreed to bear a particular risk, it is entitled to be indemnified for losses incurred if the risk becomes manifest as a result of following the charterer’s orders. In practice, therefore, vessels are only likely to be off-hire if the employment order which eventually resulted in quarantine was given by a previous charterer (e.g. an order given by charterer A to sail to port X, which later leads to the vessel being quarantined at port Y following an order given by charterer B). In such a case the owner’s loss of hire might be recoverable from charterer A under the implied indemnity.





2.2 Voyage Charters

Once the vessel arrives at or off the port, the burden of time lost due to entry or berthing restrictions is allocated according to the charterparty terms regarding service of NOR and the running of laytime. Although it seems to contradict plain meaning, WIFPON clauses have been held by the courts to be irrelevant to the question of whether a NOR is valid or not (see *The Delian Spirit* [1971] 1 LLR 64 and [1971] 1 LLR 506). The vessel must still be physically and legally ready to load or discharge the cargo, meaning that any quarantine restrictions preventing the vessel from berthing must be removed before a valid NOR can be tendered allowing laytime to commence. A WIFPON term merely restates the general legal position that a vessel which is otherwise ready and not subject to (or will not be subject to) any quarantine restrictions can tender a valid NOR, even though the formality of obtaining free pratique has not yet occurred.

The general position can of course be departed from by express charterparty terms. BIMCO and Intertanko have attempted in their bespoke clauses (see below at §6) to alter the balance in owners' favour. The effectiveness of these terms has yet to be tested in the courts and there may be queries about the operation of the BIMCO clause in particular, as it makes no specific reference to the tendering of NORs.

3. At the Loading or Discharging Port: Who pays for extra expenses?

A vessel might require disinfection / fumigation if it comes from a designated port or if one or more crew members has fallen ill. Both NYPE forms (46 Clause 2, 93 Clause 7) provide for "fumigations" relating to crew illness to be for owner's account, and those relating to "ports visited while ... employed under this charter" to be for the charterer. Presumably where the necessity for fumigation arises from a port call under a previous charter, the owner would have an implied right of indemnity against the former charterer.

For voyage charters, these types of expenses would normally be the responsibility of the owner, unless the parties have agreed otherwise in the charter terms (see below §6).

4. On the Voyage: Deviation

If a crew member becomes ill on board, then a deviation for the purpose of saving life will almost always be permissible. Commonly used charterparty forms contain liberties to deviate in this situation (e.g. NYPE 46 Clause 16, NYPE 93 Clause 22, Shelltime 4 Clause 27(b) and Gencon 94 Clause 3), as do the Hague and Hague-Visby Rules (Article IV, Rule 4) and Hamburg Rules (Article 5, Rule 6).

During such a deviation, hire should remain payable under NYPE form time charters, unless "whatsoever" has been added in the case of the NYPE 46 form. By contrast, Shelltime 4 contains

an express provision stating that the vessel will be off-hire (Clause 21(iii)). Many time charters have rider clauses specifically addressing deviations or "putting back" and these would need to be examined closely to see if they give the charterer the right to deduct from hire, notwithstanding the terms of the off-hire clause on a standard form.

In voyage charter cases, while a deviation to save life will generally be permitted the costs of doing so will normally fall on the owner. Unless there is specific provision in the charterparty, the owner will have no right to additional freight.

Deviation from the original voyage may also be permitted where there are significant restrictions on entry to the discharge port. This may be allowed by an express term of the relevant contract, or because the contract has come to an end due to frustration or the operation of a force majeure clause (see below §5). It should be noted, however, that termination by frustration or force majeure is only likely to occur if the delay is substantial (i.e. probably at least several weeks).

Where there are delays, cargo interests may advance claims for financial loss, or because the goods have deteriorated. The carrier in such cases should be able to rely on the defences of "[R]estraint of princes" (Hague and Hague-Visby Rules Art IV, Rule 2(g)) or "Quarantine restrictions" (Art IV, Rule 2(h)).

5. Frustration and Force Majeure

5.1 Frustration

Frustration is a common law concept relevant to all contracts under English law. It may occur where, without fault on either side, a contract becomes impossible to perform or its performance would be radically different to what the parties originally contemplated. Where a contract has become frustrated any future performance obligations on the parties come to an end.

It is usually very difficult to prove frustration. The fact that performance may have become substantially more expensive or there will be longer than anticipated delays (unless these delays become so prolonged that performance will become something radically different), will not in itself be frustrating. Furthermore, there will generally not be frustration where the parties have included terms in the contract which are relevant to the situation.

Looking at the COVID-19 position as it currently stands, the kinds of delays being seen would fall some way short of what is required for frustration. If this state of affairs deteriorates it may come about that the performance of some voyage charters, or time charters for a trip or of short duration, becomes radically different on account of inordinate delays.

“It should be noted that a port which is prospectively safe when an order is given can subsequently become unsafe if circumstances change.”

In any event, charterparties which contain clauses dealing with COVID-19, or diseases generally, are unlikely to be frustrated in respect of those types of events, as the parties can look to the express terms of the contract to ascertain their rights and obligations.

5.2 Force Majeure

The force majeure concept also pertains to unexpected situations outside the parties' reasonable control, but unlike frustration it is not a doctrine of the common law. For force majeure to be relevant, it must be a term of the contract and its scope and application will depend on an interpretation of terms according to normal contractual principles. Force majeure clauses will typically list a number of events which may lead to one or both parties having the right to terminate the contract entirely (a so-called “frustration” clause), and/or to suspend performance for a period of time or be excused for what would otherwise have been a breach (an “exceptions” clause).

A force majeure clause may potentially be relevant in the COVID-19 context where it refers to “disease”, “plague”, “epidemic” and/or “quarantine”. The commonly found term “restraint of princes, rulers and people” may also be relevant where mandatory government restrictions are in place. Other points to note regarding force majeure clauses are (subject to any wording to the contrary):

- the burden of showing that the facts fall within a force majeure clause rests with the party seeking to rely on the clause
- parties are required to use “reasonable endeavours” to avoid, overcome or mitigate a force majeure event, even if this results in additional expense being incurred and/or would benefit the other party
- if a force majeure clause is construed as an “exceptions” clause, a causal link is required between the force majeure event and the inability of the party to perform (i.e. “but for” the event the party would have been able to perform)
- the force majeure event must be the sole effective cause of the non-performance

- there are often notice requirements in force majeure clauses, and these should be strictly adhered to
- the mere fact that an authority or some company (e.g. a shipper or receiver of cargo) “declares” force majeure is likely to be irrelevant to contracts to which they are not party (e.g. charterparties). Whether a particular set of facts gives rise to force majeure and its consequences will depend entirely on the terms of the contract between the parties concerned; and
- where there are contractual clauses dealing specifically with a particular event, these should take precedence over a more general force majeure clause to the extent of any conflict between the two

6. Special Clauses

Incorporating a clause which deals with diseases generally or the COVID-19 virus itself can assist in avoiding potential disputes where there is loss of time or extra costs are incurred. Of course it may not now be possible to agree such a clause for charters that were fixed before the virus was known about, but discussions along these lines between the parties to any new fixtures are recommended.

BIMCO published two clauses (Infectious or Contagious Diseases Clause for Time / Voyage Charter Parties) in 2015 in response to the Ebola outbreak in Africa. These clauses might in theory cover current issues, but it is an arguable point whether COVID-19 would, as matters stand, be classified as a “Disease” (defined in the clauses as “a highly infectious or contagious disease that is seriously harmful to humans”), which is a precondition for the clause to have effect. Furthermore, the Club has recently seen cases where charterers have refused to agree to the BIMCO clause, on the grounds that if COVID-19 were to fall within the definition of a “Disease” under the clause, then there could be a multitude of ports around the world which would be “Affected Areas”, thereby potentially hindering to a large degree the charterer’s ability to trade the vessel.

In February, Intertanko published two clauses (“COVID-19 (‘Coronavirus’) Clause – Time / Voyage Charterparties”) which, as the name suggests, are intended to deal solely with COVID-19. They can be used for any cargo carrying vessel, not only tankers.

The clauses are slightly narrower in operation than the BIMCO clauses as the owner’s various rights only take effect where there is a reasonable judgment that there is an unacceptable level of risk to the crew or other persons on board. The BIMCO clauses, by contrast, can also operate where there is a risk to the vessel of quarantine or other restrictions.

Both sets of clauses follow a similar scheme. If the owner/Master reasonably assesses there to be an unacceptable risk of exposure, they may refuse to follow the charterer’s original orders and request alternative orders or, if the vessel comes to be in an affected area, they can depart to a safe place. Any extra costs incurred in respect of quarantine, fumigations, cleaning and the like will be for charterer’s account. With time charters, the vessel will remain on hire throughout, while for voyage charters time lost will count as laytime or demurrage (although see above §2.2 in relation to tender of NOR).

If fresh orders are required but not given by the charterer the vessel will simply remain on hire or, in the voyage charter case, owners will have the right to discharge the cargo at a safe port of their choice. With the latter, any extra expenses are recoverable from the charterer, full freight will still be payable and (for the BIMCO clause) additional freight will be payable if the vessel has to sail an extra distance of over 100 miles.

To prevent there being any disjuncture between the BIMCO / Intertanko clauses and any contracts of carriage between owners and cargo interests, it is specified that the clauses must be incorporated into bills of lading or other carriage documents. Finally, the clauses make it clear that their terms are to supersede any other terms of the charter, including force majeure provisions.

While we trust this advice will answer many questions that members currently have about contractual issues relating to COVID-19, the situation is developing and changing rapidly and this could give rise to different challenges. We encourage members to get in touch with their usual contact at the Club if they have any enquiries. ■

“A vessel might require disinfection / fumigation if it comes from a designated port or if one or more crew members has fallen ill.”



Law Under Lockdown

The COVID-19 pandemic has seen many parts of the world placed under severe restrictions on travel and movement, with various forms of lockdown.



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Despite such difficult times, it remains important for individual states to maintain as far as possible a functioning legal system across civil and criminal areas to promote access to justice, reinforce the Rule of Law, and to underpin the personal and business interests of people and corporations. For shipping interests this comes at a time combining volatile shipping, energy and commodity markets with a global state of emergency with distinct echoes of the 2008 crash and a potential for a significant increase in legal disputes.

This article looks at how the English legal and arbitration systems have adapted to a State in lockdown.

Courts

It was already possible to have a degree of remote attendance at hearings. For example, foreign witnesses were able to give evidence via video link in civil cases and arbitrations. Criminal and family cases also permitted witnesses to attend remotely given concerns over protecting the vulnerable.

In the civil and commercial sphere, the courts are still functioning with an emphasis on genuinely urgent applications, such as freezing orders and injunctions. Likewise arrest of ships under Admiralty Court jurisdiction is still possible using electronic filing.

This was underlined by an announcement from the Lord Chief Justice that “We have put in place arrangements to use telephone, video and other technology to continue as many hearings as possible remotely. We will make best possible use of the equipment currently available; HMCTS is working round the clock to update and add to that. Some hearings, the most obvious being jury trials, cannot be conducted remotely.”

The court system has had to adapt to deal with cases primarily via telephone or video conferencing. The preparations for such systems were already in place, but the magnitude of the current crisis has forced their adoption, overcoming any

objections to their use. Following official guidance and the introduction of The Coronavirus Act 2020, the presumption now is that all hearings are to be conducted remotely where possible.

Televised cases have been used for a number of years. The above developments acknowledge that public access to courts is an important part of the justice system, with limited exceptions, and that even remote hearings should still be public hearings where possible.

Practice directions have clarified the manner in which the court may exercise its discretion to conduct hearings remotely in private, and to set out the steps to be made to ensure access by the public to remote hearings held in private, by making available audio or video recordings of those hearings at a time when the courts are operating normally.

Adjournments

A key driver behind keeping courts operating remotely was to avoid the inevitable backlogs and delays which would build up if cases were adjourned.

It is important to note that there is no intention in the above Act to suspend time limits. Claim forms still need to be served and limitation periods adhered to.

The Ministry of Justice recently confirmed an amendment of the rule allowing parties to agree extensions of up to 28 days without being required to seek the court’s permission. The new practice, direction provides for this to be doubled to 56 days. Parties are also encouraged to use the available time to explore between themselves, the possibility of compromising claims before resorting to adjournments.

There is also a drive to accept electronic signatures and witness statements, with documents able to be signed electronically. It is important to remember however, that the special requirements of a document to be executed and witnessed as a deed under English law do not yet have an electronic equivalent. The COVID-19 situation is certainly compelling in this area, not least as this requirement for being signed in the presence of witnesses affects the ability of people to validly execute wills under the current travel restrictions and social distancing regime.



In terms of how these changes translate into resolving matters, the case of *Fowler v Commissioners for Her Majesty’s Revenue and Customs*, takes the credit for making legal history as the first Supreme Court case to be handled solely through video conferencing. The case concerned the tax treatment of a diver with the parties and their legal teams, counsel and the Justices themselves all located in different places during the hearing.

The proceedings were made available shortly afterwards and are available to the public with appropriate restrictions on recording or redistribution. Whilst tax cases are by nature perhaps a little dry, the introduction of Lord Hodge and the submissions from Counsel provide an insight into what can be achieved online. As for any hearing, it seems that management of the paper bundles or e-bundles remains a key challenge in presenting and digesting argument.

Following the closure of its physical premises in March, the Supreme Court has indicated that cases will proceed with judgments to be handed down via video conferencing until further notice.

Likewise, the Commercial Court handled a high profile matter concerning the Republic of Kazakhstan by way of a groundbreaking full virtual trial by video conferencing software, again with open online access.

Arbitration

International arbitration has an inherent flexibility, with arbitrators afforded an element of discretion in the conduct of cases and commercial parties and their advisers able to agree how proceedings are run. For London maritime arbitrations, the LMAA recently reassured its users that arbitrators can continue to be appointed via email and with documents only Awards being sent out by e-mail as usual.

For cases that require an oral hearing, virtual hearings have previously been available and are now being actively promoted with a likely future benefit being enhanced ability for parties to arrange hearings partly or entirely on a virtual basis. A Working Group has been established by the LMAA to support this development.

In terms of support from the Court system, arbitration applications and appeals continue to be heard. Whilst they are by nature confidential and subject to reporting restrictions, it has been clear from recent experience that a number of significant arbitral hearings progressed entirely on a virtual basis and as for the Commercial Courts, that process involves all participants attending remotely from their respective separate locations.

Mediation

Even with the serious market disruptions, it remains possible for parties to continue settlement discussions, using technology to replace international travel. It is also worthwhile to consider Alternative Dispute Resolution including mediation as a more structured route towards compromise at this time. That may apply all the more so where there is anticipated to be an increase in the volume of cases in court and arbitration proceedings even once the initial phase of the pandemic has eased. Given the International aspect of shipping litigation, many mediators and practitioners are familiar with online mediation as a concept and in practice, and it is hoped that this will provide parties with a further tool to meet their needs.

Remote working has very rapidly become established as a close equivalent to business as usual with States, professional bodies and parties able to use technology in innovative ways which has already brought change in legislation and protocol and is now positioned to bring longer term benefits to commercial and legal practices. ■

PHILIPPINES – Crew Claim Guidance – Impact of COVID-19 on 120/240 Day Rule

This article is based upon advice prepared and provided by the Club’s correspondent lawyers Del Rosario & Del Rosario.



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Background

In response to the threat posed by COVID-19, the President of the Philippines placed Luzon, which includes the capital Manila, under “enhanced community quarantine” (ECQ) from 16th March to 13th April, which was initially extended to 30th April, but was recently subject to a further extension to 31st May. However, the recent extension beyond 15th May has seen a traffic light system introduced, resulting in the “community quarantine” (CG) status in some low risk Provinces being removed (green light); whilst those in moderate risk Provinces continue under “general community quarantine” (GCQ) (amber light); and a new “modified enhanced community quarantine” (MECQ) status introduced for high risk Provinces (red light). No doubt both the date and the nature of the quarantine status in each Province, will be kept under review.

The significant restrictions imposed on one third of the Philippines, with a population of more than 55 million people, includes suspension of public transport and impacts on access to non-essential medical or surgical assistance.

In addition to the direct impact this has on Manning Agents and Company Designated Physicians (CDPs), the Supreme Court closed all courts nationwide and Government offices like the National Labour Relations Commission (NLRC) and National Conciliation and Mediation Board (NCMB) have suspended hearings. Despite the restrictions on both domestic and international travel in force, Overseas Filipino Workers (OFWs – which includes seafarers) are still able to travel in and out of the country. However, we understand the POEA are unable to process seafarers’ contracts at present.

The “work from home” scheme adopted by the private sector during the ECQ, has resulted in CDP informing Manning Agents that they will be unable

to see seafarers who are undergoing treatment on an “out-patient” basis for the duration of the ECQ. Where possible/appropriate, seafarers are advised to continue their treatment at a clinic/hospital near the place of their residence and required to send medical reports issued by doctors who provided interim treatment to the CDP via electronic mail. On the basis of the said reports, the CDP will evaluate the seafarers and send updates to the Manning Agents/Principals.

Effect of the ECQ on the 120/240 Day Rule

Current Supreme Court jurisprudence dictates that employers must take the following steps to avoid exposure to a claim for maximum disability under the POEA SEC or CBA by default, based on the number of days a seafarer has been treated. It is essential employers continue to strictly abide by the following rules:

1. The CDP must issue a fit to work determination and/or provide a final medical assessment regarding the seafarer’s disability grading, within a period of 120 days.
2. NB: If the CDP fails to act as indicated above, within the period of 120 days, without sufficient justification, then the seafarer’s disability becomes permanent and total.
3. The CDP can extend seafarers’ treatment beyond 120 days with sufficient justification (e.g., seafarer requires further medical treatment), for a period up to 240 days. The employer has the burden to prove that the CDP has provided sufficient justification to extend the period beyond 120 days, before the 120 day period expires.
4. If the CDP still fails to declare the seafarer fit to work and/or provide a final disability assessment within the extended period of 240 days, the seafarer’s disability becomes permanent and total, regardless of any justification issued.
5. NB: In this regard, the CDP is mandated to issue a medical certificate, which should be personally received by the seafarer within 240 days, or, if not practicable, sent to the seafarer before the expiry of 240 days, by any other means sanctioned by the Rules of Court.

“The “work from home” scheme adopted by the private sector during the Quarantine, has resulted in Company Designated Physicians (CDPs) informing Manning Agents that they will be unable to see seafarers who are undergoing treatment on an “out-patient” basis...”

Indisputably, the enforced travel restrictions require CDPs to suspend work and prevents seafarers from reporting throughout the duration of the ECQ. Employers therefore need to review their options vis-à-vis their desire to continue providing medical assistance to their seafarers, without jeopardising their position giving consideration to the strict application by the courts of the 120/240 day rule, in liaison with the Club and retained correspondent / lawyers.

Safety Measures

Employers cannot predict how the Philippine labour courts will act in response to the obvious impact of COVID-19, in their interpretation of the 120/240 day ruling. To guard against the application of the State policy of favouring labour in case of doubt, employers should continue to adopt the following guidelines in providing medical attention to their seafarers:

1. The CDP must still issue a final assessment prior to the end of the 120 day period, or;
2. If justification can be provided to extend treatment beyond 120 days, the CDP must issue a written report stating their justifications for extending the period of treatment.
3. If treatment is extended, a final assessment must still be issued before the lapse of

240 days. Employers must check all cases approaching 240 days and take immediate steps to ensure a final assessment is issued.

Arguably, during the implementation of the ECQ, the strict observance of the 120/240 day period will not be beneficial to all seafarers as it will limit their ability to access treatment. If employers wish to continue providing medical attention to the seafarers by extending the period of treatment on a case by case basis, by another 30 days or more, depending on when the ECQ will be lifted, employers may be protected though the following precautionary measures:

4. If the seafarer consents, they will be required to make a written request to the employer that their treatment be extended in line with the number of days the Island of Luzon is under ECQ. The request must be handwritten by the seafarer in the language or dialect for which the seafarer is very much familiar with (most likely Tagalog).
5. The medical report(s) to be issued by the CDP during the “extended” period, must contain a statement that treatment has been continued in line with the written request of the seafarer patient. ■



COVID-19 – Frequently Asked Questions

Does the present COVID-19 pandemic of itself prejudice Club cover?

The short answer is “no”.

However, Clubs do require that the entered vessel is, and remains, classed and this could be problematic where certification is about to expire and renewal is likely to be delayed due to COVID-19.

Fortunately, a number of flag states have already recognised the demand to apply a reasonable and pragmatic approach, including agreeing to extend the period of validity for ships’ certification; classification societies have similarly agreed to extend the validity of certification where it is not possible to complete the necessary surveys. Initially, the permitted allowable extension is, in general, three months. In case ships are still unable to complete the necessary surveys and audits within this period, discussions are underway to see if and how certificates can be extended further whilst ensuring safety standards are maintained.

A. CREW:

1. Due to inability to rotate, crew have to remain on board – contracts, certification, “overlap” wages.

This is an issue we are seeing with increased frequency as more ports refuse to allow crew changes, and in other cases where crew on board are simply unable to leave or new crew to join due to COVID-19 related border or airline restrictions. A number of issues can arise:

- Expiry of seafarer’s contract: contract length varies, although under the Maritime Labour Convention (MLC) should not exceed 12 months. However, the ITF have stated (E-Circular 087 dated 17 March 2020) that until 16 April 2020, it will not challenge extensions of up to one month, even where they exceed the MLC period or other periods allowable under ITF approved collective bargaining agreements, provided individual seafarers consent to such an extension. A number of States have also said that they will permit extensions
- Expiry of Seafarer certificates and medical certificates: most administrations, including most of the major seafarer supply states (and flag states that issue endorsements), have announced an extension of certificate validity for periods between one and six months
- Expiry of P&I Club enhanced PEMEs: under our scheme these have a validity period of

12 months; however, we have agreed with our clinics that they can give a three month extension, with further three month extensions thereafter to a maximum of 12 months beyond the original 12 month period of validity

- “Overlap” wages; an owner may find itself liable for wages of both a crew member who has to remain on board and for the intended replacement who is about to join or has joined the vessel. Such wages would not fall within Club cover

Finally, it is worth noting that the IMO, in its preliminary list of recommendations for governments and relevant national authorities (circular letter 4204/Add 6, 27 March 2020) includes recommendations to designate professional seafarers and marine personnel as “key workers”, to grant them exemptions from national travel or movement restrictions to facilitate their joining or leaving ships, and to permit them to disembark ships in port and transit through their territory for the purposes of crew changes and repatriation. We shall report developments.

2. Crew member has to go through a period of isolation ashore before joining/ after disembarkation.

It is unlikely that there would be cover for accommodation, food or other costs, nor for wages during this period; these costs being of an operational nature even where the period is imposed by an order or regulation of the border, port or other authority. There might be exceptional cases where cover might be available – for instance if the crew member has contracted the virus during his service, and the period of isolation is a necessary part of his repatriation or of his medical treatment.

3. Crew are tested prior to joining, or whilst on board the vessel.

The cost of such precautionary testing will not fall within Club cover, whether testing is performed prior to joining or whilst on board. However, where a crew member falls ill during service, such testing might fall within cover if it forms part of that crew member’s medical treatment.

4. Crew member showing symptoms is isolated on board the vessel.

If this is part of quarantine or pursuant to a public health order, in principle cover would be available; however, we would only cover additional costs i.e. costs in excess of normal operating costs. Since the cost of food, board etc on board would have been incurred anyway,

it is unlikely that any of these costs would be covered. As to what constitutes “quarantine” for the purpose of our Rules, please see C2 below.

5. Crew member showing symptoms is removed from the vessel and isolated ashore.

We would cover the additional costs involved (which are likely to be the cost of accommodation, food and travel, but not wages) provided that this is part of quarantine or pursuant to a public health order (see Rule 25* xii, and section C below as to quarantine).

6. Crew member showing symptoms is repatriated.

If the crew member is ill and this necessitates repatriation, then repatriation expenses are likely to be covered under Rule 25 ii c (i).

7. Crew member falls ill whilst on board the vessel.

In this situation, the following will be covered by the Club as with any other illness or injury:

- Any legal liability on the part of the Member for damages or compensation to that crew member, including any maintenance and cure obligations for the illness, injury (or death) (Rule 25 ii a)
 - Reasonable hospital and medical costs (Rule 25 ii b)
 - Costs of repatriating that crew member (including periods of quarantine or isolation if that is an integral and necessary part of the repatriation process) (Rule 25 ii c)
 - Port and deviation expenses (fuel, insurance, crew wages, stores, provisions and port charges) to the extent that they exceed ordinary operating costs and provided they are solely and reasonably incurred in securing necessary treatment for that crew member (Rule 25 ii g)
 - Certain crew substitution expenses necessarily incurred to replace the sick crew member (Rule 25 ii d)
8. Crew member falls ill after disembarking (or prior to joining) the vessel

If the disembarking crew member contracted the illness whilst on board, then the answer will be the same as A7 above. However, where COVID-19 is actually contracted on the journey prior to joining/ after disembarking, similar cover will apply but only if the crew member was, or remained under contract to the owner at the time of infection. In most cases, the crew will so remain under contract but ultimately this will depend upon the terms and scope of his employment contract and on any applicable laws or rules in the relevant jurisdiction.

9. Vessel diverts to obtain medical treatment ashore for infected crew member.

The Club will cover certain port and deviation expenses, to the extent that they exceed ordinary operating costs and provided they are solely and reasonably incurred in securing necessary treatment for that crew member (see A7 above).

10. What about the 120/240 day limits in the Philippines?.

To avoid a finding of maximum disability by default, the Company Designated Physician (CDP) must within 120 days issue a fit to work determination or provide a final assessment as to disability grading. Within that period, the CDP can instead extend the seafarer’s treatment if there is sufficient justification to do so, up to a maximum of 240 days.

With the enhanced community quarantine in Luzon, the CDPs are presently unable to conduct medicals, and seafarers may encounter difficulties obtaining routine medical treatment in their Provinces. More importantly, strict observance of the 120/240 day rule could limit or shorten the amount of treatment the crew member receives, jeopardising their recovery.

We understand that a possible course of action which might offer a solution would be to obtain the crew member’s agreement that they make a hand-written request, prior to expiry of the 120 or 240 day period, that their treatment be extended. The medical report issued by the CDP would then contain a statement that treatment will be continued upon written request of the crew member.

This is discussed in more detail in an article on our website giving [Philippines crew claim guidance](#).

B. PASSENGERS:

1. Passenger falls ill whilst on board.

In this situation, the following will be covered by the Club as with any other illness or injury:

- Any legal liability on the part of the Member for damages or compensation to that passenger for the illness, injury (or death), including reasonable hospital and medical costs (Rule 25 ii a and b)
- Liability for the costs of repatriating that passenger (including periods of quarantine or isolation if that is an integral and necessary part of the repatriation process) (Rule 25 ii c)
- Port and deviation expenses (fuel, insurance, crew wages, stores, provisions and port charges) to the extent that they exceed ordinary operating costs and provided they are solely and reasonably incurred in securing necessary treatment for that sick passenger (Rule 25 ii g)

2. Cruise is curtailed due to an outbreak on board – infected passengers.

In respect of passengers who are actually infected with COVID-19, as stated in B1 above, the following will be covered by the Club as with any other illness or injury:

- Any legal liability on the part of the Member for damages or compensation to those passengers for the illness, injury (or death); which will include any claim for curtailment, loss of enjoyment etc
- Liability for reasonable hospital and medical costs (although we would expect passengers, in the first instance, to look to their own travel/ medical insurance)
- Costs of repatriating those passengers (including periods of quarantine or isolation if that is an integral and necessary part of the repatriation process)
- Port and deviation expenses (fuel, insurance, crew wages, stores, provisions and port charges) to the extent that they exceed ordinary operating costs and provided they are solely and reasonably incurred in securing necessary treatment for those passengers

The quarantine rule (see below) may also be relevant.

3. Cruise is curtailed due to an outbreak on board – non-infected passengers.

Liability for damage or compensation under the passage contract (for cruise curtailment) would only be recoverable from the Club if this was a consequence of the outbreak, and if that outbreak posed a threat to the life, health or safety of those passengers (Rule 25 ii f). This will be a question of fact in each case, although the threat would need to be actual and real.

The cost of repatriation would not be covered as of right; however, the Managers do have a discretion in certain circumstances to reimburse all or part of that cost.

C. QUARANTINE (Rule 25 xii):

1. What are the pre-conditions for cover under this Rules?.

There must either be an outbreak of an infectious or contagious disease on board the entered vessel, or the expenses (for which reimbursement is sought) must be in respect of quarantine.

Only “extraordinary” expenses will be reimbursed.

2. What constitutes “quarantine” and “extraordinary” expenses?

We construe “quarantine” in this context widely enough to include a requirement of the port that the vessel leaves berth for a period of isolation, or that it isolates before it will be allowed to proceed to berth/ disembark crew etc, provided that the requirement is directly related to COVID-19.

What constitutes “extraordinary” expenses will depend upon the circumstances, but in most cases it will mean no more than the expenses over and above normal operating expenses and expenses which would have been incurred even if the outbreak or quarantine had not arisen.

3. The Vessel is subjected to a period of quarantine before berthing, or whilst at berth is ordered into quarantine or away from berth due to an outbreak, or suspected outbreak on board.

If there is an actual outbreak on board, the pre-condition referred to above will be satisfied and the quarantine Rule will be triggered. This Rule provides cover for the following additional/ extraordinary expenses:

- Disinfection of the entered ship or persons on board (including the cost of taking in fuel in quarantine, loading and discharging cargo, and victualling passengers and crew)
- Fuel consumed or towage in proceeding to and from and lying at any place solely in accordance with quarantine or public health order
- Expenses (including additional wages e.g. overtime, and port charges etc.) directly consequent upon deviating to a port or place of refuge (which includes e.g. a berth or anchorage within a port) and resuming the voyage thereafter

* Note, however, the proviso that if the vessel proceeds to a port where it was known, or ought reasonably to have been known, that the vessel would be subject to quarantine, then there is no cover under this Rule (unless the vessel was already contractually obliged to do so).

* If there is no actual outbreak (it was only suspected), because the vessel is being subjected to quarantine, again the pre-condition is satisfied and cover will apply in exactly the same way as above.

4. The vessel is subjected to a period of quarantine before berthing, or whilst at berth is ordered into quarantine or away from berth, without there being any outbreak or suspected outbreak on board.

In this situation too, because there is quarantine (and note the way we construe this word – C2 above) again the pre-condition is satisfied and cover will apply in exactly the same way as in C3 above.

5. Vessel is refused permission to berth until a period (usually 14 days) lying off the berth has been completed (but there is no “quarantine order” as such).

In this situation, it will be necessary to look very carefully at the requirement to lie off. If we are satisfied that it is directly related to the COVID-19 pandemic (see C2 above), then we will treat this as “quarantine” such as to satisfy the pre-condition for cover under this Rule, and cover will be available in exactly the same way as in C3 above.

On the other hand, if the requirement is simply a routine operational requirement of the port unconnected with COVID-19, there will be no cover under this Rule.

D. CARGO ISSUES (Rule 25 xiii)

1. The port named in the contract of carriage is closed – as a consequence, the cargo is delivered at some other place: will usual P&I cover for cargo liabilities be prejudiced?

There are two potential concerns here. First, this could amount to a deviation, and our Rules provide that there shall be no recovery from the Club in respect of cargo liabilities which arise out of, or as a consequence of, a deviation. However, the Managers can agree to such a deviation (Rule 25 proviso (iii)). In such situations, please get in touch with your usual contact at the Club.

The second issue is that cover does not apply as of right to liabilities etc which arise out of the discharge of cargo at a port or place other than that permitted by the contract of carriage (Rule 25 proviso (viii)(a)). Obtaining a Letter of Indemnity (LoI – for instance in International Group Form B wording) from the charterer or cargo interests might mitigate the risk presented by this loss of cover. However, such LoIs do not represent a perfect solution: amongst other issues the wording might not be wide enough to apply in the particular circumstances, and recovery under the LoI is always dependent upon the credit-worthiness of the party providing that LoI.

In any event, in this situation it is advisable to speak with the Club. If required, it may be possible for an additional cover(s) to be provided.

2. As a consequence of the above, the bill of lading does not arrive at the “new” place of delivery in time to be presented to take delivery: does this present any issues as to cover?

As a matter of English law at least, a bill of lading needs to be presented in order to take delivery of the cargo (even if it is a non-negotiable, or “straight” bill). Thus, if the Master does deliver the cargo without the bill, this will be a breach of contract and the owners will be liable for any loss

which arises as a consequence – the most likely loss will be a claim for misdelivery of the cargo.

This is echoed in our Rules, which provide that cover does not apply as of right to liabilities etc which arise out of delivery of cargo without presentation of the relevant bill of lading or other similar document of title (Rule 25 proviso (viii)(b)). Here, again, obtaining a LoI (for instance in International Group Form A wording) might afford some protection to mitigate this loss of cover, but for the same reasons as in D1 above, it will not provide complete protection.

In this situation, we recommend that you speak with the Club. If required, it may be possible for an additional cover to be provided.

In practice, of course, e-bills may provide a solution to this particular issue.

3. Additional costs are incurred in transporting the cargo to the “new” place of delivery: are any of these costs recoverable from the Club?

Such costs are not recoverable from the Club. They do not fall within any head of cover and are essentially operational costs/costs of earning freight.

4. Perishable cargo is damaged due to delays at the discharge port: will normal P&I cover for such loss or damage be available in the usual way? Yes.

Such damage will be covered under our Rules in exactly the same way as any other cargo claim (provided of course that the delay was not so long as to constitute a deviation and the Member did not act imprudently – in particular, did not embark on the voyage knowing that the vessel was likely to be delayed with risk to the cargo as a consequence).

It is worth noting that the carrier may have a defence under the Hague/Hague-Visby Rules/ US CoGSA under Article IV 2 (g) “... *restraint of princes* ...” or (h) “*Quarantine restrictions*”.

E. CONTRACTS:

For Members with FD&D cover, assistance will be available in relation to COVID-19 related charter party or contractual disputes in the same way as any other disputes. The reader is also referred to an [article dealing with contractual issues](#) on our website.

*Rule citations refer to the Owned Rules. For chartered entries, the relevant Rule is 21 (not 25), but otherwise the numberings are the same.

Please note that the above is intended as a general outline for guidance only. For advice in connection with a specific matter involving COVID-19, Members can of course refer to their usual contacts at the Club. ■

COVID-19: Club Cover – Some Basics

In these difficult and uncertain times, we appreciate that Members will have many questions concerning club cover. Whilst every case will depend upon its own facts, we attempt below to identify Rules which might apply in the present circumstances and to set out, in general terms, how those Rules operate.

Club cover extends to the following:

Quarantine (Rule 25 xii *)

The cost/ expense of:

- Disinfection of the entered ship or persons on board (including the cost of taking in fuel in quarantine, loading and discharging cargo, and victualling passengers and crew)
- Fuel consumed or towage in proceeding to and from and lying at any place solely in accordance with quarantine or public health order (PHO)
- Expenses (including additional wages e.g. overtime, and port charges etc) directly consequent upon deviating to a port or place of refuge (which includes, for example a berth or anchorage within a port) and resuming the voyage thereafter

However:

Note that such quarantine cover applies only to additional expenses (i.e. that would not have been incurred in any event), and only where the vessel is under, or the expenses are consequent upon, quarantine or a public health order.

We construe “quarantine” in this context widely enough to include a requirement of the port that the vessel isolate before it will be allowed to proceed to berth/ disembark crew etc, provided that requirement is directly related to COVID-19. However, where there are general restrictions a member should, as a matter of prudence, confirm with the relevant authority that they apply to its vessel.

Furthermore, if the vessel proceeds to a port where it was known, or ought reasonably

to have been known, that the vessel would be subject to quarantine, then there is no cover under this Rule (unless the vessel was already contractually obliged to do so).

Repatriation (Rule 25 ii c)

- Repatriation expenses of persons on board consequent on illness or injury to such persons (which expenses could include periods of quarantine or isolation if they are an integral and necessary part of the repatriation process and could not reasonably be avoided)
- Other repatriation expenses, or expenses incurred to avoid repatriation, which are reasonably and necessarily incurred, at the discretion of the managers

Deviation (Rule 25 ii g)


Additional port and certain deviation expenses (over and above ordinary running costs) where these are solely incurred:

- To secure necessary treatment for sick or injured person being carried on an entered ship
- While awaiting a substitute for a deceased, injured or sick crew member provided they have been reasonably incurred

The additional deviation expenses covered are fuel, insurance, crew wages, stores and provisions, less any savings.

Compensation for illness, injury or death (Rule 25 ii a)

Damages or compensation in respect of injury, illness or death to crew, passengers, supernumeraries or third parties for which the Member is liable.



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Medical costs (Rule 25 ii b)

Reasonable hospital and medical costs in relation to injury, illness or death of any person on board, or any seaman whilst engaged as crew. This could include cost of testing for COVID-19 if this is a part of the medical treatment.

Compensation to passengers for breach of the passage contract (the “Casualty Rule” – 25 ii f)

Damages or compensation for which the Member is liable, under a passage contract, to passengers on board in consequence of a casualty – for these purposes, “casualty” requires that there be an actual threat to the health, life or safety of passengers on the vessel.

Cover includes any liability for the cost of forwarding passengers to destination or returning them to the port of embarkation.

The most typical type of claim here would be for early curtailment of the cruise, or compensation to ferry passengers for delay.

Note the requirement that passengers be on board – we do not cover such liability to passengers prior to boarding, for instance where a cruise sailing or ferry crossing is cancelled.

Loss of baggage and effects (Rule 25 ii h)

Where passenger baggage, or personal property (excluding cash etc) of crew is lost.

Crew substitutes (Rule 25 ii d)

Certain expenses reasonably and necessarily incurred in sending crew substitutes to

replace a crew member who has died or been disembarked due to illness.

Cargo liabilities (Rule 25 xiii)

Usual Club cover in respect of cargo extends to:

- Liability of the Member for loss, shortage, damage or other responsibility arising out of any breach by the Member of its obligations under the contract of carriage
- Additional handling costs (restowing, discharging, or disposing) of damaged or worthless cargo (less any proceeds of sale)
- Liability of the Member for extra costs and liabilities arising directly out of the failure of cargo interests to collect or remove cargo from the place of discharge or delivery (to the extent those costs exceed the proceeds of sale of the cargo)

However, certain provisos to cover may apply to the above, including deviation in relation to cargo, delivery without presentation of the original bill of lading, and delivery at a port or place other than that permitted by the contract of carriage. If these situations arise, it is recommended that you get in touch with your usual contact at the Club.

* Rule citations refer to the Owned Rules. For chartered entries, the relevant Rule is 21 (not 25), but otherwise the numberings are the same. ■

COVID-19 and Ships' Crews

Appropriate COVID-19 precautions and procedures for crew on board cargo vessels are a prime concern for Members. Although the landscape is rapidly changing, we set out below a snapshot of the current situation as it relates to certain P&I issues and available sources of advice.



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Steamship Mutual COVID-19 webpage

Steamship Mutual has a dedicated area on our website which is updated regularly, <https://www.steamshipmutual.com/publications/Articles/coronavirus012020.htm>. At the top of the page you will see a link to the Marine Media Enterprises and Steamship Mutual film "Coronavirus – Stay Safe on Board"

Below that is a section for links to industry sites including links to the WHO, IMO and various ISWAN links including ISWAN's guides to mental health sponsored by Steamship Mutual, Seafarers' FAQ, free BIMCO posters, and much more.

A section P&I/Charter Party issues contains many of the articles you can see in this COVID-19 section of Sea Venture including Steamship's own COVID-19 FAQ and the "Club Cover – some basics" article.

Below that are links to port and country updates from, amongst others, IGP&I, Wilmhelmsen, GAC and others, followed by Steamship's own country by country guide with information supplied by Correspondents around the world. The webpage is updated regularly.

General information

Hygiene and cleanliness on board are paramount. Anyone on board should regularly clean their hands using alcohol-based hand rub or soap and water. When coughing or sneezing, the general consensus is that the mouth and nose should be covered with a flexed elbow or tissue (which should be disposed of immediately). Avoid close contact with others (where practical), particularly if an individual is showing signs of a fever, cough and/or has trouble breathing. If a crewmember demonstrates any of these symptoms then they should immediately isolate themselves and medical advice should be sought from a doctor. The consumption of

raw or undercooked animal products should also be avoided. Raw meat, milk or animal organs should be handled with care, to avoid cross-contamination with uncooked foods, as per good food safety practices.

If COVID-19 is suspected on board

COVID-19 is an illness like any other and cover responds in the usual manner. If a crewmember has contracted COVID-19 they will likely be treated and placed in quarantine at the place where they are landed and would only be repatriated once they have recovered, but much will depend on the regime in place at the relevant port. A routine medical repatriation would typically be arranged in conjunction with the local P&I correspondent, and the Clubs handle a number of these cases every year, in many parts of the world. Cover would apply in the usual way, including for substitutions, as per Rule 25(ii)(c).

Depending on the requirements of the authorities at the relevant port and/or the flag state, crewmembers who are asymptomatic may also be required to undergo quarantine in some form. Whilst each case must be treated on its own facts, if extraordinary expenses were to be incurred as a consequence of an outbreak of infectious disease on board or the vessel was subject to quarantine, the Club's Quarantine Rule (Rule 25(xii)) might apply. Coverage may extend to expenses such as disinfection, victualling and fuel as set out in the Rule. It will be appreciated, however, that cover would not be available in circumstances where it was known or ought to have been anticipated that the vessel would be subject to quarantine at that port. Deviation expenses solely incurred in order to secure necessary treatment for a sick crewmember would be covered in the usual manner under the Rules (25(ii)(g)).

Unfortunately, we are hearing of a few cases where sick or injured crewmembers (not COVID-19 related) have encountered difficulties at ports. The Club will of course endeavour to assist by utilising our extensive network of Correspondents and medical advisers.

If members have any queries that are not answered above or on our website then please do not hesitate to get in touch with your usual contact at the Club. ■



Contract



Damned if You Don't Perform the Contract

Now there is a judgment from the Court of Appeal, this is a follow-up to the article in Sea Venture 31 looking at the compensatory principle in awards for damages.



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The Court of Appeal has overturned a controversial decision of the High Court on damages, which was founded on a 'distortion' of the compensation principle.

The Court of Appeal has handed down judgment in *Classic Maritime Inc v Limbungan Makmur SDN BHD*

[2019] EWCA Civ 1102. The decision is important for its discussion of two important questions of law:

- i. Whether a party relying on a force majeure or exceptions clause has to show that it would have performed the contract 'but for' the force majeure/excepted event?
- ii. If performance is made impossible by such an event, but the party relying on the force majeure/exceptions clause would not have performed the contract in any case, is the innocent party entitled to claim substantial damages?

The decision of the High Court, discussed in greater detail at <https://www.steamshipmutual.com/publications/Articles/beware-pyrrhic-victories.htm>, had proved especially controversial for its application of the compensation principle, which had resulted in Owners being awarded nominal damages of US\$1, even though Charterers would not have performed the contract in any event. This aspect of the decision has now been overturned by the Court of Appeal, which has awarded Owners damages of US\$20 million.

Factual background: a recap

The litigation arose following the bursting of the Fundao dam in Brazil on 5 November 2015. The Charterers under a COA, Limbungan, blamed their failure to provide cargoes as required under the COA on the bursting of the dam and claimed that clause 32 of the COA exempted them from liability for non-performance.

Clause 32 provided materially as follows:

'Exceptions – neither the vessel, her master or owners, not the charterers, shippers or receivers shall be responsible for ... failure to supply, load ... cargo resulting from: Act of God, ... floods ... accidents at the mine or production facility ... or any other causes beyond the owners' charterers' shippers' or receivers' control;

always provided that such events directly affect the performance of either party under this charter party...'

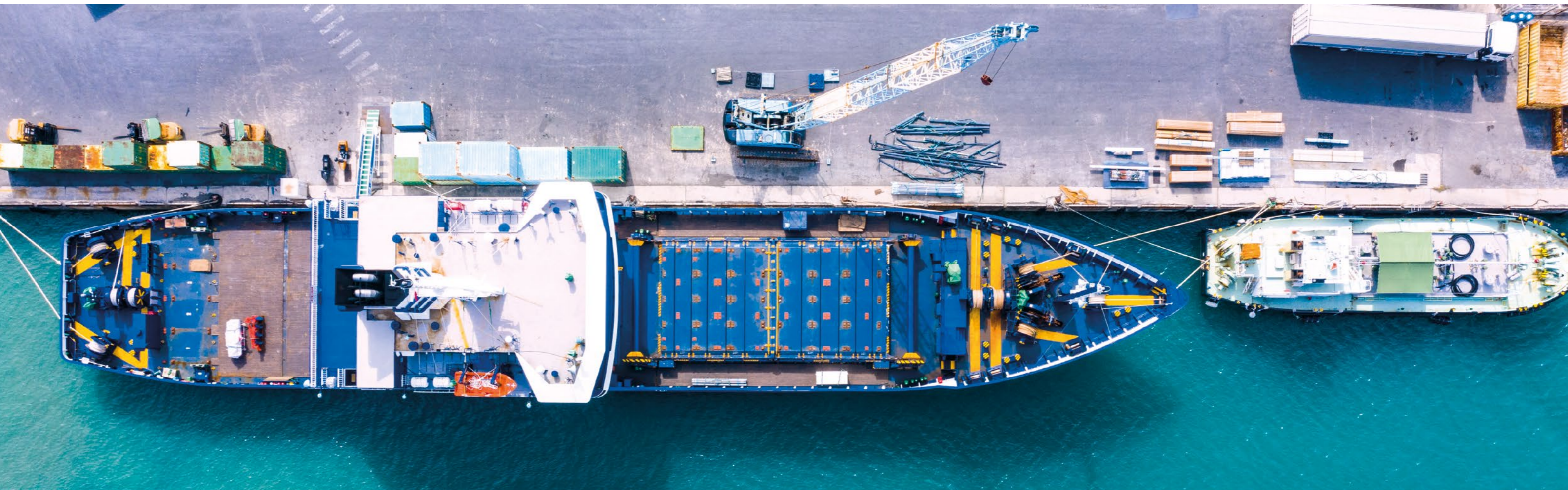
Decision of the High Court

The High Court firstly decided that clause 32 did impose a causation requirement: in order to rely on the clause to excuse their non-performance, Charterers had to show that they would have performed the contract had the dam not burst. However, Teare J found on the facts that Charterers would in any event have been unwilling/unable to perform its obligations (for separate commercial reasons unrelated to the bursting of the dam), and therefore could not rely on clause 32.

As to the question of damages, Teare J considered that the correct application of the compensation principle was to compare the freight Owners would have earned if Charterers had been ready and willing to perform the contract, with the position Owners in fact found themselves in as a result of the dam bursting. As Owners would not have received any cargo in either case, the judge only awarded nominal damages to Owners of US\$1.

Decision of the Court of Appeal

Owners sought to appeal the decision that they were only entitled to nominal damages. Meanwhile, Charterers sought to appeal



the decision that a ‘but for’ causation test was applicable in relation to clause 32.

i. Liability / causation

The Court of Appeal affirmed the decision that the ‘but for’ test was applicable to clause 32. The court agreed with the High Court that the words “resulting from”, together with the requirement that the events in question “directly affect the performance of either party” did import a causation requirement; this was further confirmed by the words “any other causes” and reference to “such events or causes”.

In reaching this decision, Males LJ stated explicitly that, although he did consider clause 32 to be an exceptions clause, he was far more concerned with the content of the clause rather than its categorisation. Thus, he had analysed clause 32 “without any predisposition as to the construction which should be adopted” and without the need to consider the “consequences of adopting one or other of the rival constructions”; it was “simply a matter of construing the words of the clause” (at para 36). Indeed, it was “not profitable to examine the cases relied upon” and “better to concentrate on the terms of clause 32” (at para 37). This was put most vividly at paragraph 62:

“what matters is not whether the clause is labelled a contractual frustration clause, a force majeure clause or an exceptions clause, but the language of the clause. As with most things, what matters is not the label but the content of the tin.”

ii. Damages

The Court of Appeal held that the correct application of the compensatory principle was to compare the freight Owners would have earned with the actual position they found themselves in as a result of Charterers’ breach, whereas the High Court had compared Owners’ actual position with the position Owners would have been in had Charterers been willing and able to perform. The distinction lies in a differing assessment of the nature of the obligation – and therefore the nature of the breach: Males LJ held that Charterers’ obligation was not to be ‘willing and able to supply cargoes’, but to actually supply cargoes. In failing to supply cargoes, Charterers had breached this obligation. Charterers’ unwillingness / inability to provide cargoes was merely the reason why they were in breach, which was “neither here nor there”, and there was no justification for applying the compensatory principle in a different way so as to take account of the reason why a party was in breach. This represented a “distortion” of the principle and an “impermissible sleight of hand”.

Mance LJ then went on (at para 83) to distinguish the present case from *The Golden Victory* and *Bunge v Nidera* (two famous cases where the Supreme Court had taken the effect of subsequent events

“...commonly used... phrases “resulting from” and “directly affect performance” are now likely to import a causation requirement.”

on the contract into consideration when assessing damages). The basis for this distinction was that those cases were both concerned with anticipatory breaches (i.e. a renunciation in advance of the time for performance), whereas the breach in this case was an actual breach. This was relevant because in the case of an anticipatory breach, the breach consists of a party indicating in advance of the time for performance that it is unwilling/unable to perform, so it is necessary to consider whether later events may ultimately have excused any non-performance. In this case, however, because Charterers had actually breached the contract by failing to do what they had promised to do, the effect of any later events was not relevant.

The appeal was allowed.

Commentary

We had previously commented that the High Court’s decision had provided welcome guidance on the difference between exception and frustration clauses. Some commentary has suggested that this distinction has been upheld in the Court of Appeal’s decision. However, this view is difficult to reconcile with the Court of Appeal’s judgment, which shied away from making general pronouncements on the categorisation of such clauses and the consequences of such categorisation, and which explicitly stated that it was more concerned with the actual terms of the clause.

A drafting consideration arising from the Court of Appeal’s analysis of the actual terms of the clause is that the commonly used phrases “resulting from” and “directly affect performance” are now likely to import a causation requirement.

Finally, the Court of Appeal’s distinction of the present case from *The Golden Victory* and *Bunge v Nidera* suggests that subsequent events should only be taken into account when assessing damages in the case of an anticipatory breach and not an actual breach of contract.

Charterers are applying for permission to appeal to the Supreme Court. ■



Singapore Convention on Mediation – The Missing Link

A new international convention is intended to make the enforcement of mediation agreements as easy as the enforcement of arbitration awards.



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Pre-Singapore Convention

The trend towards mediation in commercial disputes has grown in recent years as parties look for savings in costs, time and resources, coupled with the less adversarial approach and flexibility often associated with mediation.

However, the availability of an internationally-endorsed regime for the enforcement of international arbitration awards (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the very recent adoption of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgment Conventions) have highlighted the absence of a unified cross-border enforcement mechanism for mediated settlements.

Traditionally, if settlement agreements concluded at mediation outside of underlying court or arbitration proceedings were breached, the remedy was to bring a claim for breach of contract before the appropriate Court or an arbitral tribunal. Any judgment or award obtained would then have to be separately enforced, sometimes in a different jurisdiction where the defaulting party's assets may be located. The international flavour of commercial disputes means that this process can inevitably be time-consuming, costly and burdensome, if not sometimes futile.

Singapore Convention and its benefits

On 7 August 2019, 46 Member States signed an international treaty in Singapore intended to address the shortcomings and challenges of the present process and promote the continued adoption of mediation as an effective and efficient alternative to resolving business disputes. This treaty, known as the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), aims to make cross-border enforcement of mediated commercial settlements a straightforward process by allowing them to be enforced in the same way as a Court judgment or Arbitral award.

In addition to the benefits that mediation already brings, the assurance that mediated agreements can be readily enforced will, it is hoped, contribute to an increased level of trust between business counterparts. It is also expected that this harmonised framework will facilitate early-stage resolution of disputes, which is often crucial to the preservation of long-standing business relationships.

Application and enforcement

The Singapore Convention will come into force six months after at least three Member States have implemented domestic legislation giving effect to it. It will then apply "to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

- a. At least two parties to the settlement agreement have their places of business in different States; or
- b. The State in which the parties to the settlement agreement have their places of business is different from either:
 - i. The State in which a substantial part of the obligations under the settlement agreement is performed; or
 - ii. The State with which the subject matter of the settlement agreement is most closely connected."
- d. The obligations in the settlement agreement have been performed, or are not clear or comprehensible;
- e. Granting relief would be contrary to the terms of the settlement agreement;
- f. The party would not have entered into the settlement agreement without a serious breach by the mediator of standards applicable to the mediator or the mediation; or
- g. The mediator failed to disclose circumstances that raise justifiable doubts as to the mediator's impartiality or independence and this had a material impact or undue influence on the party, without which that party would not have entered into the settlement agreement.

The Convention will not apply to settlement agreements in respect of disputes arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes, or relating to family, inheritance or employment law.

Similar to the regime under the New York Convention, enforcement of mediated settlements can be refused by courts of a Convention State on limited grounds and in this case where:

- a. A party to the settlement agreement was under some incapacity;
- b. The settlement agreement is null and void, inoperative or incapable of being performed under the law it is subjected to or the law deemed to be applicable;
- c. The settlement agreement is not binding or final according to its terms, or has been subsequently modified;

Support from Singapore and the international community

Member States are optimistic that the unified support the Convention has gained in its early days will in time reflect the exemplary success of the New York Convention, which has since been ratified by nearly 160 Member States. Indeed, the Singapore Convention has been signed by some of Asia's and the world's largest economies including US, China, India and South Korea.

The Convention is also regarded as a major milestone in Singapore's long-term commitment to serving as a key dispute resolution and maritime hub regionally and globally, supplementing the existing infrastructure and support provided by its Courts including the International Commercial Court (ICC), arbitration auspices such as the Singapore International Arbitration Centre (SIAC) and Singapore Chamber of Maritime Arbitration (SCMA), and the Singapore International Mediation Centre (SIMC). ■



Payment Fraud Alerts

Being alert to the risks of potential payment fraud is increasingly important. This article looks at a recent case where a claimant sought a recovery.



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The hacking of email accounts and the frequency and sophistication of intercepted and fraudulent emails has increased over recent years resulting in payments being made inadvertently to fraudulent bank accounts. Some victims eventually manage to recover their money, while the more unlucky ones are often left with no choice but to abandon any recovery, due to the insubstantial amount and/or costs involved. However, in a recent case in the English Commercial Court dealing with a “payment interception” fraud, *K v A* [2019] EWHC 1118 (Comm), the defrauded paying party managed to retrieve over US\$1million, but also lost US\$161,646 due to fluctuations in foreign exchange rates.

Facts:

In *K v A*, A agreed to sell, and K agreed to buy, a bulk cargo on FOB terms with Vicorus SA (“V”) as a broker. The contract required 100% net cash payment within 2 banking days to A’s bank upon presentation of a commercial invoice and other documents. Upon completion of cargo loading, A sent emails to K via V on 2 November 2015 attaching an invoice and subsequently an amended invoice, for US\$1.16 million and seeking K’s payment to a bank account maintained at Citibank NA, New York branch (the “**Correct Account**”). V’s email records showed that the emails with the invoices were apparently forwarded by V to K on the same day, however what K actually received were emails which appeared to come from V, containing payment instructions for remittance via Citibank NA’s New York branch *in favour of Citibank NA at its London branch* with different account details purporting to identify A as the beneficiary. It emerged subsequently that the London branch account was in the name of “Ecobank” (the “**Fraudulent Account**”), although there is no suggestion of wrongdoing by Ecobank itself.

For another week or so, A and K exchanged several emails, either via V or directly, dealing with

various matters. These emails were manipulated in a similar way to the initial invoices, and the fraud went unnoticed for some time.

K had remitted funds on 5 November. Subsequently, on 13 November, K emailed A asking for an acknowledgement of receipt of the funds saying that its bank had been told by Citibank New York that the latter had had payment confirmed by the London branch. Citibank London had also requested confirmation from the buyer’s side of having performed due diligence in respect of the payment “*as last payment for same beneficiary has been recalled because fraudulent*”.

On discovery of the fraud, investigations showed that the funds were still in the Ecobank account, although K’s US\$ payment had been converted into Pounds Sterling (for reasons which were not made clear in the case). Arrangements were made to recall the funds from Ecobank and reallocate them to the Correct Account. On 24 November, Ecobank approved the debit from their account of £674,831 which was less than the original credited sum of £768,372. It is also not clear from the judgment how this discrepancy came about, but Citibank explained that the difference was due to fluctuations in exchange rates. The funds were transferred to the Correct Account on 18 December 2015 valued at about US\$1 million, leaving a shortfall from the contractual price of US\$161,646, for which A commenced arbitration against K.

Arbitration:

The dispute was heard before a GAFTA First Tier Tribunal and thereafter appealed to the GAFTA Board of Appeal. The former’s decision was not considered in the court case because under the GAFTA arbitration rules an appeal to the Board of Appeal operates as a complete *de novo* rehearing.

The GAFTA Board of Appeal ordered K to pay to A US\$161,616 plus interest taking the following issues into account:

1. It was an agreed fact that the invoices received by K providing for payment into the London account were fraudulent and that an email account was likely to have been manipulated.

2. There were disagreements as to where the fraudulent email manipulation had taken place (whether at any of or all the offices or servers of A, K and/or V), which party was at fault for the manipulation and whether any party bore vicarious liability. It was impossible to determine where or how the fraudulent manipulations had taken place. The Board proceeded on the basis that it had to identify the allocation of liability based on risk.
3. The Board considered the emails and invoices sent by A to V containing the Correct Account’s details as good notice, since V was acting in its capacity as broker and by reliance on the incorporated contractual provision of GAFTA 119 Clause 18 which states “...*A notice to the Brokers or Agent shall be deemed a notice under this contract*”.
4. Therefore, K’s duty was to ensure transfer of the full contractual price to the account nominated by A. K should bear the risk of receipt of the incorrect bank details which led to payment into the Fraudulent Account.
5. As a result, A was entitled to (a) the difference between the amount eventually received by A into its own bank account, and the amount invoiced for the goods, as it was a consequence of K’s payment into the incorrect account; and (b) interest on the disputed sum and also on the full purchase price for the period between the due date and the date when the monies were received into the Correct Account.

Further Appeal to Court:

K challenged the Award in the English Commercial Court on various grounds available under the Arbitration Act, including that:

1. The Board made an obvious error of law in holding that K had an obligation to ensure payment into A’s account at Citibank NA (s.69 “Appeal on Point of Law”). K’s obligation, it was argued, was only to pay the fund to A’s bank, which was A’s agent to receive payment regardless of any account details.
2. The Court rejected this argument, deciding that to fulfil a payment obligation transfer instructions should have been accompanied by the account details notified by the seller. It is “commercially impossible” to make a payment without specific bank details including an account name and number, regardless of the fact that technically any payment to a bank account is a payment to the bank of which the customer is a creditor. Upholding K’s argument would lead to “a commercially absurd result”. Permission to appeal under s.69 was therefore rejected.
3. The Tribunal’s decision of holding V to be K’s agent and that notification to V of A’s bank

account details constituted a notification to K by reliance of Clause 18 of GAFTA 119 was seriously irregular because, as accepted by the parties, neither party had raised agency arguments in their submissions and K had been deprived of an opportunity to address the point (s.68 “Challenging the Award: Serious Irregularity”). Furthermore, it was a substantial injustice for the Board to hold K responsible for the risk which eventuated in A not receiving the price in full, and for making up the difference resulting in the outcome that K’s payment obligation ended up being more than the contractual price. Alternatively, the Board’s decision was wrong and constituted an error of law (further ground of appeal under s.69).

The judge decided to remit this matter for reconsideration by the GAFTA Board of Appeal, as he was satisfied that for s.68 purposes, it is sufficient if the Board might well have reached a different view. K was not required to prove that if K had had the opportunity to address its arguments to the Board, the result would necessarily or even probably have been different.

HIGHLIGHTS:

Despite the successful challenge under section 68 of the Arbitration Act, the only relief K was granted was a remission to the GAFTA Board of Appeal to reconsider the Board’s reliance on a contractual term with the benefit of submissions from the parties on the point.

This case emphasises the importance of exercising due diligence before remitting payments. The judgment makes it clear that the responsibility for ensuring payments are made to the correct account lies squarely with the paying party, not the payee.

Preventive measures:

Precautionary measures should be taken to ensure payment into the correct bank account. These may include a clear specification of account details in the contract and verifying (by phone calls instead of emails) and checking the authenticity of any subsequent apparent change of account details.

A number of the Club’s members have been affected by frauds of this type, but after contacting the Club immediately on discovering the fraud, and subject to being able to take prompt steps against the bank in the relevant jurisdiction, it has been possible in some of these matters to recover these monies if still in the account to which they had been remitted.

Unless sufficient time is allowed for checking/ vetting account details, complications can arise in charterparty contexts as an owner will normally have the right to exercise liens on cargo / hire / freight, suspend performance and/ or withdraw the vessel in default of timely hire and/or freight payments. Furthermore, time

charter clauses such as 11(d) of NYPE 2015 give the owner the right to suspend performance immediately once hire is outstanding, without the need to tender any grace period notice. It is, therefore, important that hire payments be arranged sufficiently in advance to avoid adverse consequences where there appears to have been a change in account details, so that there is ample time to make necessary verification/checking.

So far there is no proforma charterparty form containing provisions allocating the risk of payment fraud. The newly published “BIMCO Cyber Security Clause 2019” does not purport to address payment fraud, but rather situations where a party’s own “Digital Environment” is affected by a cyber security incident and that incident affects the ability to perform contractual obligations. As the drafting sub-committee explains, “[payment fraud] risk will not be greatly reduced through a contractual clause. The fraud is successful mainly due to poor verification and authorisation procedures in companies and can be avoided by tightening internal procedures...” (see <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/cyber-security-clause-2019>).

For a more general discussion of digital risks, including links to Guidelines on Cyber Security and Club Circulars, see the article available on the Steamship website and App and Sea Venture 31 “Cyber Security and Data Protection” <https://www.steamshipmutual.com/publications/Articles/cyber-security-data-protection062019.htm>. ■

“The judgment makes it clear that the responsibility for ensuring payments are made to the correct account lies squarely with the paying party, not the payee.”



Further Developments in Salvage

LOF 2020: We look at the changes to the Lloyd’s Standard Form of Salvage Agreement.



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Continuing from the publication of the revised SCOPIIC 2018 form, reported in “Recent developments in Salvage” (Sea Venture 31), Lloyd’s of London has now concluded its review of the Lloyd’s Standard Form of Salvage Agreement, more commonly known as the Lloyd’s Open Form (LOF). The new version, named LOF 2020 and its associated Lloyd’s Salvage Arbitration Clauses named LSAC 2020 have seen some significant changes. The first and perhaps most obvious is the consolidation into one document¹ of the previously separate arbitration clauses and procedural rules of LOF 2011². However, Lloyd’s have gone one step further and included into the same document the Fixed Cost Arbitration Procedure (FCAP) to encourage its use.

The main LOF 2020 form has seen two amendments. The first is a re-write of Clause H ‘Deemed performance’ on the reverse of the form. This clause addresses the circumstances in which a contractor may redeliver the casualty; that is the casualty is to be in a safe place and safe condition. The qualifying definition of what is a safe condition has been simplified to remove some slightly antiquated language although the meaning remains unchanged; that is the casualty may be redelivered in a damaged state provided it is not in need of skilled salvage services or the contractor is being prevented from demobilising through the intervention of a local authority.

In more recent years, Lloyd’s has tried to identify the frequency by which the terms of a standard LOF have been amended by a side-agreement or other variation of its terms. In continuation of this initiative, an additional provision has been inserted into ‘Important Notices No. 4’ obliging a contractor to disclose any agreement that seeks to amend or vary the standard LOF terms.

Another notable amendment found in the LSAC 2020 is that of the Special Cargo Provisions, now clause 14³. Previously limited to container cargoes, these provisions provide an arbitrator the power to take into account the terms on which a contractor may have settled with a majority (by salved value) of cargo interests when

considering the award to apply to the remainder, unrepresented cargo interests. The provisions also permit small, salved value cargo interests to be omitted from contributing to the overall salved fund. The change is that LSAC 2020 has removed the restriction to container cargoes⁴ and widened the application to any cargoes where the provisions may be appropriate.

An entirely new clause appears as clause 19 ‘Contractor’s Special Right to Terminate’. This clause seeks to address an anomaly between the termination provisions of SCOPIIC and LOF. The difficulty arises where an owner may terminate SCOPIIC but the contractor has no similar rights of termination under LOF. This may leave the contractor in the invidious position of having to attend a casualty with a potentially low salved value without the reassurance of SCOPIIC remuneration or an Article 14 award⁵.

To explain, SCOPIIC is a substitute method of calculating Special Compensation under Article 14 of the salvage convention. Once incorporated into LOF, a contractor has no recourse to special compensation other than through SCOPIIC itself. There are, however, two exceptions to this rule. The first entitles the contractor to withdraw from SCOPIIC and rely on an Article 14 award if the owner fails to provide initial SCOPIIC security⁶. The second permits the contractor to terminate the services under both SCOPIIC and, crucially, to terminate the main agreement (LOF) if, under SCOPIIC, the owner fails to provide increased security⁷. However, if the owner has complied with their SCOPIIC security obligations the exceptions will not apply and on termination of SCOPIIC the contractor is no longer earning SCOPIIC remuneration, nor does the contractor have any automatic right to terminate the main agreement. In this position, the contractor can only look to the slightly subjective termination provisions of LOF of whether there is any reasonable prospect of a useful result⁸ or that the casualty is in ‘safe place’ and ‘safe condition’⁹ for re-delivery to the owner. Termination of SCOPIIC part way through a salvage operation is unlikely to trigger any of these criteria, leaving the contractor bound to perform the operation under their LOF obligations with potentially limited prospects of a financial reward to reflect those efforts. The remedy to this imbalance in the termination provisions is to provide the contractor an opportunity to apply to the salvage arbitrator to bring the main agreement to an end.

Finally, in an attempt to reduce the cost of salvage arbitrations, particularly in low salvaged value or straightforward cases, Lloyd's have supported the Fixed Costs Arbitration Procedure (FCAP). The initiative has existed since 2005 but usage has proved disappointing, and in an attempt to improve visibility of the procedure it is now fully incorporated within LSAC 2020. FCAP has also seen some changes, with the nominal threshold increased to US\$2,000,000, salvaged value and wider powers to the arbitrator to order FCAP for straightforward cases in excess of the threshold value or order full arbitration in complicated cases below the threshold value.

Two documents (LOF and LSAC) are available on Lloyd's Salvage and Arbitration Branch website: <https://www.lloyds.com/market-resources/lloyds-agency/salvage-arbitration-branch/lloyds-open-form-lof> ■

¹ LSAC 2020

² LSSA Clauses 2014

³ LSSA Clauses 2014 cl. 13, cl. 14 & cl. 15.

⁴ LSSA Clauses 2014 - Special Provisions

⁵ International Convention on Salvage, 1989, Special Compensation.

⁶ SCOPIC 2018 cl. 4(i)

⁷ SCOPIC 2018 cl. 4(ii)

⁸ LOF cl. G

⁹ LOF cl. H

“Once incorporated in LOF, a contractor has no recourse to special compensation other than through SCOPIC itself. There are, however, two exceptions to this rule.”



The “Santa Isabella” – What is a Contractual Route?

Was the chosen route “usual and reasonable” and did it constitute a breach of duty to care for the cargo?



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In *Alianca Navegacao E Logistica Ltda v. Ameropa SA (Santa Isabella)* [2019] EWHC 3152 (Comm), the High Court provided useful guidance on the test for determining what constitutes a “usual and reasonable” route in the absence of a specific contractual provision.

Background

The “Santa Isabella” (“the vessel”) was fixed to carry a cargo of 44,000 MT white corn from Topolobampo, on the west coast of Mexico, to Durban and Richards Bay in South Africa. The charterparty did not contain any provision regarding the vessel’s route. Rather than taking the Panama Canal route, the vessel took the slightly longer route around Cape Horn. On arrival in South Africa, the cargo was found to be damaged, which led to complications and delays on discharge. Owners subsequently claimed against Charterers for demurrage.

Charterers relied on the rule in *Budget v. Binnington* [1891] 1 QB 35 to argue that they were not liable for demurrage as the delays had been caused by the fault of Owners. Amongst other things, Charterers argued that Owners had breached the charterparty by taking a non-contractual route, arguing that the route around Cape Horn was not a “usual and reasonable” route and that the longer voyage had caused the cargo to spoil, which in turn led to the delays upon discharge.

What is a ‘usual and reasonable’ route

Where the charterparty does not expressly provide for what route the vessel should take, the vessel should proceed by a “usual and reasonable” route, without unjustifiable departure from that route and with reasonable despatch.

The High Court identified a number of principles that were relevant considerations for the purpose

of establishing what is a ‘usual’ route. In the absence of evidence to the contrary, it is presumed that the usual route is the direct geographical route, though the usual route frequently differs from the direct route and may be significantly longer than the direct route. Establishing the usual route does not require proof of a custom and the usual route can change over time; there may even be more than one usual route between two ports. Commercial and navigational reasons were also relevant considerations when determining which route is the usual route.

Charterers had argued that if a vessel takes the shortest geographical route, then it has taken a contractual route; but that if a vessel diverges in any respect from that route, then a full range of considerations, including the way in which the cargo is best protected, apply when deciding whether the route taken is a usual and reasonable route. On that basis, Charterers argued that the Cape Horn route was not a usual and reasonable route because: i) it was not the shortest geographical route; ii) it involved a voyage through colder temperatures, giving rise to an increased need for ventilation of the cargo; and iii) it involved a voyage through worse weather conditions, increasing the risk that the vessel would not be able to undertake ventilation due to bad weather.

The High Court identified a number of problems with that approach at paragraphs 85-90 of its judgment:

- i. Charterers’ distinction between the shortest geographical route and all other routes seemed arbitrary. It would mean that as soon as any divergence occurred from the shortest route, then a wholly different set of factors would become relevant in deciding what is or is not a contractual route, including a detailed consideration of questions of cargo care and the relative merits of different routes from that point of view.
- ii. The consequences for a carrier of being held to have deviated are severe, including loss of the right to claim freight and of the protection of exception clauses under the Bill of Lading. For



such consequences to ensue because of the nature of the cargo where a vessel had taken a commonly used route between two ports (albeit a slightly longer one) would be a marked departure from the generally accepted position.

- iii. In order to avoid such consequences, shipowners would have to comply with a highly uncertain standard. They would have to weigh up the costs and duration of alternative routes with their possible effects on particular cargoes. Problems would also arise where the vessel was carrying more than one type of cargo or in the context of voyage charters, which are frequently concluded without knowledge of the type of cargo to be carried, such that a shipowner might then have to undertake unprofitable voyages once the precise nature of the cargo and resulting routing implications had become clear.

For those reasons, the judge held that identifying the ‘usual and reasonable’ route did not entail the broad-ranging enquiry argued for by Charterers.

“the High Court’s decision insofar as it concerns the vessel’s choice of route should be welcomed by Owners.”



On the facts, Cape Horn route was only very marginally longer than the Panama Canal route and was a relatively common route. Accordingly, the judge held that the vessel's route was a usual and reasonable, and therefore contractual, route and did not amount to a deviation.

Whether choice of route was an aspect of the duty to care for the cargo

Charterers had framed their case on the alternative basis that the choice of route constituted an aspect of the shipowner's duty to take care of the cargo. Charterers argued that in taking a route that exposed the cargo to a greater risk of condensation damage (see above), Owners had breached the obligation under Article III(2) of the Hague-Visby Rules to properly and carefully carry and care for the cargo.

The judge rejected this approach on the basis that it was not supported in the case law and would create considerable uncertainty:

"it would overlay the relatively clear and well-established principles for identifying the contractual route with a need for wide-ranging consideration

of the subtleties of how one or more cargo being carried by the vessel may be affected by the length, likely temperatures/humidities and sea conditions of alternative routes, and of which factors prevail given potentially countervailing considerations of voyage time, cost, and the different needs of other cargoes that may be on board" [at para 121].

Accordingly, Owners had not breached Article III(2) by reason of the decision to take the Cape Horn route.

Comment

Although the High Court did ultimately find that Owners failed to properly ventilate the cargo in accordance with a sound system as required under Article III(2), with the result that Charterers were not liable for the demurrage, the High Court's decision insofar as it concerns the vessel's choice of route should be welcomed by Owners. For the approach suggested by Charterers would have been very onerous on Owners, requiring a refined (and uncertain) analysis of various considerations any time a vessel does not take the shortest route in order to avoid the potentially very severe consequences of a deviation. ■

"Charterers' distinction between the shortest geographical route and all other routes seemed arbitrary. It would mean that as soon as any divergence occurred from the shortest route, then a wholly different set of factors would become relevant in deciding what is or is not a contractual route."

Identifying a Disponent Owner Not Named in the Charterparty

The recent case of *Americas Bulk Transport Ltd v Cosco Bulk Carrier Ltd* ('The Grand Fortune') serves both as a warning of the potential repercussions when the parties to a contract are not clearly identified, and a reminder of the legal principles that apply when determining who the parties are.



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Background

The dispute arose out of a charterparty chain. The Defendants, *Cosco Bulk Carrier Ltd* ("Cosco") were the Disponent Owners of the "Grand Fortune" (the "Vessel"). They chartered the Vessel to *Britannia Bulk A/S* ("Bulkers") (the "Head Charterparty") whose obligations under the Head Charterparty were guaranteed by *Britannia Bulk Plc* ("Bulk"). The Vessel was then sub-chartered to the Claimants, *Americas Bulk Transport Ltd* ("ABT") (the "Charterparty"). In the Charterparty Recap, the Charterparty was expressly stated to be "Otherwise as per [the Head Charterparty] with logical alterations" and although it identified ABT as the Charterer, it did not state who the Disponent Owner was.

A dispute arose between Cosco and Bulkers concerning hire claimed to be due to Cosco from Bulkers under the Head Charterparty. When Bulkers went into liquidation in 2008, Cosco took an assignment of Bulkers' rights in order to claim the unpaid hire from ABT. Arbitration proceedings were commenced by Cosco but ABT asserted that the true Disponent Owner was Bulk, not Bulkers, and that there was therefore no contract and, in turn, no valid arbitration agreement between it and Cosco. ABT sought a ruling from the Tribunal that the Tribunal had no jurisdiction over the dispute between ABT and Cosco, however the Tribunal rejected ABT's case and ruled that it did have jurisdiction. ABT appealed to the Commercial Court (the "Court") under section 67 of the Arbitration Act 1996, challenging the Tribunal's substantive jurisdiction to hear the dispute.

The Appeal

The Court reached the same conclusion as the Tribunal; that Bulkers and not Bulk were the Disponent Owners of the Vessel and that the Tribunal did therefore have jurisdiction over Cosco's claim against ABT. That conclusion was reached despite a pro forma charterparty having been drawn up several months after the Charterparty was agreed which named Bulk, not Bulkers, as the Disponent Owner.

The Court summarised the legal principles as follows:

1. Where the contract is contained in a document, does that document sufficiently unequivocally identify the parties to the contract.
2. Where the contract is evidenced in writing but the parties cannot be identified, then it is permissible to look at the extrinsic evidence of what the parties said and did up to the point at which the contract was concluded.
3. Where 2 applies, the approach should be objective not subjective i.e. the question is what a reasonable person furnished with the relevant information would conclude.

Parties Identified in the Recap?

As to the first issue, the Court rejected ABT's argument that the reference to the Head Charterparty in the Recap had the effect of stating that the Charterer under the Head Charterparty was to be treated as being the Disponent Owner under the Charterparty. That reference was effective only to incorporate the terms of the Head Charterparty into the Charterparty to the extent they are not contradicted by the terms of the Charterparty. The Court therefore found that the Recap did not sufficiently identify the Disponent Owner.

Extrinsic Evidence

It was therefore necessary to consider the second issue, namely the extrinsic evidence of

what the parties said and did up to the point at which the contract was concluded for the purposes of determining who a reasonable person, furnished with the relevant information, would conclude was the Disponent Owner.

Based on the available evidence, the Court found:

- The identity of the Disponent Owner was not discussed at any time before the Charterparty was fixed and the Recap sent
- ABT and its counterparty, by their respective agents, were aware of the existence of the Head Charterparty prior to the date of the Recap (since it was referred to in the Recap) and therefore knew who was identified as the Charterer therein
- The Head Charterparty also identified Bulk as the guarantor of Bulkers' obligations under the Head Charterparty, thus leading a reasonable person to conclude that Bulk had elected to be a guarantor rather than itself become Charterer under the Head Charter. The reference to Bulk as guarantor also highlighted the probability that Bulk and Bulkers were related companies and made the possibility of there being a sub-charter between Bulk and Bulkers more improbable (there was no evidence of the disclosure of or knowledge of the existence of a sub-charter anyway): if the intention was to internally charter the Vessel from Bulkers to Bulk, it would have made more sense for Bulk to be the Charterer under the Head Charterparty as opposed to the guarantor

Conclusion

The Court concluded that the extrinsic evidence of what the parties said and did up to the date when the Recap was sent would have led a reasonable person to conclude that Bulkers and not Bulk was the Disponent Owner. In those circumstances, everything that was said and done thereafter was irrelevant and immaterial. However, the Court added that to the extent it was wrong and it was

"...only evidence of what the parties said or did up to the point at which the contract was concluded is relevant to determining who the parties are."



permissible to refer to conduct occurring after the date the contract was entered into, then on the facts it would have reached the same conclusion in any event on the basis hire due under the Charterparty was paid to Bulkers; cargo letters of indemnity had been issued to Bulkers; and although the draft pro forma charterparty which was drawn up several months after the Charterparty had been agreed named Bulk as the Disponent Owner, it is likely that this was an error.

Comment

The case serves as a useful reminder that where the parties to a contract are not sufficiently identified in the contract itself, then only evidence of what the parties said or did up to the point at which the contract was concluded is relevant to determining who the parties are.

The case also highlights the risks involved in what is unfortunately a commonly used practice in the shipping industry of failing to name either the owners/disponent owners or charterers (or both) in charterparty recaps or inserting potentially ambiguous wording such as “otherwise as per last fixture”. Identifying the parties in clear terms would avoid the issues which arose in *The Grand Fortune*, including the time and costs involved litigating, and would also make it easier for a party to a contract to screen its counterparty for sanctions etc. ■

“... it is permissible to look at the extrinsic evidence of what the parties said and did up to the point at which the contract was concluded for the purposes of determining who a reasonable person would conclude was the Disponent Owner.”



Disclose Documents or Risk Time Bar

The meaning of “all available supporting documents”



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In *MUR Shipping BV v Louis Dreyfus Company Suisse SA (The Tiger Shanghai)* [2019] EWHC 3240 (Comm) the Commercial Court ruled on whether Charterers’ claim for the return of hire paid in advance due to Owners’ breach of charterparty was time barred due to Charterers’ failure to provide Owners with “all available supporting documents” within the 12 months after the completion of the charterparty required under their contract. This court decision was an appeal against a Declaratory Arbitration Award dated 5 March 2019 when by a majority the Tribunal held that “Charterers’ claim was time barred and totally extinguished.”

Background Facts

MUR (“Charterers”) chartered the vessel “Tiger Shanghai” (the “Vessel”) from Louis Dreyfus (“Owners”) on an amended NYPE time charterparty dated 9 August 2016. The Vessel was scheduled to load a cement clinker cargo at Carboneras, Spain. The loading crane at Carboneras was too short to reach the feeder holes on the Vessel’s starboard side and Charterers accordingly sought Owners’ approval to cut new feeder holes into the hatch covers. Clause 46 of the charterparty provided that Charterers could, at their own expense and time, fit and weld any additional equipment for loading cargo. This would be subject to the Owners’ and Master’s approval, which was not to be unreasonably withheld. Owners refused to approve the required work and Charterers in response appointed a surveyor who issued a survey report on the cutting of new feeder holes (the “Survey Report”). When Owners stated that their refusal was “final and non-negotiable”, Charterers terminated the charterparty on the grounds that Owners’ unreasonable refusal placed them in repudiatory breach of Clause 46, which entitled Charterers to terminate.

Charterers commenced arbitration on 8 August 2017, claiming the return of hire and the value of delivery bunkers paid in advance. The final hire statement was attached to the claim letter at the commencement of the arbitration. When Charterers served claim submissions nearly one year later on 2 July 2018, the Survey Report was attached, having not previously been disclosed to Owners.

Owners argued in response that as the Survey Report had been produced more than 12 months after the completion of the charterparty, in breach of Clause 119, the entire claim was time barred.

Clause 119

Clause 119 provided that: “[Owners] shall be discharged and released from all liability in respect of any claim or claims which [Charterers] may have under Charter Party and such claims shall be totally extinguished unless such claims have been notified in detail to [Owners] in writing accompanied by all available supporting documents (whether relating to liability or quantum or both) and arbitrator appointed within 12 months from completion of charter.”

Arguments in Arbitration

Owners argued that the Survey Report went to the heart of the issue of liability and that had it been presented in time the parties could have resolved the dispute without the need for arbitration.

Charterers argued that as the Survey Report had been prepared for the purposes of the arbitration it was privileged, and should be treated as akin to an expert report and not as a “supporting document” within the meaning of the clause.

Arbitration Tribunal’s decision

The Tribunal agreed that the nature and quantum of the claim were adequately particularised in the final hire statement but that the Survey Report was “pertinent to the charterer’s claim describing the difficulty and possible solutions in detail.” The arbitrators disagreed as to whether the Survey Report was privileged, with the majority view that it was not, and was therefore a “supporting document”. Accordingly, the claim was time barred. The dissenting arbitrator concluded that the Survey Report was privileged and was therefore not a “supporting document”.

Arguments in High Court

The Charterers appealed. They argued that the Survey Report was not truly “supportive” because it was only relevant if Owners were arguing a case of reasonable refusal, which was not known at the commencement of the arbitration. They also argued that the result of the Tribunal’s decision would be to time bar claims retrospectively if, during the course of an arbitration, relevant documents came to light.

Owners submitted that the purpose of Clause 119 was the prompt notification of claims in order to maximise the chance of speedy resolution. This required the early provision of all relevant documents. Owners also noted that Charterers’ claim depended on whether the termination was lawful, to which the question of reasonable refusal (and thus the Survey Report) was central and accordingly relevant at the commencement of the arbitration.

High Court Judgement

The Commercial Court dismissed the appeal.

In considering the correct interpretation of Clause 119 and the meaning of the words “all available supporting documents”, Cockerill J considered the principles applicable to the construction of commercial contracts. Following *The Oltenia* [1982] 1 Lloyd’s Rep 448, the Judge reminded the Court that the actual wording of the clause must be respected, and that the word “all” indicates a fairly expansive approach to the production of supportive documents.

Cockerill J also agreed with Owners that the claim in fact depended on whether the Owners’ refusal to approve the new feeder holes was reasonable. In claiming that it was not reasonable, Charterers relied on the Survey Report, which was accordingly a “supporting document”.

Regarding the retrospective operation of the time bar, the Judge took a strict approach, concluding

that a supporting document could potentially fall within Clause 119 irrespective of the stage at which it was produced. Accordingly, if a relevant supporting document emerges later in proceedings it can cause the entire claim to be time barred. However, the Judge confirmed that “parties would not as a matter of common sense be debarred from making factual corrections to claims presented in time.”

Privilege

The Court rejected the argument that if a document was arguably privileged, then its disclosure was not required by an “all supporting documents” time bar clause. It was held that “a bad claim as to privilege should not prevent the parties to disclose a document that would otherwise be supportive under Clause 119.” A different approach would be “profoundly uncommercial” as it would sit ill with the requirement of certainty.

Comments

This decision again underlines the importance of checking and complying with both the production of documents – “all available supporting documents”, and time bars, as well as that consideration is needed as to whether particular documents are relevant or supportive of the claim. When making a claim, the claimant should present within the time bar any available document on which it intends to rely and it is also important that careful consideration is given to the need to maintain privilege.



What's in a Guarantee?

In *The Rubicon Vantage* [2019] EWHC 2012 (Comm) the Commercial Court considered the on demand nature of a parent company guarantee and found the parent company liable to pay, notwithstanding the underlying dispute as to liability under the charterparty contract.



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Before turning to the facts and findings of this particular case, it may be instructive to revisit the legal distinction between the following two types of guarantee instruments:

On demand guarantee

An on demand guarantee is one that imposes an obligation on the issuer/guarantor to pay the beneficiary against a compliant demand. If there is a dispute as to whether there is an underlying liability the beneficiary should have the benefit of contesting that dispute with the money received under that guarantee, rather than incurring legal fees and then having to recover outstanding sums in enforcement proceedings.

A true guarantee

A true guarantee is one that imposes a secondary obligation where the issuer/guarantor is to pay only when the principal obligor is liable to pay upon breach of the underlying contract, and this will first need to be established by the beneficiary. In contrast to the demand guarantee, therefore, the beneficiary is at a disadvantage as it has to chase the money.

Facts

A dispute arose in the context of a charterparty. The Claimant (“Rubicon”) chartered a Floating Storage and Offloading Facility called the “Rubicon Vantage” (the “Vessel”) to a wholly owned subsidiary (“Kegot”) of the Defendant (“Krisenergy”). Under the charter, Kegot was to procure a guarantee for Rubicon. This was provided by Krisenergy, and was described as a parent company guarantee, but could operate in some circumstances as an on demand guarantee.

The relevant terms of the guarantee were:

“4. In circumstance where the amount(s) demanded under this Guarantee are not in dispute between the Company and the Contractor, the Guarantor shall be obliged to pay the amount(s) demanded within forty-eight (48) hours from receipt of the demand.

5. In the event of dispute(s) between the Company and the Contractor as to the Company’s liability in respect of any amount(s) demanded under the Guarantee:

(a) the Guarantor shall be obliged to pay any amount(s) demanded up to a maximum amount of United States Dollars Three Million (US\$3,000,000) on demand notwithstanding any dispute between the Company and the Contractor;

(b) the Guarantor shall be entitled to withhold and defer payment of the balance of the sum demanded in excess of United States Dollars Three Million (US\$3,000,000); and

(c) the Guarantor shall be entitled to withhold and defer payment of any other disputed amounts claimed under this guarantee.

Until a final judgment or final non-appealable award is published or agreement is reached between the Company and Contractor as to the liability for the disputed amount(s).

6. In the circumstances described in Clause 5 the Guarantor shall not make any payment in excess of United States Dollars Three Million (US\$3,000,000) under this guarantee unless the Contractor obtains a final judgment or final non-appealable award in its favour or the Company and the Contractor agree that an amount is payable by Company to Contractor. ...in circumstances where the final judgment or non-appealable award is given in favour of the Company...the Contractor shall refund to the Guarantor the sums paid by the Guarantor to the Contractor pursuant to clause 5(a) of this Guarantee to the extent that it is found that the Contractor was not entitled to the sums demanded and paid.

10. Save as set out in Clause 3, in no circumstances whatsoever shall Guarantor’s liability hereunder vis-à-vis Contractor be greater than that of Company vis-à-vis Contractor under the Contract [ie, the charter]. The Guarantor shall have all the limitations rights and defences of the Company under the Contract”.

After the vessel was accepted a number of invoices were sent by Rubicon to Kegot claiming payment for the costs of certain works to the vessel, totalling US\$1.8 million. A dispute arose between the parties in relation to these invoices and Kegot refused to pay. Rubicon demanded payment from Krisenergy under the guarantee, alleging that the guarantee was an on demand instrument and that Krisenergy was liable to pay even if liability under the charter was disputed. Krisenergy said that Kegot disputed liability and that the wording of the guarantee was ambiguous as to whether its on demand obligation to pay was triggered when there were disputes as to both liability and quantum, or only if liability had been admitted but not quantum.

Krisenergy relied on the decision in *Marubeni Hong Kong Ltd v Mongolian Government* [2005] 1 WLR 2497 that where a guarantee instrument is not given

by a bank or financial institution, there is a ‘strong presumption’ that such a guarantee imposes only a secondary liability such that payment is contingent on first establishing Kegot’s liability under the charter.

In contrast, Rubicon’s position was that there was no ambiguity and the intention of the parties was clearly that the guarantee was on-demand up to US\$3,000,000.

The judge rejected Krisenergy’s argument that because it was not a bank or financial institution there was a presumption that the on demand guarantee it gave was to be construed restrictively.

Adopting the above approach, the judge then went on to look at the language within the operative clauses. The key conclusions were as follows:

(1) Interpretation of Clause 4: If a demand is made and there is no dispute between Rubicon and Kegot either as to liability or quantum, then Krisenergy is obliged to pay the sum so demanded within the stipulated time frame;

(2) Interpretation of Clause 5: if there is a dispute between Rubicon and Kegot either as to liability or as to quantum, then Clause 5 is engaged. This clause is not limited to disputes as to quantum only (as contented by Krisenergy). The only limitation the clause imposes is that Krisenergy is only obliged to pay up to a maximum of US\$3,000,000; and

(3) Interpretation of Clause 10: Despite Krisenergy’s arguments that under Clause 10 the guarantor is not obliged to pay out more than was admitted due, it was held that Clause 10 is directed to the guarantor’s ultimate liability. On the construction of the guarantee wording ultimate liability is calculated after any adjustment/refund which was clearly legislated for in Clause 6. The clauses must therefore be read together as a whole.

On the facts, since a valid demand had been made, Krisenergy was held liable to pay the sum demanded.

Comment

This case emphasises the importance of clear and unambiguous drafting, since the court will look to the language of the instrument in determining the scope of payment obligations under the guarantee instrument. ■



“An on demand guarantee is one that imposes an obligation on the issuer/guarantor to pay the beneficiary against a compliant demand.”



Cargo & Jurisdiction

Delivery of Cargo Without Production of Bills of Lading: A Recap

A useful reminder of the risks involved with delivering cargo without production of bills of lading, including discussion.



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A recent case in which cargo was delivered against fraudulent bills of lading illustrates the risks of agreeing charterparty clauses that oblige an owner to discharge and deliver cargo without presentation of the bill of lading, against a charterer's letter of indemnity (LOI).

An International Group circular as long ago as 2001 stated that: "Members are strongly advised not to accept such clauses...". Nevertheless, it is recognised that such terms are commonly required by Charterers and commercial pressures may make it difficult to withhold agreement. Frequently, the explanation given for such a requirement, particularly in the case of short sea voyages or where there are multiple sales and sub-sales, is that the Bill of Lading is unlikely to be available on the vessel's arrival due to delays in the banking chain. Cases where agreement to such terms have led to claims for mis-delivery are few but members should be aware of the potential risks that may be faced if such terms are agreed and the steps that can be taken to mitigate such risks.

From the perspective of Club cover in such circumstances, the starting point is that, unless the Directors exercise their discretion in a member's favour, claims for delivery of cargo without production of the relevant bill of lading are not covered. The reason for this is that, under English law at least, in the event of mis-delivery an owner is liable in conversion to the holder of the bill of lading, a claim to which there would ordinarily be no defence. For example, any package limitation which would otherwise be available would not apply.

In consequence, a commercial practice has evolved whereby, in consideration of an owner agreeing to deliver cargo without production of the relevant bills of lading, the charterer or another party such

as the receiver of the cargo agrees to provide a LOI, indemnifying the owner against the consequences of doing so. In its circular, dated February 2001 the International Group provided a recommended wording for such LOIs and recommended that they be counter-signed by a bank, although in practice this is rare. Mis-delivery occurs when, after delivery, it emerges that a party other to that to which delivery was made is the holder of the original bills of lading, entitling it to delivery of the cargo, and that party brings a claim for the cargo value. The LOI provides that when it is alleged that cargo has been mis-delivered, the party issuing the LOI will not only indemnify the owner against any liability that it may incur to the bill of lading holder, but will, in addition, pay the legal costs incurred by the owner in defending that claim and, if necessary,

provide security for it. It is important to note that when such a LOI is provided, this does not have the effect of reinstating Club cover. Instead the LOI is a substitute for the non-availability of cover.

Whilst the provision of a LOI potentially provides some protection, Members should be aware that by agreeing to accept such security in return for not requiring presentation of original bills on delivery, they are assuming the credit risk of the LOI provider. Whilst this may be less significant in cases where the providers are, for example, oil majors or large trading houses, an LOI from a party without adequate resources may ultimately leave the member bearing the loss. Even in the case of a substantial provider there is no guarantee that the terms of the LOI will be honoured, and legal proceedings may be required to enforce the right of indemnity.

There may be additional steps that a Member can take to protect itself when such a charterparty term is proposed:

1. The most obvious is a credit check on the party issuing the LOI;
2. Ensuring both that the wordings of the charterparty clause, and of the LOI to be given, are broad enough to cover the circumstances in which discharge and/or delivery is intended to be made, when these are known;

3. Where a party other than the charterer is intended to provide the LOI, it has agreed to do so;
4. In the case of voyage charters, requesting details prior to entering the fixture as to the proposed mechanics of delivery. Often this will be to a local agent at the discharge port acting on behalf of the charterer who will then hold the cargo pending the arrival of the original Bills of Lading against which it will be released. Some reassurance may be gained if that agent is a party of substance since, although acting on behalf of the charterer and not the member, it may be possible to bring a claim against the agent (in addition to a claim under the LOI) if the agent delivers against presentation of fraudulent bills; and
5. Where delivery is into the custody of an agent, if non-negotiable copies of the original bills of lading are on board or received by owners prior to discharge, copies can be provided to such an agent, suitably endorsed, (for example "Specimen, non-negotiable") enabling that agent to check that the Bills of Lading ultimately presented correspond with the copies.

If all else fails and:

- a. a claim materialises which cannot be successfully defended; and
- b. recovery under the LOI proves impossible:

then a discretionary claim may be submitted to the Directors. It is a requirement, prior to the exercise of their discretion, that "they are satisfied that the Member took such steps as appear to those Directors to be reasonable to avoid the event or circumstance giving rise to" the claim.

Bearing in mind that Club cover may be unavailable for the reasons given above, Members may wish to consider obtaining separate insurance for mis-delivery risks. If requested, the Club may be able to provide such cover on special terms and conditions as agreed. ■



"Even in the case of a substantial provider there is no guarantee that the terms of the LOI will be honoured..."

Senegal: Customs Fines

Customs fines in Senegal have increased significantly with the authorities taking a strict attitude.

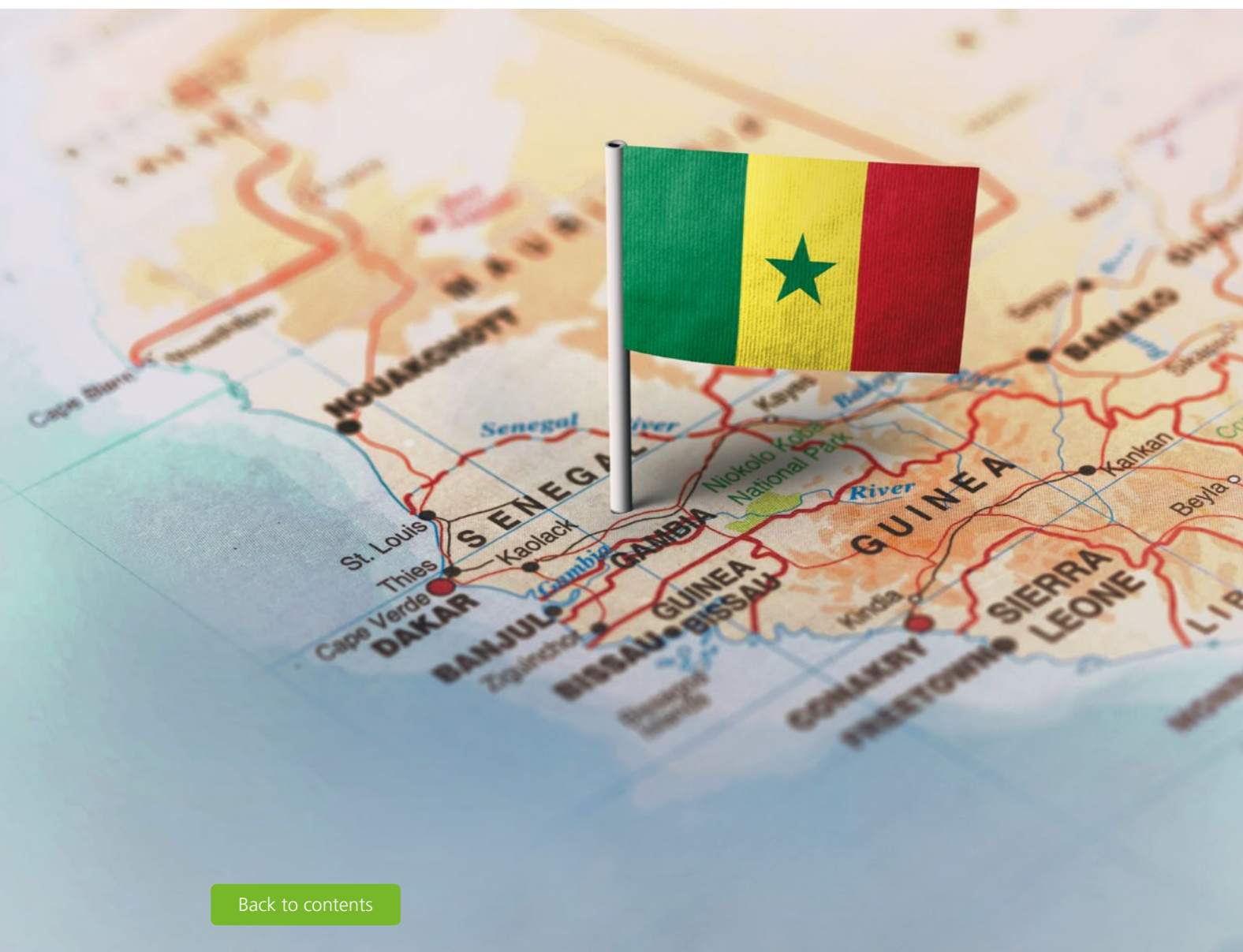


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Club correspondents TCI report a significant change in the attitude of the Senegalese customs re fines which will now be imposed on bagged and bulk cargoes if shortages are found on discharge, either by customs surveyor or based on stevedores outturn report, which

hitherto has never been the case. Here is the text of the circular from Correspondents TCI Africa, Dakar:

“We would like to warn against reinforced Customs control as Authorities have recently taken the decision to follow up discharge operations of vessels carrying bagged or bulk cereals and other bulk cargo in order to sanction any substantial shortage or excess of cargo recorded by their own surveyor or by stevedores. A precautionary tally survey is therefore strongly recommended to



“The Customs declaration is irrevocable and the Master’s good faith is not taken as an excuse.”

ascertain the discharged quantity and defend ship’s interests against disproportionate Customs fines.

Please be informed that Senegalese Customs have decided to become less tolerant and have taken a new stance on the level of fines which has significantly increased over the last weeks. For instance, recently a fine of Euro 2.33 million was imposed for mere mistakes on the declaration of cargo manifest and finally negotiated at Euro 304,898.

We would therefore strongly recommend that your Members instruct their ship’s Masters calling at Dakar port to:

1. Prepare their Dakar Customs declarations prior to berthing
2. Personally receive the Customs officers on board for formalities in company with the ship’s agent
3. Ensure that all consumables on board, including bunkers, lube oil and stores (food, chemicals, CO2, foam, extinguishers, paint, crew personal effects etc) are accurately declared
4. Properly declare the cargo manifest for Dakar (together with the cargo in transit, if any)
5. Place all the Customs papers in a separate file to be counter checked by the ship’s agent before their presentation to the Customs boarding officer.

Please find below a list of items for which declaration is usually demanded by Customs (with specification in quantities in Mt, litres, kg... etc, whatever is applicable):

- Paint inventory
- Crew list
- Cargo manifest (with goods in transit, if any)
- Bills of Lading
- Crew effects

- Ports of call list
- Bonded store
- Food provisions
- Chemicals
- Fire extinguishers
- Foam
- CO₂ (fixed and portable)

Bunker declaration:

- Fuel oil
- Diesel oil
- Gas Oil

Lube oil declaration:

- Oil in tanks (including in sump tanks)
- Oil in drums
- Oil in cans
- Oil in use (in engines, cranes, winches, stern tube etc)
- Used oil (sludge)w

N.B. The total quantity of bunkers and lube oil for each item must be confirmed by its corresponding detailed inventory. Any discrepancy between the declared quantity and the inventory will be sanctioned.

The declared quantity of bunkers and lube oil must also be identical to the actual quantity in the tanks on ship’s berthing as Customs usually request confirmation by sounding.

Kindly note that the Customs declaration is irrevocable and the Master’s good faith is not taken as an excuse. No additional declaration, correction or amendment is authorised, hence the need to carefully check the documents before submitting them to Customs.

We remain at your disposal.” ■

We thank Correspondents TCI Africa Dakar for supplying this information.

Members may wish to review other items on the Steamship website regarding Dakar, Senegal. From November 2017, regarding fines for failing to declare fire extinguishers and CO2 at:

<https://www.steamshipmutual.com/publications/Articles/senegal fines.htm>

From February 2018, regarding stowaways at: <https://www.steamshipmutual.com/publications/Articles/dakarstowaway0218.htm>

“Senegalese Customs have decided to become less tolerant and have taken a new stance on the level of fines which has significantly increased.”

Clean on Board?

A recent High Court decision, *The Tai Prize* [2020] EWHC 127 (Comm), has held that where an agent presents a clean bill of lading to the Master for signing, this is not a warranty to the Master that the cargo is actually in good order and condition.



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The Facts and the Arbitration

The “*Tai Prize*” was time chartered to Noble Chartering Inc (“Noble”) who in turn voyage chartered her to Priminds Shipping (HK) Co Ltd (“Priminds”) for a voyage from Brazil to China with a cargo of soybeans. Clean bills of lading were issued for the cargo.

The B/L was executed by agents on behalf of the Master without any reservations, stating that the cargo had been ‘SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel for carriage to the Port of Discharge ...Weight, measure, quality, quantity, condition, contents and value unknown ...’

The B/L incorporated the Hague Rules (HR) by operation of clause 2 on its reverse side. The contract of affreightment evidenced by the B/L was with the shipowner, not the claimant.

The receivers in China brought a claim for heat, caking, and mould damage to the cargo, and obtained a court award against the Owners for over US\$1 million. Noble paid US\$500,000 to settle the Owner’s indemnity claim under the time charter, and then claimed an indemnity for this amount from Priminds.

Noble argued that, because the shipper and shipper’s agents presented clean bills to the Master for signature, they were entitled to be indemnified by Priminds –the shipper being considered as Priminds’ agent under the terms of the charterparty.

The arbitrator, Sarra Kay, made findings of fact that the cargo damage was due to its pre-shipment condition, which would have been reasonably apparent to the shippers but which would not have been reasonably apparent to the Master. She

decided that the shipper was Priminds agent and their presentation of clean bills of lading to the Master, for signature, amounted to a warranty by Priminds that the cargo was in good order and condition, or that Priminds had impliedly agreed to indemnify the Noble against the consequences of the inaccuracy of the statement of apparent good order in the bill of lading. The arbitrator held that Priminds were obliged to pay Noble’s claim of USD\$500,000, plus costs.

Priminds appealed to the High Court.

The High Court

The High Court was obliged to accept the Arbitrator’s findings of fact, that the shippers (who were Charterers’ agents) knew or ought to have known that the cargo was damaged before shipment and that the Master could not reasonably have detected the damage during the loading operation.

Therefore, the High Court considered three questions of law arising out of the award:

- Did the words “clean on board” and “apparent good order and condition” on the draft bills of lading presented to the Master for signature amount to a warranty that the cargo was in good order and condition?
- Whether any of the statements on the bills were inaccurate as a matter of law; and
- If so, whether the Charterers were obligated to indemnify the Owners for the consequences of those statements being erroneous

Judge Pelling QC, sitting as a judge in the High Court, overturned the arbitration award. He stated that the presentation of the clean bill of lading for signature was merely an ‘invitation’ to the Master, from the shipper, to issue a clean bill if he was satisfied that it was an accurate statement on the apparent cargo condition. The representation in the bill of lading is the record of the carrier’s evidence of the apparent



cargo condition when shipped on board and it will be relied upon by the cargo receivers.

The Judge specified that the Master is still obliged, pursuant to the Hague Rules which were incorporated into the Charter Party and Bills of Lading, to make his own assessment of the “apparent order and condition of the cargo.” Additionally, it was determined that there was no causal link between the alleged inaccurate representation by the Shipper and Noble’s loss because the Master did not rely on the representation on the draft Bill.

The High Court also held that Noble was not entitled to an indemnity from Priminds. This was because the Hague Rules Visby, which were incorporated into the charter between Noble and Priminds, do not impose any obligation on the shipper in relation to statements concerning apparent order and condition of cargo. As such, an indemnity could not be implied.

It is understood that Noble has been given leave to appeal.

Comment

When cargo is loaded onboard ship, the Master, or carrier, is obliged to ascertain the apparent order and condition of the cargo and issue clean or claused bills of lading accordingly. Even if the charterparty requires

“...the presentation of the clean bill of lading for signature was merely an ‘invitation’ to the Master, from the shipper, to issue a clean bill if he was satisfied that it was an accurate statement on the apparent cargo condition.”

the Master to sign bills of lading ‘as presented,’ this does not require or permit the Master to sign clean bills if the condition of the cargo does not justify it. The Master is required to make his own reasonable judgment of the order and condition of the cargo and clause the bills accordingly.

If the Master has any concerns about the condition of the cargo at loading, he can obtain assistance from his P&I Club or local P&I correspondent. ■

Claims Under General Average Guarantees

The High Court decision in *The BSLE Sunrise* [2019] EWHC 2860 (Comm) held that cargo insurers can resist a claim for payment under a General Average guarantee where the General Average peril was caused by the actionable fault of Owners, or whilst the issue of underlying liability is yet to be resolved.



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Facts

The case arose out of claimant Owners' efforts to recover General Average expenses following the grounding and subsequent refloating of the "BSLE Sunrise" off Valencia in 2012. Owners declared General Average under the York-Antwerp Rules 1974 and in relation to a cargo of offshore pipes, cargo interests issued General Average bonds with defendant cargo insurers providing security for the bonds in the standard Association of Average Adjusters (AAA)/Institute of London Underwriters (ILU) form.

The GA guarantees were addressed to the owner and provided:

"In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we the undersigned insurers, hereby undertake to pay to the ship owners ... on behalf of the various parties to the adventure as their interest may appear any contributions to General Average ... which may hereafter be ascertained to be properly due in respect of the said goods.

We further agree:

- a. to make prompt payment(s) on account of such contributions as may be reasonably and properly due in respect of the said goods as soon as the same may be certified by the... Average Adjusters..."

An adjustment was published with the first and second defendant's shares of

the GA loss and expenditure calculated at US\$526,365 and US\$548,030 respectively.

It was common ground between the parties that if the casualty occurred because of a breach by the owner of Art. III.11 of the Hague Visby Rules – which was incorporated into the bills of lading, then GA was not due from the relevant cargo interests by operation of Rule D of the York Antwerp Rules.

The Court had, therefore, to consider whether the "properly due" language used in the guarantee would extend the Rule D defence to the insurers under the guarantees.

"...in general GA guarantees are intended to operate in conjunction with, or to go hand in hand with, not in effective substitution for, the GA bonds."

The High Court

In his conclusion the judge stated that "Nothing is payable under the GA guarantees issued by them if the loss was caused by the owner's actionable default or until that issue has been resolved."

The Judge agreed with Defendant's case "that the meaning of the word "due" when applied to a monetary obligation is that it is legally owing or payable" and that "The inclusion of the word "properly" serves to put the point beyond doubt".

A key point was "that in general GA guarantees are intended to operate in conjunction with, or to go hand in hand with, not in effective substitution for, the GA bonds." There was little to suggest the GA guarantees were seen as anything other than as security for the GA bonds, which could alternatively have been provided as cash deposits. Indeed, the guarantees stated:

"... consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit ...".

And as such the insurers would have little commercial interest in "providing a guarantee that conferred a greater benefit on the ship owner than the owner would have had under the GA bonds secured by a cash deposit."

The Owner had relied on Maersk Neuchatel https://www.steamshipmutual.com/publications/Articles/ga-security_pay-now_-_argue-later.htm. In that case, the obligation to pay was under a letter of

undertaking the sum due "... under an Adjustment ..." with the central issue being whether Maersk, as time charterer guarantors, had contracted out of the right to challenge such an adjustment.

The language in the Maersk Letter of Undertaking was substantially different from that in the GA guarantees in the present case, particularly with reference to sums under the GA guarantee here being "properly" due. Therefore, the conclusion that the charterer had contracted out of the right to challenge the adjustment was distinguishable.

Comment

This decision makes it clear that the defence of actionable fault will be available to cargo insurers under AAA/ILU standard form wordings of guarantee. That follows a review of what were considered to be settled practices within the marine industry and that it would only be a very clear wording that would justify a departure from that practice; with the Maersk Neuchatel viewed as exception.

¹ The obligation to exercise due diligence before and/or at the commencement of the voyage to ensure that the vessel was seaworthy and/or properly to equip and/or supply the vessel. ■



"Nothing is payable under the GA guarantees if the loss was caused by the owner's actionable default."



Miscellaneous

Renos: Breaking Up is Hard To Do

As anticipated in the Club's May 2018 website article 'How late is too late?' the hull and machinery underwriters did indeed appeal to the Supreme Court for a final decision.



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Recalling the case, the Renos was the subject of a salvage operation conducted under a Lloyd's Standard Form of Salvage Agreement (LOF) with SCOPIC incorporated and invoked by the salvor. The argument before the courts was whether the owners were entitled to claim a Constructive Total Loss (CTL) or, as argued by the hull and machinery insurers only, a lesser partial loss on the basis the requirements of a CTL had not been met. The lower courts had earlier addressed a question of whether a delayed Notice of Abandonment prevented an owner from claiming a CTL and found in the owners' favour that it did not. However, the insurers further challenged the lower court's decision to allow all expenditure of salvage and repair, including SCOPIC remuneration, incurred prior to the Notice of Abandonment to be included within a CTL calculation.

The Supreme Court addressed the question in two parts.

First, the insurers argued a literal interpretation of the Marine Insurance Act (MIA) section 60(1) which states a CTL will exist when an actual total loss appears to be unavoidable or the cost to avoid the total loss would exceed its insured value. Taking the word 'would', the insurers argued this referred only to expenditure from the date of the Notice of Abandonment, i.e. future costs from the notice. The Supreme Court noted that any objective assessment of the cost to repair a casualty following a salvage operation ordinarily would occur once the salvor had delivered the casualty to a place of safety at which point, if the assessment warranted it, a Notice of Abandonment may be issued. If the insurers' interpretation was correct then in the majority of cases the salvage remuneration would be excluded from the assessment of a CTL. The court found little support for this argument either in the language of the MIA or in past precedent finding that, as a general rule, a loss under a hull and machinery policy occurs at the time of the casualty and not at the time of any subsequent assessment of the loss. The same applied in the case

in question and the time of the casualty is to be the objective point from which to calculate a CTL.

However, on the second point, the Supreme Court did find in the insurers' favour in respect of SCOPIC. Recalling the origins of SCOPIC as a commercial alternative to the additional salvage remuneration 'Special Compensation' permitted under Article 14 of the Salvage Convention 1989, the court took the view these costs were primarily incurred in the avoidance of damage to the environment. As such, SCOPIC remuneration can be distinguished from ordinary salvage remuneration which is incurred for the purpose of enabling the ship to be repaired, a fact underlined by the two liabilities falling to different underwriters, SCOPIC for the account of P&I insurers and loss to property to the hull and machinery insurers. SCOPIC in the view of the court added nothing to the assessment of the cost to repair the ship and should not be included in the assessment of a CTL.

Although this decision is primarily of concern to owners and their hull and machinery insurers, in any SCOPIC case the P&I Club concerned will be looking to determine at what point a casualty has become a wreck removal. One factor in this assessment may be the acceptance by a property insurer that the casualty has become a CTL. However, the exclusion of SCOPIC costs in the assessment of a CTL may have the unintended consequence of prolonging that decision potentially to the detriment of an enhanced SCOPIC remuneration. ■

“SCOPIC in the view of the court added nothing to the assessment of the cost to repair the ship and should not be included in the assessment of a CTL.”

War Risk, Unsafe Port and Frustration

This article was published on the Club's website shortly after the attacks on merchant vessels in the Strait of Hormuz in May and June last year, and looks at relevant charterparty issues in the context of war or warlike acts and terrorism.¹

Strait of Hormuz

The Strait of Hormuz is a narrow strait in the region connecting the Persian Gulf with the Gulf of Oman and the Arabian Sea. Vortexa, an energy analytics firm, report that 22.5 million barrels of oil have flowed through the Strait of Hormuz a day since the start of 2018. This reportedly accounts for about a third of all the world's seaborne trade oil, the majority of which is destined for the Asian markets, mainly Japan, India, South Korea, and China².

Although no party has claimed responsibility for the most recent, or the earlier, attacks, tensions in the area are running high and there is considerable uncertainty as to how events may now unfold. Against this background it is, therefore, opportune to revisit the potential charterparty issues which were discussed in <https://www.steamshipmutual.com/publications/Articles/SanctionsConRS0212.htm>³ on the Steamship Mutual website from 2012.

The focus of that article was the issues facing Members letting or taking vessels on time or voyage charter terms which may be ordered to the region, specifically compliance with charterers' orders, port safety, frustration and consequential matters. These are largely repeated below.

War Risks Clauses

Most time and voyage charters nowadays incorporate fairly detailed war risk clauses that aim to safeguard owners and vessels' interests in circumstances where the Owner or Master considers that proceeding to a port would expose the vessel and crew to war risks. These are commonly on BIMCO's CONWARTIME 2013 or VOYWAR 2013 terms or their previous 2004, 1993 versions or similar.

CONWARTIME 2013 provides that:

"War Risks" shall include any actual, threatened or reported:

war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel.

VOYWAR 2013 contains an identical definition.

Under older, narrow clauses it has been necessary to consider whether a situation amounts to war. The leading English authority, *Spinney's Case* (1980)⁴ determined that the main characteristics of war included considerations of: (i) conflict between opposing sides with territorial, political or other identifiable objectives of dominion; and (ii) the character and the amount/nature of armaments/ conflict. Warlike operations will trigger a war risks clause regardless of whether or not there has been a formal declaration of war. 'Warlike operations' and hostilities are wider than 'war' and do extend to belligerent acts, although *Spinney's Case* suggests that these acts may require to be done in the context of war or similar.

A blockade requires the use of force to cut off access of vessels and must be effectual and constantly enforced. A blockade of the Strait of Hormuz and the repercussions likely to flow from that may well fall within the remit of the War Risk provision, however consideration would need to be given to the nature and duration of the blockade, as well as the surrounding political and military circumstances.

Orders to a War Risks Area

As result of the *The Triton Lark*⁵, significant changes have been made to the CONWARTIME wording. The 2013 version at Clause (b) provides that:

The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter "Area"), where it appears that the Vessel, cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be exposed to War Risks whether such risk existed at the time of entering into this Charter Party or occurred thereafter. Should the Vessel be within any such place as aforesaid, which only becomes dangerous, or may become dangerous, after entry into it, the Vessel shall be at liberty to leave it.

A war risks clause such as CONWARTIME 2013 would permit Owners to refuse orders to proceed to the Gulf if, in the reasonable judgement of the Master or Owners, the Vessel would be exposed to war risks. The test is objective reasonableness. In *The Triton Lark* (2011) (please see our earlier article on this case at <https://www.steamshipmutual.com/publications/Articles/conwartime-1993.htm>), it was held that the Owners would have to establish that they had formed a reasonable judgment (this would require evidence of the decision making process) that there was a "real likelihood" that the vessel would be exposed to war risks (in that case piracy). "Real" means that there must be some evidence, not for example mere speculation. The Judge in *The Triton Lark* also held that "likelihood" did not mean more likely than not: it could include an event which had a less than evens chance of happening but it required a degree of probability greater than a bare possibility.

In a further judgment in the same case on 25 January 2012, the Judge observed that what is dangerous in the context of exposure to war risks will depend on the facts of the case and will include the degree of likelihood that a particular peril might occur and the gravity or other consequence should that event occur. Future developments will need to be carefully monitored to determine if these tests are met.

If the standard war risks clauses are triggered, they make provision for discharge of the cargo elsewhere if loaded already. In the case of the SHELLTIME 4, if no cargo is loaded and charterers give no substitute orders within 48 hours then the charter is automatically terminated. In any event, if the clause provides an option to cancel, it must be exercised promptly. Such clauses are often construed strictly against the party with the option to terminate.

While an owner carries the burden of normal insurance risks, it is common practice for additional premiums incurred for war risk insurance cover

to be allocated to the charterer. For example, under CONWARTIME 2013, clause (d), if the vessel proceeds to or through an area exposed to War Risks, "the charterer shall reimburse to the owner any additional premiums required by the owners' insurers and the costs of any additional insurances that the Owners reasonably require in connection with War Risks." For more information on the Club's War Risk cover please see our War and Piracy Circular.

Remedies for loss and damage and Unsafe Ports

If a vessel suffered damage from a belligerent act when passing through the Strait of Hormuz, an Owner may have limited recourse against the charterer for damages in the context of an unsafe port unless, perhaps, the nature of the threat changes. A safe port warranty, whereby the Charterer warrants at the time of nominating a port that it will be safe during the vessel's approach, call and departure without being exposed to danger in the absence of an abnormal occurrence, is limited to those parts of the approach to the port which are characteristic of that port, not all those in a region.

The further the danger is from the port the less likely it is to interfere with the safety of the voyage. However, the Strait is a waterway through which access to all the ports of the Persian Gulf is obtained from those outside and since there is no other way of reaching these ports it might be arguable that the Strait is within the approach.

It may also be possible that a Charterer could be in breach of an obligation such as that in CONWARTIME 2013 not to order the vessel to or through a waterway reasonably considered to be dangerous. Accordingly, where, for example, an Owner has stated its position that it was unsafe to proceed and a Charterer affirmed its orders or, with knowledge of the situation, did nothing to prevent the vessel from continuing, the Charterer may be in breach and held liable in damages to the Owner.

It is important to note that, while the acceptance by Owners of the Charterers' orders or their failure to refuse to proceed with the voyage will amount to a waiver of the right to do so, at least absent a change in circumstances, if the vessel or Owners suffer damage as a result and it is shown that the Charterers were in breach, Owners' acceptance will not prevent them from claiming damages, see *The "Kanchenjunga"* (1987)⁶.

However, there are circumstances whereby an owners' acceptance of a charterers' nomination has been held to constitute a waiver of a claim for damages. In *The Chemical Venture* (1991)⁷ the crew refused to comply with Charterers' orders to proceed to Kuwait despite Owners' orders to the crew to comply with them. At Owners' suggestion, Charterers negotiated directly with the crew who finally agreed to proceed to Kuwait



after Charterers agreed to pay them a significant bonus. The court held that Owners had waived their right to claim damages on a proper construction of correspondence exchanged with Charterers. Care should therefore be taken over any negotiations to proceed with or continue a voyage.

Charterers' orders, or navigation?

The implied indemnity arising out of the Master's duty to obey charterers' orders as to employment under a time charter provide an alternative basis upon which an owner may recover damage caused by compliance with charterers' orders. If a matter is dealt with fully by express terms of the charter, there may be no reason to imply an indemnity. Furthermore, this subject often gives rise to issues over whether the risk of damage was, on a proper construction of the charter, assumed by the Owner such that there is no indemnity or to causation issues such as whether the damage was caused from compliance with charterers' orders or by the mMaster's navigation.

In the context of orders to proceed through the Strait of Hormuz, arguments as to whether damage was caused from compliance with those orders or the Master's navigation may be unlikely to arise, given the narrow confines of the Strait, unless it is a case of transiting via an area declared unsafe, rather than one declared to be safe, or deliberately proceeding through an area known to be mined.

The War Risks clause is therefore likely to provide the simplest answers to the issues that arise. Owners' obligations under the charter are also likely to be affected by the Owners and Master's responsibility for the navigation of the vessel given the House of Lords decision in *The Hill Harmony* [2001]⁸ that the choice of ocean route as a matter of the vessel's employment. However, it could provide some operational flexibility, for example, to deviate or delay for the vessel's safety without being held in breach of charter.

“...there are circumstances whereby an owners' acceptance of a charterers' nomination has been held to constitute a waiver of a claim for damages.”

Frustration

The doctrine of frustration often arises in the context of hostilities. In the words of Lord Justice Bingham, the effect of frustration is "...to kill the contract and discharge the parties from further liability under it...". *The Super Servant Two* (1990)⁹. It can be said that a charter is frustrated and brought to an immediate end if, during its performance, a fundamentally different situation arises through no fault of either party, and for which the parties have made no provision in the charter, so that it would be unfair in the new circumstances to require them to perform the balance of their obligations. Clearly, frustrating events are more likely to arise in relation to a voyage charter or time charter trip than a longer period hire charter with wide trading limits.

Will War or Threats of Hostilities Frustrate a Charter?

No. This was made clear by Mustill J in *The Chrysalis* (1983)¹⁰:

"Except in the case of supervening illegality, arising from the fact that the contract involves a party trading with someone who has become an enemy, a declaration of war does not prevent the performance of a contract: it is the acts done in furtherance of war which may or may not prevent performance depending on the individual circumstances of the case."

Cases dealing with issues of frustration in the context of hostilities arose from the nationalisation of the Suez Canal by the Government of Egypt in 1956 and the subsequent blocking of the waterway. This resulted in vessels having to undertake a longer passage around the Cape at considerable expense. In *The Eugenia* (1963)¹¹, Lord Denning held that this did not amount to a fundamentally different situation so as to frustrate charterparty in question:

"To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you must compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or expensive for one party than he thought is not sufficient to bring about a frustration. It must be positively unjust to hold the parties bound."

Having said that, the presence of War Risks clauses in the charter does not necessarily prevent the charter being frustrated. The fact that contractual obligations become more onerous or expensive to perform is unlikely to frustrate the contract. However, since there is no possibility of an alternative route in relation to trade into and out of the Persian Gulf, frustration may be more

arguable should the Strait of Hormuz be blocked. Generally, delay can be a frustrating event but is a question of fact whether or not the period of delay is sufficient to constitute frustration; see *Universal Cargo Carriers v Pedro Citati* (1957)¹².

Even if the Strait of Hormuz was blocked it may be that would not be sufficient to immediately frustrate contracts of carriage to or from the Persian Gulf. The situation will need to be assessed over a longer period of time taking into account the reaction to the international community to determine its effect.

Conclusion

The current events of themselves are unlikely to amount to acts of war, however if there is an escalation such that the powers in the region threaten one another this may change. Accordingly, and whilst it is hoped that there will not be any further attacks, Members should be paying close attention to the war risks and sanctions clauses in their contracts, as well as any safe port warranties. ■

¹ Liabilities costs and expenses arising from war or acts of terrorism are excluded under R21 of the Club's Rules although claims in excess of the proper value of the entered ship (deemed not to exceed US\$100m) can be covered, and "ground up" cover is available from the Club for both Hull War and P&I War risks

² <https://edition.cnn.com/2019/06/13/business/strait-of-hormuz-importance/index.html>

³ Written by Stephen Kirkpatrick of Reed Smith

⁴ *Spinney's (1948) Ltd v Royal InsuranceCo.* [1980] 1 Lloyd's Rep 406

⁵ *Pacific Basin IHX Ltd v Bulkhandling Handymax A/S (The Triton Lark)* [2011] EWHC 2862 (Comm)

⁶ *Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India (The Kanchenjunge)* [1990] 1 Lloyd's Rep. 391

⁷ *The Chemical Venture* [1993] 1 Lloyd's Rep. 508

⁸ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd., (The Hill Harmony)* [2001] 1 Lloyd's Rep 147

⁹ *The Super Servant Two* [1990] 1 Lloyd's Rep. 1

¹⁰ *The Chrysalis* [1983] 1 Lloyd's Rep. 503

¹¹ *The Eugenia* [1964] 2 QB 226. *Ocean Tramp Tankers Corporation v VIO Sovfract* [1963] 2 Lloyd's Rep. 38

¹² *Universal Cargo Carriers v Pedro Citati* [1957] 1 Lloyd's Rep. 174



"A war risks clause such as CONWARTIME 2013 would permit Owners to refuse orders to proceed to the Gulf, if in the reasonable judgement of the Master or Owners, the vessel would be exposed to war risks."

Sulphur Regulation: Letters of Indemnity Warning

With the Sulphur 2020 regulations now in force this article looks at some of the considerations when looking at whether a Letter of Indemnity can be accepted, including the Club cover implications.



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and estimated consumption? It is unclear to what extent a vessel would be expected to deviate to obtain compliant bunkers and to do so may lead to potential issues in the context of a laden voyage as to whether the deviation was permissible.

The Sulphur Regulation is now in force. What issues this will give rise to in practice remains to be seen, but the Managers will carefully monitor developments and intend to provide ongoing guidance as appropriate to assist Members in addressing these.

One issue that has come to the Club's attention is a request to an Owner to use non-compliant bunkers due to alleged non-availability of low sulphur fuel against the provision of a Letter of Indemnity (LOI) from a charterer in respect of any adverse consequences.

The regulation envisages that there may be circumstances where low sulphur fuel may be unavailable. Should such a scenario arise, provision is made for the vessel to issue a fuel non-availability report (FONAR). It is important to note that merely issuing a FONAR does not exempt an Owner from breach of the Regulation. It is merely a factor that the relevant Port State may take into account in deciding whether to proceed against a vessel for non-compliance and/or the nature of any penalty imposed.

There is at present no guidance as to the effect that will be given to FONARs in practice. Non-availability is not defined. It is likely, however, that the validity of weight given to a FONAR will be held to be dependent on the reasonableness of the efforts to source compliant bunkers and avoid any breach.

For example, were prudent steps taken to identify bunkering locations at which compliant bunkers ought to have been available in sufficient quantities, having regard to the vessel's itinerary

“There is at present no guidance as to the effect that will be given to Fuel Non-Availability Reports (FONARs) in practice.”

If there is MGO on board it is likely that the vessel would be expected to burn this rather than HSFO. The cost of alternative arrangements to avoid the use of non-compliant fuels is unlikely to be accepted as justification for issuing a FONAR and burning HSFO.

Nor is agreeing to do so in return for a LOI from charterers likely to be viewed sympathetically. Were an owner to agree to such a course effectively it would be intentionally breaching its own legal obligations on the basis that it could transfer the consequences of that breach to its charterer. The latter belief would in any event likely to be misplaced. Under English law at least, a LOI responding to an intentional unlawful act is likely to be unenforceable. As explained above, issuance of a FONAR does not

make use of non-compliant bunkers lawful but at best may mitigate the consequences of doing so.

In addition, acceptance of a LOI also involves acceptance of the charterer's credit risk. A fine in such circumstances may be substantial. It would also be likely to prejudice any Club cover that might otherwise have been available.

It is possible that there may be circumstances where a charterer's LOI may be enforceable. For example, if there was a genuine issue as to whether bunkers supplied were compliant so that in burning these owners were acting in a bona fide belief that by doing so they were not breaching the Regulation. Even then acceptance of a LOI carries substantial risk. ■



How will Compliance with MARPOL Annex VI be Determined?

This article discusses the procedures used to ascertain compliance in relation to vessels without scrubbers or other equivalent means of compliance by reference to the available IMO Guidelines.



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One of the questions that follows from the introduction of the Global Sulphur Cap is exactly how compliance is to be determined, what procedures will apply and what will be used to ascertain whether bunkers on board and the operation of the ship are compliant. Whilst much will depend on the jurisdiction and will only become clearer over time, this article attempts to examine some of these questions in relation to vessels without scrubbers or other equivalent means of compliance by reference to the IMO Guidelines available.

At the 74th session of MEPC the IMO approved (i) 2019 Guidelines for Consistent Implementation of the 0.50% Sulphur Limit under MARPOL Annex VI and (ii) 2019 Guidelines for Port State Control. The purpose of the former Guidelines is for Administrations, Port States, shipowners, builders and fuel suppliers to use them to ensure consistent implementation of the 0.50% sulphur limit. The latter are intended to provide guidance on the conduct of Port State Control inspections for compliance with MARPOL Annex VI and afford consistency in the conduct of these inspections, the recognition of deficiencies and the application of control procedures.

In order to verify compliance the Port State will carry out an initial inspection which will include, amongst other things:

- Evidence of fuel delivered to and used on board the vessel
- Vessel certification and its validity
- Maintenance and other records required under MARPOL
- Existence of required procedures, such as fuel changeover procedures

If all certificates and documents are valid and in order and the overall observations of the Port State are favourable, that should be the end of the matter.

However, where the observations give 'clear grounds' for believing that the condition of the ship or equipment does not correspond with the particulars of the certification or documentation a more detailed inspection will be carried out.

Although not exhaustive, the 'clear grounds' for a detailed inspection could include:

- Missing or expired/invalid certificates
- Missing documents or records – for example fuel changeover procedures, MARPOL Annex VI record books
- Inconsistencies between the bunker delivery note and other documentation/certification
- Inconsistencies between the voyage plan and compliant fuel reserves on board
- Data from a remote or portable emission measuring device or receipt of information which would indicate that the ship may not be compliant

The full list of "clear grounds" is set out in the guidance.

In accordance with the Guidelines, as part of their detailed inspection, the Port State will conduct a more in-depth review of on board documentation and examine the operational procedures and familiarity of the crew with regard to, amongst other things, bunkering and change over procedures in connection with MARPOL Annex VI.

The most important part of this detailed investigation will of course be, to check and verify whether fuel oil used by the ship complies with Regulation 14 of MARPOL Annex VI. Sampling and testing of the fuel is to be in accordance with Regulation 18.8.2

of MARPOL Annex VI, following the procedures set out in the amended Appendix VI (Verification Procedures for a MARPOL Annex VI fuel oil sample). It is important to note that the amended verification procedures in Appendix VI are due for adoption in Spring 2020 and may not come into force until 2021. However in the interim the IMO has issued a circular to Member States recommending their early implementation and directs Port States to the amended procedures in its guidance.

The details of the approved amendments to Appendix VI are set out in the MEPC.1/Circ. 882 "Early Application of the verification procedures for a MARPOL Annex VI fuel oil sample".

The amended Appendix VI provides an agreed method for determining whether the fuel oil delivered to, in-use and carried on board the vessel is in accordance with MARPOL Annex VI. In addition to the procedure for the "MARPOL sample", procedures for the collection and analysis of 'in-use' samples from the vessel's service system and "on board" samples from the storage tanks have been included.

When the 'MARPOL sample' has been taken by the authorities the details must be recorded in the ship's sample logbook together with the bunker delivery note and sufficient details for traceability.

Samples shall be tested in accordance with MARPOL Annex VI Appendix VI.

The below table sets out the allowable sulphur m/m% limits in accordance with the amended Appendix VI:

As can be seen, so far as the in-use/on board samples are concerned, fuel should be considered compliant if within 0.53%, incorporating a tolerance to account for repeatability and reproducibility.

Where suppliers are required to supply fuel oil that does not exceed the 0.5% m/m limit, it has been recommended by IMO in its Guidance on best practice for fuel suppliers (MEPC.1/Circ. 875 Add.1), that suppliers should consider the statutory limit minus 0.59R reproducibility i.e. a value of 0.47% m/m as a target limit during production.

A test certificate will be issued by the laboratory which, if fuel is found to be non-compliant, is then to be evaluated by the concerned Port State authority to determine the nature of control measures or penalties

Sample type	Compliance limit per Reg. 14	Applicable limit
Marpol sample for ECA	0.1% m/m Sulphur	Less than or equal to 0.10
Marpol sample	0.5% m/m Sulphur	Less than or equal to 0.50
In-use or on-board sample for ECA	0.1% m/m Sulphur	Less than or equal to 0.11
In-use or on-board sample	0.5% m/m Sulphur	Less than or equal to 0.53

which might be applied. A copy of this certificate must be kept on board (MEPC 320(74) para 4.2.4.2).

The Port State is required to consider all relevant circumstances and evidence when determining the appropriate control measures to be taken if non-compliance has been established. The vessel's implementation plan may be taken into consideration.

Depending on the circumstances and the judgment of the Port State, penalties may include significant fines, detention, an order to off-load non-compliant fuel and load compliant fuel sufficient for the voyage or permission to sail on a single voyage to procure compliant fuel oil (subject also to permission from the State of destination).

Members are encouraged to take note of the Port State Control Guidelines and review their MARPOL Annex VI applicable documentation and certification, and to verify that all records are being properly maintained up to date (including in accordance with Flag State requirements). Crews should be properly trained and made aware of the "clear grounds" upon which detailed inspection and possible sampling will be considered.

A full review of the bunkering procedures should be undertaken, and specifically with reference to the guidelines for collection of a MARPOL representative sample as detailed in Resolution MEPC 182(59).

A periodic review of entries in the Oil Record Book, recording of fuel changeover, MARPOL representative sample and bunker delivery notes should be undertaken. The bunker delivery note must be issued by the supplier's representative as per Appendix V of MARPOL Annex VI and must include a declaration that the sulphur content of the delivered fuel oil does not exceed a limit value % m/m. The retention period of the bunker delivery note is 3 years from the date of delivery of the fuel on board and the MARPOL representative sample must be retained until "the fuel oil is substantially consumed, but in any case, for a period of not less than 12 months from the time of delivery".

It is expected that the IAPP certificate has been reissued and placed on board after the 1 March 2020 carriage ban has come into effect and where the supplement to the certificate includes para 2.3.3 in reference to the 0.5% m/m Sulphur limit for the carriage of fuel oil where an approved equivalent arrangement for emission control has not been fitted.

'In-use' and 'on board sampling'

The IMO has also issued 2019 Guidelines for on board sampling for the verification of the sulphur content of the fuel oil used on board ships (MEPC.1/Circ. 864 Rev.1 2019) setting out the number and location of 'in-use' sample points required on a vessel. Much will depend on the number of independent systems and fuel types. This should be considered on a case by case basis. In-use sampling points should be identified or, if necessary, installed, clearly indicated on the vessel's fuel oil system drawing and approved by the vessel's Classification society. Generic guidelines for the handling of the 'in-use' sample are also included.

Similar Guidelines relating to 'on board' sampling points and procedures are expected in the near future. The draft of the '2020 Guidelines for sampling of fuel oil intended to be used or carried for use on board a ship' was finalised in the PPR7 of Feb 2020 and will now be forwarded to the next session of the Marine Environment Protection Committee (MEPC 75) with a view for adoption.

In the interim, the necessary amendments to MARPOL Annex VI itself are still awaited and there is some speculation these will not be adopted/come into force

until Autumn of 2021. It is anticipated that designated sampling points will need to be identified/installed no later than the vessel's first renewal survey after 12 months have elapsed from the entry into force of the amended MARPOL Annex VI regulation for an existing vessel and from the date of entry into force for new vessels. It is however recommended that consideration be given to installation and/or designation of sampling points prior to the entry into force of the anticipated amendments, at the vessel's next dry dock. This is to ensure Port State Control authorities are able to obtain 'in-use' and 'on board' samples in the near term in the event they wish to investigate a possible non-compliance. Intertanko, amongst others, have produced guidance on this.

Treatment of non-compliant fuel on board

Vessels not fitted with equivalent means can no longer store fuels containing sulphur >0.5% m/m from 01 Mar 2020. Where routine independent test results of samples collected at the manifold indicate higher sulphur values the Master should consider notifying the Flag administration, PSC of the destination port and the administration under whose jurisdiction the bunker deliverer is registered with copies of the test and document the notification.

In cases where it has been established by the PSC based on Marpol sample analysis that vessel is in non-compliance with the sulphur regulation the imposed control measure may include debunkering. Members are therefore encouraged to formulate contingency procedure for the removal of the non-compliant fuel and tank pipelines and system cleaning prior to loading compliant fuel oil to prevent contamination by any residues of the debunkered fuel.

On board blending of non-compliant fuel oil with compliant low sulphur fuel oil in order to avoid de-bunkering of the non-compliant fuel oil should not be undertaken. Such blending could result in compatibility and instability issues and also void the bunker delivery note and the MARPOL representative sample. For further details, reference is drawn to a recent publication by BIMCO on the topic at: <https://www.bimco.org/ships-ports-and-voyage-planning/environment-protection/2020-sulphur-cap/regulatory-and-technical/20192012---on-board-fuel-blending>

Further reference is also drawn to the below links to the websites of the IMO and CIMAC guidelines on fuel oil testing:

<http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx>

https://www.cimac.com/cms/upload/workinggroups/WG7/CIMAC_WG07_2016_Feb_Guideline_Interpretation__Fuel_Analysis_Test_Results_Final.pdf. ■

“On board blending of non-compliant fuel oil with compliant low sulphur fuel oil in order to avoid de-bunkering of the non-compliant fuel oil should not be undertaken.”



Supporting Seafarers' Mental Wellbeing

Last November, Steamship Mutual was announced as the new sponsor of the International Seafarers' Welfare and Assistance Network's (ISWAN) mental health resources for seafarers.



ISWAN, an international charity which works to promote and support the welfare of seafarers all over the world, developed these self-help resources in response to the challenges faced by seafarers. The resources comprise a series of three Good Mental Health Guides available in a number of different languages, accompanied by a range of infographics and an audio relaxation exercise.

Working at sea away from family and friends with limited communication may mean that a seafarer is less likely to talk about a low mood or feelings of unhappiness than someone ashore who sees their loved ones every day. Limited or no shore leave, monotonous routines, long working hours, shift working and few opportunities for exercising or socialising can also affect a seafarer's mental wellbeing.

Since it can be difficult for seafarers to access the emotional support they might need, ISWAN's self-help resources contain skills, exercises and coping strategies for managing and coping with low mood, stress and fatigue, and maximising wellbeing while working at sea.

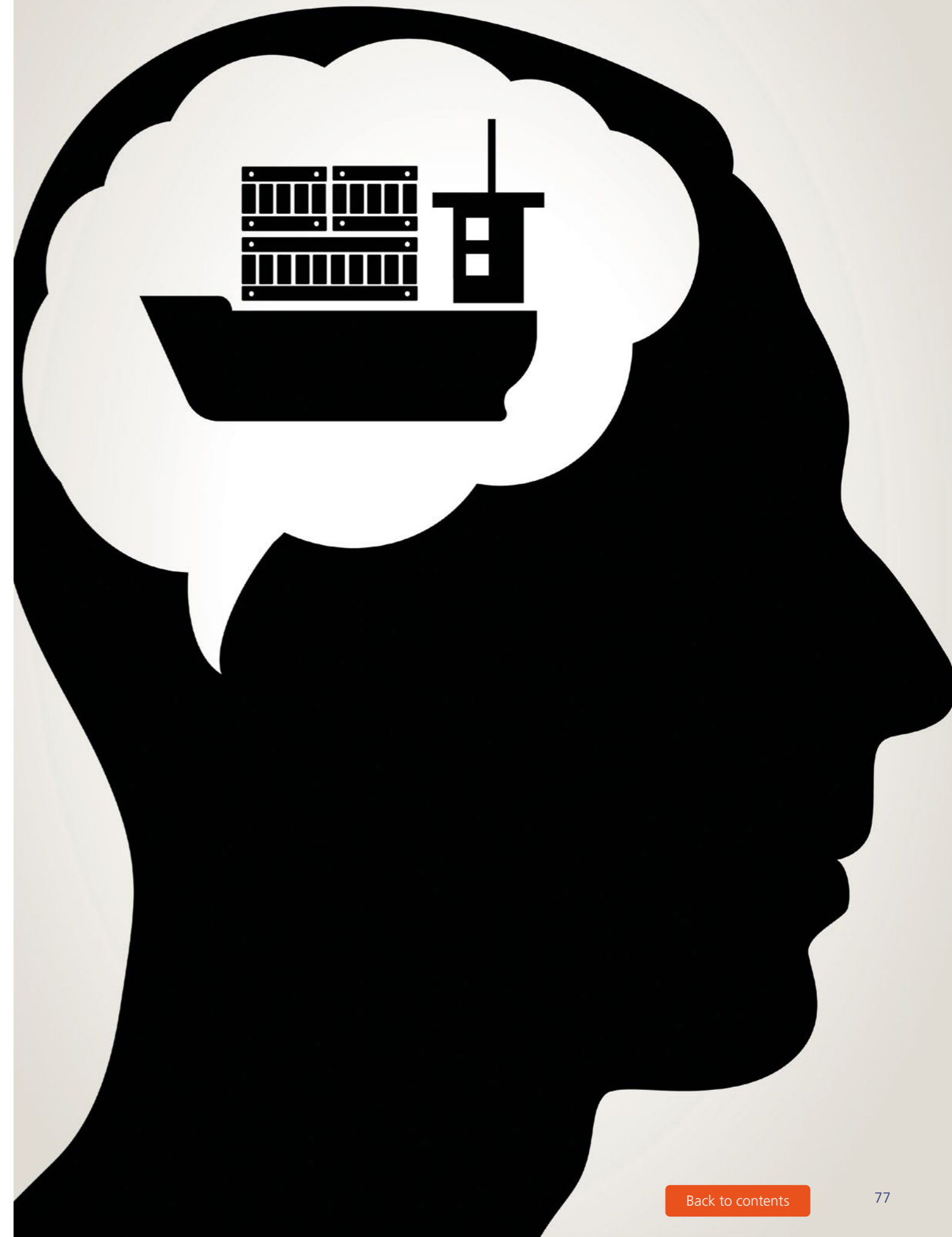
With the support of Steamship Mutual, ISWAN has initiated a large print and distribution of its mental health resources in the Philippines, where

the organisation's Regional Programme provides humanitarian support to seafarers. The Philippines is one of the largest supply countries for seafarers, with over 449,000 Filipino seafarers reported to have been deployed in 2017. Steamship Mutual's sponsorship has enabled ISWAN to provide these seafarers with valuable information on how to improve their wellbeing, and to develop a new guide in the series which ISWAN hopes to release later in 2020.

These mental health resources complement ISWAN's free, confidential, multilingual helpline for seafarers and their families, SeafarerHelp. The helpline is available 24 hours a day, 365 days a year, and its operators are trained in providing emotional support and suicide risk assessment. Seafarers can call +44 20 7323 2737 or find further contact details and a 24/7 live web chat at www.seafarerhelp.org. The helpline team works closely with ISWAN's regional representatives in the Philippines, India and Nigeria to support and assist seafarers and seafarers' families in need all over the world.

The mental wellbeing of seafarers is a key issue for the maritime industry and ISWAN is delighted to be partnering with Steamship Mutual. The Club has long recognised the importance of crew wellbeing on safety – the safe and effective operation of its Members' vessels relies very heavily upon their seafarers being fit, physically and mentally, for the pressures of a seagoing career. Steamship Mutual's sponsorship will help ISWAN reach even more seafarers around the world and give them the support to ensure their time at sea is a safe and positive experience. ■

“The mental wellbeing of seafarers is a key issue for the maritime industry and ISWAN is delighted to be partnering with Steamship Mutual.”



News



Meet the Loss Prevention Team

In Sea Venture issue 31 readers were introduced to the Steamship Mutual Legal Team. In this edition, you can meet our Loss Prevention Department (LPD). Manned by former seafarers, the LPD provides information and assistance to Members as well as to Steamship's own claim handlers and underwriters. The LPD is also responsible for monitoring the condition of vessels entered with the Club, either on first entry or as circumstances require thereafter.

The team comprises Steamship Managing Director Chris Adams, who is a Fellow of the Nautical Institute and Younger Brother of Trinity House, the team's manager, Captain John Taylor, Captain Muhammad Khan, Vijay Rao, Taslim Imad and Nahush Paranjpye, based in Steamship's Singapore office.

Team manager Captain John Taylor, has a background working on board tankers and LNG carriers before coming ashore. He has experience in terminal operations, taking the Tangguh LNG terminal in Indonesia from feed and construction through to full operation before moving on to BP Angola in support of their deep-water FPSO operations. John explains, "The tasks of LPD are many and varied. We are involved in the preparation of the Club's Loss Prevention publications, including films, Risk Alerts and articles. We participate in seminars around the world and help to arrange the biannual Member Training Week. Analysing claims

and claim trends allows LPD to observe the issues of importance to Members so we can ensure our publications are relevant to the issues Members see."

People risks form an important part of the output of Loss Prevention. This extends from the Club's Pre-Employment Medical Examination (PEME) scheme, which aims to ensure that seafarers are fit for work at sea, to the production of Risk Alerts on matters such as Ebola and Stowaways. There is also a focus on best practice issues such as Safety in Enclosed Spaces, Use of Portable Ladders, and Guidance for use of CO2 in ships' firefighting systems.

"The Loss Prevention team brings a wealth of maritime experience to the service of members."



Back row: Chris Adams; Taslim Imad; Vijay Rao. Front row: Muhammad Khan; John Taylor

"Interacting directly with Members and seafarers is an important part of the work of the LPD."

Interacting directly with Members, and also their seafarers, is an important part of the work of the LPD, and Captain Muhammad Khan is part of the team involved in planning the Member Training Week (see the article on page 82 of this Sea Venture). Muhammad says, "Education and imparting information are important parts of our role in the LPD. The Member Training Week, Club Seminars and participation in training seminars for officers and crew are good opportunities for us to discuss topical issues and to convey messages that can help avoid incidents that give rise to claims." After many years at sea where he served on containerships, bulk carriers, general cargo and reefer ships, Muhammad is well placed to do this.

In addition to providing information and material to Members, the LPD is also an invaluable resource for our claims and underwriting staff. Vijay Rao served at sea for many years, mostly on tankers and Ro-Ro ships and his background as a Marine Engineer ensures that the team is able to address the machinery related issues that arise. "We often work with our claims teams to examine survey reports and the findings of experts. A marine background can help clarify some of the more technical issues often seen in survey reports".

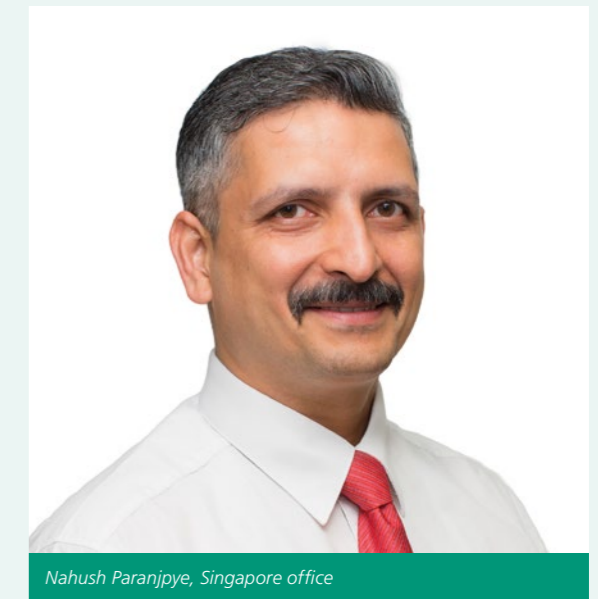
The Loss Prevention Department has expanded recently to meet the growing demand for loss prevention advice. To widen the reach of the LPD, particularly in the Far East time zone, Nahush Paranjpye joined Steamship Mutual in 2019 and is based in the Singapore office.

With his background as a Master Mariner, Nahush brings with him many years of experience from Ship Operations and Management, Marine Casualty related Investigations & Surveys (Cargo, H&M, P&I and GA) and Underwater Technology start-up (ROV); having sailed for the first 15 years on bulk carrier, general cargo and container vessels with leading ship owners and managers.

Taslim Imad completes the team in London and also joined in 2019. A Master Mariner, Taslim has many years of sailing experience, and having served on a variety of ships including general cargo ships, bulk carriers, container carriers, Ro-Ro ferries (pax/freight) and cruise ships. Since coming ashore, Taslim has worked as Marine Superintendent for the Pure Car and Truck Carrier (PCTC) division of a blue-chip Japanese shipping line in their European

headquarters in London. Prior to joining Steamship, Taslim was working as a Technical and Compliance Officer for a leading White List Flag Administration.

Steamship Managing Director and Head of Loss Prevention, Chris Adams says, "The Loss Prevention team brings a wealth of maritime experience to the service of Members. That experience has contributed to the production of innovative loss prevention materials, particularly our award-winning DVDs on a range of topics." The work of the LPD is an expanding and important part of the Club's work and we invite readers to browse our material on the Loss Prevention page of the Steamship website: <https://www.steamshipmutual.com/loss-prevention/>. Loss Prevention material is also available on the Steamship Mutual and A Team Effort Apps." ■



Nahush Paranjpye, Singapore office

"People risks form an important part of the output of Loss Prevention."

Member Training Course 2019

The Club was delighted to welcome 24 delegates from 11 countries to its Member Training Course 2019. Training and sharing knowledge are important for all organisations and the week-long course provides an ideal opportunity for both Members and Club to learn and engage in topical discussion.

The 2019 year course was a great success. The focus of the course is on learning through engagement and enjoyment. Once again, one of the highlights of the course was time spent at the Warsash Maritime Academy ship simulator facility, now located at

Southampton Solent University. The Academy provides internationally recognised certification programmes for both deck, engine and technical officers, having pioneered the use of bridge and engine room simulators for higher level training. Delegates have the opportunity to spend a morning in small teams working through simulation exercises. This is a unique and valuable experience for delegates, giving them a rare insight into life and decision making on the bridge and being involved in the collision that would be the subject of the workshop in collision incidents later in the day.

Hosting the course in Southampton, one of the UK's major ports and an area rich with maritime history, provides many opportunities to learn about, and engage in that maritime heritage. The delegates enjoyed a guided tour of Admiral Lord Nelson's flagship, HMS Victory, and a visit to the Maritime Museum at Bucklers Hard, which once was home to the Master Builders of ships for Nelson's navy, including the Agamemnon, Swiftsure and Euryalus which fought at the battle of Trafalgar. There was also a dinner cruise on the Solent which provided the opportunity to view at close quarters the many large cruise, container, vehicle and other vessels whose trade makes Southampton the UK's top port for exports.

"The focus of the course is on learning through engagement and enjoyment."



The focus during the seminar sessions is on workshop participation, with delegates having the opportunity to debate liability for a collision and live through the handling of a major casualty. The course addresses a wide spectrum of key topics, encompassing P&I and FD&D, claims and underwriting; including crew/personal injury, pollution, cargo liabilities, discretionary cover, a mock arbitration, underwriting, charterers' cover and an introduction to the International Group Excess Loss reinsurance arrangements. The course also tackles topical and important issues such as sanctions, cyber security and media management in the wake of a casualty.

The course was run by Claims Director Sue Watkins. Sue said, "The Member Training Course is a great opportunity for Members to meet Club staff and learn more about P&I and its role in the shipping world. It is, of course, a two way street and it is always a great opportunity for Club staff to meet Members and to discuss the issues of interest to them."

The next course will take place in summer 2021 – further details will be released in due course.

The feedback from delegates was very encouraging:

"Very informative with a wide array of topics covered. All of the topics seemed to be very relevant to our day-to-day work and the speakers were all very knowledgeable in their area."

"The variety of topics kept the whole course very interesting. In addition, the plethora of interactive activities during the presentations helped in keeping us engaged and were thoroughly enjoyable."

"Overall it was a very interesting and entertaining course. Helped us understand in general how the P&I and FD&D work."

"Very useful content, well organised."

"It's an excellent package!" ■

"This is a unique and valuable experience for most delegates, giving them a rare insight into life and decision making on the bridge..."

2019 IG Singapore Correspondents Seminar



Neil Gibbons
Correspondent and Communications Manager
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Every four years, the International Group Correspondents sub-committee arranges a conference for all correspondents listed by IG Clubs. The last conference took place in London in September 2017. The feedback provided by delegates showed that a regional event focusing on issues within the region would be a popular future event. The IG decided that Asia would be an ideal location for the first regional event and the IG P&I Asia Correspondents Seminar took place in Singapore in December 2019. In order to differentiate the seminar from the regular four-yearly conference, attendance was encouraged from correspondents with offices in Asia, or those who serve shipowners operating in the region, and the agenda was targeted towards issues particularly relevant to these correspondents.

In order to provide an efficient claims handling service to Members, Clubs rely greatly on the dedication and professional assistance provided 24/7 by their correspondents. See the Club's earlier article, <https://www.steamshipmutual.com/publications/Articles/SSMCorrespondents-0917.htm>.

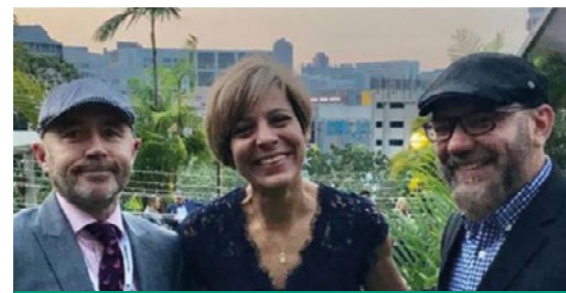
Around 350 people attended the Singapore seminar including 250 correspondents. Whilst the majority were from Asia, a significant number attended from many parts of the world including North and South America, Africa and Europe. In all, 63 countries were represented. The location enabled many of the Asian based correspondents to send delegates who had not previously attended an IG correspondent event.

In addition to Correspondent and Communications Manager Neil Gibbons, Steamship attendees included Nina Jermyn Syndicate Manager from Steamship Hong Kong; James Ingham Director Steamship Tokyo; Jamie Taylor Director Steamship Singapore; and Jonathan Andrews Eastern Syndicate Head of Underwriting.

The programme was based around the IG P&IQ course and delegates heard presentations from Club speakers and industry experts with sessions on people risks, cargo claims, collision, FFO, pollution and finishing with towage salvage and GA.

Steamship Mutual Correspondent & Communications Manager Neil Gibbons said, "We were impressed at the turnout, especially as this was the first regional event, and we are very grateful to all the correspondents who attended. In particular, it was great that so many of the claim handlers from the regional Asian offices were able to attend, meaning that correspondents and club staff at all levels were able to meet, exchange views and hear about current developments within the P&I world."

For a flavour of the event, a brief video can be viewed on the IGP&I website – it can be viewed at <https://www.igpandi.org/article/2019-international-group-regional-seminar-pi-correspondents>. ■



Clockwise Neil Gibbons; James McKinnell (Hispania P&I), Nina Jermyn (Steamship Hong Kong), Neil Gibbons; Neil Gibbons, Eng. Terry Lopez, Capt. Lenin Garcia (Caribbean Marine Surveyors)

"350 people attended the Singapore seminar including 250 correspondents. In all 63 countries were represented."

P&I Qualification (P&IQ) Programme

The P&I Qualification (P&IQ) programme was originally launched in 2010 for P&I Club staff. P&IQ provides carefully edited knowledge related to the work of the Clubs, including how risks are underwritten, how claims are dealt with and the application of international conventions.

The Club has 28 members of staff that have undertaken the programme. Three members of staff, Fern Attree, Danielle Southey and Lorna Watkin have successfully completed the whole course. It has quickly become central to our learning and development programme particularly for new joiners to the Club.

Readers may also recall that the P&IQ programme, was opened up to all interested parties in December 2019. Prior to that, from October 2017 it had been extended to P&I Correspondents. Since that time over 1400 candidates have registered for the course and 388 of these are Correspondents.

Further information can be read in Club Circular L.336 <https://www.steamshipmutual.com/Circulars-London/L.336.pdf>.

The Module structure and corresponding textbooks are as follows:

- Module 1: The Shipping Business
- Module 2: P&I Insurance History, Operation and Practice
- Module 3: Underwriting, Loss Prevention and Claims Handling
- Module 4: People Risks
- Module 5: Cargo Risks
- Module 6: Collision, FFO & Pollution
- Module 7: Towage, Salvage, General Average & Wreck Removal
- Module 8: [No textbook] A test-only module, assessing the candidate's ability



(L-R) Danielle Southey, Fern Attree, Lorna Watkin

to apply the knowledge gained in other modules to real life case studies.

There are three levels of qualification linked to the Modules completed by a particular candidate:

- P&IQ Certificate – Modules 1 – 3
- P&IQ Advanced Certificate – Modules 4 – 7
- P&IQ Diploma – Module 8

The exams are sat in two sessions a year (one in spring and another in autumn) and the sitting in May 2020 will be open to all.

Potential candidates are able to register for the course and to review the materials and online sample exams at www.pandiq.com. ■

"It has quickly become central to our learning and development programme, particularly for new joiners to the Club."

CPI and the Club Celebrate over Three Decades Together

Gary Rynsard, immediate past Executive Chairman of the Club's Managers, visited China P&I on 7 November 2019 to say farewell to old and more recent friends prior to his retirement in February 2020. Accompanied by Rohan Bray and Eric Wu from the Club's Hong Kong office, Gary was given a tour of the China P&I Centre, CPI's modern headquarters situated on the Huangpu River in Hongkou District, Shanghai, before being welcomed as guest of honour at a dinner banquet.

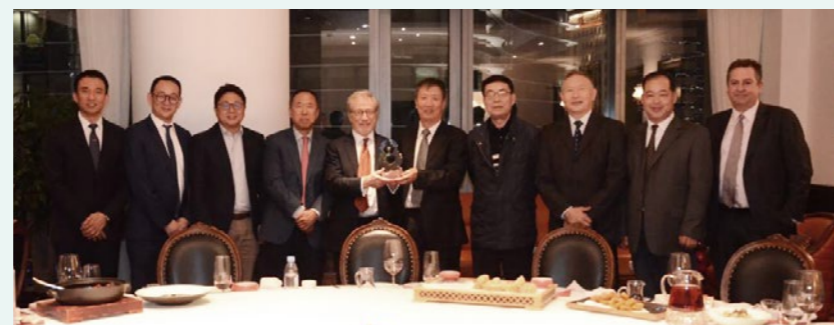
In 1985 Steamship Mutual was the first International Group Club to establish ties with CPI through a coinsurance arrangement which has grown considerably over the years. Gary was instrumental in the negotiations which led to the start of this relationship, and a number of CPI staff from that time were present at the dinner including Mr Wang Yu-Gui and Mr Hu Jingwu, each of whom have served as Managing Directors of CPI and Board Members of Steamship Mutual.

The Steamship / CPI programme today constitutes an important element of the Club's membership, and speakers at the dinner noted the continuing cooperation between Steamship Mutual and CPI for over 34 years, and a shared desire to see further growth of Chinese entries with the Club in the future.

We are very grateful to Dr Song Chunfeng, current Managing Director of CPI and Board Member of the Club, and his staff for a memorable event. ■



(L-R) Mr. Gong Xiqian, Dr. Song Chunfeng, Mr. Gary Rynsard, Mr. Wang Yugui, Mr. Rohan Bray, Mr. Eric Wu, Mr. Piao Junlong



(L-R) Mr. Liu Yutong, Mr. Eric Wu, Mr. Patrick Wang, Dr. Song Chunfeng, Mr. Gary Rynsard, Mr. Wang Yugui, Mr. Hu Jingwu, Mr. Wei Ming, Mr. Gong Xiqian, Mr. Rohan Bray

“Speakers at the dinner noted the continuing cooperation between Steamship Mutual and CPI for over 34 years, and a shared desire to see further growth of Chinese entries with the Club in the future.”

Crista Cullen – Olympic Champion Visits Steamship London

Neil Gibbons

Correspondent and Communications Manager
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At Steamship we have many lectures and presentations from industry experts, most are on topical maritime or legal issues. From time to time we invite speakers to talk about wider issues and on 5 September 2019 we were lucky to hear an inspirational presentation from Olympic Gold Medal winner, Crista Cullen. Crista was part of the Great Britain women's hockey team at the Beijing, London and Rio de Janeiro Olympic Games, winning bronze in London and gold in Rio.

Inspiration can be found in many sources but people with experience are able to offer valuable insights into performance. Being part of a team is an important feature of our working lives and the teamwork aspect of P&I has been emphasised in Steamship Mutual's popular Team Effort mobile App.

Crista Cullen spoke of her preparation, training, hard work and setting of goals, both in terms of an individual's performance and how this relates to being part of a team. Crista's background in the sporting arena is different from most of ours, yet it was interesting to hear how the performance of an individual is important to a team and how individual endeavour enhances both the team and the individual.

Crista's sporting achievements are impressive, as is her work with the Tofauti Foundation, a charitable organisation aiming to make a difference to Africa's wildlife and communities.

Afterwards, Crista joined Steamship's staff for a reception and was proud to display her Olympic gold medal.

Our thanks to Crista Cullen for her inspiring and thought-provoking presentation. ■

“Crista's background in the sporting arena is different from most of ours, yet it was interesting to hear how the performance of an individual is important to a team and how individual endeavour enhances both the team and the individual.”



Danielle Southey Atlantic Crossing

Danielle Southey
Syndicate Associate Claims
European Syndicate
danielle.southey@simsl.com



Crew with Fatjax sign (Danielle is centre, front row)

On 24 November 2019 I was lucky enough to be on the start line for the Atlantic Rally Cruise – an annual transatlantic sailing event from Gran Canaria to St Lucia for cruising and racing sail boats, which is now in its 33rd year.

I was one of eight crew on board “Fatjax”, a 63-foot carbon sailing yacht. As a team, we had spent many summers racing together on the English east and south coast, so we all knew each other well but this was an adventure on an altogether grander scale. We had experienced several North Sea and channel crossings as well as a Fastnet Race, but this would be the first ocean crossing for each of us.

We estimated that the 2,700 mile route would take us between two and three weeks, and with light winds forecast as we set off, we were preparing for a slow crossing. With visions of days spent drifting in the doldrums, we made sure we were well provisioned.

However, our first night gave us an exciting taste of what was to come with steady 20 knot winds across the beam driving us to speeds of up to 18 knots.

We were conscious of the fine line between pushing the boat’s speed and avoiding breakages since we didn’t have the usual comfort of knowing we could sail into a repair yard or nip to the chandlery for spare parts at the end of the day. This lesson was reinforced when we learnt one of our competitors had had to return to Gran Canaria during the first night having suffered severe damage to their rigging.

As the sun set on the first evening, we settled in to a watch system of six hours on, six hours off, during hours of darkness – keen to avoid the effects of fatigue. Each three-person watch could sail and trim the boat but any sail changes in heavier winds required a full crew: with some night’s weather generating three or four sail changes, it became important to maximise sleep whenever we were off-watch.

Weather and routing updates every 24 hours helped us to plan our course. Fatjax is designed with asymmetrical downwind sails rather than a conventional symmetrical spinnaker and this set-up favoured a more northerly route whereas most of the fleet were sailing south to join the trade winds blowing west from Cape Verde. Whilst it was tactically risky to separate from the fleet, daily position updates helped us to track our progress against our competitors.

We were fortunate not to suffer any major breakages along the way, mostly due to the exhaustive preparations of Fatjax’s owner and aided by the maintenance we carried out along the way. One of the more common hazards of long distance sailing is rope failure due to chafing, and small adjustments every few hours helped prevent this. However, the long crossing inevitably gave rise to damage – a blown-out spinnaker mid-way was perhaps our most costly. We also struggled with faulty wind readings for the first few days which meant three trips to the top of the 20 metre mast for one crew member, for repairs.

As we passed the half way mark, squalls became a more prevalent hazard. As well as maintaining our hourly log, we began a routine 15-minute radar check so we could either reduce our sail

“...helped me appreciate the issues seafarers live and work with every day.”

“The physical seclusion was more extreme than I had expected...”

area in advance or change direction altogether if any squall looked sufficiently ferocious.

Whilst we were relatively fortunate with the weather conditions, as we approached the Caribbean a steady 25 knot breeze set in for our final few days which regularly gusted into the mid-thirties. This contributed to an unsettled sea state where large rolling waves fought against the shorter, wind-generated waves. The choppy conditions were familiar to us from sailing in the shallow North Sea but the immense rollers were something quite new and impressive.

The everyday tasks of dressing, washing and cooking became more of a challenge in these unsettled conditions, as did sleeping: we became accustomed to wedging ourselves into our bunks as tightly as possible to stop from rolling in both directions. Fatjax is designed with three double cabins so ‘hot bedding’ meant we had an assigned bunk that we swapped in and out of as we changed watch.

The physical seclusion was more extreme than I had expected, bearing in mind we were part of a large fleet – for most of the crossing there were no other vessels within radar or AIS range. However, we were lucky enough to spot sharks, a whale and numerous dolphin pods which were a great boost to morale.

The Owner had given a lot of thought to the mix of crew he thought would work well, factoring in not only skills and strengths to make sure each watch had a full range of capabilities, but also personalities and weaknesses. The team included four of the Owners’ family – all very experienced sailors, and four non-family members with professions ranging from photography to business owners and of course, a P&I Club Associate. The thought that was put in to planning the team paid off, and being a close-knit team meant spirits were kept high even during the most challenging moments. I would like to thank my fellow crew member, Rupert Shanks, for permission to use his photographs. <http://www.rupertshanks.com/>

Excitement on board grew as we closed in on St Lucia and it was during our 13th night that we finally spotted lights ashore on Martinique. We crossed the finish line on the west coast island of St Lucia a few hours after sunrise, meaning we had completed the crossing in just under 14 days.

It had been almost 24 hours since we received the last fleet positions and so we were thrilled to learn we were the first boat in the cruising division of 122 boats to cross the line. We headed ashore to enjoy the local hospitality followed by an eagerly awaited full night’s sleep. Once all the boats had arrived and the handicaps applied, we were awarded first in our class and second overall.

This was my first ocean crossing and I was fortunate that we faced no major unexpected tribulations. The speed at which conditions changed and the persistent underlying sense that you are very much on your own should problems arise certainly helped me appreciate the issues seafarers live and work with every day.

I’m hugely grateful to Fatjax’s owners for having me on board and for the experience! ■





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