STEAMSHIP MUTUAL

Sea Venture

Issue 28

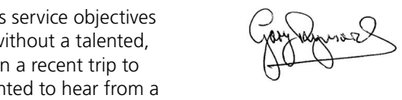
Introduction

The attribute above all else on which we, as a P&I Club, are quite rightly judged is the quality of service that we provide to our Members.

Easily said and perhaps too easily assumed to be the case. Moreover, quality of service brings with it an obligation never to be satisfied and to always be looking for ways to improve. One of the means by which Steamship looks to do this is through the provision of information that is relevant to the Club's Members and Sea Venture is but one example of how we achieve this goal. Part of the aim of the publication is to consolidate articles published on the Club's website that cover developments in the law in a thorough but accessible manner. Whilst we hope you will feel this is achieved feedback is, as always, very welcome.

None of the Club's service objectives can be achieved without a talented, dedicated staff. On a recent trip to Miami I was delighted to hear from a senior attorney that Steamship Mutual is known throughout the industry to provide the best training and education for those working in this segment of the insurance industry. Our intention is to ensure that this continues to be the case for the benefit of the Club's Members.

We are in the process of expanding the number of our offices world-wide. Five years ago the Club opened an office in Piraeus. During this time the Club's Greek membership has grown from less than one million GT to over four million GT demonstrating the benefit of having an office in the same time zone and the excellent service this office provides. We have just opened an office in Singapore and hope to open an office in Tokyo shortly. Later this year, and as a result of the UK's vote to leave the EU, we are likely to open a further office in Europe. If the UK had not voted to leave the EU we may well have not opened this new office but assuming the UK leaves the EU in March 2019 our aim is to ensure that the new office enhances our offering to European Members. Ironically it may serve to further internationalise the Club. That must be a positive and welcome development.



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If you would like future issues of Sea Venture in electronic format or have any suggestions for future articles, or comments about this edition, please contact us at seaventure@simsl.com

Contents

Contract

06 The Primacy of Language in the Construction of (Commercial) Contracts
09 Hold Cleaning – When is Clean, Clean Enough?
12 *The Arundel Castle* – Definition of "Within Port Limits"
14 The Meaning of "Consequential Damages"
17 Strikes, Congestion and Delays – Whose Risk?
19 Disbursements and Equitable Set Off
21 Contractual Interpretation; "For want of a comma, …"
24 *Ocean Victory* Update – Supreme Court Clarification on Unsafe Port
26 *The New Flamenco* Supreme Court Decision
29 OW Bunkers – New York Ruling
30 Floating Storage and Contractual Interpretation

Cargo & Jurisdiction

34 *The Maersk Tangier* – Package Limitation for Containerised Cargoes
37 Freezing Orders – Hong Kong
39 Deck Carriage and the Hague-Visby Rules
42 Electronic Release System and Delivery of Cargo
44 The LMAA Terms 2017
47 Asymmetric Jurisdiction Clause in Ship Finance Agreement Upheld
50 The New Brazilian Civil Procedure Code: What Has Changed and How May It Affect You?
52 English High Court v London Arbitration

People

56 The Collateral Source Rule – Who Benefits?
58 Court Holds Punitive Damages Can be Recovered for Unseaworthiness
60 Increased Exposure for Shipowners in Medical Malpractice Cases
62 US Court Reviews Maintenance and Cure, Unseaworthiness and Jones Act Negligence
64 The Cruise Passenger Protection Act
68 SSM Work with Marine Catering Training Consultancy
69 A Case Study: Stowaways – What to do When it is Already Too Late?
72 US Crew Personal Injury Claim Compelled to Arbitration

Miscellaneous

76 Save the Steam Trawler "Viola"
79 Monitoring, Recording Verification (MRV) of CO_2 Emissions from Ships
82 A Vessel Does not Comply with Regulations or Requirements – Who Pays for Consequent Modifications?
86 Claiming Safety Exemption From Complying with California and United States Low-Sulfur Fuel Use Regulations
88 Contribution for Purely Economic Damages Available Under the Oil Pollution Act
91 *Force Majeure* in the aftermath of Hurricanes Harvey and Irma
92 Yacht Claims and the Limitation of Liability for Maritime Claims Conventions
95 Qatari Restrictions – What Do These Mean for Shipping?

News

100 Edward Lee Retirement
101 Marine Cup Challenge
102 "OOCL Hong Kong" arrival at Felixstowe 21 June 2017
104 Members Training Course 2017
105 IG Correspondent Conference 2017
106 Steamship Wanderers Walk 24 Peaks in 24 Hours in Support of Seafarers UK
107 Marathon for Parkinsons
107 Patience Williams Retirement

Contract

The Primacy of Language in the Construction of (Commercial) Contracts

There have been a number of high profile decisions which have considered the interpretation of commercial contracts.

Simon Rainey
Quadrant Chambers

We are grateful to Simon Rainey QC and John Russell QC of Quadrant Chambers for the following article discussing two recent cases:

Gard Shipping v Clearlake Shipping [2017] EWHC 1091 (Comm) Sir Jeremy Cooke 12 May 2017; and *Persimmon Homes v Ove Arup* [2017] EWCA Civ 373 Court of Appeal (Jackson, Beatson, Moylan LJJ) 25 May 2017; addressing the correct approach to the construction of contracts.

The *Gard Shipping* case is the first application in a first instance decision of the recent Supreme Court decision in *Wood v Capita Services*, which rejected the suggestion that there was any tension between the Supreme Court's earlier decisions in *Rainy Sky v Kookmin Bank* [see the Club's previous article on this decision, 'Contractual Interpretation – Commercial Common Sense' (https://www.steamshipmutual.com/publications/Articles/RainySky1212.htm)] and *Arnold v Britton* [see the Club's previous article on this decision, 'A more Literal Approach to Construction' (https://www.steamshipmutual.com/publications/Articles/LiteralApproachtoConstruction04_16.htm)]. It also considers the application of the Supreme Court decision on the implication of terms in *Marks & Spencer v BNP Paribas* [see the Club's previous article on this decision, 'Implying Terms into a Commercial Contract – Does the Restrictive and Traditional Test Still Apply?' (https://www.steamshipmutual.com/publications/Articles/implyingtermsintoacommercialcontract.htm)].

The decision in *Persimmon* is striking, not so much for what it decides, as to the doubt it casts on the continuing relevance in commercial contracts, of the principle of contra proferentem and the rule in relation to exemption clauses flowing from the *Canada Steamship* case.

Gard Shipping v Clearlake Shipping

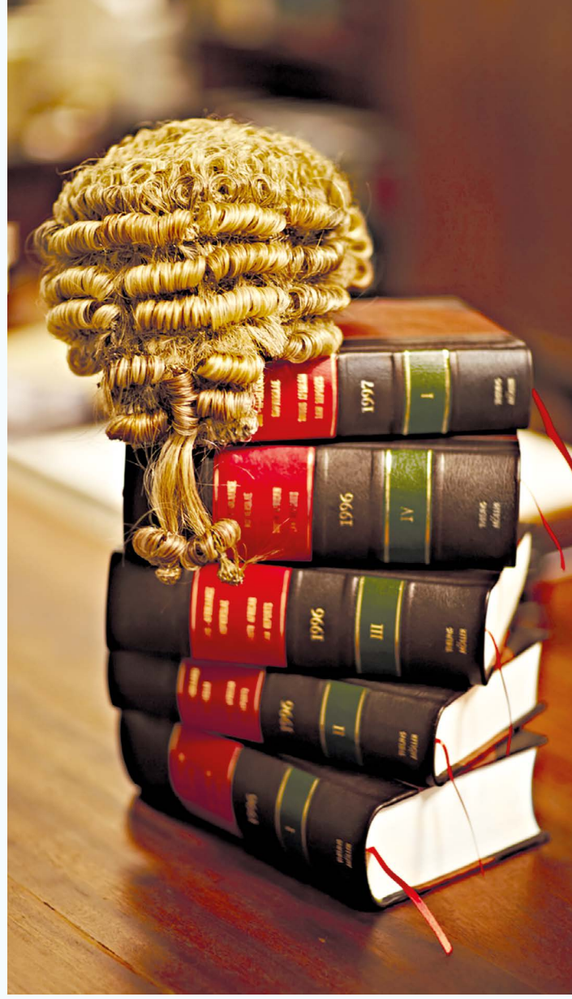
The Supreme Court decision *Rainy Sky* in 2011 opened the floodgates: no case on construction could be argued without it being asserted or, indeed, "*trumpeted*" (per Eder J in *Aston Hill Financial*) by each side that its interpretation made more commercial sense.

This development was not embraced with enthusiasm by most first instance judges. How could advocates or judges discern what, objectively, made commercial sense in myriad different circumstances? And even if they could, construing a contract in accordance with objective commercial sense risked rewriting the bargain actually struck by the parties.

Such doubts seemed to be reflected in the subsequent Supreme Court judgment in *Arnold v Britton* in June 2015. This was widely seen as being a "*rowing back*" from the free-for-all of *Rainy Sky*. Although there was no criticism of *Rainy Sky* per se, the Supreme Court emphasized the importance of the language of the provision which was to be construed. Commercial common sense was not to be invoked to undervalue the importance of the language.

Then, in March of 2017, came the Supreme Court decision in *Wood v Capita Services* [see the Club's previous article on this decision, 'Contractual Interpretation; "For want of a comma,.."' (https://www.steamshipmutual.com/publications/Articles/contractualinterpretationmissingcoma.htm)]. Giving the only judgment, Lord Hope emphatically rejected the submission that *Arnold* was a rowing back from or recalibration of *Rainy Sky*. What the court has to do, in any case, is, in the unitary exercise of construction, balance the indications given by the language and the commercial implications of competing constructions.

The balancing exercise is key to the approach. As to how that balance is to be struck, Lord Hodge identified three factors (which must be viewed as non-exhaustive): (1) the quality of the drafting – the poorer the drafting the more the balance may tip away from a strict semantic reading; (2) the court should bear in mind that one party may simply have made a bad bargain; and (3) the court should bear in mind that the drafting may be a negotiated compromise, with the parties unable to agree more precise terms.



Gard shows the first application of *Wood* in a first instance decision.

A voyage charterparty based on BPVOY4 contained standard laytime/demurrage provisions. It also contained specifically agreed terms that Charterers had the liberty to order the vessel to stop and wait for orders. If they exercised that liberty, waiting time was to count as laytime and demurrage was to be payable at enhanced and escalating rates. Charterers did not give a "stop and wait" order. Instead, after the vessel tendered a Notice of Readiness ("NOR") at the discharge port, Charterers simply gave no discharge orders at all for over two months.

Owners argued that it was clear that the commercial purpose of the clause was to make charterers pay at the enhanced rates, where they used the vessel as floating storage. They had used the vessel as floating storage at the discharge port. It could make no commercial sense if the charterers could avoid the enhanced rate by the tactic of giving no orders, after NOR, rather than giving a "stop and wait" order. Commercially the two amounted to the same thing, and should attract the same consequences.

Sir Jeremy Cooke had no hesitation in rejecting this argument. The wording of the specially agreed terms required a "stop and wait" order to trigger the enhanced rates. There was no such order. Therefore, the enhanced rates were not triggered. The ordinary demurrage rate applied. He also firmly rejected Owners' alternative argument based on an implied term on the grounds of lack of commercial necessity.

This case, therefore, provides an early indication that in charterparties, which are indeed often a negotiated compromise, in carrying out Lord Hodge's balancing exercise judges will give more weight to the words the parties have actually used, rather than arguments based on supposed commercial common sense. Notwithstanding Lord Hodge's assertion that *Arnold* did not recalibrate *Rainy Sky*, the post-*Arnold* focus on the actual words of the contract is likely to be maintained.

Persimmon Homes v Ove Arup

The correction of approach to the relevance and utility of the so-called "commercial" approach to construction of commercial contracts post *Arnold v Britton* and the current emphasis on the primacy of the language used by the parties as usually the best and surest guide to what they intended to achieve has found an echo in the rather different field of exemption clauses. The traditional approach that an exclusion or exemption clause is to be construed contra proferentem (once one has decided who the proferens is) in the event of any ambiguity has ruled the field for many years, although there have been many statements to the effect that it is not to be deployed where the words are themselves sufficiently clear. But the trend has increasingly been to give effect to exclusion clauses in commercial contracts without resort to maxims of hostile construction where the wording is subjected to some special linguistic threshold or a more demanding need for clarity.

> "This was widely seen as being a *"rowing back"* from the free-for-all of *Rainy Sky*."

An early indication of the new approach was given by Lord Neuberger MR in *K/S Victoria Street v House of Fraser* [2011] EWCA Civ 904, although was perhaps lost sight of. The position was reviewed more clearly and emphatically in the context of the

"...judges will give more weight to the words the parties have actually used, rather than arguments based on supposed commercial common sense."

mutual indemnities and exclusions in *Transocean Drilling v Providence Resources* (*The Arctic III*) [2016] EWCA Civ 372 where the Court of Appeal ruled that the principle had no role to play in the case of a mutual clause "*especially where the parties are of equal bargaining power*", and stressed the parallels with *Arnold v Britton*. The Court distinguished the sort of mutual exclusion clause before it from what it described as "*a typical exclusion clause, by which a commercially stronger party seeks to exclude or limit liability for its own breaches of contract.*" The decision raised a number of questions in particular as to equality of bargaining power and the consistency of the Court's approach in the light of a case decided by the Court of Appeal just shortly before (*Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128) in which the contra proferentem approach appeared to receive restatement and approval. However the Court was clear that it was not intending to cast any doubt on the allied principle of construction that clear words were required to exclude liability for negligence and the 'Rule' in *Canada Steamship*[1].

The recent decision in *Persimmon Homes v Ove Arup* appears to continue the trend towards minimising the scope for a contra proferentem approach generally, and not just in the context of mutual exclusion or exemption clauses. The case raised issues of construction under a contract for consultancy and surveying services rendered by Ove Arup to Persimmon and other parties relating to a redevelopment project for the Barry Docks. Asbestos was found in more than expected quantities for which it was alleged that Ove Arup was responsible by negligently failing to detect and manage that risk. A number of issues arose as to the application of exclusion and limitation clauses. In particular a clause which read "*Liability for any claim in relation to asbestos is excluded*".

The Court of Appeal re-endorsed in terms the approach in *K/S Victoria Street* to the effect that the language used should be and usually is enough to resolve the meaning without resort to "rules" of construction and the approach taken in *The Arctic III*. But more importantly it went a step further and doubted the relevance and applicability of the *Canada Steamship* principles (by which a clause must either expressly refer to negligence or some synonym of it or, if it does not, must indicate that it covers negligence with general words being read as covering non-negligent liability if possible to do so and unless such liability is fanciful).

The Court stressed that it was necessary to distinguish between a simple exclusion of liability and an indemnity clause requiring a party to hold the other harmless from the consequences of that party's negligence and that, at least in the former case, the Court's "impression" was that *Canada Steamship* guidelines "*in so far as they survive*" are "*now more relevant to indemnity clauses than to exemption clauses*" and that in commercial contracts between sophisticated parties, such as a large construction contract, it should all turn on the language. The Court made it clear that the wording in question (referred to above) was clear enough to cover liability for negligence and that *Canada Steamship* was simply not of assistance. As belt and braces the Court then applied *Canada Steamship* and held that any liability other than liability for negligence was indeed fanciful.

The case represents a further cutting back of the application of technical canons of construction to exclusion clauses in the commercial context in favour of simply giving ordinary language its effect. It also states, perhaps more clearly than before, that the same approach applies generally and that *Canada Steamship* is not exempt from the process.

Although the Court was at pains to stress that the issues before it were not such as to merit a general review of *Canada Steamship*, its words will be likely to be cited generally as building on an *Arnold v Britton* approach, even to exclusion clauses: "*Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down.*" ■

Article published originally on Quadrant Chambers website and on the Steamship Mutual website June 2017.

[1]This was a 1952 decision in which rules for interpretation of exclusion clauses were set out, these being: (i) words seeking to exclude liability for negligence must be express and clear; (ii) any ambiguity in wording must be resolved against the party seeking to rely on the exclusion; and (iii) where negligence is the only basis of liability, even general wording can exclude liability for negligence. However, such general wording will not exclude negligence if there is another basis of liability provided that such other basis is not "fanciful or remote". If another basis does exist, a widely drawn clause will not exclude liability for negligence.

Hold Cleaning – When is Clean, Clean Enough?

Preparation of cargo holds for the next cargo is an important operational consideration on all bulk carriers in order to avoid disputes in relation to cargo damage and also lost time.

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Hold cleaning disputes are not infrequent and can result in the need for multiple surveys and significant delays and costs.

This article discusses some of the practical aspects of cleaning cargo holds, including the factors which will be relevant to the extent of cleaning required, and also how appropriate systems can be put into place to carry this out in an efficient manner. It also comments on a recent London arbitration which considered an implied term in relation to the standard of cleanliness required and whether charterparty requirements were met in circumstances where there were contradictory survey results.

Introduction to Hold Cleaning

Preparation of cargo holds for the next cargo is an important operational consideration on all bulk carriers. If not properly planned and carried out inadequate hold cleaning can lead to several different claim types. Claims in respect of the cargo, such as for shortage, contamination or water damage, can be directly linked to the hold cleaning, in addition to which charterparty disputes resulting from delays and berth costs may arise. By way of an example, unless the hatch cover seating surfaces are clean, a weathertight seal will not be possible resulting in a risk of water accumulating and dripping into the hold and causing cargo damage.

The extent of hold cleaning and preparation required for the next cargo will depend on several factors; most importantly, the cargo to be loaded and its intended use. In the bulk carrier trade a number of terms are often used to describe the cleanliness requirements but Members should be aware that there is no universal definition of these terms and very often surveyors will inspect holds subjectively based purely on their previous experiences rather than set criteria. Standards such as 'hospital', 'grain', 'normal' and 'shovel' are all in common use and are often included in charterparties. However, even when one of these commonly used terms is used, disputes can arise in relation to the cleaning standard required as some countries interpret the requirements differently and what may be acceptable as 'grain clean' in one port may not be acceptable in another. For instance, it is well known that Australia, USA and Canada require very high standards of hold cleanliness prior to loading grain cargoes.

A broad guide to these commonly used terms is:

Hospital Clean is the most stringent and requires all hold surfaces to have 100% intact paint coatings on all surfaces (including the tank top, all ladder rungs and undersides of hatches).

Grain Clean requires the holds to be free from insects, odour, residue of previous cargo, lashing material, loose rust scale and paint flakes, etc. Prior to loading the holds must be swept, washed down with fresh water, dried and well ventilated. Light atmospheric rusting of exposed steel is generally acceptable but loose scale or paint, such that it may become detached and mix with the cargo, certainly is not.

"... there is no universally accepted definition of these terms."

Normal Clean requires the holds to be swept to remove all residues of the previous cargo, washed down and dried ready to receive a similar or compatible cargo.

Shovel Clean does not require washing but only the removal of the previous cargo by rough hand or mechanical sweeping.

It should however be noted that there is no universally accepted definition of these terms. Therefore, wherever possible, it is important to use as clear a description as possible when describing the cleaning standard required in a charterparty or voyage order.

A significant distinction in so far as hold cleanliness is the obligation that applies on delivery under charters and that which applies for intermediate hold cleaning. For a discussion on this issue see: 'Intermediate Hold Cleaning – Owners' Duty' (https://www.steamshipmutual.com/publications/Articles/Katerina0807.html) and 'Hold Cleaning – Who Bears The Cost?' (https://www.steamshipmutual.com/publications/Articles/Articles/HoldClean0805.asp).

Planning and Preparation for Hold Cleaning

To reduce the amount of hold cleaning required for the next cargo, Masters may utilise the discharge/cleaning facilities at the current port. By removing as much remnant of the prior cargo from the holds, disposal and clean-up costs can be reduced and time can be saved before the next load port. In order to effectively and quickly clean holds it is also important to have access to sufficient cleaning materials, including chemicals (if appropriate for the next cargo) and high pressure washing equipment on board.

When planning the hold cleaning operation the Master should also properly assess the risks of this. For instance, if chemicals are to be used as part of the washing-down procedure, accurate data (MSDS) should be provided to the vessel to ensure the risks are understood and safe handling implemented. This will include a job specific risk assessment, a tool box talk and the correct use of personal protective equipment. Moreover, agreement on compatibility of the clean with the next intended cargo should be obtained from the shippers/charterers in order to ensure that there is clarity on the precise level of cleanliness they require the vessel to achieve, for example, no loose rust, no bare steel or fully painted and cured.

With the introduction of new requirements under MARPOL Annex V, Masters need to be aware that cargo residues, wash water and wash water containing chemicals which are Harmful to the Marine Environment ("HME") must be identified as such and disposed of in the correct manner in order to avoid breaching these regulations [see 'MARPOL Annex V – Bulk Cargo Hold Wash Water Discharge and Cargo Declarations' (https://www.steamshipmutual.com/publications/Articles/MARPOLAnnVITOPFpaper0813.htm)].

> "... it is important to ensure that any charterparty provision is clear as to the standard required..."

London Arbitration 4/17

Facts

The vessel was chartered out by disponent owners for the carriage of a bulk cargo of wheat.

Clause 77 of the Charterparty provided "*Vessel's holds on arrival load port to be clean, swept, dried up, free of loose paint/rust scale, free of cargo residues from previous voyage and in every respect ready to load the intended cargo to the satisfaction of the shipper's independent surveyor. Should the vessel fail to pass the hold inspection, Owners to arrange cleaning at their time and expense.*"

Four hold inspections were carried out, three of which the vessel passed and one which the vessel failed. These were as follows:

1. The first inspection was carried out on behalf of Head Owners at anchorage shortly after the vessel's arrival, between 19.20 and 21.30, at which time it was dark. This report concluded that the holds were passed, without remark, and were ready for loading of grain cargo.

2. The second inspection was carried out on behalf of consignees, also at anchorage between 19.20 and 21.30. This report concluded that the holds were clean, dry, free from foreign smell, without residues of previous cargo and suitable for loading.

3. The third inspection was carried out by the loadport authorities after the vessel berthed between 07.00 and 08.00, at which time it was still dark. The report stated that the holds were clean and dry, without foreign smell and free from insects.

4. The fourth inspection, which failed the holds, was produced by an inspection team that included representatives of the authorities at the country of discharge, whose law required delegates to inspect and approve both the cargo to be imported and the carrying vessel. This inspection started at 07.10 and continued until 14.30 and found the presence of remnants of the previous cargo of coke and rust.

The Master did not remark on the survey or issue any letter or protest in relation to the

results of the fourth survey. However, he did instruct the crew to further clean the holds and this process took about three days.

Arguments and Decision

Owners suggested that the words "*to grain clean standard*" should be implied after the word "*clean*" in clause 77. However, the difficulty with this was that there was no uniform meaning to "*grain clean standard*" and the standard required by authorities around the world varied considerably. In these circumstances the Tribunal concluded that this proposed implied term would not be workable.

Owners also argued that there should be a second implied term that the shippers would not appoint a "*wholly ignorant or unreasonable inspector*" who may unreasonably reject the vessel's holds. While the Tribunal agreed the clause 77 should not be used to require an unreasonable level of cleanliness this did not, however, mean that the standard required by the clause should be limited to those acceptable to the local authorities – particularly when those standards were at the lower end of the scale determined on a worldwide basis. The Tribunal commented that the first and second survey reports were superficial and far from convincing. They also remarked that it would be difficult to carry out a proper inspection at night in that time scale. So far as the third report was concerned, the Tribunal also noted that it would not have been possible to visit each of the holds in that time scale and that it was dark at the time of the inspection.

As regards the fourth inspection, which failed the holds, it was held that as the shippers were contractually bound by this survey and as the inspectors were independent of the shippers, that this was an independent survey for the purpose of clause 77. It was also noted that this was the only survey which took place in the light and that it took significantly longer than any of the three preceding inspections, the implication being that this inspection was more thorough. Accordingly, the Tribunal rejected Owner's assertions that the inspection team was "*wholly ignorant*", was not competent to carry out a survey and required an unreasonable standard of cleanliness. Instead, the Tribunal interpreted the Master's decision to carry out cleaning as an acceptance that there were remnants of previous cargo and rust.

Despite the holds being passed by the first three inspectors, the Tribunal accepted the findings of the fourth surveyor and concluded that there was presence of the rust and remnants of the previous cargo with the effect that the requirements of clause 77 were not met.

Comment

There are many different standards for hold cleaning, and how these are interpreted can vary widely depending on the port. In order to avoid delays, it is important to ensure that any charterparty provision is clear as to the standard required, for example where using a term such as grain clean that it is clearly stated what this is agreed to mean. It can also assist to include an agreement as to what steps are to be taken in the event that there is not a consensus on whether the holds are acceptable, for example appointment of a mutually acceptable surveyor as this can help with controlling any resulting delays.

It is also clear that surveyors can take very different approaches when inspecting the holds, from a cursory inspection to one which involves a careful inspection of all surfaces. In order to ensure that any challenge of an inspector's finding can be limited, instructions should be given to the surveyor setting out the contractual requirements that the holds need to meet. If possible, it may also be useful for surveys to be coordinated so that the extent and timing of the surveys for each party are the same. If the findings of another surveyor are not agreed with, it is important that a timely protest is made.

Finally, some charterers have their own requirements, for example specific cleaning routines which are to be used prior to carriage of cargo. If this is the case, care should be taken to ensure any contractually agreed procedures are followed in order to reduce the scope for disputes. ■

Article published on the Steamship Mutual website September 2017.

The Arundel Castle – Definition of "Within Port Limits"

The High Court confirms that *The Johanna Oldendorff* is still the relevant authority for the purposes of defining the meaning of "within port limits".

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The recent case of *Navalmar UK Ltd v Kale Maden Hammaddeler Sanayi Ve Ticart As (The Arundel Castle)* [2017] EWHC 116 (Comm) discussed the meaning of "within port limits" in an amended Gencon 94 charterparty form in relation to laytime and tendering notice of readiness.

Facts

The "Arundel Castle" found the port of Krishnapatnam congested upon her arrival and could not proceed straight to berth. Instead, the port authority directed the ship to an anchoring area. Owners tendered Notice of Readiness ("NOR") from the anchorage and the matter ended up in a demurrage dispute.

The fixture recap provided: Clause 15: "*[Notice of readiness] to be tendered at both ends even by cable/telex/telefax on vessels arrival at load/disch ports within port limits. The [notice of readiness] not to be tendered before commencement of laydays*".

Clause 35: "*Otherwise Gencon 94 printed form charterparty with logical amendments on [basis] the terms as per fixture recap.*"

Clause 6(c) of Gencon 94: "*If the loading/discharging berth is not available on the Vessel's arrival at or off the port of loading/discharging, the Vessel shall be entitled to give notice of readiness within ordinary office hours on arrival there …*"

Award

Charterers alleged that the NOR was invalidly tendered because the vessel was outside "port limits".

The parties did not suggest there was a law, local or national, that defined the port limits at Krishnapatnam. The parties did not address the area of exercise by the port authority of its powers to regulate the movements and conduct of ships.

The Tribunal held that the NOR was not validly tendered as it was given while the vessel was, by reference to the relevant Admiralty chart that described the "*Limit of Port of Krishnapatnam*", outside port limits.

Appeal

Owners brought an appeal under section 69 of the Arbitration Act on the following point of law:

"On a proper interpretation of the fixture recap entered into between the parties dated 27 October 2014, if the [owners] had no right to tender NOR outside port limits, what is the meaning of port limits?"

Owners' position was that "port limits":

i. include "*any area within which vessels are customarily asked to wait by the port authorities and over which the port authorities exercise authority or control over the movement of shipping*"; alternatively

ii. meant "*any area where vessels load or discharge cargo including berths, wharves, anchorages, buoys and offshore facilities as well as places outside the legal, fiscal or administrative area where vessels are ordered to wait for their turn no matter the distance from that area*", as described in BIMCO's Laytime Definitions for Charterparties 2013.

The test to determine when a vessel has arrived under a port charterparty was addressed in *The Johanna Oldendorff* [1]. In brief the test is:

- A ship is an arrived ship under a port charterparty when, if she cannot proceed immediately to a berth, she is "*within the port and at the immediate and effective disposition of the charterer*".

- The ship can generally be presumed to be at Charterers' disposal when she is at a usual waiting place within the port.

- If the ship is waiting at some other place in the port then it will be for Owners to prove that she is as fully at the disposition of Charterers as she would have been if in the vicinity of the berth for loading or discharge.

- The area where the port authority exercises its powers to regulate the movement and conduct of ships would indicate the limits of the port where no particular law determines them.

Given the limited information before them the Judge concluded that the Tribunal was entitled to reach a conclusion of fact that the vessel was not within port limits, or at least that Owners had not proved that she was. However, Knowles J went on to say this "*did not mean that in another case, on more complete or additional material, the same conclusion would be reached even as regards the port of Krishnapatnam*".

With respect to Owners' alternative argument – the definition of "port" in the Laytime Definitions for Charterparties 2013 – was not expressly incorporated in the underlying charterparty and, therefore, was not relevant for the interpretation of the meaning of "port limits" in this case.

Accordingly the appeal was dismissed.

However, Knowles J did caution that the definition of "port" in the Laytime Definitions could extend the test for an arrived ship to places outside the non-exhaustive port limit 'boundaries' described in *The Johanna Oldendorff* and questioned if this was the intention of those drafting the Laytime Definitions. BIMCO's commentary provides that the definition of "port" is intended "*to reflect the wider concept of port area explained in The Johanna Oldendorff (1973) with reference now made to places outside the legal, fiscal or administrative area*". The Judge though said he did not "*believe that the definition does reflect what was explained in The Johanna Oldendorff.*"

Comment

The Johanna Oldendorff remains relevant today when determining whether a vessel is "within port limits" if the charterparty does not otherwise extend the place from which a vessel can be arrived and serve NOR. In *The Arundel Castle* the Laytime Definitions were not incorporated and, therefore, the definition of "port limits" set out therein did not apply. If they had been, greater weight could perhaps have been given to the words "*at or off the port*" in clause 6(c) of Gencon 94 as opposed to the words "*within port limits*" in clause 15 of the fixture recap. Further, if the material before the Tribunal had not been limited to an Admiralty chart Knowles J may have reached a different conclusion. ■

Article published on the Steamship Mutual website May 2017.

[1] *Oldendorff (EL) & Co GmbH v Tradax Export S.A.* [1973] 2 Lloyd's Rep 285

The Meaning of "Consequential Damages"

Consequential loss has been construed by the English courts as applying only to loss which is not ordinarily foreseeable, and which would be recoverable only if the special circumstances out of which the loss arises were known to the parties when contracting.

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In a High Court decision in late 2016 Mr Justice Cooke considered the construction and meaning of the term "*consequential and special damages*" in the context of a limitation of liability clause included in a standard form SAJ shipbuilding contact. Consequential loss has been construed by the English courts as applying only to loss which is not ordinarily foreseeable, and which would be recoverable only if the special circumstances out of which the loss arises were known to the parties when contracting. That is the well-known second limb of *Hadley v Baxendale*. Therefore, a clause excluding consequential loss will only exclude what would not be recoverable in any event, because it was not ordinarily foreseeable and there was no knowledge of the special circumstances out of which that loss arose.

However, for the reasons explained below, the conclusion of Cooke J was that these words were not necessarily confined to this well-settled meaning and will depend on the specific context in which the words are used – *Star Polaris LLC and HHIC-PHIL Inc* [2016] EWHC 2941 (Comm).

The Facts

The claimant, Star Polaris LLC (the "Buyer"), entered into a shipbuilding contract dated 6 April 2010 on an amended SAJ form (the "Contract") with the defendant, HHIC-PHIL INC (the "Yard") for the build and purchase of a bulk carrier, the "Star Polaris" (the "Vessel"). The Vessel was delivered to the Buyer on 14 November 2011, and subsequently on or around 29 June 2012 suffered a serious engine breakdown necessitating towage to South Korea for repairs. The Buyers commenced arbitration against the Yard, and claimed:

i. The cost of repairs to the Vessel;

ii. The costs caused by the failed engine, including towage fees, agency fees, survey fees, off-hire and off-hire bunkers; and

iii. Diminution in value of the Vessel.

The material provisions of the Contract were, *inter alia*:

Article IX (1): A 12 month guarantee of material and workmanship commencing from the date of delivery;

Article IX (3): An express undertaking on the part of the Yard to remedy at its expense any defects;

Article IX (4): The extent of the Yard's liability, with article IX(4)(a) specifically limiting liability after delivery of the Vessel and excluding liability for any "*consequential or special losses, damages or expenses unless otherwise stated herein.*" This provision was expressed to *"replace and exclude any other liability, guarantee, warranty and/or condition imposed or implied by statute, common law, custom or otherwise…*"(Article XI(4)(d)).

Hadley v Baxendale

A key aspect of this case was the parties' understanding of the meaning of "consequential or special losses". English law has long recognised these words according to the decision in *Hadley v Baxendale*, which identified the circumstances in which a party could recover losses, before becoming too remote, namely:

i. Direct losses (**limb 1**): losses which are reasonably in contemplation of both parties at the time the contract was made i.e. losses which a reasonable person might expect to result from the breach in ordinary circumstances; and

ii. Consequential losses (**limb 2**): actual knowledge of special circumstances outside the ordinary course of things, but which were communicated to the defendant or otherwise known by the parties.

Back to contents

> "… the decision does suggest that, dependent on the wording of the relevant clause or clauses of a particular contract, the term may have a much wider meaning."

Since *Hadley v Baxendale* there have been a number of decisions attempting to define the meaning of "consequential loss", including – *Saint Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 67 Ll L Rep, *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep and *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep. However, in *The GSF ARCTIC III* Moore-Bick LJ observed that "*It is questionable whether some of those cases would be decided in the same way today, when courts are more willing to recognise that words take their meaning from their particular context and that the same word or phrase may mean different things in different documents*".

The Tribunal Decision

The Buyer's claim was based on an argument that the losses claimed were not excluded as they were all direct, ordinarily foreseeable and, therefore, within 'limb 1' of *Hadley v Baxendale*, and were not "consequential or special losses".

The Tribunal decided in favour of the Yard, holding that Article IX was a "complete code" defining the context in which the Yard's responsibility was to be understood. Therefore, the Yard's obligations were limited to the express wording contained within the contract i.e. to repair or replace defective items and/or the physical damage caused as a result of such defects. The Tribunal went on to state that by virtue of the express exclusion in clause IX(4)(d) it was clear that the Yard had not assumed any responsibility for any losses other than the remedy of defects, financial or otherwise.

As a result of this the Buyer's claims for items (ii) and (iii) were dismissed.

High Court Decision

The Buyer appealed the award on two grounds:

1. The words "consequential and special losses" excludes liability only for damages falling within the second limb of the rule in *Hadley v Baxendale* and claims (ii) and (iii) fell within the first limb. To exclude losses falling outside that well recognised meaning, would require very clear and unambiguous wording.
2. The words "special losses" when used with the words "consequential losses" are indicative of an intention to refer to the specific losses falling within the second limb of *Hadley v Baxendale*.

The High Court agreed with the Tribunal's decision concluding that the words "consequential loss" or "special loss" had a cause and effect meaning, and were intended to have a much wider meaning than the limited context argued by the Buyer. That is, "*in such circumstances, the word 'consequential' had to mean that which follows as a result or consequence of physical damage, namely additional financial loss other than the cost of repair or replacement*" (Cooke J).

Therefore, the Yard's liability was limited by the positive obligations in Article IX (3) to remedy any defects and Article IX (4) made it plain that the Yard has no liability above and beyond those express obligations. When considered as a whole, the contract expressly excluded financial losses which resulted as a consequence of the engine failure (beyond the costs of replacement and repair of physical damage to the engine).

In summary, the obligation to repair and replace was exhaustive and the Buyer's appeal was, therefore, dismissed.

Comment

Although unlikely to alter the English law interpretation of the meaning of "consequential and special losses", the decision does suggest that, dependent on the wording of the relevant clause or clauses of a particular contract, the term may have a much wider meaning. As such the decision underlines the need for careful consideration when drafting and negotiating exclusion and/or limitation clauses. To avoid ambiguity, wherever possible parties should set out expressly the losses they agree to be responsible for, and those which are expressly excluded. Parties should also bear in mind the *contra proferentem* rule i.e. where there is ambiguity in a contract the words will generally be construed against the party who seeks to rely them.

By way of postscript it is also noteworthy that in the recent case of *Transocean Drilling UK Ltd v Providence Resources PLC* (*The GSF Arctic III* 2 Lloyd's Rep (2016) the Court of Appeal considered how consequential loss clauses should be interpreted in the context of a drilling contract. In that case it was held that sophisticated commercial parties are free to enter into contracts which limit or exclude liability in the event of breach, and in such circumstances the well-recognised meaning of the term consequential losses may not be appropriate, especially in light of the particular context in any given contract. ■

Article published on Steamship Mutual website May 2017.

Strikes, Congestion and Delays – Whose Risk?

Two reported London arbitration awards have considered who should bear the cost of delays caused by strikes on two voyage charters.

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The Club is often asked to advise on which party to a charterparty should be expected to bear the cost of delays to a vessel arising from strikes or consequent port congestion. In most cases, this will depend on the exact wording of charterparty clauses. In *Carboex S.A. v Louis Dreyfus Commodities Suisse S.A.*[1] the Court of Appeal held that the wording in the strike clause in that charterparty had the effect that Owners bore the delays caused by strikes at the discharge port, and the delays caused by port congestion even after the strike had finished.

Two recently reported London arbitration awards have considered the treatment of delays caused by strikes on two voyage charters. Although arbitration awards do not create binding precedents at English law, the awards might give indications of how the law might operate.

London Arbitration 3/17

The vessel arrived at the discharge port and tendered notice of readiness ("NOR")on 14 January 2017. Due to congestion caused by a strike, the vessel did not berth until 31 January. Discharge took place from 31 January to 2 February.

The parties had agreed the following charterparty provisions:

"COP DISCHARGE AT….. 1 GSB[2] ALWAYS AFLOAT ALWAYS ACCESSIBLE BENDS AT ALL PORTS DEMURRAGE USD 3800 PD OR PR FREE DESPATCH BENDS. ONCE IN DEMMS IS ALLWAYS IN DEMM CLAUSE TO BE APPLICABLE TO THIS C/P"

Charterers argued that custom of the port ("COP") should cover the entire time at the discharge port starting from tender of the NOR.

Charterers also argued that the COP provision was in effect an agreement that no demurrage would be payable at the discharge port.

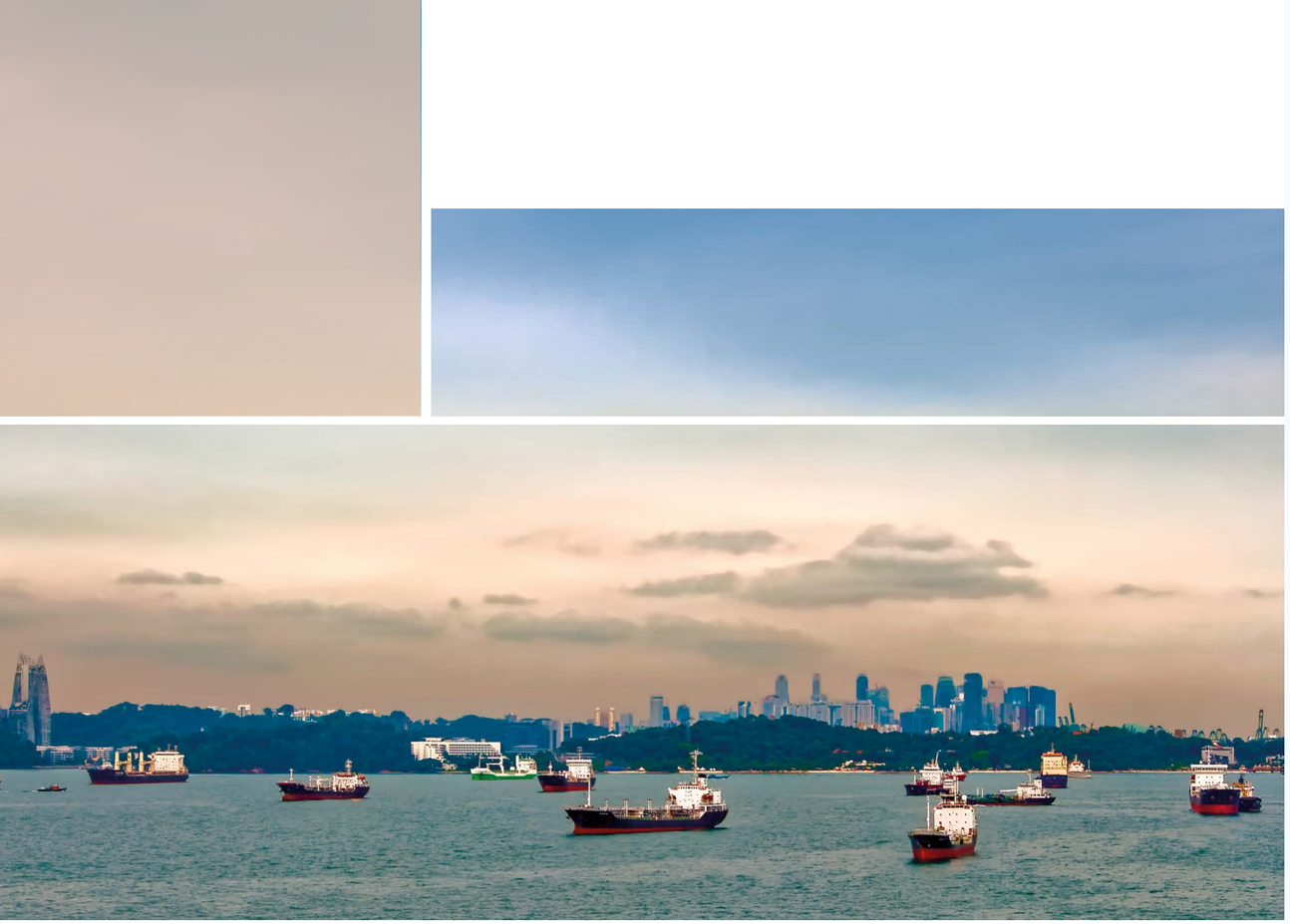
Owners argued that they were entitled to either damages for detention or demurrage for the period between the vessel's arrival, on 14 January, and her berthing, on 31 January, because Charterers were in breach of their obligation to provide a berth reachable on arrival. They accepted that the time actually spent discharging (just over two days and five hours) was within the allowable scope of COP and they did not make any claim for that period.

The arbitration Tribunal found in Owners' favour.

They noted that in the charterparty a demurrage rate had been expressly agreed on a 'both ends' basis and so Charterers' argument that there could be no demurrage at the discharge port failed. The Tribunal held that the COP provision applied to the time for cargo operations, only, and not to the period when the ship was delayed, waiting for a berth.

Owners' argument that there was a breach of the 'always accessible' obligation succeeded. Charterers argued that 'always accessible' did not equate to 'reachable on arrival' but the Tribunal

> "… the question of whether laytime counts during a delay caused by a strike can also turn on the wording of other clauses in the charterparty."



disagreed: the words spoke for themselves. They required that when a vessel arrived there be a berth that the vessel could access without delay.

The Tribunal awarded Owners damages for the time lost waiting for a berth, up to 31 January, and assessed at the demurrage rate.

London Arbitration 9/17

The vessel was fixed on an amended Gencon 94 form to carry salt in bulk from Kandla to Chittagong. She arrived at the discharge port and commenced discharge on 18 April. Discharge was interrupted from 21 April until 27 April by a strike by lighter barge workers, and was finally completed on 27 May.

Owners commenced arbitration claiming demurrage from the expiry of laytime, 14 May, until the completion of discharge (but allowing for a period of bad weather during the strike).

Paragraph three of the Gencon strike clause holds that:

"If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge…."

Owners did not give Charterers any formal notice of the strike, but the Tribunal considered that it was clear that Receivers and Charterers were both fully aware of the existence of the strike, and that the lack of any formal notice from Owners did not preclude them from counting laytime in full and claiming (i) half-demurrage for the period of the strike, and (ii) thereafter at the full rate payable.

Conclusion

Strike clauses vary considerably in their form and effect, and the question of whether laytime counts during a delay caused by a strike can also turn on the wording of other clauses in the charterparty. ■

Article updated on the Steamship Mutual website May 2017.

[1]Carboex S.A. v Louis Dreyfus Commodities Suisse S.A. [2012] EWCA Civ. 838 – see 'Berth Charter and Risk of Delay – Strikes, Congestion – Revisited' (https://www.steamshipmutual.com/publications/Articles/Carboex1212.htm)

[2]Good and Safe Berth

Disbursements and Equitable Set Off

Making deductions from hire can be fraught with difficulty, no more so than when purporting to exercise a right to set off.

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In London Arbitration 11/17, which considered an amended NYPE 93 charter incorporating the BIMCO Piracy and Conwartime clause, the vessel was ordered to call at a range of ports in Yemen carrying wheat in bulk.

Although the sums claimed by Owners included alleged off-hire deductions made by Charterers, the award related only to Owners' claim for reimbursement of various disbursements incurred during the voyage.

In accordance with Charterers' orders the vessel had crossed the Indian Ocean to call at Yemen and as a result Owners incurred increased premiums ("APs") under the vessel's War Risks and LOH Insurance policies. Charterers were required under the charter to reimburse these costs but alleged Owners had been guilty of culpable delay during the early stages of the voyage, which they said amounted to a breach of the charter. There had been significant increases in the premiums for vessels calling in Yemen during the alleged delays and but for the delay Owners would have had to pay less by way of APs.

Owners argued that the relevant clauses in the charterparty – the BIMCO Piracy clause and the Conwartime clause – were not dependent upon fault or breach of contract and, therefore, so long as the APs covered the periods in question Charterers were liable to pay the increased APs. The Tribunal agreed. The disbursements/charges were provided for under the charterparty and, therefore, were due to Owners by way of a debt. Charterers' remedy, if any, was in damages.

Charterers had asserted an equitable set off arising from their counter claim for hire (which they had withheld) and bunkers. Whilst the Tribunal did not agree with Owners that their expenses claim was analogous to a claim for hire – such that the Charterers could not set off their claim for damages based on an alleged breach of the charter against Owners' claim for expenses – the Tribunal nonetheless declined to allow the debt to be set off as there was no express contractual or implied right to equitable set-off to such a debt.

The decision is of interest because of the apparent reliance placed by Charterers on a right to set off their counter claim against Owners' claim – a right often misunderstood.

Where then lies the line that separates cross claims that can be set off and those that have to be brought separately?

Under English law, and so far as hire is concerned, charterers have a right to make deductions from hire on three grounds. These are:

a. where charterers have an express right of deduction under the terms of the charter;

b. where charterers are entitled to an adjustment of hire following a period of off-hire; and

c. where charterers have claims for damages which they are permitted to set off against hire.

A discussion on the right to set off, or as it is often referred 'equitable set off', is too detailed for the purpose of this article but in broad terms arises if charterers have been deprived of, or are prejudiced in, the use of the whole or part of the vessel (*The Nanfri* [1978] 2 Lloyd's Rep.132):

"…it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach[1] the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross- claim…" (Lord Denning at p.140).

If available it is a right (i) to withhold monies pending a final adjudication of the charterers' claim, and (ii) which can only be exercised in good faith and on reasonable grounds – *"it is to be remembered that although a right of set-off is a defence, with all the legal consequences which follow from it, in practice the exercise of a right of deduction or set-off is essentially a provisional act. It decides nothing finally… For the exercise of the right does not prevent either party from subsequently proving his claim or*

> "Where then lies the line that separates cross claims that can be set off and those that have to be brought separately?"

cross-claim, and so does not affect the final resolution of the fundamental dispute…" (*The Kostas Melas* [1981] 1 Lloyd's Rep. 18 - Robert Goff, J at p.26).

In the *Nanfri,* Charterers deducted a sum of money from hire payable in respect of an alleged loss of speed. A clause of the charterparty allowed for deductions of hire "*If upon the voyage the speed is reduced by defect in… machinery ..*". The deductions were made based on a reasonable assessment (with reference to the information Charterers acquired) as well as in good faith, but whilst the unanimous decision in the Court of Appeal was that the clause allowed Charterers to make such deductions without Owners' consent the question how much could be deducted was left open. Lord Denning's view was that provided the deduction had been quantified by a reasonable assessment made in good faith Charterers could deduct that sum (and if too much is deducted the Owner will be able to recover that amount but "*that is all*" (Lord Denning)), but Goff, L.J.'s judgment differed in that he said that in deciding to make a deduction the Charterers act at their peril.

Subsequent decisions, however, support the view that charterers are not in breach of charter if they deduct on the basis of a reasonable assessment made in good faith. Furthermore, where the deduction is based on equitable set-off, charterers cannot deduct more than the amount of the hire paid or payable in respect of the period during which they have been deprived of the use of the ship.

There are though, limits to what claims can be set off. In the *Nanfri,* Lord Denning also said "*I would not extend it to other breaches or default of the shipowner, such as damage to cargo arising from the negligence of the crew.*"

The question to be asked is, assuming a breach of contract by owners, whether that breach is one that deprives charterers of part of the consideration for which hire has already been paid. In the *Li Hai* [2005] 2 Lloyd's Rep. 389, it was decided that a cancellation fee charged by a bunker supplier could not be set off against hire. Such transactions do not constitute loss of earnings or impede the vessel's trading and, therefore, Charterers had not been deprived of the vessel's use.

In contrast, cases which involve alleged breaches of speed warranties (*Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159), or owners' alleged failure to properly clean the holds, can more easily be linked to the payment of hire as charterers may well be denied the use of the vessel. Charterers have been deprived of some of the consideration for which they already paid.

An additional matter arising from London Arbitration 11/17 was that the Owner could not insist on the crew proceeding to Yemen. The charterparty required Owners to employ crew on terms that were acceptable to the ITF Collective Bargaining Agreement ("CBA"). The CBA allowed the crew to refuse such an instruction and, therefore, when they refused to continue the voyage the crew had to be changed. However, by ordering the vessel to Yemen, Charterers were not only responsible for the expense of the crew change, but also to pay for the pre-agreed bonuses. Furthermore, the Tribunal concluded that the timing of Charterer's orders meant that the crew change could not have taken place any earlier.

Given how widely used the Conwartime and Bimco Piracy clauses are, the decision demonstrates how these standard charterparty clauses can protect owners. No doubt commercial parties on both sides take this into consideration when negotiating fixtures and when there is the possibility that the vessel might be ordered to such high-risk areas. ■

Article published on the Steamship Mutual website October 2017.

[1]In *Geldof v Carves* [2011] 1 Lloyd's Rep. 517 (C.A), and whilst endorsing the need for a close connection between the right and the cross-claim, Rix, L.J said the reference to impeachment ("*an unhelpful metaphor in the modern world*") should now be dropped.

Contractual Interpretation; "For want of a comma, …"

Determining what the parties to a contract may have intended can be problematic but attention to detail will save time and costs.

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"*For want of a comma, we have this case*" is how Judge Barron introduced a recent decision at the United States Courts of Appeal. In *O'Connor v Oakhurst Dairy*, No. 16-1901 (1st Cir. 2017), delivery truck drivers employed by the dairy had brought a claim for overtime payments. A state law in the state of Maine held that employees should be paid at one and a half times their normal rate for any hours worked in excess of forty hours a week. But the state law had an exemption for certain employees working with food or perishable goods. The overtime law did not apply to "*The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of : (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods*". The dairy argued that the drivers were engaged in the distribution of agricultural produce or perishable foods, so that the overtime law did not apply to them. The drivers argued that the exemption only applied to "*packing for shipment or distribution*" and not to the actual distribution of the produce. The Court of Appeals found for the drivers, holding that if they were only engaged in distribution, and not in packing for shipment or distribution, then the exemption did not apply to them. The Court indicated that its decision might have been different if there had been a comma before "*or distribution*".

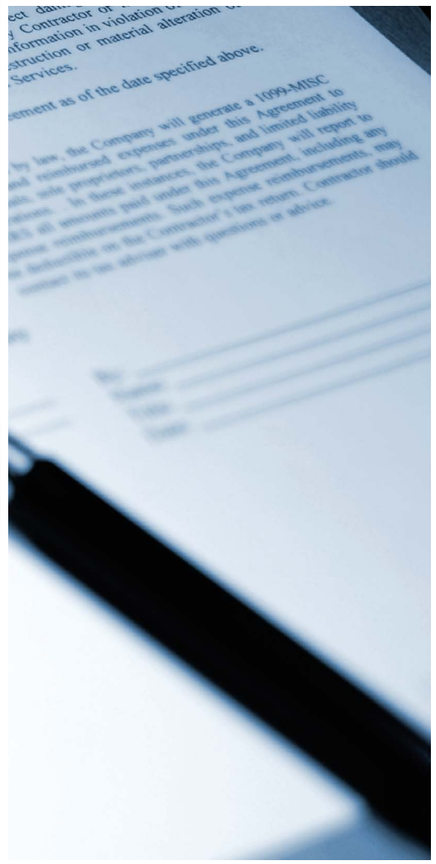
Two weeks later, the English Supreme Court handed down another decision that turned on the precise interpretation of a clause in a contract. In *Wood (Respondent) v Capita Insurance Services Limited (Appellant)* [2017] UKSC 24, Mr Wood was the principal shareholder of a motor insurance business, Sureterm, which he had sold to Capita. After the sale, employees of Sureterm reported to the new management that they were concerned about sales practices that they had been involved in. Capita investigated these, and decided to report them to the regulator, the Financial Services Authority ("FSA"). The regulator subsequently decided that Sureterm were obliged to pay compensation to customers. Capita sought an indemnity for this from the sellers of Sureteam, under the terms of the sale agreement.

The sale agreement included a clause 7.11, which held that:

"*The Sellers undertake to pay to the Buyer an amount equal to the amount which would be required to indemnify the Buyer and each member of the Buyer's Group against all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred, and all fines, compensation or remedial action or payments imposed on or required to be made by the Company following and arising out of claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person and which relate to the period prior to the Completion Date pertaining to any mis-selling or suspected mis-selling of any insurance or insurance related product or service.*"

The sellers argued that there had been no claims or complaints registered with the FSA, the Financial Services Ombudsman or any other Authority with respect to the mis-selling, but that the FSA had opened its investigation because Capita had reported to them, and therefore this clause was not triggered. Capita argued that the phrase "*following and arising out of claims or complaints registered*

> "English courts will not "correct" a contract to save one party from a bad bargain, …"



> "English law will seek to give an objective meaning to a clause or contract wording, and decide what it actually means, not what a party thought they meant by it."

with the FSA, the Financial Services Ombudsman or any other Authority against the Company, the Sellers or any Relevant Person" only applied to the words "*all fines, compensation or remedial action or payments imposed on or required to be made by the Company*", and did not apply to the words "*all actions, proceedings, losses, claims, damages, costs, charges, expenses and liabilities suffered or incurred*". The Supreme Court preferred the seller's interpretation, that the phrase applied to all of the words in both of these sections of the clause. The Court held that Capita were not entitled to an indemnity under this clause, when no claims or complaints had been registered.

In considering this dispute, the Supreme Court set out some useful guidance on how English law will work to interpret the meaning of a clause or other wording in a contract.

English law will seek to give an objective meaning to a clause or contract wording, and decide what it actually means, not what a party thought they meant by it. In *Wood v Capita*, Lord Hodge stated that the Court had two systems for deciding this. The Court could look at the exact, literal meaning of the words in dispute, but the court also had to examine and consider the contract as a whole, and the factual background available to the parties at the time that they entered the contract. He held that the two approaches, looking at the exact text, and considering the context of the clause, were not mutually exclusive, and that the Court should use both approaches.

He considered that in some cases greater weight might be given to the exact literal meaning of the text. He noted that the sale contract in *Wood v Capita* was a detailed and professionally drafted contract (it was said to have contained 30 pages of warranties, although these were subject to a two year time-bar which had elapsed before Capita brought their claim) and in this case he gave more weight to the exact, literal meaning of the words chosen by the professionals who had drafted the document. He suggested that in other cases, where an agreement might be made quickly and commercially between parties, without input from lawyers, then it might be appropriate to give more weight to the context of the agreement, and less to the exact words used.

English courts will not "correct" a contract, to save one party from a bad bargain that he has made, or an unforeseen consequence of the contract that he has agreed. Courts should also be aware that the clause agreed in a contract might be a compromise wording, between the original positions of the two parties. The significance of *Wood v Capita* is that when faced with a clause that might have more than one possible meaning the Court must strike a balance between the words used ['A More Literal Approach to Construction' (https://www.steamshipmutual.com/publications/Articles/LiteralApproachtoConstruction04_16.htm)] and the business common sense approach ['Contractual Interpretation – Commercial Common Sense' (https://www.steamshipmutual.com/publications/Articles/RainySky1212.htm)].

In both *O'Connor* and *Wood*, the parties to the contracts have spent considerable time and cost in taking disputes through the court systems, where they were eventually decided by the absence of a comma, or precise punctuation. Careful consideration of the words and clauses to a contract, before the contract is agreed, could avoid similar disputes. ■

Article published on the Steamship Mutual website April 2017.

Ocean Victory Update – Supreme Court Clarification on Unsafe Port

The decision is not only of interest so far as the approach to safe port warranties but also the potential consequences of joint insurance provisions and charterers' rights to limit liability.

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On 10 May 2017 the Supreme Court definitively confirmed the approach to safe port warranties in this long-standing case dating back to October 2006.

Unsafe Port

The main focus of the claim, that the port of Kashima is unsafe, divided judicial opinion where it was upheld at first instance but overturned by the Court of Appeal. To recap, the Court was asked to consider two factors which ultimately led to the total loss of the vessel: swell generated from long waves and severe northerly gale force winds. This unfortunate combination of events meant that the vessel was at risk of damage while remaining alongside but equally it was unsafe to navigate out of the port. At first instance the Judge held that the port was unsafe as the long waves and gale force winds were characteristics of the port and thus foreseeable ['A Reasonably Safe Port?' (https://www.steamshipmutual.com/publications/Articles/SafePort1113.htm)].

The Court of Appeal disagreed and reversed the decision, having held that the combination of events was extremely rare (known only to have happened this once). This was supported by unchallenged evidence given on the exceptional nature of the storm in terms of its rapid development, duration and severity. Those events could not therefore be considered characteristic of the port and must be construed as an abnormal occurrence ['The Ocean Victory – Court of Appeal Decision – Unsafe Port of Abnormal Occurrence' (https://www.steamshipmutual.com/publications/Articles/the-ocean-victory-court-of-appeal-decision-unsafe-port-or-abnormal-occurrence.htm)].

The Supreme Court unanimously agreed with the Court of Appeal's assessment and concluded that Kashima is not an unsafe port within the meaning of the safe port warranty so that the charterers were not in breach of it. The conditions at the port amounted to an abnormal occurrence as that expression is understood in the authorities cited. In doing so the Supreme Court reaffirmed the classic test as set down in *The Eastern City* when assessing whether a safe port warranty has been breached.

Joint Insurance Provisions

In addition to the safe port warranty, the Supreme Court was asked to consider whether or not the demise charterer had a right to claim at all. Having alleged they were liable to the registered owners and entitled to recover from time charterers for breach of the safe port warranty, the bareboat charterers (via subrogated insurers) were successful at first instance. However, the Court of Appeal disagreed and considered that the parties agreed the demise charterers' loss would be funded by marine and war risks insurance in favour of both the demise charterer and registered owners. Any claims between those parties would consequently be discharged, and would extinguish any recovery against a liable third party – in this case the time charterer. The Supreme Court upheld the decision by a majority of 3:2 but there remains uncertainty as to how this might affect insurers pursuing subrogated claims against third parties in a wider insurance context.

Limitation

Finally, the Supreme Court was asked to consider whether if time charterers had been liable to the demise charterers, they would be entitled to limit their liability in respect of the loss of the vessel. This issue was not considered by the Court of Appeal as (1) it was bound by *The CMA Djakarta* which established that a charterers' ability to limit depends on the type of claim, not the capacity in which it was acting at the time and (2) no breach was found in respect of charterers' safe port warranty. However, the issue was considered to be sufficiently important for the Supreme Court to be asked to revisit.

Ultimately, the Supreme Court agreed with the approach taken in *The CMA Djakarta* which held that the vessel cannot be both the victim and the perpetrator and that the "property" envisaged in article 2(1)(a) of the 1976 Limitation Convention must be the property of a third party either on board the vessel (e.g. cargo) or external to the vessel. If there were a breach of the safe port warranty in this case, charterers would not therefore be entitled to limit their liability under the Convention in accordance with the limitation fund calculated by reference to the vessel. ■

Article published on the Steamship Mutual website June 2017

> "... the Supreme Court agreed with the approach taken in *The CMA Djakarta* which held that the vessel cannot be both the victim and the perpetrator and that the "property" ... must be the property of a third party ..."

Back to contents

The New Flamenco Supreme Court Decision

The Supreme Court overturns the Court of Appeal judgment and seeks to provide guidance in relation to restrictions on the rules of mitigation of damages following early termination of a charter.

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The Supreme Court has handed down its long awaited judgment in *Globalia Business Travel S.A.U (formerly TravelPlan S.A.U) of Spain v Fulton Shipping Inc of Panama*, *The New Flamenco*, concerning whether certain benefits obtained by the innocent party have to be accounted for when assessing the measure of damages.

The Supreme Court held that the benefit that arose from the sale of the vessel by Owners should not be taken into account when assessing damages because the sale had not arisen from the consequences of the Charterers' repudiation and was not a successful act of mitigation.

In doing so, the Supreme Court overturned the decision of the Court of Appeal, which was discussed in 'The *New Flamenco* – Court of Appeal Decision' (https://www.steamshipmutual.com/publications/Articles/newflamencocopdecision.htm).

The Facts

In 2004, the "New Flamenco" was time chartered by her then owners, Cruise Elysia Inc, for a period of one year. In June 2007, her Owners and Charterers reached an oral agreement to extend the charterparty for a further two years, up to November 2009. In repudiation of the charterparty, the Charterers redelivered the vessel early in October 2007. Shortly before redelivery, Owners agreed to sell the vessel for US$23,765,000. Owners commenced arbitration and claimed damages for loss of profit in the amount of €7,558,375.

Procedural Background

By the time of the hearing, it had become clear that there was a significant difference between the capital value of the vessel in October 2007, when it was sold, and in November 2009, when it would have been redelivered, following the global financial crisis. Charterers argued that the change in the capital value had to be taken into account when assessing damages.

The arbitrator found in Charterers' favour, declaring that the change in the capital value was a benefit that had accrued to the Owners and that Charterers were entitled to a credit of €11,251,677 (US$16,765,000), wiping out Owners' loss of profit claim.

The decision was overturned on appeal to the Commercial Court, with Popplewell J deciding that Owners were not required to give credit for any benefit in realising the capital value of the vessel in October 2007, by reference to its capital value in November 2009, "*because it was not a benefit which was legally caused by the breach*". It was held that: the fall in the capital value of the vessel was caused by the global financial crisis and not by the Charterers' breach; the decision to sell the vessel was a commercial decision and was legally independent

> "... the benefit Owners enjoyed was the result of the global financial crises."

of the Charterers' breach, which was "*the trigger not the cause*"; and to allow Charterers to appropriate the proceeds of the sale would be unfair and unjust.

The judgment was overturned by the Court of Appeal, which upheld the decision of the Arbitrator. It was held that, if by way of mitigation a measure is adopted which arises out of the consequences of the breach and is in the ordinary course of business and such measure benefits the claimant, that benefit should be brought into account.

This matter has now been finally decided by the Supreme Court, which sided with Owners holding that Popplewell J had been correct.

The Supreme Court

In a relatively short judgment, Lord Clarke (with whom the other Justices agreed) held that the essential question is whether there is a sufficiently close causal link between the benefit and the loss, and not whether they are similar in nature, stating that "*the benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation*".

In this case, the benefit Owners enjoyed was the result of the global financial crisis. Similarly, Charterers' breach did not cause the fall in the capital value, rather it caused a loss of profits over the remainder of charter term.

There was nothing about the repudiation of the charterparty which made it necessary to sell the vessel and equally it would not have been necessary to sell the vessel at the end of the charter term. Owners could have taken the commercial decision to sell the vessel at any time or not at all.

The same reasoning would have applied equally if Owners had decided not sell the vessel and the market had in fact risen – the lack of a causal link would have prevented the Owners claiming the difference in value from the Charterers and they would have been left to rue their decision to sell the vessel earlier for a lower sum.

The analysis is also the same if the reason for selling the vessel was that absence of an available market which, at best, it can be said that the "*premature termination is the occasion for selling the vessel. It is not the legal cause of it*".

Finally, the sale of the vessel was not an act of mitigation because it was incapable of mitigating the actual loss, namely, the loss of profits.

Conclusion

This case highlights the difficulties that can arise when assessing damages and mitigation particularly where contracts are repudiated. This is emphasised by the fact that this matter was overturned by a unanimous decision of the Supreme Court, appealing a unanimous decision of the Court of Appeal. As was highlighted earlier by Popperwell J, there is no single rule which determines when a wrongdoer obtains credit for a benefit received following their breach of contract. That being said, the Supreme Court has provided helpful guidance in this regard. The judgment highlights that not all benefits will be taken into account when calculating damages for repudiation of a charter and the key focus should be on the causal link between the benefit and the loss, not whether they are of the same type.

The judgment also makes clear that changes in the capital value of the vessel should not be relevant when assessing damages in the context of a time charter and Members should be encouraged that, in such situations, their commercial acumen will not be prejudiced. The article on the Club's website discusses the decision of Popplewell J in the Commercial Court and can be read at 'Keeping the Benefits of a Breach' (https://www.steamshipmutual.com/publications/Articles/newflamenco0714.htm'). ■

Article published on the Steamship Mutual website August 2017.

OW Bunkers – New York Ruling

As the fallout from the collapse of OW Bunkers continues, New York's US Federal Court rules that OW do have a maritime lien over bunkers supplied.

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The English law test on who was entitled to payment for bunkers stemmed before the collapse of OW Bunkers was decided in May 2016 when the UK Supreme Court handed down its judgment in the *Res Cogitans* litigation [see 'Supreme Court Ruling on the "RES COGITANS" – OW Bunkers' (https://www.steamshipmutual.com/publications/Articles/rescogitansowbunkers0516.htm)].

However, as discussed in an earlier article on the Club's website – 'OW Bunkers – A Global Perspective' (https://www.steamshipmutual.com/publications/Articles/owbglobalperspective.htm) – there have been developments in other jurisdictions, one of those being New York.

By way of recap, a number of Owners and Charterers filed interpleader lawsuits in New York's US Federal Court as early as December 2014 requesting clarification as to whether OW (rather than ING to whom OW's claim for payment had been assigned) or the physical supplier were entitled to be paid under outstanding bunker invoices. The Court chose to focus on three test cases (collectively referred to as the "*NuStar*" test cases) namely *Clearlake Shipping Pte Ltd. v O.W. Bunker (Switzerland) SA, No. 14-CV-9287 and Nippon Kaisha Line Ltd. v O.W. Bunker USA, Inc., No. 14-CV10091)*, and *Hapag-Lloyd Aktiengesellschaft v US Oil Trading, LLC, No. 14-CV-99494*. In these cases, the physical supplier and OW/ING claimed a right to the interpleader funds under the US Commercial Instruments & Maritime Lien Act ("CIMLA"); namely that "*the claimant provided the necessaries on the order of the owner or a person authorised by the owner*".

In January 2017 a New York Federal Judge ruled that OW had maritime liens over bunkers supplied as they had provided necessaries for the purposes of CIMLA. Whilst the Judge sympathised with the physical suppliers, the contractual position could not be ignored. The physical suppliers provided bunkers to the vessels on the direction of OW, and there were no contracts between the physical suppliers or any of the vessel interests. An argument was raised that the signing of bunker receipts by the chief engineers of the vessels could amount to a separate and distinct contract, but this was rejected. The contracts all clearly described OW as either the buyer or the seller.

It is thought that this judgment will affect some 30 cases filed in New York and, perhaps, cases elsewhere in the US District Court system. Whilst the New York Southern District ruling is not binding, it is considered persuasive authority. This also follows the English law authority in establishing that OW/ING are the rightful recipients of payments under relevant bunker invoices, and will no doubt bolster ING's efforts to recover outstanding sums due. ■

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Floating Storage and Contractual Interpretation

A reminder to choose words carefully when agreeing contracts as more weight is given to the expressed obligations over perceptions of commercial common sense.

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Two recent decisions looked at sums due to Owners where the vessels concerned had allegedly been used as floating storage.

The Commercial Court in *Gard Shipping AS v Clearlake Shipping Pte Ltd* [2017] EWHC 1091 approached the matter as one of contractual interpretation where an extensive demurrage regime had been agreed in the Charterparty.

In London Arbitration 18/17 the Tribunal had to consider whether a notice of readiness ("NOR") had been validly tendered so that only demurrage would be payable or whether damages could be claimed for an allegation amounting to detention.

Gard Shipping AS v Clearlake Shipping Pte Ltd

The issue in this case was whether or not Owners were entitled to claim demurrage at an enhanced and escalating rate for a period of 64.7083 days during which the vessel was waiting to discharge cargo at Rotterdam.

By a voyage Charterparty dated 9 December 2015 Owners agreed to let to Charterers the "Zaliv Baikal" for one voyage to one or two safe port(s) "*UK CONT North Spain-Hamburg range*". By an addendum a second voyage was agreed in direct continuation from Ust-Luga or St Petersburg with the discharge range as before. The dispute arose in relation to the second voyage.

The Charterparty based on amended BPVOY4 terms contained standard laytime and demurrage provisions, but also incorporated a specifically agreed regime for enhanced demurrage. The key clause upon which the argument turned was Additional Clause 11 which gave liberty to the Charterers to instruct the vessel to stop and wait for orders or discharge instructions for a maximum of three days. If the waiting period lasted five days or more the vessel was to be considered as being used for storage and enhanced demurrage rates were to apply as follows:

- *Days 6-15 demm rate plus US$5,000*
- *Days 16-25 demm rate plus US$10,000*
- *Days 26-35 demm rate plus US$15,000*

Prior to the expiry of 35 days Charterers were to inform Owners if they required more time and new rates were to be mutually agreed. Charterers were also given an option to order the vessel to wait at an offshore position and if a final destination and/or delivery window had been advised the increase rates were not to apply.

It was common ground between the parties that the vessel departed the load port on 31 December 2015, stopped at various ports en-route, and arrived at Rotterdam on 26 January 2016. After the vessel tendered notice of readiness at the discharge port, the Charterers gave no orders for 64 days. The parties agreed that demurrage was due for this period but disagreed as to the actual level payable.

Owners argued that the commercial purpose of the clause was to recognise when the vessel was being used as floating storage. Further, that it did not make commercial sense if the Charterers could avoid the enhanced rate of demurrage by the tactic of giving no orders, rather than giving a "stop and wait" order.

The Court considered the principles of contractual interpretation set out in *Rainy Sky v Kookmin Bank* [2012]1 Lloyd's Rep 34 along with the recent judgment in *Wood v Capita Services* [2017] 2 WLR 1095 in which the Supreme Court set out that in the exercise of contract construction the Court has to balance the indications given by the language and the commercial implications of competing constructions.

The Court rejected the Owners' arguments and agreed with Charterers that there were a number of different demurrage regimes provided for in the Charterparty. The key was to identify under which regime the relevant event fell. The enhanced demurrage regime under Additional Clause 11 only applied when a "stop and wait" order was given. Crucially, Charterers had not given a "stop and wait" order. A passive failure to give orders did not fall within the meaning of the wording used. Accordingly, the enhanced regime had not been triggered.

The Court also rejected Owners' alternative argument that there was an implied term on the grounds of lack of commercial necessity. The Charterparty provided a reasonably comprehensive framework for different types of events and it was not necessary to imply the term sought by Owners.

Owners were only entitled to the ordinary demurrage rate of US$32,500 per day.

London Arbitration 18/17

This arbitration related to two separate issues arising under a voyage charter, the first covering additional expenses at the load port (which we will not consider) and a second dispute in relation to delays off the discharge port whilst the Charterers considered whether to discharge at an alternative port.

By way of background, the vessel had been chartered for carriage of petcoke from Port Arthur, USA to Matanzas, Venezuela. Charterers had issued orders "*not to berth nor tender NOR nor discharge any cargo at port in Matanzas, Venezuela until charters give written approval to do so*".

In compliance with Charterers' orders, the vessel anchored on 8 September at sea buoy 0.1. Owners claimed they were entitled to a reasonable daily remuneration based on a commercial rate of US$11,700 per day for allowing the vessel to be used as floating storage during a period of 12.7 days awaiting orders. Charterers submitted that an NOR had been tendered and Owners were only entitled to demurrage at the Charterparty rate of US$8,500 per day.

The Tribunal agreed with Owners that the sea buoy was not a customary anchorage for vessels to wait to transit to Matanzas. Accordingly a valid notice of readiness could not be tendered there and laytime had not commenced. Charterers had been aware of the vessel's position and raised no objection.

The Tribunal decided that under a voyage charterparty the vessel was to sail directly to discharge port where she could tender notice of readiness and laytime would commence. Charterers' extra-contractual orders prevented the vessel from proceeding to such a position and damages were payable to Owners for the entire period of delay to the vessel reaching the position where notice of readiness could be tendered.

Owners were entitled to damages rather than demurrage at an adjusted rate of US$9,500 per day, and following *The Saronikos* [1986] 2 Lloyd's Rep 277 Owners were also entitled to bunkers consumed during the waiting time.

Comment

These cases highlight the difficulties for Owners and Charterers if intentions are not made clear. The Court and Tribunal both gave more weight to the actual obligations expressed in the Charterparties rather than arguments which were framed on the parties' competing perceptions of what constituted commercial common sense. An article on the Club's website of June 2017 – 'The Primacy of Language in the Construction of (Commercial) Contracts' https://www.steamshipmutual.com/publications/Articles/languageconstructioncontracts0617.htm – discusses the approach of the English Courts to contractual interpretation in greater detail. ■

Article published on the Steamship Mutual website September 2017.

Cargo & Jurisdiction

The Maersk Tangier – Package Limitation for Containerised Cargoes

The method used to calculate package limitation can have significant consequences.

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The judgment of Andrew Baker J in *Kyokuyo Co Ltd v A.P. Moller – Maersk A/S (the Maersk Tangier)* [2017] EWHC 654 (Comm) discusses several important issues in respect of limitation of liability for containerised cargoes under the Hague-Visby Rules.

Facts

Twelve reefer containers carrying frozen tuna loins were received by Maersk Line ("Maersk") at Cartagena (Spain) for carriage by sea to Yokohama (Japan) pursuant to contracts of carriage incorporating Maersk's terms and an implied term entitling the shippers to demand bills of lading from Maersk.

On receipt of the cargo, Maersk issued a draft straight consigned bill of lading covering the details for the carriage of the twelve containers. The containers were then shipped on the "Maersk Tangier" but nine of the containers were transshipped on to the "Maersk Emden" while, after about a month's delay, the remaining three containers were carried to Japan on other Maersk vessels. So far as these three containers it was agreed that three non-negotiable waybills would be issued instead of bills of lading to prevent further delays. Upon delivery the consignee alleged that the cargo in these containers was damaged and held Maersk responsible for that damage.

The Court was asked to consider a number of issues relevant to the sum payable by Maersk if held liable for the damage to the cargo. The first was whether any such liability should be subject to package limitation as calculated in accordance with Article IV Rule 5 of the Hague or Hague-Visby Rules. The second was how to calculate package limitation, that is, by reference to the containers as individual "units", or if the cargo was sufficiently enumerated in the waybills; or if package limitation should be calculated by reference to the cargo in all three containers collectively, or by separate treatment of the cargo in each container individually.

Statutory Applicability of the Hague-Visby Rules

Which Rules applied was complicated by a number of factors – principally whether, because bills of lading were not required, and therefore, were not issued, contractually the Hague-Visby Rules applied to the contracts of carriage. If so the Hague-Visby Rules applied by force of law[1] so that the higher Hague-Visby package limits applied.

Maersk's position was that their terms applied the Hague-Visby Rules only if these Rules applied to the contracts of carriage compulsorily, which they did not because:

(a) To do so it was necessary for Article 1(b) of the Rules to apply;
(b) Which requires the contracts of carriage to be "… *covered by a bill of lading or any similar document of title* …"; and
(c) By agreement, non-negotiable waybills were issued and thus that the contract of carriage was covered by a different kind of transport document.

As such on Maersk's terms the Hague Rules applied with a significantly lower package limitation.

The Judge, however, agreed with the claimants that all that was needed to satisfy Article 1(b) was that when concluded the contracts of carriage provided for bills of lading to be issued[2]. The claimants relied on several English and common law cases where the Hague-Visby Rules applied when a contract of carriage was concluded between the parties but a bill of lading was never issued (e.g. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402).

> "… he did not consider … – an enumeration of the cargo "as packed" – necessary, …"

Accordingly the higher Hague-Visby Rules package limitation applied[3].

Calculation of Package Limitation

(a) Meaning of "Unit" in the Hague and Hague-Visby Rules

The claimants argued that the individual frozen tuna loins were "units" because they were stuffed in the containers individually. Maersk said that "unit" in accordance with the Hague Rules means any item that can be loaded on a vessel "as is" if not in containers, and since they were not packaged or consolidated the tuna loins could not be so loaded "as is". The tuna loins were not, therefore, "units" for the purpose of package limitation.

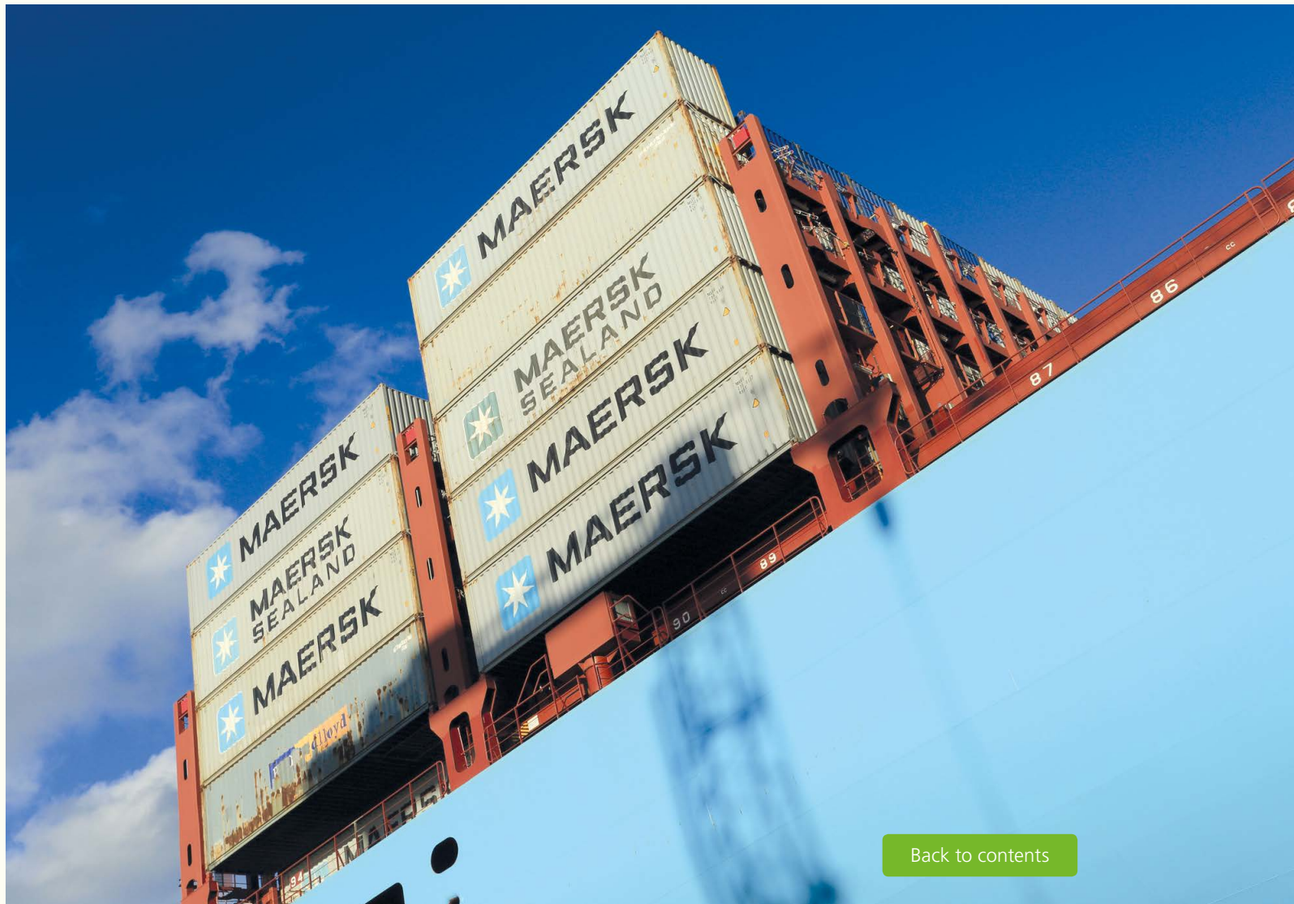
In deciding this issue Mr Justice Andrew Baker rejected both (i) the argument, as he was bound to do, that the containers could be the relevant units [see 'Containerised Cargo - What Is A Package?' (https://www.steamshipmutual.com/publications/Articles/Articles/ContainerPackage0405.asp)], and (ii) that there was any rule focusing on how the cargo could have been shipped if not containerised. He decided that a "unit" for the purpose of package limitation is determined by reference to the characteristics of the cargo as stuffed into the container – that is as if "*the container walls are transparent under the gaze of Article IV rule 5*".

(b) Enumeration in Accordance with Article IV Rule 5(c) of the Hague-Visby Rules

Article IV Rule 5(c) of the Hague-Visby Rules provides that "*…the number of packages or units enumerated in the bill of lading as packed…shall be deemed the number of packages or units for the purpose of this paragraph…*". The issue was, therefore, if all or any of the individual pieces of tuna, in the form of "*packages or units*", were "*enumerated… as packed*" for the purposes of Article IV Rule 5(c).

Here, the Court held that Article IV Rule 5(c) does not require enumeration of the cargo "as packed", just the number of packages or units inside the container to be accurately stated on the bill of lading (or, in this case, the waybills).

The Judge considered the Federal Court of Australia case *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co S.A.* [2004] 2 Lloyd's Rep 537[4], where



Back to contents

Back to contents

the majority held that the bill of lading must contain information not only about the number of items stuffed in the container but also whether these have been packed together. However, he did not consider the latter requirement – an enumeration of the cargo "as packed" – necessary, and decided that the bill of lading need only accurately state the number of 'packages or units' carried within the container. Since the waybills accurately described the number of packages and units, e.g. 206, 520, and 500 frozen tuna loins, contained in the reefer containers, the enumeration required by Article IV Rule 5(c) of the Hague-Visby Rules was met.

(c) Guidance on How to Calculate Limits

The Court also clarified that when the Hague-Visby Rules apply, each separate "unit" would be subject to a limitation of 666.67 units of account. The "packages" though would be subject to the greater of 666.67 units of account per package, or two units of account per kilogram of gross weight of the goods lost or damaged. When the Hague Rules apply instead, each "unit" and/or "package" would be subject to a limitation of £100.

As such any unused balance in respect of one "unit" or "package" could not be carried over to another "unit" or "package" to increase the limitation sum applicable to that "unit" or "package" because package limitation is not an aggregate limit of liability.

Comments

- The Judge ruled that although sea waybills were issued instead of bills of lading, the Hague-Visby Rules will still apply compulsorily pursuant to the Carriage of Goods by Sea Act 1971 as the contract was still "*covered by*" a bill of lading.

- It is sufficient for the physical items of cargo to be listed or enumerated, and not necessarily stipulated in the bill of lading "as packed", as long as they are accurately documented for the purposes of the Hague-Visby Rules.

- Cargo limits should be calculated as per "unit", not collectively across the containers, and the balance cannot be carried over, reflecting the actual damage suffered.

- It was held that in the Hague and Hague-Visby Rules a "unit" would be every article within the container identifiable as a separate article for transportation.

- Mr Justice Andrew Baker differed with the majority in Federal Court of Australia's decision in *El Greco*, and decided that it is sufficient for the physical items of cargo to be listed or enumerated, and not necessarily set out item by item in the bill of lading "as packed", as long as they are accurately documented for the purposes of the Hague-Visby Rules.

- The Court also clarified how to apply the limits of liability under the Hague and Hague-Visby Rules. ■

Article published on the Steamship Mutual website July 2017

[1]COGSA 1971 s1(2) "*The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.*"
[2]COGSA 1971 s1(4) "*(…) nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.*"
[3]So far as the carriage to which the Rules applied. Maersk had agreed to carry two of the three containers from the discharge port to destination by road.
[4]Referred to in the decision in *The Aqasia*, discussed in 'No Hague Rule Limitation for Loss or Damage to Bulk Cargo – *The Aqasia*' (https://www.steamshipmutual.com/publications/Articles/aqasia.htm)

Back to contents

Freezing Orders – Hong Kong

Whilst there are mechanisms available to prevent the dissipation of assets prior to enforcement, taking steps to do so may not be straightforward.

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Freezing Orders have developed into an important weapon in a claimant's armoury, especially when pursuing a defendant which does not own a vessel or vessels that might be susceptible to arrest. Over the years, the English Courts (and those of other common law jurisdictions) have developed a set of basic requirements for the granting of a Freezing Order. If these can be fulfilled the Court will order that the defendant's assets (usually funds in a bank account) be frozen up to a set amount. This can even extend to assets held outside of the jurisdiction (a so-called "Worldwide Freezing Order").

In many cases, the most difficult criterion for a claimant to fulfil to obtain a Freezing Order, is that requiring demonstration of *a real risk of the defendant's assets being dissipated*. This aspect was examined in a recent judgment handed down in the Hong Kong Court of First Instance.

Crete Maritime Corporation ("Crete") had commenced London arbitration against Emirates Shipping Line ("Emirates"), claiming US$265,149, plus interest and costs, for breach of a time charter due to unpaid hire and early termination. Emirates had counter-claimed for underperformance of the vessel, which led to the early termination. The Court had already granted a Mareva Injunction (the historical term for a Freezing Order, still used in Hong Kong, and named after the claimants in the 1975 English case where such an order was first made) against Emirates' Hong Kong assets at an ex parte hearing (i.e. where only the claimants had attended and made submissions), but Emirates, once notified of the injunction, subsequently challenged it on the grounds that there existed no real risk of dissipation of assets.

The Judge noted that Crete's case on the dissipation aspect rested entirely on the allegation that Emirates was "*an entity of unacceptably low commercial morality*", a phrase coined in an earlier Hong Kong case (*Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLR 235). Claimants seeking Freezing Orders often face difficulty obtaining *direct* evidence of a risk of dissipation, so often *inferential* evidence needs to be put forward and this can be achieved by demonstrating the defendant is an entity of low commercial morality. In that regard one may consider a spectrum of general corporate conduct, from clear cases of fraud to sharp commercial practice. Where fraudulent conduct can be shown that would tend towards the inference of a real risk of dissipation, whereas sharp practices, whilst undesirable, would not in isolation give rise to such an inference.

Crete tried to support its case that Emirates demonstrated unacceptably low commercial morality by asserting that:

1. Emirates had no proper ground for refusing to make hire instalments;

2. The underperformance dispute was entirely unmeritorious and a poor excuse not to honour the charter terms; and

3. The ultimate early redelivery was based on this "poor excuse".

Unsurprisingly, the Judge did not find these assertions came close to demonstrating the necessary low commercial morality. He said that even looking at Crete's case in the best possible light, one could only say that Emirates was trying to get out of a bargain through untenable excuses and while "*Regrettably, such commercial behaviour is not uncommon … to say that a party with that behaviour should have his assets frozen because there is a real risk of dissipation is not supported by common sense.*" Furthermore, when one looked at evidence submitted by Emirates it seemed that there was a genuine belief that the vessel had underperformed. This, combined with the fact that Emirates is a substantial international company with a number of offices, 250 staff and an annual turnover of about US$280 million, led the judge to conclude that "*the suggestion [it] would dissipate its assets to evade an award of US$0.5 million [was] untenable.*" He therefore discharged the injunction and awarded Emirates its costs.

Back to contents

The judgment also helpfully outlines further factors to be considered when looking at the risk of dissipation of assets. These derive from the judgment in *Eastman Chemical Ltd v Heyro Chemical Co Ltd* (No 2) [2012] 3 HKLRD 307:

a. The Court should not be too ready to infer a real risk of dissipation from the defendant's conduct or commercial morality.

b. There must be "solid evidence" of the risk of dissipation and the standard of proof is relatively high.

c. The fact that a defendant may be short of money to pay its debt is not itself a good reason for a Freezing Order, as the purpose of the Order is not to put the claimant in a better position than other creditors.

d. Merely fearing that there will no assets against which to enforce a judgment or award is insufficient. The dissipation must be shown to be with an intention to defeat the claimant's claim, or be otherwise "improper".

e. The fact that the defendant might not have been forthcoming with information of its financial position is irrelevant.

f. A failure by the defendant to give assurances of retention of assets to settle a debt, when the claimant has no legal right to such assurances, is also irrelevant.

g. The Court will not make an order if there are no identifiable assets to be frozen.

h. The test is, however, an objective one and there is no need for the claimant to prove a subjective intention on the part of the defendant to dissipate assets to defeat the claim.

This case provides a good illustration of the fact that there is no automatic right to a Freezing Order simply by identifying assets of the defendant and asserting an arguable claim (which in many jurisdictions is all that is needed to arrest a vessel). Whilst Freezing Orders can be an effective means of obtaining security, many applicants will be unable to surmount the hurdle of having to demonstrate to the court that there is a real risk of dissipation of assets by the defendant. ■

Article published on the Steamship Mutual website October 2017.

Back to contents

Deck Carriage and the Hague-Visby Rules

Will undeclared on-deck carriage prevent the carrier from relying on the limitations applicable under the Hague-Visby Rules?

METCALF & COMPANY
BARRISTERS AND SOLICITORS

Eric Machum
Metcalf & Company

De Wolf Maritime Safety B.V. v Traffic-Tech International Inc., 2017 FC 23

De Wolf Maritime Safety B.V. ("De Wolf"), the consignee of cargo described as "*One piece zodiac and Spare Parts*" stuffed into a container, contracted Traffic-Tech to carry the Zodiac on board the vessel "Cap Jackson" from Vancouver, Canada, to Rotterdam, Netherlands. The value of the cargo was €71,706.00. During the voyage, the container was lost overboard with Zodiac and all. Unbeknownst to De Wolf, the container had been carried on deck.

De Wolf promptly sued Traffic-Tech in the Federal Court of Canada alleging it failed to carry the cargo under deck, and that failure to disclose the on-deck carriage precluded Traffic-Tech from relying on any limitation of liability under the Hague-Visby Rules ("HVR"). De Wolf also argued that Traffic-Tech's failure to disclose that the goods would be carried on deck, after a clean bill of lading was issued (implying under deck carriage), was an act of bad faith and constituted gross negligence.

Traffic-Tech brought a motion for determination of questions of law to determine whether the HVR were applicable and if so, whether it was entitled to limit liability in accordance with the Rules.

The key issue was whether the undeclared on-deck carriage of the cargo prevented the carrier from relying on the limitations applicable under the HVR. The crux of the argument centered around the meaning of the words "*in any event*" in Article 4(5) of the HVR. That Article states:

"*5. (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall* ***in any event*** *be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.*" (Emphasis added).

Traffic-Tech relied on a decision of the English Court of Appeal in *The Kapitan Petko Voivoda, Daewoo Heavy Industries Ltd et al v Klipriver Shipping Ltd et al*, [2003] EWCA Civ 451 [see 'Unauthorised Deck Carriage – Hague Rules – Package Limitation' (https://www.steamshipmutual.com/publications/Articles/Articles/05_UnauthDeck_Hague_Pack.asp)] holding that:

(i) In the context of the Hague Rules the words "*in any event*" meant "*whether or not the breach of contract is particularly serious; whether or not the cargo was stowed on deck*" and that "*although … the obligation to carry under deck was an extremely important obligation, it could not be said that it was 'overriding' in the same sense as the seaworthiness obligation*"; and

(ii) Accordingly the carrier was entitled to rely on the HVR limits notwithstanding the undeclared deck carriage.

De Wolf relied on the argument set out in the late Professor William Tetley's famous text *Marine Cargo Claims* (4th ed. Cowansville: Les Éditions Yvon Blais, 2008) that the words "*in any event*" of Article 4(5)(a) "*should be construed to mean that the package limitation applies where the carrier fails to prove its right to total exoneration from liability under any of the exceptions of Art. 4(2)(a) to (q)*" of the HVR. Tetley's argument relied on older Canadian, US and French authorities but was in essence that undeclared deck carriage amounted to a deviation and a fundamental breach of the contract.

De Wolf further argued that *The Kapitan Petko Voivoda* was of limited assistance because it had been decided under the old Hague Rules which, unlike the HVR did not provide that the carrier lost its right to limit liability in the circumstances of the new Art. 4(5)(e).[1] Professor Tetley himself had called the decision "*unfortunate and flawed*".

Back to contents

The Federal Court first considered whether the cargo was in fact "*goods*" under the HVR.

The Court held that in order for cargo not to be regarded as "*goods*", the particular goods must not only be carried on deck, but also be stated in the contract of carriage as being so carried. As Traffic-Tech's bill of lading did not mention on-deck carriage the cargo fell within the definition of "*goods*" subject to the HVR.

With respect to the carrier's right to limitation of liability, the Court agreed that it should stick to the ordinary meaning to be given to the terms of the treaty and followed *The Kapitan Petko Voivoda* – the words "*in any event*" mean that limitation of liability is available "*in every case*". Neither the wording of Art. 4(5)(a) nor the context of the article suggest that "*in any event*" refers to the events listed under Art. 4(2). Also, interpreting the words "*in any event*" as "*in every case*" was consistent with Supreme Court of Canada's earlier determination that the doctrine of fundamental breach should be laid to rest.[2] De Wolf's bad faith argument was dismissed on the facts as there was no allegation or evidence to support it.

In summary, the Federal Court concluded that the only exception to the package/kilo limitation set out in Art. 4(5)(a) of the HVR is the one provided by Art. 4(5)(e), that a carrier would lose the right to limit if damage "*resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result*".

It is noteworthy that *The Kapitan Petko Voivoda* specifically overruled an earlier case, *The Chanda* [1989] 2 Lloyd's Rep 494, which had held that where the cargo was damaged as a result of being wrongfully stowed on deck the carrier lost its right to limitation, and which up until then had been considered to be the leading case on this question. Interestingly, the history of cases was not discussed by the Federal Court.

This result is no doubt welcome news to carriers and their insurers and provides further clarity on the scope of the HVR. Furthermore, being consistent with prior English authority on the Hague Rules, promotes the uniformity of maritime law. Whilst speculation, it is perhaps possible that De Wolf would not have brought the claim if the bill of lading had included an appropriate liberty clause. ■

Article published on the Steamship Mutual website September 2017.

[1] Article 4(5)(e) provides that: "*(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.*"

[2] *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII)

"..., the Federal Court concluded that the only exception to the package/kilo limitation set out in Art. 4(5)(a) of the HVR is the one provided by Art. 4(5)(e), ..."

Back to contents

Electronic Release System and Delivery of Cargo

The vulnerabilities of electronic cargo release systems and the importance of updating standard contracts to reflect technological advances in container shipping practices.

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The English Court of Appeal has recently considered whether the provision of release codes as part of an electronic release system constituted delivery of the cargo to the receiver in accordance with the contract of carriage.

Glencore, the shipper, and claimant at first instance, made seventy shipments of cobalt briquettes between January 2011 and June 2012 to Antwerp, which were carried under negotiable MSC bills of lading. This case concerned the seventieth shipment, which consisted of three containers. After discharge at Antwerp, two of the three containers disappeared (apparently misappropriated by "unauthorised persons" who had succeeded in penetrating the port's electronic release system) before the notify party, who was Glencore's agent, had collected the cargo.

> "Changes in practice resulting from technological innovations require parties to consider updating their standard contracts ..."

The bill of lading contained the term "*If this is a negotiable (To order/of) Bill of Lading, one original Bill of Lading, duly endorsed must be surrendered by the Merchant to the Carrier … in exchange for the Goods or a Delivery Order*".

The port had in place an electronic release system, which was not mandatory and not used by all carriers operating at the port. The system involved the provision of a computer-generated release pin code, contained within an electronic 'Release Note', which was sent by email to receivers of cargo on presentation of the bill of lading and payment of any applicable dues. The system required the receiver of cargo (or his haulier/agent) to enter the pin code on arrival at the cargo holding terminal, in exchange for which the cargo would be released. No paper delivery order or release note was issued. The electronic release system was used for all seventy of Glencore's cobalt shipments.

Glencore claimed damages against MSC for breach of contract, conversion and in bailment. Andrew Smith J, at first instance, found in favour of Glencore and held that MSC was liable for misdelivery, and that, whether or not coupled with the pin code, the Release Note did not amount to a delivery order as required by the bill of lading, which must have been referring to a ship's delivery order within the meaning of section 1(4) of the Carriage of Goods by Sea Act 1992.[1]

MSC appealed. Five grounds of appeal were advanced:

Ground 1 – Pin Codes as (Symbolic) Delivery

MSC submitted that the provision of the pin codes to Glencore's agents amounted in law to delivery of the goods. It was said that delivery can be effected by a symbolic act, the classic example of which is the giving of the keys to a warehouse where the goods are held, and that provision of the pin codes was the modern equivalent. The Court of Appeal cited with approval the judgment of Diplock J in *Barclays v Customs & Excise* [1962] where it was said that in order to deliver the cargo the carrier must divest itself of "*all powers to control any physical dealing with the goods*". In the present case, the Court of Appeal held that provision of the pin codes was insufficient to discharge the carrier's obligation to deliver the goods.

Ground 2 – The Release Note and Pin Codes as a Delivery Order

The alternative basis contemplated in the contract by which the carrier could discharge its obligations, other than actual delivery, was by providing a Delivery Order. MSC submitted that the electronic Release Note containing the pin code constituted a Delivery Order in accordance with the bill of lading. The Court of Appeal agreed with Andrew Smith J that the term Delivery Order should have the same meaning as a ship's delivery order, as defined in the Carriage of Goods by Sea Act 1992 ("COGSA 1992"), the key attribute of which is that it contains a substitute undertaking by the carrier to deliver the goods to the person identified in it. The Release Note did no more than instruct the Terminal to deliver against entry of the pin codes. The provision of the Release Note containing the pin code did not constitute provision of a Delivery Order in accordance with the bill of lading.

Ground 3 – Release Note and Pin Codes as Ship's Delivery Order

MSC further submitted that the Release Note containing the pin codes was, on proper analysis, a ship's delivery order within the definition in COGSA 1992. The Court of Appeal held that it was not. A delivery order, both within the COGSA 1992 meaning and (in light of the decision on Ground 2 in the appeal) within the bill of lading definition, must contain an undertaking by the carrier to deliver the goods to the person identified in it. The Release Note could not be treated as providing any such undertaking by MSC to deliver to Glencore (or its agent). Further, it was held that no trade custom varying the general position was applicable simply because the electronic release system had been in place for some time.

Ground 4 – Estoppel

MSC argued that Glencore was estopped from contending that delivery of the cargo on presentation of the pin code was a breach of contract and/or duty. It was said that the history of sixty-nine previous shipments using the electronic release system established that provision of pin codes was an acceptable alternative to a Delivery Order. The Court of Appeal upheld Andrew Smith J's view that there was no estoppel. No representation, let alone a clear one (as required to establish estoppel), was made by Glencore that delivery otherwise than to Glencore would be acceptable, provided that it was made to the first presenter of the codes. The fact that cargoes had been delivered to Glencore after presentation of pin codes many times said nothing about what the position would be if they were not.

Ground 5 – Causation

MSC also sought to adduce new evidence and to have the case remitted to the first instance Court on a question of causation. The Court of Appeal refused the application because it was too late to raise the issue and because it was not convinced the new evidence would affect the result of the case.

The appeal was therefore dismissed.

The case highlights the need for the terms in parties' contracts to cater for the operating practice in fact in use by the parties. Changes in practice resulting from technological innovations require parties to consider updating their standard contracts to protect themselves. The case also demonstrates the potential vulnerabilities to criminal interference of electronic release systems for cargo. ■

Article published on the Steamship Mutual website September 2017.

[1] *4. References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which— a. is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and b. is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.*

"... in dealing with costs, a tribunal may take account of unreasonable conduct, ..."

The LMAA Terms 2017

The new London Maritime Arbitrators Association ("LMMA") terms apply to proceedings commenced after 1 May 2017.

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Revisions have also been made to the LMAA Small Claims Procedure ("SCP") with a noteworthy change being an increase to the recommended SCP limit to US$100,000. The LMAA Intermediate Claims Procedure ("ICP") has also been refreshed.

The LMAA terms are generally revisited every five years or so and, when doing so, there is a balancing act to be had between the need to address ongoing concerns over costs and efficiency without wishing to risk any adverse effects on what is demonstrably a popular forum of dispute resolution. As the LMAA notes discuss, when reviewing the terms there was a need to maintain flexibility and autonomy for the parties within the existing procedures to suit a particular case and a recognition of an element of "if it ain't broke, don't fix it". Whilst that could be characterised as a cautious approach, there a number of key revisions which will be of interest to parties and practitioners alike.

Full details, including notes of the 2017 terms, and a tracked changes comparison with the 2012 terms can be found at http://www.lmaa.london/news-article.aspx

Main Terms

For the constitution of an arbitral tribunal, paragraphs 10 and 11 provide for an arbitrator appointed by a party to become sole arbitrator where the other party fails to appoint, or for the appointment by the President of the LMAA where the parties have failed to comply with an arbitration agreement for the appointment of a sole arbitrator. Under the 2012 Terms unless otherwise agreed, an application to court for the appointment of an arbitrator would have been necessary in such circumstances.

Disputes involving a number of arbitrations, such as are commonly found with charterparty chains, can bring their own difficulties and parties will still have to rely on the powers of the tribunal in relation to chain arbitrations, unless the parties are able to agree on a suitable mechanism for consolidation. When arbitration proceedings are run concurrently to avoid inconsistent conclusions, and to deal with the inherent delays where submissions are being passed up and down the line with minimal amendments, paragraph 16(b)(i) now gives an express power to the tribunal to shorten or otherwise modify the usual time limits. The tribunal also retains its powers of discretion and the parties may be able to reach agreement on a suitable mechanism to minimise, or eliminate the involvement of intermediate parties.

For matters proceeding to a hearing, there is enhanced discretion for the tribunal to order security for its own costs, together with a requirement for the tribunal to provide advance notice and transparency of its own fees and also the possibility for interim billing to be adopted to encourage an ongoing focus on costs.

To attempt to avoid excessive rounds of pleadings, the Second Schedule of the LMAA Terms 2017 expressly provides that where parties wish to serve submissions beyond the stage of reply (or reply to counterclaim if applicable) they must obtain the tribunal's permission.

Paragraph 11 of the Second Schedule mirrors previous guidance and enables the tribunal to give directions following the exchange of questionnaires if the parties have not been able to reach an agreement between themselves within 21 days. Paragraph 13 underlines best practice in relation to the need for parties and tribunals to consider how to make arbitration as cost-effective as possible, with particular reference the LMAA Checklist as found in the Fourth Schedule.

Paragraph 19(b) sets out clearly that in dealing with costs, a tribunal may take account of unreasonable conduct, including failure to comply with the LMAA Checklist. This appears to be a measure aimed at tackling escalating costs and addressing criticism of how parties and their representatives conduct proceedings. The paragraph also expressly confirms that the Part 36 regime, in the sense of the entire machinery for protective costs offers

as set out in the Civil Procedure Rules, does not apply to arbitration under LMAA Rules and that the tribunal's discretion is not to be fettered by the factors set out within paragraph 19(b).

Interlocutory directions and applications play an important part in the progress of an arbitration; but at times they can become fertile ground for aggressive correspondence, additional time being spent by the tribunal in considering the issues with the result that unnecessary costs may be incurred by the parties. It remains incumbent on the parties to attempt to agree directions between themselves and paragraph 21 clarifies that where the parties do so agree and wish the directions to be deemed to take effect as if by an order of the tribunal, the tribunal must then be notified for it to have the desired effect as per section 41 of the Arbitration Act.

The Third Schedule of the LMAA terms 2017 sets out the regime for the LMAA Questionnaire and previous guidance is now incorporated to underline as far as possible the importance of the LMAA Questionnaire in terms of case management and focusing the attention of parties and their advisors on how the arbitration is to progress.

For example, the reference to estimated costs and breakdown of those costs may provide an appropriate pause to reflect in detail on any potential disparity in costs between the parties. There is also a greater emphasis upon identifying the issues to be dealt with through expert and witness evidence.

The LMAA Checklist, containing guidelines on the efficient conduct of arbitration, is now to be found incorporated in a Fourth Schedule. This serves to draw attention to its contents and highlights its importance, in terms of good practice, such as how to treat strings of e-mails within bundles, and also to the potential costs consequences of failing to comply.

Small Claims Procedure

The financial limit for the SCP 2017 has been raised to US$100,000, unless the parties have otherwise agreed. Even before the introduction of the 2017 terms, it was not uncommon to see an arbitration agreement with limits set above that figure and whilst complexity and claim value are not inextricably linked, the level of complexity and number of issues in dispute can test the appropriateness of the SCP framework. There is a mechanism to deal with such complex matters instead under either the LMAA Terms 2017 or ICP 2017 where that would be more appropriate and if that occurs, it is made clear that if the parties agree, the original tribunal would retain its jurisdiction over the dispute.

In an apparent effort to prevent either bland demands for payment at one extreme, or extensive pleadings supported by voluminous documentation at the other, the procedure for submissions – whether served in support of the parties claim or defence or reply submissions – has been clarified. Parties unable to comply may be requested to re-submit letters of submission in a more appropriate form.

Intermediate Claims Procedure

The ICP is often rather forgotten, or perhaps even unknown by parties considering an arbitration clause or agreement, or the commencement of proceedings. The level of appointments for the ICP has certainly been consistently and significantly lower than under either the LMAA Terms or SCP terms.

The 2017 revision is an opportunity for parties to revisit the suitability of the ICP terms for medium size claims that require a more detailed procedure than the SCP; but where the full LMAA terms may not necessarily be proportionate. The parties are free to agree the financial limits to apply to this procedure, although the suggested upper limit of US$400,000 remains.

Under the ICP, there is a mechanism for appeal from an award if it is alleged that the award gives rise to an issue of general interest or is of importance to the trade or industry in question and in the latter case, the tribunal must first certify that the issue is of importance to the relevant trade or industry.

The ICP does not have a formal disclosure stage as documents should accompany the opening submissions. Specific requests for disclosure are also to be made with the opening submissions and the Tribunal may draw adverse inferences in the event of non-disclosure. The provisions for admission of expert evidence and witness statements are also limited in comparison with the main terms notice to be given prior to adducing witness statements and with the permission of the tribunal required for expert evidence or supplementary witness statements and expert supplementary reports. There are also default word limits for any such expert's initial and supplementary reports.

Parties' costs under the ICP are capped with reference to the monetary value of the claim with a procedure for summarily assessing costs which should assist in achieving a cost-effective arbitration.

Concurrency of arbitrations is also catered for under the mechanism in Paragraph 18.

For parties who wish to take advantage of the ICP, it should be noted that this had been removed from the BIMCO London arbitration clause and so amendment to the standard clause would be necessary.

Conclusion

Whilst the majority of these amendments are unlikely to result in substantial change in how LMAA arbitrations work in practice, it is to be hoped the greater guidance on cost control will result in enhanced efficiency and cost-effectiveness whether or not a matter settles, or has to proceed to an award. ■

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Asymmetric Jurisdiction Clause in Ship Finance Agreement Upheld

A claimant can rely on an Asymmetric Jurisdiction Clause to commence court proceedings in England even after the other party has commenced proceedings in a different jurisdiction.

STEPHENSON HARWOOD

Duncan McDonald
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Introduction

The judgment of Mr Justice Cranston in *Commerzbank AG v Pauline Shipping and Liquimar Tankers Management Inc.*, 3 February 2017, is one of great importance for banks and other parties involved in international finance.

The Judge held that the jurisdiction clause in a shipping loan agreement and related guarantee (an "asymmetric" clause of a kind commonly used in finance documentation) permitted the bank to bring enforcement proceedings in England against the borrowers, in spite of the fact that the borrowers had already started proceedings against the bank in Greece.

This article discusses the implications of the judgment.

The Problem of Multiple Claims

The background is the problem of claims being brought in the courts of different EU Member States between the same parties and involving the same issues. This situation can occur even where the relevant contract contains a jurisdiction clause providing that any claims shall be brought in the courts of a named Member State.

Historically the problem could arise because European law effectively decided that the court where proceedings were commenced first should prevail, even in the face of an exclusive jurisdiction clause specifying that all disputes must be submitted to the courts of a different Member State. So a party which anticipated being sued in the courts of Member State A (the courts identified in the jurisdiction agreement) could delay or disrupt the proceedings by commencing proceedings first in Member State B (preferably a Member State the courts of which have a reputation for slow proceedings or which would be less familiar with the relevant principles of English law). If a claim was subsequently brought in the courts of Member State A, that claim had to be stayed.

The Recast Regulation on Jurisdiction and the Enforcement of Judgments 2012 ("the Recast Regulation") was intended to deal with this problem. It provides that where there are proceedings in different Member States between the same parties involving the same cause of action, and the courts of one of those Member States has exclusive jurisdiction under a jurisdiction agreement, then the courts of any other Member State must stay their proceedings until the court specified in the exclusive jurisdiction agreement declares that it has no jurisdiction. So the court specified in an exclusive jurisdiction agreement prevails, not the court where proceedings were commenced first.

Whilst the intention of the Recast Regulation was clear, the question in the present case (previously undecided by the English courts) was how it applies to an asymmetric jurisdiction clause, a clause which is very common in finance documentation but which may also be found in many other areas of commerce.

The Facts

The judgment relates to two sets of proceedings before the Commercial Court in London. The claimant in both proceedings is Commerzbank, a German bank. The defendant in the first action is Liquimar Tankers Management Inc as guarantor of a loan made by the bank. The defendants in the second action are (i) Pauline Shipping Ltd, the borrower under a second loan made by the bank and (ii) Liquimar, as guarantor of that loan.

Both the loan and guarantee documentation contained asymmetric jurisdiction agreements. These provided that either party could bring proceedings in the English courts, but that the bank (alone) also had the right to sue in any other court of competent jurisdiction. Clauses of this kind are important to banks, as they give them flexibility to seek enforcement wherever a borrower has assets, while ensuring that the bank can only be sued in the named jurisdiction. Such clauses are, the Judge observed, "*a long established and practical feature of international financial documentation*".

Following events of default by the borrowers the bank warned Liquimar and Pauline of its intention to commence proceedings in England. However, before the bank brought its claim in England, Liquimar and Pauline commenced proceedings against the bank in Greece.

In the Greek proceedings Liquimar and Pauline sought orders that there was no liability to the bank under the guarantee, and claimed damages from the bank under Greek law for (amongst other things) reputational loss. The bank subsequently commenced proceedings in England against Liquimar and Pauline, claiming (amongst other things) the amount outstanding under the loan, a declaration of non-liability in respect of the claims made by Pauline and Liquimar, and damages and/or an indemnity for breach of the jurisdiction clauses in the loan agreements and guarantees. It was common ground between the parties that (apart from the claims for breach of the jurisdiction clauses) the claims in the London actions involved the same causes of action as the claims in the Greek actions.

Liquimar and Pauline applied for (among other things) a stay of the actions in England, in favour of the matters in issue being decided by the Greek court.

The Recast Regulation and Exclusive Jurisdiction

The issue was therefore whether the bank could proceed with its claim in England, in spite of the parallel proceedings in Greece. The answer turned on whether the asymmetric jurisdiction clause conferred exclusive jurisdiction on the English courts for the purposes of the Recast Regulation.

Liquimar and Pauline argued that the bank should not be allowed to proceed in England, and that the English court should stay its proceedings pending the ruling of the Greek court. Their core argument was that the asymmetric jurisdiction clause was not an exclusive jurisdiction clause, on the ground that the clause permitted the bank to commence proceedings not only in England but in any other court of competent jurisdiction. Accordingly, they argued, the bank could not rely on the rule that the courts named in an exclusive jurisdiction clause should prevail.

The Judgment

The Judge refused the defendants' applications for a stay and confirmed that the English courts had jurisdiction. Accordingly, the bank could continue with its claim in England. The Judge held that the reference in the Recast Regulation to "*an agreement [which] confers exclusive jurisdiction*" includes asymmetric jurisdiction clauses such as those in the present case:

"*... where a clause confers exclusive jurisdiction on the court or courts of a Member State when one party sues, the clause will still be an exclusive jurisdiction clause for the purposes of [the Recast Regulation] even where, if the other party to the clause sues, the clause shows the parties to have agreed that jurisdiction is to be conferred differently, or allowed to engage differently.*"

The Judge went on to say that the conclusion that an asymmetric jurisdiction clause was exclusive was consistent with the aims of the Recast Regulation, which were to enhance the effectiveness of exclusive jurisdiction clauses and to avoid abusive tactics. The defendants had agreed to sue only in England, but instead had initiated proceedings in Greece. It would undermine the agreements of the parties and foster abusive tactics if the jurisdiction clauses in the present case were not to be treated as exclusive.

Comment

The judgment provides welcome certainty in an area where there had previously been much academic debate but no determination of the matter by the English courts. It enhances the effectiveness of asymmetric jurisdiction clauses, and makes it less likely that abusive tactics will be successful.

Part of the object of the Recast Regulation was to prevent "torpedo litigation" whereby a party to a jurisdiction agreement would commence proceedings in a jurisdiction other than the agreed one, thus causing delay and disruption. That objective would have been completely undermined if the relevant provision of the Recast Regulation had been held not to apply to asymmetric jurisdiction clauses, which are standard in finance documentation.

Subject to any appeal, the matter is now settled so far as the English courts are concerned. Whilst there remains some uncertainty about how such clauses will be treated in other jurisdictions it is to be hoped that, in the interests of discouraging abusive litigation tactics, the courts in other jurisdictions will agree with the approach taken by the Judge in this case. ■

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> "... that the conclusion that an asymmetric jurisdiction clause was exclusive was consistent with the aims of the Recast Regulation, which were to enhance the effectiveness of exclusive jurisdiction clauses and to avoid abusive tactics."

The New Brazilian Civil Procedure Code: What Has Changed and How May It Affect You?

The new Civil Procedure Code is a welcome attempt to tackle the delay and uncertainty that litigants often experienced under the former system.

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Many parties in the shipping industry are likely to be wary of being involved either as claimants or defendants in judicial proceedings in Brazil. Brazilian judicial claims procedures are known for their slowness, proceedings may last many years and a party may appeal numerous times, and the outcome is often uncertain. All these factors are magnified by the high levels of interests and indexation – approximately 18% per annum accruing to the claim value.

On 18 March 2016, the new Civil Procedure Code came into force with promising changes aiming for a more dynamic, faster and reliable judicial procedure[1].

Focusing on shipping, this article highlights the main changes to civil claims procedures and their likely impact on litigants and prospective litigants in this unique jurisdiction:

Conciliation Hearing

The parties are now obliged to attend a conciliation hearing prior to evidence gathering and trial. Thereafter, in the event a settlement is not achieved, the defendant will be able to file his defence. If the parties fail to reach a settlement at this hearing, an out of court settlement is still possible at any stage during the proceedings including the enforcement stage, and the parties may also request another conciliatory hearing if they so wish. Thus, the new code emphasises conciliation between the parties as a mean to resolve disputes in Brazil.

Chronological Order of Judgments

Prior to the new procedure code, the courts were not obliged to process claims in the order in which they were filed. The new procedure code attempts to tackle the practice of some courts to pick and choose between claims, preferring to try straightforward claims over complex cases. The practical result of this should be a faster response from the courts in resolving disputes as they are no longer able to postpone difficult cases for their own convenience.

Maritime Tribunal Proceedings

In the event of a casualty the Brazilian Maritime Tribunal may commence proceedings in order to establish the facts and the liability of the parties. The new procedure code obliges the courts to suspend the civil court proceedings while the Maritime Tribunal proceedings are ongoing.

While the Maritime Tribunal proceedings may take considerable time to publish its findings, the suspension of civil claim proceedings ensures that a specialised court in the maritime field investigate the facts accurately and provides useful evidence which can be adduced at the evidentiary stage of the civil proceedings.

Although this may be regarded as an improvement upon the previous procedure code, the Maritime Tribunal only opines on the liability/fault aspect of the incident leaving the merits of the claim including questions of damages and indirect or consequential loss, for the civil courts to decide. Hence, in cases where liability for the incident is abundantly clear, the delays caused by the suspension of the civil court proceedings to allow the Maritime Tribunal to assess the facts, may be unwelcome for the parties who are eager to focus on other aspects of the claim such as damages and quantum.

Limitation of Appeals

Brazil's judicial system is well known for the extent of appeals available to the parties. As a consequence, it is not uncommon for the parties to use this as means to delay the proceedings indefinitely. Recognising the burden this places on the courts, the legislator introduced a number of measures to discourage this 'appeal culture' such as:

"Brazil's judicial system is well known for the extent of appeals available to the parties. As a consequence, it is not uncommon for the parties to use this as means to delay the proceedings indefinitely."

- Reducing the circumstances in which a party can file an interlocutory appeal; the appeal of 'motion of reconsideration' (Embargos Infringentes) and 'retained interlocutory appeal' (Agravo Retido) have now been scrapped; and

- Costs' penalties – an appellant that has its appeal dismissed will be liable to pay higher legal costs to the respondent.

Binding Decisions

Introducing elements of the Common Law, the new procedure code obliges judges of the courts of 1st and 2nd instance to follow the Superior and Supreme Courts' abridgments of laws and binding precedents. Hence, the lower courts are now entitled to issue summary judgments extinguishing the proceedings in the event they are contrary to the higher courts' decisions.

All the above changes aim to reduce the number of claims, appeals and general delays in civil proceedings allowing more opportunities for conciliations between the parties, greater certainty in decision making and a faster and more efficient judiciary system. This is certainly welcomed by lawyers, judges and litigants. However, only time will tell the effect of these changes in practice. ■

Article published on the Steamship Mutual website September 2017.

[1] *Maritime Arbitration developments in Brazil were discussed in a May 2015 article on the Club's website, 'Maritime Arbitration: Recent Developments in Brazil' (https://www.steamshipmutual.com/publications/Articles/maritime-arbitrationinbrazil0515.htm).*

Back to contents

English High Court v London Arbitration

Under English law, the two main mechanisms for pursuing claims are High Court proceedings and arbitration. Here we provide a brief comparison of both.

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If a jurisdiction clause calls for English High Court, this refers to one of the senior courts of England and Wales (along with the Court of Appeal and Crown Court). It has three divisions:

- Queen's Bench Division
  This court hears a wide range of common law cases and includes specialised courts including the Commercial Court and Admiralty Court.

- Chancery Division
  Deals with business law, trusts, probate, and insolvency and includes the Patents Court and the Companies Court.

- Family Division
  Usually for Charterparty/Bill of Lading disputes, a claim will be issued in the Commercial Court. The Admiralty Court is reserved for cases such as collisions, salvage, mortgages, passenger injuries and arrests.

As soon as a claim is issued (that is, a Claim Form sealed by the court and the issue fee paid) the management of the claim is governed by the Civil Procedure Rules ("CPR"). These are standard rules which set out the timetable for claims from issue to trial, and detail what is required from each party in terms of pursuing or defending a case. Subject to the type of claim, it may be allocated to the small claims track (less than £10,000), fast track (no more than £25,000 and not particularly complex) and multi-track (all other claims).

A key component of the CPR is that claims are dealt with proportionally, with costs in mind, and that the parties explore alternative dispute resolution where appropriate. The rules, however, are less flexible than that of arbitration and can only be varied by agreement between the parties or an application to the judge. However, in the interests of ensuring claims are dealt with expeditiously, the court has certain case management powers which allows it to make orders on its own initiative.

Cases in the High Court will be conducted by English solicitors and often pleadings will be drafted by Counsel. At hearings, Counsel will usually appear before the judge to advocate on behalf of the claimant/defendant, with the solicitors providing support. This, and the need for strict compliance with the CPR, can increase the legal fees incurred subject to the type of claim.

In general terms, if a party is awarded judgment in their favour, they will also be entitled to recover their legal fees. Depending on the judge, and the nature of the claim, a good rule of thumb is that 65% to 70% may be recovered. There will be a statutory entitlement to interest which is currently 8% above the Bank of England base rate per annum.

There may be grounds to appeal a judgment from the High Court if it is considered the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. The case would then proceed to the Court of Appeal and, if further appealed, to the Supreme Court which is the highest court in England and Wales. It should be noted judgments are published and will name all parties involved.

There are a number of instruments governing the enforcement of English judgments within EU Member States and Commonwealth countries. There are no reciprocal arrangements between the UK, USA, Japan and China so the law of the enforcing country will apply alone.

London Arbitration

Where English law and arbitration is provided for in a contract, it will be governed by the Arbitration Act 1996. The Act gives the parties freedom to agree how disputes are to be resolved. If a clause providing for arbitration is silent the procedure is governed by the Act but frequently the parties agree to apply the London Maritime Arbitrators Association ("LMAA") model. If so the arbitration clause may provide for the main LMAA terms, or the Small Claims Procedure ("SCP") (usually for claims under US$50,000 but can be amended by agreement).

The LMAA terms seek to offer a more cost-effective but specialist mechanism for resolving claims. In particular:

- SCP
  The main advantage is the use of a sole arbitrator and a fixed fee which includes the appointment fee, interlocutories, a hearing not exceeding one day, an award and an assessment of costs. There is no formal disclosure procedure which speeds up the process and reduces time and costs. Costs can be recovered up to a maximum of £4,000 plus claim fee. There is no right of appeal to the courts unless it relates to an arbitrator's ruling on his own jurisdiction. The fee (currently £3,000) must be paid on commencement of arbitration but if the case settles a proportion of this fee can be recovered subject to the stage of proceedings.

- LMAA Terms
  These terms will apply to all claims, regardless of value or complexity, where there is no SCP agreed. There are a number of options available in relation to the composition of a tribunal and this is usually expressly agreed between the parties in the arbitration clause. The fee payable on commencement of arbitration is only £250 but, if the matter proceeds to a hearing, costs can equal those incurred in High Court proceedings. Full rights of appeal to the courts apply under this procedure.

Whilst LMAA terms adopt the procedural timetable as set out in the Arbitration Act 1996, one of the key components of this type of arbitration is the flexibility. The parties are essentially able to agree their own procedure, only reverting to the arbitrator or tribunal if an agreement cannot be reached. Whilst this reduces pressure in complying with the need for pleadings, witness evidence, expert evidence etc. it can also mean that proceedings can stretch out over several years if the claimant does not actively progress matters. Unlike the courts, an arbitrator or tribunal is unlikely to intervene unless expressly asked to do so by one of the parties.

If the claimant is successful, there is an entitlement to recover costs. Whilst recoverable costs in the SCP are capped at £4,000 under the LMAA terms recoverable costs may be in the region of 70% to 80% of the successful party's costs. Arbitrators also have the power to award simple or compound interest on an award (e.g. 4.5% per annum and pro rata compounded at three-monthly rests). Awards are confidential and only reported using the facts of the case, maintaining the parties' privacy. The only exception is if an award is appealed, when all details will then be made public.

As mentioned above, under the Arbitration Act 1996 arbitrations awards handed down on LMAA terms are capable of being appealed on a question of law or if a serious irregularity can be shown. An appeal would be made to the High Court (usually Commercial Court) and may then follow the same route of appeal to the Supreme Court. It is widely considered the rights of appeal are limited to ensure a balance and prevent parties utilising both arbitration and High Court litigation.

Enforcement of arbitration awards is mandatory in all New York Convention signatory states (nearly all key trading countries, some 148). However, in China for example, there is a "public policy" exception commonly relied on to complicate the enforcement of foreign arbitration awards. Often domestic courts will have the last say as to the enforcement of awards and this is therefore something that should be explored before costs are incurred pursuing an award. ■

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People

The Collateral Source Rule – Who Benefits?

Can a claimant recover medical expenses paid by insurance or, if the medical provider billed a greater sum, that greater sum?

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In the decision of *DePerrodil v Bozovic Marine, Inc.*, No. 16-30009, 5th Cir. [Nov. 17, 2016], the US Court of Appeal for the Fifth Circuit provided welcome clarification as to the effect of the collateral source rule on the recovery of medical costs. The question considered was whether a plaintiff is allowed to recover the unpaid, written-off portion of his billed medical expenses, or only those expenses actually paid by his employer under the Longshore and Harbour Workers' Compensation Act ("LHWCA"). For the reasons explained below, the conclusion was that a plaintiff is limited to recovery of those medical costs actually paid.

The Collateral Source Rule

The collateral source rule prevents an injured person's damages from being reduced by payments made by their own medical insurance or worker's compensation. The basis for this is that this income source, i.e. medical insurance or worker's compensation, is considered to be independent of (or collateral to) the tortfeasor, and as he has not contributed to that income source he may not reduce its damages by any amount paid. In practice, the rule allows plaintiffs to recover expenses they did not personally have to pay.

The rationale for this is that this income source of the collateral source rule is to ensure that tortfeasors bear the full cost of their own conduct and also to protect plaintiffs who have the "*foresight to obtain insurance.*" This was clarified in *Phillips v Western Co.* [5th Cir. 1992] where it was stated "*If tortfeasors could set off compensation available to plaintiffs through collateral sources, then plaintiffs who pay their own insurance premiums would suffer a net loss because they would derive no benefit from any premiums paid.*"

Background

Robert dePerrodil, a 70-year-old oilfield consultant who worked for Petroleum Engineers, Inc. ("PEI"), was transported on a crew boat owned and operated by Bozovic Marine, Inc. from Venice, Louisiana, to his work site on an offshore platform. Upon arrival at the platform site, dePerrodil realised that he would not be able to board the platform because no lift boat was present and so he asked to return to port. While returning to port the vessel encountered rough seas, causing dePerrodil to fall to the floor and suffer injuries to his back.

PEI carried workers' compensation insurance for dePerrodil pursuant to the LHWCA and his medical providers billed the insurer US$186,080 of which US$128,695 was written-off as part of the insurer's negotiated rates. Ultimately the insurer paid US$57,385 in medical expenses. Subsequently dePerrodil commenced a claim in the US District Court for the Western District of Louisiana against Bozovic Marine, Inc. for compensation in connection with the injuries sustained aboard the defendant's vessel.

Following a bench trial on the merits, the Court concluded that Bozovic Marine had acted negligently and accepted the claim. In awarding dePerrodil US$984,396, the court held the collateral-source rule allowed recovery for the full amount billed for medical expenses and not the lesser amount actually paid. Accordingly, the Court awarded the plaintiff the full amount of medical expenses billed for his treatment, that is, US$186,080.

Bozovic Marine subsequently appealed the District Court's ruling.

Court of Appeal Decision

The Court found that Bozovic was a third-party tortfeasor that played no role in securing the insurance coverage and that the collateral-source rule applied.

The next question considered by the Court was whether the collateral source rule allowed the plaintiff to recover the amount billed, or only the amount paid.

The Court recognised that there was no direct authority regarding the treatment of written-off or discounted LHWCA medical expenses in the maritime-tort context. Therefore, the Court looked for persuasive authority elsewhere and was guided by the rules laid down by analogous maritime authority, in the context of the cure obligation, and the case of *Manderson v Chet Morrison Contractors, Inc.* 666 F.3d 373, 381 [5th Cir. 2012]. In this case, the Court held that an injured plaintiff may only recover an amount needed to satisfy payments made for medical treatment rather than the amount billed. Whilst the decision in *Manderson* was not binding, the Court was persuaded that the rule it set down which prohibited write-off recovery was equally applicable to LHWCA maritime-tort cases. This was on the basis that maritime cure and LHWCA insurance create similar obligations for employers. In each case, employers have a duty to respond to work-related injuries through the payment of medical expenses, regardless of being at fault for the cause of the injury.

In line with the maritime cure authority, the Court held that LHWCA medical expense payments are collateral to a third-party tortfeasor only to the extent paid and concluded that the lower Court had erred in awarding the full amount billed instead of the far lesser amount actually paid by the insurer.

Conclusion

The decision in *DePerrodil* provides a clarification of the law which is welcomed by maritime defendants. The effect of the collateral source rule has been limited to the extent that a plaintiff is only allowed to recover the actual amount of medical expenses paid by his employer (or its insurer) in an LHWCA claim and not the higher amount originally billed. ■

> "The collateral source rule prevents an injured person's damages from being reduced by payments made by their own medical insurance or worker's compensation."

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Court Holds Punitive Damages can be Recovered for Unseaworthiness

In a ground breaking decision with huge potential ramifications for ship-owners the Washington State Supreme Court has ruled that punitive damages are now available to a seaman under the general maritime law doctrine of unseaworthiness.

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On March 8 2017, the Washington State Supreme Court reversed the Trial Court's decision in *Tabingo v American Seafoods Company* and held that a seaman could recover punitive damages under the general maritime law doctrine of unseaworthiness.

Tabingo injured his hand whilst working for American Seafoods as a trainee deckhand onboard the "American Triumph", which resulted in the amputation of two fingers. It was alleged that during routine operations the crew were unable to prevent the hydraulic hatch from closing on Tabingo's hand because the control handle was broken. It was further alleged that American Seafoods had known of the defective handle for approximately two years. Tabingo started proceedings claiming punitive damages premised on an allegation of unseaworthiness. American Seafood applied for summary judgment to dismiss the claim for nonpecuniary damages because, they argued, punitive damages are prohibited under the Jones Act.

The Trial Court agreed with American Seafood [see 'Punitive Damages and Unseaworthiness' (https://www.steamshipmutual.com/publications/Articles/punitivedamages0117.htm)]. Subsequently Tabingo successfully applied for a review of the Trial Court's decision, which led to review before the Washington State Supreme Court on the question of whether punitive damages are available under the theory of unseaworthiness.

On 17 January 2017 the Washington State Supreme Court considered three questions:

1. Whether Jones Act claims and unseaworthiness claims were separate causes of action. The Court held that they were on the basis that Congress created the Jones Act to remedy the historical prohibition on a seaman suing their employer for negligence.

2. Whether the United States Supreme Court's conclusions in *Townsend v Atlantic Sounding (Townsend)* were applicable [see 'US – Punitive Damages in Maintenance and Cure Cases' (https://www.steamshipmutual.com/publications/Articles/Townsend0909.html)]. The Court noted that *Townsend* held that maintenance and cure and the availability of punitive damages existed before the Jones Act was introduced, as did an unseaworthiness cause of action and, just like unseaworthy claims, are not based on a statutory remedy. *Tabingo* basically substitutes maintenance and cure for unseaworthiness to reach its conclusion.

   American Seafoods had relied on *Miles v Apex Marine Corp* [1990] and the so called Miles Uniformity Rule. The Court rejected their argument because they interpret *Miles* to be limited solely to wrongful death claims where Congress has already spoken, via the Death on the High Seas Act holding that such claims are limited to pecuniary loss.

3. Whether the Court should follow the ruling in *McBride v Estis Well Service* [2014] [see 'Punitive Damages – Punishing Times' (https://www.steamshipmutual.com/publications/Articles/PunishingTimes1113.htm)]. The decision in McBride was that where a Jones Act claim and general maritime claim are joined in the same action the bar on punitive damages applies equally to both.

The Washington State Supreme Court in *Tabingo* ruled that *McBride* misinterpreted *Miles* because that case dealt with claims which were limited to tort remedies grounded in statute whereas unseaworthiness is no such a remedy. Therefore, the Court held that *Miles* and *McBride* were neither persuasive or controlling in the *Tabingo* case.

Having considered all of the arguments the Washington State Supreme Court concluded that a finding in favour of the availability of punitive damages for an unseaworthiness cause of action would remain consistent with the public policy of treating seaman as wards of admiralty and the goal of providing them with protection. The Courts decision was that a seaman making a claim under the general maritime law for unseaworthiness can include a request for punitive damages as a matter of law.

As a result of this decision it is likely that Shipowner defendants in the 9th Circuit may now face claims for punitive damages in cases of alleged unseaworthiness. The decision could also have ramifications for the whole of the US as, whilst the decision is binding precedent only in state courts in Washington it is possible to imagine that claimants in other circuits will attempt to rely upon it as being persuasive authority.

It remains to be seen how the courts address this issue but it may be that a two prong test will be utilised. Part one would likely involve the finder of fact determining whether an unseaworthy condition existed and if so if this involved wilful, malicious, egregious or reckless conduct on the part of the Shipowner. It is this latter prong that is necessary as a basis for a claim for punitive damages.

This issue remains clouded by a pending case in Federal Court in the name of *Batterton v Dutra Group* which is also considering the availability of punitive damages in unseaworthiness cases.

For reference the *Tabingo* case was decided in state court by the Washington Supreme Court which is the ultimate arbiter of the law for state trial courts or lower appellate courts in Washington State. State trial courts are bound by Washington Supreme Court judgments to the extent they do not conflict with US Supreme Court decisions relating to federal law. However, federal courts in the 9th Circuit are not bound by state court verdicts and so, in theory, the decision in *Batterton* might well be different to the one reached in *Tabingo*. ■

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"Having considered all of the arguments the Washington State Supreme Court concluded that a finding in favour of the availability of punitive damages for an unseaworthiness cause of action would remain consistent with the public policy of treating seaman as wards of admiralty."

Increased Exposure for Shipowners in Medical Malpractice Cases

In the US 11th Circuit it has long been the case that there was a cap on non-economic damages in medical malpractice claims. This has now changed following a landmark decision from the Florida Supreme Court.

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On 8 June 2017, in a close four-three opinion, the Florida Supreme Court found that non-economic damages caps in medical malpractice personal injury cases are unconstitutional.

The claimant, Susan Kalitan, brought suit against North Broward District Hospital (the "Hospital") having been left severely injured as a result of complications arising during her carpal tunnel surgery.

The claimant was receiving outpatient treatment at the Hospital for her symptoms and her treatment required she undergo surgery and be placed under general anesthesia. During preparation for the surgery intubation was necessary. Unfortunately, this procedure caused a perforation of the claimant's esophagus which ultimately resulted in life saving care being required.

A medical negligence claim was filed and the trial court jury concluded that the claimant had suffered a catastrophic injury in the form of a severe brain injury, awarding US$4,718,011 in damages; with the non-economic portion of this equating to US$4,000,000.

However, Florida Statute 766.118 provides for a US$500,000 cap on non-economic damages in a cause of action for personal injury arising from the medical negligence of practitioners, although there is an exception in cases resulting in catastrophic injury, death or a permanent vegetative state. In such scenarios the damages may be increased.

By way of some background, the purpose of the Florida Legislature in enacting this statute was due to increases in medical malpractice insurance premiums which the Legislature believed was causing physicians to leave Florida, or to retire early, or simply to refuse to carry out high risk procedures. The consequent knock on effect being that the availability of health care in the State was deteriorating.

In light of this statute the Court adjusted the judgment but applied the increased cap rule, for catastrophic injury, and reduced the award by close to US$2 million.

The claimant then brought an appeal before Florida's Fourth District Court of Appeal arguing that the application of such a cap was in violation of the right to equal protection as guaranteed by article 1, section 2 of the Florida Constitution. In other words they argued that it is unconstitutional to cap one person's damages but not that of another, in claims being pursued under an identical cause of action; this being medical malpractice.

The Florida Constitution declares that "*all natural persons, female and male alike, are equal before the law.*" Art. I, § 2, Fla. Const. "*The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation.*"

It goes on to say that "*Unless a suspect class* [a class of individuals that have been historically subject to discrimination] *or fundamental right protected by the Florida Constitution is implicated by the challenged provision, the rational basis test will apply to evaluate an equal protection challenge.*" To satisfy this "*rational basis test*" a statute must bear a rational and reasonable relationship to a legitimate state objective.

For guidance the Court looked to the wrongful death action brought in the case of the *Estate of McCall v United States (McCall)*, where the Florida Supreme Court found that caps were unconstitutional in wrongful death medical malpractice claims. The Fourth District Court of Appeal applied the rationale in *McCall* to the personal injury context and directed the trial court to reinstate the total damages award as handed down by the jury.

An appeal by the Hospital to the Florida Supreme Court followed and they too examined the *McCall* case with reference to the "rational basis test" required to satisfy a challenge under the Florida Constitution.

In *McCall* the Court had held there was no data to support the findings of the Legislature that a medical malpractice crisis was developing, or would remain, due to increased insurance premiums. The court stated that "*...to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it offends the fundamental notion of equal justice under law*" and "*...serves no purpose other than to arbitrarily punish the most grievously injured...*". This being on the basis that those claimants suffering minor injuries would likely make full recovery of losses whereas those suffering severe injuries may not.

Having reviewed the *McCall* case the Court then considered its applicability to the personal injury context.

The Hospital argued that the statutory caps in single claimant personal injury actions are constitutional and that the Fourth District erred in determining that the reasoning in *McCall* controls. However, the Florida Supreme Court disagreed stating that the cap was a violation of "*equal protection*" under the "*rational basis test*" because the arbitrary reduction of compensation without regard to the severity of the injury does not bear a rational relationship to the Legislature's stated interest in addressing the medical malpractice crisis.

The Court further found that there was no evidence of a continuing medical malpractice crisis such that would justify the arbitrary application of the statutory cap and that it is irrational to single out the most seriously harmed medical malpractice claimants; especially given there is no mechanism in place to ensure that any savings are passed on from insurance companies to doctors by way of premium reductions.

Accordingly, the Court concluded that the statutory caps under section 766.118 of the Florida Statute unreasonably and arbitrarily limit recovery of those most grievously injured by medical negligence, and that there was no longer a "*legitimate state objective*" to which the cap could "*rationally and reasonably*" relate. It further held that it was unconstitutional that the cap discriminates between different classes of claimants resulting in those with little non-economic damage being awarded their entire claim, whereas those claimants who need help the most, because their injuries are serious, life changing and disabling, see their awards reduced to the level of the cap. ■

Article published on the Steamship Mutual website September 2017.

US Court Reviews Maintenance and Cure, Unseaworthiness and Jones Act Negligence

Seafarer's claims rejected by Court after pre-employment medical examination and facts recorded in incident report revealed both intentional concealment and that injury pre-dated employment.

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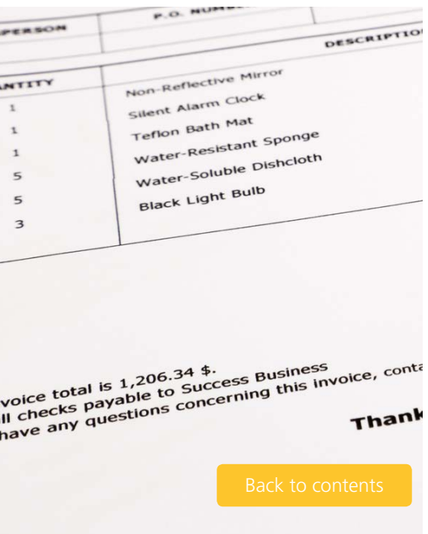
The recent case of *Cenac Marine Services, LLC v Jason Clark United States District Court Eastern District of Louisiana civil action no. 16-15256 and 16-15029* is an interesting example of how a seafarer forfeited maintenance and cure payments due to deliberate concealment of a pre-existing injury, and how the absence of a genuine issue of material fact resulted in the rejection of his unseaworthiness and Jones Act negligence claims.

Background

On 29 June 2016 seafarer Jason Clark was moving a cross-over hose unassisted which caused a back strain. The following day he submitted an incident report to his employer Cenac Marine Services ("CMS") confirming that the injury was not caused by any other person or equipment on board the ship. While receiving medical treatment for the back strain it transpired that Mr Clark was also suffering from a spinal infection (osteomyelitis). CMS agreed to pay maintenance and cure to avoid any potential grounds for a punitive damages award, but with a reservation of rights to seek reimbursement of sums paid at a later date if appropriate.



Maintenance and Cure

After Mr Clark had reached maximum medical improvement CMS' counsel discovered that his injury was not work related. Subsequently CMS filed suit seeking declaratory relief on the maintenance and cure issue. The Court granted summary judgment in favour of CMS finding they were not liable for maintenance and cure payments, or punitive damages, because the injury pre-dated the crewmember's employment and because he had intentionally concealed this from CMS. Mr Clark had undergone a pre-employment medical examination where he advised that he had a repaired hernia but failed to mention having received medical treatment for back and neck pains since 2011.

Similarly, when completing the accident report on 30 June 2016, Mr Clark again denied any previous back injury or back pain prior to the 29 June 2016 accident. It was only during discovery that CMS became aware of Mr Clark's previous back issues.

The Court found that Mr Clark deliberately concealed parts of his medical history which in turn materially impacted upon CMS decision to hire him. The Court also found that although the concealed injury from 2011, and the subsequent injury were located in the same part of the spine, there was no evidence that the injury arose during the time of the employment.

Mr Clark made three counter claims against CMS:

Unseaworthiness Claim

In an affidavit submitted by Mr Clark he claimed that the crew was incompetent rendering the vessel unseaworthy as a fellow deckhand failed to assist him when moving the cross-over hose. The facts recalled in the affidavit were in stark contrast with those stated in the incident report, later confirmed by Mr Clark during his deposition, where he advised he did not seek help from any of his colleagues and that the injury was not caused by any other person or equipment on board the ship.

The Court rejected the unseaworthiness claim emphasising that the affidavit was wholly groundless and merely an attempt to construct a genuine issue of material fact which did not exist.

Withheld Safety Bonus Claim

As part of the employment terms, CMS offered a safety reward bonus to employees who had no incidents or accidents during the period 1 January 2016 to 30 June 2016. CMS confirmed they did not pay out a safety bonus claim to Mr Clark because he was injured during that same six month period.

> "The evidential value of contemporaneous reports cannot be overstated …"

The Court found that the crewmember did not qualify for a safety reward bonus as even if he had been employed for the duration of the six month safety bonus period this would not entitled him to the benefit because his injury happened before the six month safety bonus period had expired.

Jones Act Negligence Claim

Various medical experts were consulted to assess Mr Clark's medical condition. Some medical experts advised that his condition was not related to the incident on 29 June 2016, or even work-related, and that the osteomyelitis was likely a pre-existing condition. One expert concluded that the osteomyelitis may have started as a result of a beam having fallen on him but no such accident was reported while he was employed with CMS and the same medical expert was unaware that Mr Clark had sustained a back sprain on board the vessel on 29 June 2016. Another medical expert determined that the osteomyelitis may have been connected with the 29 June 2016 incident but this medical report had been drawn up before Mr Clark was diagnosed with osteomyelitis.

The Court concluded that there was no evidence to show that that the osteomyelitis was caused by the accident on 29 June 2016 or due to any negligence by CMS. The Court concluded this was again an attempt at creating a genuine issue of material fact which did not exist.

Conclusion

This case emphasises the importance of making sure that all paperwork – such as incident and accident reports – is timely and accurately completed. The evidential value of contemporaneous reports cannot be overstated particularly where, as in this case, subsequently there are attempts to allege differing facts to underpin a claim for damages. It also shows the importance of conducting a pre-employment medical examination, whereby crew are required to disclose any prior injuries, as ultimately this can help to provide a defence to maintenance and cure claims. ■

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Back to contents

The Cruise Passenger Protection Act

There currently exists a disparity between the remedies available to surviving relatives of passengers who are victims of airline disasters as opposed to those available for deaths involving passage by cruise ship. This article discusses the attempt via the Cruise Passenger Protection Act to change this.

Sedgwick LLP MARITIME

James Kuhne
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At approximately 8:19 p.m. on the evening of July 7 1996, TWA Flight 800 took off from New York's JFK Airport, bound for Charles De Gaulle in Paris. But moments later the fuel and oxygen mixture in one of the Boeing 747's wing fuel tanks ignited, causing the plane to explode and crash into the Atlantic Ocean eight nautical miles off the coast of Long Island, New York. The plane was destroyed, and all 230 souls onboard were lost.

The Death on the High Seas Act

The remedies available under US law to the surviving relatives of the victims of Flight 800 were limited. Enacted in 1920, the Death on the High Seas Act ("DOHSA") is a wrongful death statute under which certain surviving relatives can bring suit for economic damages caused by the death of a relative on the high seas. Specifically, Section 30302 of DOHSA provides: "*When the death of an individual is caused by wrongful act, neglect or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.*" Section 30302 also identifies four classes of surviving beneficiaries for whom a DOHSA action can be maintained: "*the decedent's spouse, parent, child, or dependent relative.*" Except in cases involving Jones Act seamen, where it applies DOHSA provides the exclusive remedy under U.S. law for wrongful death occurring on the high seas.

Just as the class of relatives for whose benefit a DOSHA action can be maintained was limited, so too were the monetary damages available to those who had lost relatives in the crash of Flight 800. At the time, 46 U.S.C. Section 30303 limited recovery in a DOHSA action to "*fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought*," with any recovery apportioned among the beneficiaries in proportion to the loss each sustained.

> "... with one very narrow exception, it does not provide a vehicle for survival actions ..."

Before proceeding further, it is important to understand what "*fair compensation for the pecuniary loss sustained*" includes, and what losses, falling outside of that definition (i.e., losses not defined as "pecuniary losses"), were not available to the family members of the victims of Flight 800. As interpreted by the courts, DOSHA's pecuniary damages provision allows damages based upon the economic benefits that the surviving beneficiaries could reasonably have expected to receive from the decedent but for the untimely death, such as lost financial support, the value of the household

services the decedent would have rendered around the home, the value of the nurturing, guidance, care and instruction the decedent would have provided his or her surviving children, the cost of funeral expenses borne by the surviving relatives, and in some instances, prospective loss of inheritance. Not available under DOHSA's pecuniary damages limitation were more intangible losses that the surviving relatives suffered, such as damages for loss of society and companionship, loss of consortium damages to compensate a surviving spouse for loss of intimacy, and damages for loss of love and affection from the decedent.

DOSHA also contained another important limitation on recovery that impacted the relief available to the surviving family members of those killed in the Flight 800 crash. As a wrongful death statute, DOHSA's primary function is to compensate surviving spouses, children, and dependent relatives for the losses they suffer as a result of the decedent's death. But with one very narrow exception, it does not provide a vehicle for survival actions under which a decedent's estate can recover for injury or harm that the decedent suffered before he or she died, such as damages for pre-death pain and suffering.

The Commercial Aviation Amendment to DOSHA

In the context of Flight 800, these contours created what many viewed as discrepancies within the DOHSA scheme that left some surviving beneficiaries without a meaningful remedy. For example, the spouse and children of a high earning executive could hope to recover a reasonably significant amount based upon the financial and economic support they would have received if the high-earner had not died. In contrast, because non-economic losses were unavailable under DOHSA, parents of young children who died on Flight 800 would receive almost nothing; as one court explained, the practical result of DOHSA's pecuniary damages component was that the lives of children, who often provide little, if any, economic support to their families, were "*made to appear practically worthless in the eyes of the law.*"

Against this background and under the press of public opinion, in April 2000 the United States Congress amended DOHSA to effect two notable changes. First, the amendment, codified as 46 U.S.C. Section 30307, made non-pecuniary damages available in cases where the death resulted from a commercial aviation accident occurring more than 12 nautical miles from the shore of the United States. Second, it exempted from DOHSA's reach deaths caused by commercial aviation accidents on the high seas 12 nautical miles or less from the shore of the United States. Importantly – and perhaps tellingly as to its purpose – although it was passed nearly four years after the fact, the amendment applied retroactively to the day before the TWA Flight 800 disaster occurred.

That amendment had a dramatic effect on DOHSA as a whole. Before the 2000 amendment the territorial limits of DOHSA – the high seas beyond three miles from the shore of the United States – and its remedies – fair compensation for pecuniary loss sustained by the surviving family members – were straightforward, well-defined, and uniformly applicable to any death on the high seas. After the amendment, DOHSA's application is anything but; as a leading treatise describes it, "*DOHSA as amended seems incoherent.*" Indeed, after the 2000 amendment, DOSHA's application and the remedies available vary depending on the cause of death and the distance from shore that the incident occurred. Specifically, after the amendment, if the decedent was anyone other than a victim of a commercial aviation accident – including a decedent who was the victim of a non-commercial aviation accident or a cruise ship passenger – DOHSA's three nautical mile limit would apply. In that case, the damages recoverable would be limited to pecuniary loss. If the decedent was a victim of commercial aviation accident that occurred more than 12 nautical miles from shore, DOSHA would apply but available damages would expand to include both pecuniary and non-pecuniary loss. And if the decedent was the victim of a commercial airline accident that occurred 12 nautical miles from shore or closer, DOHSA would not apply at all, leaving courts, lawyers and litigants to argue about whether state, federal, or some other law, such as the general maritime law, would apply.

The Proposed Cruise Passenger Protection Act

Despite the many anomalies the 2000 amendment created, bicameral legislation has been introduced in Congress to amend DOHSA to make the commercial aviation accident provisions of Section 30307 applicable to cruise passenger fatalities. Introduced in the House of Representatives as H.R. 2173 and in the Senate as S.B. S965, if enacted the Cruise Passenger Protection Act ("CPPA") would apply to any vessel, other than those involved in coastwise transit between U.S. ports, that is authorized to carry and sleep 250 or more passengers and which either embarks or disembarks passengers at a U.S. port. The proposed amendment also contains a number of provisions that do not directly pertain to DOHSA or the commercial aviation amendment in Section 30307, including proposed crime prevention and reporting requirements, passenger and vessel safety and security provisions, and enhanced enforcement measures for crimes occurring on the vessels to which the proposed amendment would apply.

"The proposed amendment's geographic scope is also riddled with inconsistencies."

These bills were previously presented to Congress in virtually identical language – to the House of Representatives in 2013, and to both the House and the Senate in 2015 – each time without success. While neither of the prior attempts gained sufficient support to advance the proposed legislation out of Congress, each was limited to the crime prevention, reporting, safety, and security measures contained in the current version of the House and Senate bills, and neither contained language that would have made the commercial aviation accident provisions of Section 30307 applicable to cruise-related deaths. Given the addition of the cruise fatality language to the most recent version of the CPPA and its absence from prior bills, it is difficult to say what impact, if any, the failure of prior versions to gain sufficient congressional support will have on the current edition of the bill, and as of this writing there is very little legislative history available to provide guidance on how congressional committee discussions regarding the bill are proceeding.

The CPPA Threatens Uniform Application of American Maritime Wrongful Death Law

With little from which we can meaningfully predict the CPPA's chances for being successfully enacted into law or what form it will ultimately take if it does pass through Congress, the question then becomes whether the proposed amendment to DOHSA *should* be enacted into law. At face value, there seems to be some logical appeal to affording surviving relatives of cruise fatalities the same rights and remedies as those available to the surviving relatives of victims of commercial airline disasters. And certainly, the emotional appeal of providing a meaningful remedy to the family of a young child who dies on a cruise ship may be just as strong as that which prompted Congress to provide a remedy to the parents of children who died on TWA Flight 800.

Yet there are also strong reasons against enacting the proposed amendment to DOHSA. Among the most obvious is the congressional intent behind DOHSA as it was enacted in its original form. Under the federalist system established by the United States Constitution and the Tenth Amendment, power is initially vested in each of the fifty States and the authority of the federal government is limited to those powers expressly delegated to it under the Constitution. As a result, each state and the federal government is empowered to enact its own statutory laws and establish its own courts, and thus, to develop its own body of statutory and common law. Recognizing the benefits of uniformity in the field of maritime law and the challenges presented by the federalist system, DOHSA's enactment in 1920 represented an attempt by Congress to bring a system of uniformity to maritime wrongful death claims, which otherwise would have been subject to the differing laws of the States based solely upon where the death occurred.

Rather than promote the uniformity that Congress sought to achieve when it enacted DOHSA, the CPPA's proposed amendment would accomplish precisely the opposite effect. For example, DOHSA originally provided a uniform remedy to all deaths occurring on the high seas more than three nautical miles from shore. In contrast, the proposed amendment would give cruise passenger deaths preferential treatment by making non-pecuniary damages available to their surviving relatives while continuing to limit other plaintiffs to pecuniary loss; certainly, the surviving relatives of non-cruise ship fatalities must feel the same sorrow, loss of companionship, and loss of affection as those to whom the proposed amendment would give a more expansive remedy. It is also difficult to justify exposing cruise ship operators to damages for non-pecuniary loss while limiting the exposure of smaller private vessels to economic damages.

The proposed amendment's geographic scope is also riddled with inconsistencies. In its original form DOHSA set a "bright line" boundary at which it applies to all maritime deaths – three nautical miles from the shore of the United States. After the amendment, DOHSA's geographic boundary would move out to 12 nautical miles from shore for cruise fatalities but would remain at three nautical miles for all deaths not subject to the amendment. Inside 12 nautical miles, DOHSA would not apply at all to cruise fatalities and the resulting claims would be subject to such "*Federal, State, and other appropriate law*" as may apply. Thus, between 12 nautical miles and three nautical miles from shore, DOHSA would not apply to cruise fatalities but it would apply to all other traditional maritime deaths, leaving cruise operators subject to the varying remedial and liability schemes of state law. Neither the text of the current House and Senate bills nor the relevant legislative history provide any explanation for these geographical distinctions, or for why one boundary applies to cruise fatalities while different boundaries apply to everyone else.

While it is difficult to deny the emotional appeal of expanding DOHSA's remedies to provide compensation to the survivors of those whose lives may otherwise "*appear worthless in the eyes of the law,*" the Cruise Passenger Protection Act seems to be a significant step backwards. It expands the class of beneficiaries who would receive preferential treatment through the availability of non-economic damages to include the surviving relatives of cruise ship fatalities, but it fails to provide a reasoned basis for drawing such a distinction between them and the surviving relatives of other maritime deaths. It draws seemingly arbitrary geographic boundaries with no explanation for why it does so. It is unlikely to change the operational procedures and policies of cruise ship operators, who already take steps they deem necessary to avoid loss of life on their vessels. Ultimately, it places emotional appeal above uniformity and equal treatment under the law, and Congress would be well-advised to reject it. ■

Article published on the Steamship Mutual website August 2017.

SSM Work with Marine Catering Training Consultancy

In recent months, the Managers have been working with Marine Catering Training Consultancy ("MCTC") of Limassol to develop a computer based training course on Safe Food Handling & Nutrition. This project was selected because the objectives of this training course are perfectly aligned with one of the key messages contained in the Club's "Fit for Life" DVD – the importance of a balanced diet and nutritious food in maintaining crew health and physical wellbeing.

With financial support from The Ship Safety Trust, the Managers have been closely involved in the development of the five modules which comprise the course. These modules cover an "Introduction to the Galley", "The Basics of Cooking", "Health and Nutrition", "Managing a Budget" and "Food Safety Management". The course is intended for existing or aspiring sea-going cooks and should enable users to cater effectively to accommodate cultural diversity and to generate efficiencies through improved stock and cost control.

With the support and consultancy from MCTC that is available as an adjunct to this course, further advice and guidance can be provided on issues such as menu selection with direct reference to the supplies that are available on the vessel. The Club's loss prevention posters on Galley Safety and Hygiene are also incorporated in the course. Further details will be provided to Members once the course has been completed and released. Chris Adams, Head of European Syndicate and Loss Prevention said:

"The health and wellbeing of seafarers is vitally important to safe shipping operations. This training course from MCTC will make an extremely valuable contribution to that objective, and we are delighted to have had the opportunity to participate in its development."

Further information relating to courses offered by Marine Catering Training Consultancy can be found via their website http://www.mctconsultancy.com/index.php ■

Back to contents

A Case Study: Stowaways – What to do When it is Already Too Late?

Shipowners take reasonable precautions to prevent stowaways boarding their vessels. However, if stowaways nonetheless manage to board, precisely how easy is it to repatriate them?

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Introduction

Steamship recently assisted one of its Members in the successful repatriation of two stowaways that had boarded the vessel in Morocco. The case serves as an example of the difficulties shipowners face repatriating stowaways. In this case:

- The stowaways were on board for 46 days.
- In trying to repatriate the stowaways eight different jurisdictions were considered.
- The majority of these refused to take the stowaways.
- Many of the jurisdictions had also increased requirements for the vessel's call at their location, even though the stowaways were not allowed to disembark.

The attempts at repatriation in this case are set out below.

Process of Repatriation

Two stowaways were discovered on board the Members vessel at Gibraltar. They had no common language with the crew, and no documents, but it was established that they were Moroccan nationals, both aged 18.

The authorities in Gibraltar refused to allow them ashore, and the vessel continued her voyage towards India with both of the Moroccans on-board. They were provided with clothing, regular meals, exercise and accommodation on-board.

Maclaims Maritime Morocco, one of the Club's correspondents in Morocco, tried to obtain documentation, but the stowaways were not co-operative. As the ship sailed towards the Suez Canal, both the Moroccan and Egyptian correspondents worked with government and embassy staff to obtain temporary travel documents, but it was not possible to repatriate the stowaways from Egypt.

The ship was scheduled to discharge her cargo at Indian ports, and then proceed to Malaysia to load a cargo for Europe.

However, the Club's correspondents in these countries advised that the authorities would not allow the stowaways to be landed. At Singapore, where the vessel was scheduled to bunker, the local correspondent advised that, while it might have been possible to get permission to land the stowaways, the vessel would not have been allowed to sail until the stowaways had landed in their home country.

Additional costs were also incurred:

- The Indian authorities required local guards to be employed throughout the vessels port call;
- The Singapore authorities required the Master to post a US$10,000 bond per stowaway.

> "They were becoming restless and disruptive, causing difficulties for the crew. Maclaims Maritime Morocco were very helpful, having many telephone calls with the stowaways to explain the situation."

Back to contents

At the first load port in Malaysia the authorities detained the vessel on completion of loading and required an ISPS audit and security guards to be employed on-board for the duration of the vessel's stay in Malaysian waters.

By the time the vessel sailed from Malaysia, bound for Turkey and Italy, the stowaways had been on board for around a month. They were becoming restless and disruptive, causing difficulties for the crew. Maclaims Maritime Morocco were very helpful, having many telephone calls with the stowaways to explain the situation.

Fortunately by this time the stowaways were willing to go home and their families provided a copy of a passport for one and a copy of a birth certificate for the other. However, this created another problem: it was possible to repatriate the stowaway with the passport earlier than the other, but there was a risk of adverse impact on the latter. To avoid this risk, and notwithstanding the consequent extra days onboard, the Members agreed that they would both have to come off the vessel together.

After loading in Malaysia the vessel was due to pick up armed guards off Galle, Sri Lanka to transit the Gulf of Aden. Investigations in Sri Lanka suggested it might be possible to land the stowaways. This avenue was pursued, given the advice from Club's correspondents was that it would be difficult to land the stowaways in Turkey and Italy.

Intermarc, the Club's Sri Lankan correspondent, worked with the Moroccan correspondents to secure emergency travel documents to land the stowaways. This was complicated by the absence of a Moroccan embassy in Sri Lanka; some documents had to be issued by the Moroccan embassy in India and couriered, or sent by diplomatic bag, to Sri Lanka.

Given the limited time, to expedite the issue of documentation, and in co-ordination with the Moroccan embassy in India, the correspondent in Morocco travelled to Rabat to attend the relevant government department.

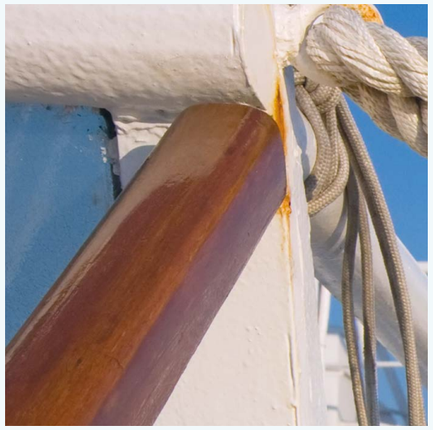
However, and notwithstanding these efforts, it became clear that the vessel would arrive off Galle a day before the original travel documents arrived from India; furthermore, the travel visas for the escorts to accompany the stowaways home would take even longer to obtain. Intermarc, therefore, negotiated for the vessel to depart as soon as the stowaways had disembarked, instead of having to wait until all of the travel documentation was in place and the stowaways had left the country.

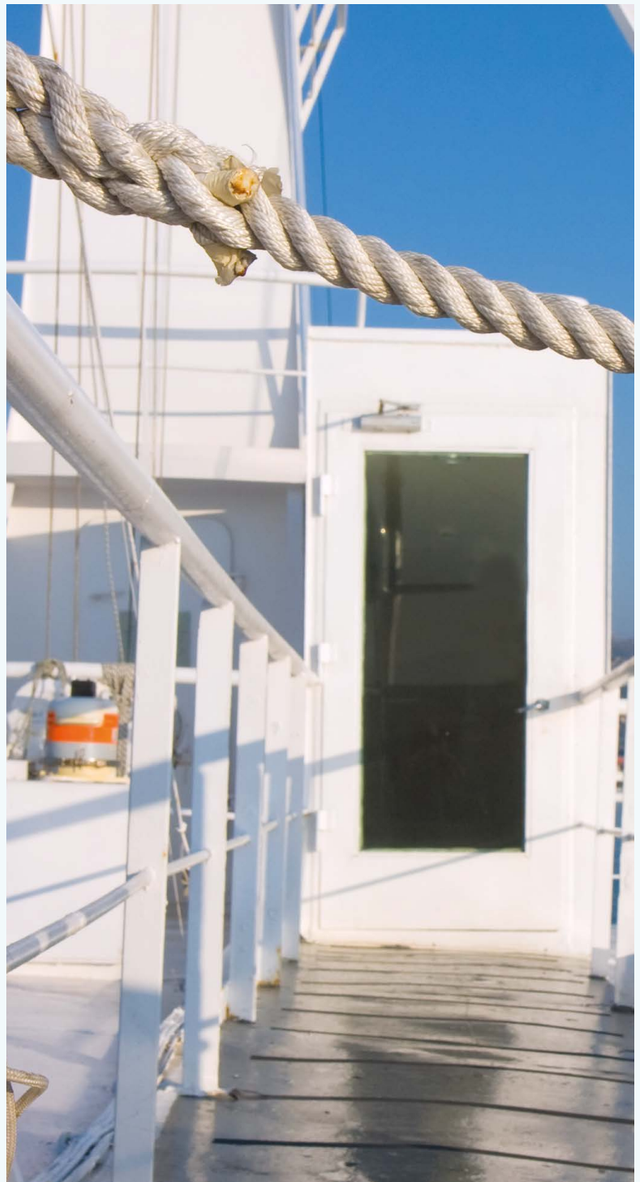
46 days after they boarded, the two stowaways finally disembarked from the ship off Galle, in good health, and appreciative of the care given to them by their reluctant hosts.

For the stowaways that was not the end of the saga. They were held in Sri Lanka for a few more days while visas and flights were arranged and when, accompanied by the security guards, they were due to fly out of Colombo late on a Friday evening the airline refused to accept them on the flight even though they had earlier been cleared to fly. As such at very short notice Intermarc arranged tickets with another airline and the stowaways finally took off for Morocco that night. The Moroccan correspondent advised that on landing the stowaways were briefly arrested.

Summary
A growing number of jurisdictions are adopting stricter position so far as allowing stowaways to disembark vessels. In view of this, whilst the Club will assist Members to resolve stowaway problems, prevention is the best course. The Club's guidance aimed at reducing the risk is set out at – 'Stowaways – Preventative Guidance' (https://www.steamshipmutual.com/publications/Articles/Stowaway0309.html). ■

"… at very short notice Intermarc arranged tickets with another airline …"





US Crew Personal Injury Claim Compelled to Arbitration

US crew members have traditionally been able to avoid the enforcement of arbitration provisions in their employment contracts on the basis that their nationality makes them exempt from having to arbitrate Jones Act and General Maritime Law claims. The 11th Circuit has now provided the framework for when such an argument will be invalid.

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Gerald Dahir, an American crewmember working for Royal Caribbean Cruise Line ("RCCL"), was injured during his service on-board the vessel as a result of which he filed suit in Federal Court, Texas for damages.

In response, and in accordance with the terms of his employment contract, RCCL filed a motion to have the claim removed to arbitration.

When determining whether to refer a case to binding arbitration the court must first consider whether the employment contract falls within the terms of the New York Convention ("the Convention"). The Convention applies to the recognition and enforcement of foreign arbitral awards and requires the courts of contracting states to give effect to agreements to arbitrate. The Convention requires the party seeking to rely upon the agreement to show:

1. There is a written agreement to arbitrate the matter;

2. The agreement provides for arbitration in a Convention signatory nation; and

3. The agreement arises out of a commercial legal relationship.

The US courts have also held that agreements arising out of a relationship which is entirely between citizens of the United States do not fall under the Convention.

Fairly bargained arbitration clauses in the employment contracts of non-US crew are now routinely upheld by the courts. See *Lindo v NCL (Bahamas) Ltd* (11th Cir. Aug.29, 2011) – "US – Enforcement of Arbitration Clauses in Crew Contracts" (https://www.steamshipmutual.com/publications/Articles/LindoNCL0212.htm).

However, often a US crewmember will contend they are exempt from having to submit their Jones Act and General Maritime Law claims to arbitration[1] because:

i. The agreement includes a US party and;

ii. The employment agreement constitutes a seaman's employment contract and, as such, is expressly excluded from coverage under the Federal Arbitration Act ("FAA"). (The FAA is a domestic act passed by congress which allows disputes to be resolved via arbitration but which does not apply to employment contracts.)

When considering the first point the courts have determined that it is not as simple as merely determining if one of the parties to the agreement is a US citizen but that one also needs to determine whether the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship with one or more foreign states.

So far as the second point is concerned, the courts have considered this and ruled that the FAA only applies to the extent that it is not in conflict with the Convention. Because the Convention does not recognise an exception for seaman's contracts there is a conflict and the exclusion under the FAA, therefore, does not apply.

In *Dahir* the plaintiff did not dispute the fact that the first three requirements for arbitration to be compelled had been met and the argument focused upon whether his status as a US citizen rendered the arbitration agreement invalid.

Dahir argued that the contract did not envisage performance abroad because he only worked in international waters and not ashore at a foreign destination. The Court in *Dahir* looked to the decision in *Alberts v Royal Caribbean Cruises Limited (Alberts)* for guidance.

In *Alberts* the Court concluded that it was sufficient for the employment to involve performance *"in or travelling to or from foreign state"* to prove that performance abroad was contemplated. It held that the contract envisaged performance abroad because the vessel the crew member was assigned to did enter international waters on route to foreign destinations and, therefore, the arbitration clause was enforceable.

The *Dahir* Court adopted this line of reasoning and held that it was not necessary for the crew member to work on foreign shores to evidence performance abroad. It was enough that the accident occurred in international waters, on route to a foreign port, to demonstrate the contract between employer and employee did envisage performance abroad. This being the case the Convention requires that the claimant be compelled to arbitrate his claim against RCCL.

Dahir argued that to compel arbitration went against the public policy of protecting seaman and also that the Federal Employer's Liability Act prohibited an employer from exempting themselves from Jones Act liabilities. In response to these two arguments the Court held that, firstly, there is a very strong public policy favouring arbitration and that it was the plaintiff's burden to provide persuasive evidence that enforcement created a compelling issue of public interest; a burden which in this case he failed to meet. The Court further rejected the second argument on the grounds that when arbitrating a case the seaman does not relinquish the rights they have but rather they simply move to a different forum with all rights preserved.

This decision is helpful to ship-owners employing US crew working abroad where there is a desire to have those crew submit to binding arbitration, outside of the high exposure US court system. ■

Article published on the Steamship Mutual website September 2017.

[1] See also 'Post-Accident Arbitration Clauses for Jones Act Crew Claims' (https://www.steamshipmutual.com/publications/Articles/postaccidentarbit.htm).

Miscellaneous

Save the Steam Trawler "Viola"

A UK charity is fundraising in order to recover a trawler with a remarkable history and bring her home to Hull for restoration.

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"Viola" is an Edwardian era British steam trawler currently beached at Grytviken on the remote South Atlantic island of South Georgia. One of only four surviving British vessels to have seen active service in the First World War,[1] she was requisitioned by the Admiralty in 1914 for use as an armed trawler. A UK charity, the Viola Trust, aims to raise the funds needed to return "Viola" to her home port of Hull, and to restore her as a museum and a memorial to the vital contribution of coastal communities to the war effort. This article is a brief account of "Viola's" unique history.

The advent of steam railways and steam trawlers allowed cheap and fast distribution of fresh fish to Great Britain's growing industrial population, and sometime between the 1840s and the 1870s fish and chips became the UK's national dish. 'Boxing' was an early method of intensive fishing, where trawler crews packed the newly caught fish in boxes which were then transferred to fast steam cutters, which rushed the catch to Hull and other docks including London's Billingsgate Market. Tokens attached to the boxes meant each vessel was paid for the fruits of its own labour. In September 1905 Charles Hellyer, Managing Director of the Hellyer Steam Fishing Company and Hull's leading trawler owner, announced plans to build a new North Sea boxing fleet of 50 ships, and placed orders for a total value of £450,000 (equivalent to £50 million today). The bulk of Hellyer's order was won by the Grovehill shipyard of Cook, Welton & Gemmell at Beverley in the East Riding of Yorkshire. All the vessels in the Hellyer fleet were named after characters from the plays of William Shakespeare and yard number 96 was named "Viola" after the heroine of *Twelfth Night*.

A flush-decked vessel of 173 GT with a length overall of 108 ft and a beam of 21 ft, "Viola" had little superstructure other than the raised engine room casing and small open bridge. After her launch in January 1906, she was towed downriver to Hull to have her coal-fired boiler and triple expansion engine fitted by Amos & Smith. "Viola" was crewed by a skipper, mate, bosun, three deckhands, first and second engineers, fireman and cook. On joining the Hellyer fleet she was assigned the identification H868.

While previous boxing fleets had taken years to assemble, short delivery dates meant Hellyer's new fleet of 50 vessels was ready in just five months. The fleet's first sailing on 20 February 1906 was a rare spectacle and a proud day for Hull. From then until 1914, it was constantly at sea, shooting, towing and hauling the nets, gutting and packing the catch, and rowing the fish boxes to the five steam cutters. Individual trawlers returned to port every five to six weeks for crew leave, new bunkers and provisions. The fleet operated in all weather and six trawlers and their crews were lost in storms prior to the First World War.

While the Hellyer family was forming its ambitious new trawler fleet, the Royal Navy was building its new revolutionary all-big-gun steam turbine battleship. HMS "Dreadnought" was launched at Portsmouth three weeks after "Viola" was launched at Beverley. With her armament of ten 12-inch guns, displacement of 17,900 GT and maximum speed of 21 knots, she overturned all the long-established principles of compromise in naval architecture. Her superiority was so obvious that all naval powers were forced to build new battleships to the same design, exacerbating the naval arms race between Great Britain and Imperial Germany. Ultimately the British Navy was able to maintain numerical superiority but only at exorbitant cost. When the war began, rather than risk its High Seas Fleet in an encounter with the superior strength of the British Grand Fleet, Germany decided to rely on two principal methods of offence, mines and submarines.

Having concentrated on winning the race to build capital ships, the Royal Navy lacked sufficient small craft to deal with such threats, especially since its destroyers were required as screens for the battleship and cruiser squadrons. However, the UK had the world's largest merchant fleet and fishing vessels were well suited to minesweeping and patrol work, being handy in a seaway, drawing little water and carrying small crews. In 1910 the Royal Navy Reserve formed a trawler section and made arrangements with leading trawler owners to hire their vessels when required. Their crews were given training in minesweeping duties. By the outbreak of war, 146 trawlers were part of this scheme but many more had to be hired along with whalers, drifters, steam-

Back to contents

yachts, paddle-steamers and motor-boats. These small ships would ultimately number nearly 4,000 and evolve into a supplementary fleet, the Auxiliary Patrol. Manned by up to 50,000 merchant seaman, fisherman, yachtsmen and naval enthusiasts, it kept open the seaways around the British Isles so that the mercantile marine could continue to move vital food and raw materials to Great Britain.

When "Viola" was requisitioned in mid-September 1914, her trawling gear was removed and she was armed with a 3-pounder gun. As His Majesty's Trawler "Viola", with Admiralty designation 614, she was sent to the Shetland Isles as part of the Auxiliary Patrol. Her wartime crew were Hull trawlermen under skipper Charles Allum. Based at Lerwick or Scalloway, she operated in a unit consisting of five trawlers and a yacht and was engaged in boom duties – guarding the anti-submarine nets that stretched across the harbour entrances – or sent out on patrol searching for U-boats or minefields. In October 1915 the unit was transferred to the River Tyne and "Viola" was refitted with a 12-pounder gun, hydrophones and depth charges, which greatly improved her ability to hunt, chase and sink U-boats.

North Sea fishing continued during wartime but as single-boat operations rather than in fleets. Losses were high as the unarmed trawlers were easily destroyed by U-boats, mostly with guns or explosives in order to save torpedoes. Trawler crews were usually allowed to escape in their rowing boats. By the middle of 1916 the active fishing fleet had been decimated. As the owners were reluctant to order replacements during wartime, the Admiralty began ordering armed trawlers direct from shipyards. Crew shortages meant fishermen in their 70s and 80s returned to sea.

HMT "Viola" had an eventful war. In 1917 she exchanged fire with a U-boat shelling a Norwegian steamer and successfully drove it off, and helped to rescue the crew of a coal barge driven ashore near Scarborough, actions for which Charles Allum was later Mentioned in Dispatches. In 1918 "Viola" and her group of armed trawlers hunted and destroyed two enemy submarines, UB-30 and UB-115. The latter was sighted by the airship R29 which dropped two bombs, the only recorded success by any British rigid airship in wartime. "Viola" was released from Admiralty service in February 1919.

The Hellyer Steam Fishing Company did not reconstitute its boxing fleet after the war and the company was liquidated in 1919. From a fleet of 47 vessels at the start of the war, 22 were lost – four on Admiralty service and 18 while fishing. The Hellyer family decided to sell off their surviving fleeting trawlers and instead concentrate on deep water fishing. In 1920 "Viola" was sold to Norwegian interests, renamed "Kapduen" and then "Dias", and later converted to a whale catcher for expeditions off the Angolan coast. The modifications included the installation of a harpoon platform on her bow and moving the bridge to a position forward of the funnel, radically changing her appearance.

In 1927 "Dias" was sold to Compañia Argentina de Pesca SA and moved to Grytviken where she was used to hunt elephant seals, as well as for expedition and exploratory work. Her relocation to Antarctica saved her from the fate of her surviving sisters, many of which were either wrecked or sunk by enemy action in the Second World War, or scrapped. After "Dorcas" was scrapped in Spain in 1973 "Dias" / "Viola" became the sole survivor of the Beverley-built Hellyer vessels. She underwent further modifications in the 1950s when her old bridge was replaced with a less attractive modern one, and her steam engines were converted to burn oil instead of coal.

When Pesca transferred its whaling interests to the British Company Albion Star in 1960 "Dias" returned to the British flag. She was laid up at the whaling station jetty in King Edward Cove when Grytviken station closed 1964 together with a vessel named "Albatros". After the last caretaker left in 1971, the two ships were left to the elements and sank at their mooring under the weight of accumulated snow in 1974.

In March 1982 an early action of the Falklands War took place at Grytviken after a group of Argentine scrap metal merchants landed there, ostensibly to scrap "Dias" and other equipment, but whose landing party included Argentine special forces. Later in the conflict there were echoes of 1914 when Cumberland Bay became a major British transhipment base and five requisitioned Hull trawlers ("Cordella", "Farnella", "Junella", "Northella" and "Pict") anchored in the Bay, along with Cunard's "Queen Elizabeth 2".

In the late 1980s a major environmental clean-up of the South Georgia whaling stations was undertaken, and in 1991 the former whaling station manager's house at Grytviken opened as the South Georgia Museum. "Dias" was refloated and beached in 2004, and her funnel was removed for safety reasons. It is hoped that £1.75 million can be raised in order to bring the ship home to Hull for restoration, repeating the successful salvage in 1970 of Isambard Kingdom Brunel's "Great Britain" of 1843 from Sparrow Cove in the Falkland Islands, now fully restored at Bristol. Further information including how to donate is available on the Viola Trust's website: http://www.violatrawler.net/.[2] ■

Article published on the Steamship Mutual website September 2017.

[1] Along with the light-cruiser HMS "Caroline" and monitor HMS "M33", preserved at Belfast and Portsmouth respectively; Flower class sloop HMS "President", which was permanently moored on the Thames Embankment from 1922 to 2016, is currently at Chatham and, lacking funding, is close to being scrapped.

[2] See also Robinson R and Hart I, *"Viola" The Life and Times of a Hull Steam Trawler* (Lodestar Books, 2014).

[3] Photograph of "*Dias*" (ex-"*Viola*") at Grytviken in 2016 courtesy of Solis Marine Consultants

Monitoring, Recording Verification (MRV) of CO_2 Emissions from Ships

Compliance with the EU MRV (2018) and the review initiative for alignment with the IMO global CO_2 emission data collection.

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In February 2014 the European Parliament endorsed a binding European Union (EU) 2030 target of a 40% reduction in greenhouse gas emissions compared to the 1990 levels. Moreover, all sectors of the economy would be required to contribute in reducing greenhouse gas emissions.

The driver behind the regulation was a study carried out by the IMO as part of its efforts to reduce greenhouse gas (GHG) emissions. There are considered to be around 1000 million tonnes of carbon dioxide (CO_2) annually contributing to 2.5% of global emissions[1]. Based on the study it's estimated that a 75% reduction in GHG emissions could be achieved by the application of operational measures and the implementation of existing technologies.

As a result of the studies the EU adopted Regulation 2015/757 in April 2015 to bring maritime emissions into the greenhouse gas reduction commitment. The regulation entered into force on 1 July 2015 and becomes fully effective on 1 January 2018. It requires the setting up of a system of monitoring, reporting and verification of CO_2 emissions from the fuel consumed in the engines, boilers and inert gas generators of vessels.

Regulation 2015/757 applies to all ships, regardless of the flag, of 5000GT and over, calling at the ports of EU member states, and additionally Norway and Iceland. However, it is not applicable to ships that are not carrying cargo or passengers commercially, such as dredgers,and vessels engaged in ice-breaking, pipe laying or offshore construction activities.

Exceptions to the requirements also extend to specific vessels where all voyages during the reporting period either start or end at a port under the jurisdiction of a member state and the vessel has performed more than 300 voyages during this reporting period. In such cases only the annual report of the total aggregated emission values is to be submitted.

The monitoring plan required is to be considered in two parts:

1. voyage monitoring for emissions in each regulated voyage, and

2. annual monitoring for the total aggregated emission values.

The collection of data of the CO_2 emission on a per voyage basis is to begin from 1 January 2018 upon successful assessment of the monitoring and collection plan by the appointed verifier. The submission of a monitoring plan to the verifier should have been completed by 31 August 2017.

A list of accredited verifiers (correct as at May 2017) includes:

- American Bureau of Shipping
- Bureau Veritas Certification Holding SAS – UK Branch
- Centre Testing International (Shenzhen) Corporation
- Class NK
- DNV-GL
- Dromon Bureau of Shipping
- EMICERT
- Lloyds Register Quality Assurance Ltd.
- RINA
- SGS United Kingdom Ltd.
- VERIFAVIA (UK) Ltd.

Additionally, Lucideon CICS Ltd. has been accredited as a verifier by UKAS, the national accreditation body of the United Kingdom.

The bodies listed above have been accredited based on the EU's delegated regulation EU 2016/2072.

According to Regulation 2015/757, four monitoring methods have been proposed for adoption. These are to be considered on a case by case basis for a fleet and each vessel and depend on the type of fuel used on board, the availability of monitoring equipment and the vessels' operational profile:

- Method A – Bunker fuel delivery note and periodic fuel tank readings to calculate fuel consumed.
- Method B – Bunker fuel tank monitoring on board for fuel consumption calculations in the period.
- Method C – Fuel consumption data from flow meters linked to fuel combustion and CO_2 emissions.
- Method D – Direct CO_2 emission measurement in the exhaust gas uptake. The fuel consumption to be calculated using the measured CO_2 emission and the applicable emission factor of the fuel. The calibration methods and uncertainty associated with the devices shall be specified in the monitoring plan.

The monitoring plan is to be submitted to one of the accredited verifiers, listed above. The monitoring plan and emission reports are required to correspond with the model templates located in 'Annex I of EU Regulation 2016/1927' (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1927&from=EN). The plan and recording could be in the form of a data file such as Microsoft Excel, .csv files or a web based tool to enable direct upload.

Thetis MRV is a web based application developed and maintained by the European Maritime Safety Agency for companies to submit and generate

"As a global initiative in monitoring and control of GHG the IMO, at the 70th MEPC session, also adopted a requirement for the mandatory collection of data on CO_2 emissions from the fuel oil consumed on vessels."

emission reports and for the verifiers to assess and issue a Document of Compliance ("DOC") all in one location. It is also possible to create monitoring plans on the *Thetis MRV.* The system has been available since 7 August 2017 and can be used after setting up an account. Access to the web application is only available to shipping companies, verifiers and Flag States. *Thetis MRV* can be accessed at: https://mrv.emsa.europa.eu.

The first submission of the emission results is to be made by 30 April 2019 after being successfully verified by the nominated verifier. The submission of data is through the EU *Thetis MRV* system.

On satisfactory verification the verifier is to issue a DoC with a validity of 18 months after the end of the reporting period and inform the European Commission and the Flag State. The DoC is to be carried by the vessel from 30 June 2019 and will be subject to inspection by the port state authorities.

Regulation 2015/757 also requires Member States to carry out inspection on vessels entering their ports for compliance and to penalise those in the case of non-compliance. There is the possibility of expulsion or detention if a vessel fails to comply for two or more reporting periods when a reasonable time for rectification has passed.

In the case of a vessel calling at an EU port for the first time after 31 August 2017 the company is required to submit a monitoring plan to the verifier no later than two months after vessel's first call at a port under the jurisdiction of an EU member state or Norway and Iceland.

As a global initiative in monitoring and control of GHG the IMO, at the 70th MEPC session, also adopted a requirement for the mandatory collection of data on CO_2 emissions from the fuel oil consumed on vessels. MARPOL Annex VI was amended in 2016 with the addition of Regulation 22A, applicable from 1 March 2018, that is similar to the EU MRV and is applicable to vessels of 5000 gross tonnage and above.

The methodology for collection and processes for submission of data is to be included in the Ship Energy Efficiency Management Plan (SEEMP) which has been a requirement as per MARPOL Annex VI Regulation 22 since 1 January 2013. The guidelines for the development of the revised SEEMP are included in IMO resolution MEPC 282(70).

Collected data is to be submitted to the Flag State annually and within three months after the end of each calendar year. The Flag State, upon verification of the submitted data, will issue a Statement of Compliance to the vessel. Owners are required to contact the respective flag administration to determine the extent of that state's delegation of compliance procedures to the verifiers.

The Flag State is required to subsequently submit the collected data to a 'Ship Fuel Oil Consumption Database' administered by the IMO. In turn, the IMO will analyse the collected data for, among other things, the adoption and implementation of revised strategies on GHG emission controls.

It is noted that there are certain differences in the data collection systems of the EU and IMO; for example the EU MRV requires the transport work data and annual aggregate values to be submitted in addition to the per voyage figures. Moreover, collected data EU MRV will be publicly available along with the details of the vessel it refers to, whereas only the emission figures submitted to the IMO will be available in the public domain with no specific vessel references. Other differences relate to the verifiers carrying out the initial plan assessment and data verification.

Given that there will be two data reporting systems required for vessels operating from/to and within the EU, and based on representation from the wider shipping community, the EU MRV is currently under review "*..with the aim to align the EU MRV with the global data collection system to the extent considered feasible while ensuring its effectiveness and efficiency*". This is covered under the impact assessment initiative Ref. Ares (2017) 3112662 dated 21 June 2017. It is to include a 12 week public consultation with stakeholders (ship owners, operators, ports, logistic companies public authorities, accreditation bodies, verifiers, subject experts) and civil society in general.

Such a review is required as per the provisions of EU Regulation 2016/757 Article 22 para. 3: "*In the event that an international agreement on global monitoring, reporting and verification system for greenhouse gas emissions or on global measures to reduce greenhouse gas emission from maritime transport is reached, the Commission shall review this Regulation (EU MRV) and shall, if appropriate, propose amendments to this Regulation in order to ensure alignment with that international agreement*".

The Club recommends a common system of data collection and monitoring, one that will comply with the existing EU MRV regulation and also include the IMO global data collection system requirements, to be considered. Further, with a provision for revising the system in anticipation of a revision to the EU MRV regulation in due course when the IMO data collection system is operational. ■

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[1] IMO, GHG3 Executive Summary and Report (http://www.imo.org/en/OurWork/Environment/PollutionPrevention/AirPollution/Documents/Third%20Greenhouse%20Gas%20Study/GHG3%20Executive%20Summary%20and%20Report.pdf)

A Vessel Does not Comply with Regulations or Requirements – Who Pays for Consequent Modifications?

It is not always straightforward to determine who bears the risk of additional equipment or vessel modifications to comply with regulatory changes or differing port characteristics and requirements.

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Vessels routinely trade around the world calling at a multitude of different ports whether for cargo work or for other operations such as bunkering. As is to be expected ports do not have uniform characteristics and as a result may have differing requirements that vessels may have to comply with before being allowed entry or to berth – for example particular lengths or numbers of mooring lines. If so questions will arise as to whether owners or charterers bear the burden of any additional equipment or, in extreme cases, modifications to the vessel – for example to be allowed to sail through the newly expanded Panama Canal.

This article discusses the various considerations that apply to allocate risk as between owners and charterers in these circumstances.

Typical Charterparty Clauses

The standard charter obligations relevant to this question are the maintenance and suitability clauses, examples of which include:

Clause 1(c) Shelltime 4 – "*At the date of delivery of the vessel under this charter and throughout the charter period…. she shall be tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator, radar, computers and computer systems) in a good and efficient state.*"

Clause 1 NYPE 1946 – "*That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.*"

Clause 1(f) Shelltime 4 – "*… she shall comply with the regulations in force so as to enable her to pass through the Suez and Panama Canals by day and night without delay.*"

Legal Requirements for a Vessel

Whether the risk of necessary vessel modifications to comply with regulation changes is an owners' or charterers' risk was considered in the well-known case of *Elli* and *Frixos* [see 'Due Diligence – Obligation to Maintain III' (https://www.steamshipmutual.com/publications/Articles/GoldenFleeceHL0109.html) and 'Due Diligence – Obligation to Maintain II' (https://www.steamshipmutual.com/publications/Articles/GoldenFleece0908.html)].

This case focused on new MARPOL regulations concerning the carriage of fuel oil which came into effect in April 2005 and at which time the vessels did not comply and could not lawfully carry fuel oil cargoes. The issue between Owners and Charterers was who should bear the risk of a change in international regulations. The Court of Appeal's answer to this question was "Owners" on the basis of an express promise by the Owners to comply with all legal requirements, including MARPOL. The Court of Appeal also confirmed that the cost of such modifications was not a relevant factor to be taken into consideration.

Similar considerations as to whether modifications are necessary to ensure a vessel can legally trade would likely be taken into account in the event of a dispute as to the obligation to make amendments

Back to contents

to a vessel's ballast water management system or to comply with other aspects of MARPOL, for example if modifications are needed to ensure a vessel can burn low sulphur fuel requirements to comply with ECA requirements. However, this will depend on the particular wording of any charter and the current specification of the vessel.

Port Regulations or Requirements Requiring Specific Equipment

The considerations are slightly different when the vessel is legally fit to carry the required cargo in the agreed trading area but difficulties are encountered as a result of a port requirement. One question which frequently arises is who bears the burden of providing additional or alternative mooring ropes when the ones on board do not satisfy the requirements of the port, and where there are delays whether hire is payable.

When considering this issue, the owners' promises that a vessel is "*in every way fit for the service*" or "*in a thoroughly efficient state in hull, machinery and equipment*" will often be relied on in conjunction with the agreed trading area although some charters also contain bespoke clauses requiring a vessel to be fitted such that it can comply with port requirements. Ensuring a vessel can comply with port requirements is relatively straightforward where there is a restricted trade for the vessel and the ports are known, but where worldwide trading is involved disputes can arise.

London Arbitration 19/01 considered who had the cost burden for supplying additional mooring lines required for a particular port in Northern Chile and, has previously been discussed in 'The importance of vessels being fit for the voyage' (https://www.steamshipmutual.com/publications/Articles/vesselsfitforvoyage0914.htm).

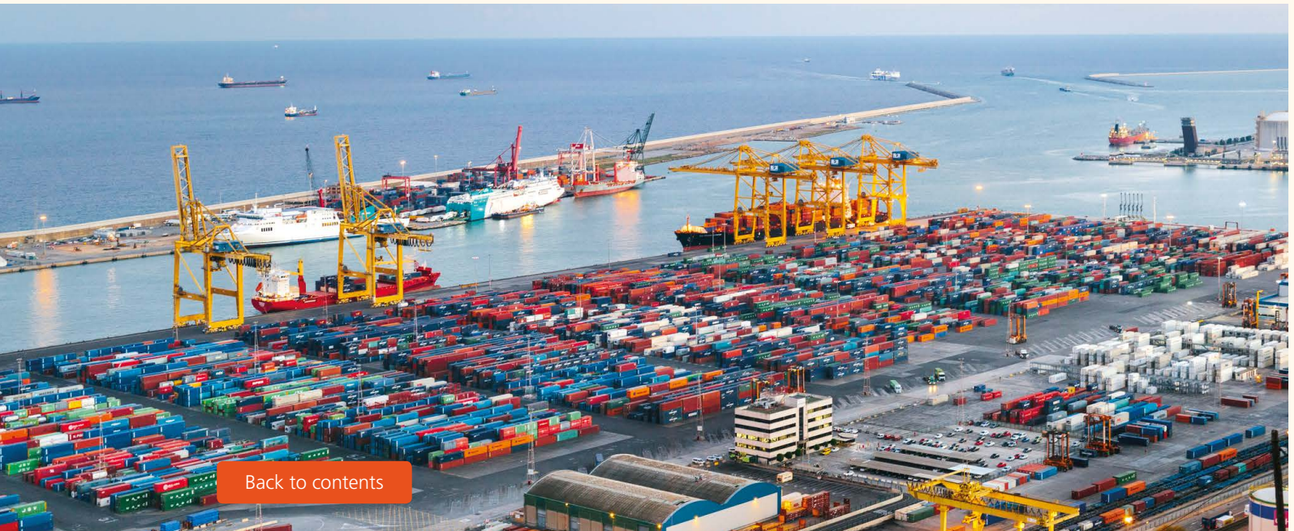
The vessel had on board five mooring lines of 197 meters in length, in accordance with the vessel design and classification requirements. The port required 14 mooring lines of 220 metres. Owners argued that the port was unusual in its requirements for mooring ropes and that they were entitled to an indemnity for the cost of complying with charterers' employment orders. The Tribunal reached the decision that the provision of mooring ropes was within owners' sphere of responsibility and there was nothing unusual in that particular port's requirement. This was on the basis that the classification requirements were the minimum requirements for trading and took no account of the practical needs of certain ports where conditions required additional securing, and that owners of commercial vessels used for worldwide trading should anticipate such requirements.

In *The Derby* [1984] 1 Lloyd's Rep. 635 and [1985] 2 Lloyd's Rep. 325 (C.A.), a case which related to a crew being ITF compliant, it was acknowledged that under a time charter a ship can often be traded to a wide range of ports and owners are not required to have obtained every certificate or permission for every eventuality. Whether a vessel is fit for service will depend on what documents would customarily be obtained by similar ships engaged on similar trades and whether there is a reasonably foreseeable risk of delay if a particular document has not been obtained.

Therefore, where a vessel only has the minimum amount of equipment available, or perhaps where the vessel's set up is unusual for that particular type of vessel, and the port requirement is not excessive or exceptional, owners may be in breach of standard charter requirements to have a vessel in every way fit for service if they cannot comply.

However, a different conclusion may be reached if the requirements of the port were particularly unusual, would not have been reasonably anticipated for that charter service, or had not been clearly communicated in advance for the vessel's arrival. In these circumstances, it could be argued that owners could not have anticipated requiring the necessary equipment to comply.

Otherwise, it is open to parties to include specific wording to the effect that a vessel will have the necessary equipment on board to comply with port requirements. Depending on the trading area, this may be an onerous requirement and one which owners may not agree to without qualification. If there is a specific obligation requiring an owner to have necessary equipment to comply with port requirements, it could be argued that this must be qualified by "reasonable" as otherwise the vessel could be in breach no matter how absurd the requirement from an operational perspective.



Back to contents

Modifications for the Panama Canal

The Panama Canal has recently been expanded with the result that wider vessels are now able to transit. This has opened up a more efficient trading route and many operators are understandably keen to utilise this to increase the profitability of their trades. However, there are various requirements for a vessel to be granted permission ['Panama Canal Mooring Line Requirements' (https://www.steamshipmutual.com/publications/Articles/panamacanal0317.htm)] and a question which has arisen is who bears the burden for ensuring the vessel complies with these requirements.

Unlike in the *Elli* and *Frixos*, a vessel can still lawfully trade even if she cannot transit the Panama Canal as a result of not being fitted such that she complies with the regulations; it is not compulsory for a vessel to use the Panama Canal, even if that is an available route. On the basis of standard charter wording, such as clauses 1 of Shelltime 4 or NYPE 1946, it is arguable that a vessel would be fit for the service as she would still be able to sail the routes envisaged at the time the charter was fixed and would be able to carry the permitted cargoes.

Accordingly, there is a good argument that, subject to specific charter provisions, owners are not obliged to have the vessel modified to comply with new canal requirements applying post fixture so that the vessel can transit the canal, and would not be in breach of their obligations if modifications are not made. This is on the basis that any modifications necessary for the vessel to comply with the Panama Canal regulations would be for the commercial benefit of charterers to enable advantage to be taken of this shorter trading route, thus make their trading more profitable. The burden to arrange and pay for these modifications would, therefore, not rest with owners. This is dependent on any other clauses specifically dealing with Panama Canal transits which may specifically address the obligations of the parties. In the absence of such clauses, the parties may wish to reach an agreement for the modifications and amongst other factors this is likely to depend on when the fixture was entered in to and on the length of term remaining on the charterparty as this will impact on the respective benefits to the parties of any modifications being made.

> "The Tribunal reached the decision that the provision of mooring ropes was within Owners' sphere of responsibility and there was nothing unusual in that particular port's requirement."

Owners and charterers will already be familiar with charters containing express clauses requiring a vessel to be suitably fitted and able to transit the Suez Canal. Therefore, for certainty on this issue, parties may wish to include an express clause, such as clause 1(f) of Shelltime 4, which addresses a vessel's ability to trade using the Panama Canal. However, it is arguable that this obligation only applies at the date of delivery and would not oblige owners to make any modifications should this be necessary to comply with future regulations.

Comment

It is clear that there is likely to be scope for disagreement if a vessel cannot comply with specific port requirements and/or if new regulations are introduced during the period of a charterparty which would necessitate changes to the vessel so as not to limit the charterers' contractual ability to trade the vessel. Parties may wish to consider this when entering into fixtures and include clauses which specifically deal with this situation. For example, it may be possible to expressly state that trading of the vessel is restricted to the suitability of the vessel as constructed and equipped and to include the necessary details of the vessel and her equipment in an appendix. Alternatively, charterers may be able to negotiate a provision placing the burden on owners of complying with regulations or requirements or otherwise sharing the cost depending on the type of regulation or requirement. This is likely of course to depend on the length of the envisaged fixture, the agreed cargoes and trading areas and the respective bargaining position of the parties. If the charter is silent on these issues any disputes are likely to be resolved on the basis of the principles discussed in this article. ■

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Back to contents

Claiming Safety Exemption From Complying with California and United States Low-Sulfur Fuel Use Regulations

Vessels must comply with local and state low-sulfur fuel regulations, although safety exemptions may apply.

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Background

Vessels operating in waters off the California coast are subject to both state and US federal regulations aimed at reducing sulfur-dioxide and diesel particulate emissions from oceangoing vessels. At the federal level, vessels are subject to MARPOL Annex VI's low-sulfur fuel use regulations which apply within 200 nautical miles of the United States' coast, called the North American Emission Control Area ("ECA"). Vessels within 24 nautical miles of the California coast must also comply with the California Air Resources Board's ("CARB") low-sulfur fuel use regulations. Both regulations require vessels to use fuel with a sulfur content of 0.1% (1,000 ppm) or less within these proscribed areas.

With prompt action and adequate documentation, vessel Masters can avoid civil penalties for non-compliant fuel use in regulated waters. CARB's regulations entitle that agency to pursue civil penalties ranging from US$1,000 to $1,000,000/day, depending on the egregiousness of the violation. Furthermore, US federal government can pursue its own civil penalties for the same occurrence in the amount of US$70,117/day.

MARPOL Annex VI's and CARB's "Safety" Exemptions

MARPOL Annex VI and CARB's regulations allow for an exemption from their respective low-sulfur fuel use requirements where doing so would present safety concerns.

California – CARB Safety Exemption

CARB's safety exemption is designed to provide the Master of a vessel with an exemption where compliance would "*endanger the safety of the vessel, its crew, its cargo or its passengers due to severe weather conditions, equipment failure, fuel contamination, or other extraordinary reasons beyond the master's reasonable control.*" See: 13 Cal. Code Regs. § 2299.2(c)(5).

If the Master of the vessel determines that the use of low-sulfur fuel would lead to such a scenario, the Master should immediately take the necessary steps to remedy the situation, including potentially using non-compliant fuel. However, the Master must also make efforts to limit the use of non-compliant fuel where reasonable. For example, if a Master finds that the main engine cannot operate reliably on the compliant fuel without risking a propulsion loss, and the Master is unable to take corrective action to mitigate the problem while the vessel is underway, then the Master can switch to heavy fuel oil to see if this alleviates the problem. To limit the use of the non-compliant fuel within the regulated area, the Master should consider whether it is feasible to safely sail outside 24 nautical miles from the California coast to conduct repairs, or whether the vessel may safely slow its speed to reduce non-compliant fuel consumption.

Federal – MARPOL Annex VI Regulation 3.1.2

MARPOL Annex VI provides a similar safety exemption. Regulation 3.1.2 provides that MARPOL Annex VI's low-sulfur fuel requirements shall not apply to any emission necessary for the purpose of securing the safety of a ship, or any emission resulting from damage to ship or its equipment provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the emission for purpose of preventing or minimizing the emission.

Claiming the Exemptions

California – CARB Safety Exemption

Obtaining CARB's safety exemption requires a two-step process. First, a party must submit to CARB a Safety Exemption Claim Form (available at https://www.arb.ca.gov/ports/marinevess/documents/marinenote2011_5.pdf) within 24 hours after the end of each episode for which a safety exemption is used. Second, within four calendar days of the submission of the Safety Exemption Claim Form, the party must submit to CARB documents (in English) establishing the conditions necessitating the safety exemption and the date(s), local time, and position of the vessel (latitude and longitude) in California Waters (i.e., 24 nautical miles off the California Coast) at the beginning and end of the time period during which the exemption is claimed. CARB requires that the Master also submit steps that will be taken to avoid or minimize repeated claims of the exemption. After receiving this information, CARB will determine whether or not to grant the exemption.

> "Vessels should be mindful that events necessitating the use of non-compliant fuel may also trigger separate USCG notification requirements."

Federal – Claiming Exemption Under MARPOL Regulation 3.1.2

The process for claiming an exemption under IMO Regulation 3.1.2 is much less defined. MARPOL Annex VI, Regulation 3.1.2 is administered by the USCG. However, a vessel's flag state also has jurisdiction related to MARPOL violations. Accordingly, a vessel should promptly notify both the USCG and its flag state of any non-compliant fuel use within the North American ECA. The USCG will take into consideration the extent to which a Master has reported the circumstances of non-compliance to its flag Administration and requested an exemption from the Flag consistent with IMO Regulation 3.1.2.

Vessels should be mindful that events necessitating the use of non-compliant fuel may also trigger separate USCG notification requirements. For example, where a Master switches to heavy fuel oil in response to a threatened or actual loss of propulsion, the Master may be required to notify the USCG of a hazardous condition or marine casualty. A separate report to the USCG and submission of USCG Form 2692 may be required in addition to notification of non-compliant fuel use.

Conclusion

Vessel Masters must comply with State and Federal low-sulfur fuel use requirements while in regulated US and California waters. However, where compliance would endanger the safety of the vessel, its crew, or cargo, a Master may seek an exemption from these regulations if (1) the Master takes immediate action to remedy the situation and, (2) restricts the use of non-compliant fuel to the extent possible.

When a vessel uses non-compliant fuel in regulated waters, the Master should take the following steps to ensure compliance with California and Federal requirements:

1. Immediately (within 24 hours) submit a Safety Exemption Claim Form to CARB;
2. Immediately notify flag State of the non-compliant fuel use;
3. Immediately notify USCG of the non-compliant fuel use;
4. Immediately notify USCG of any related hazardous condition and, if appropriate, submit a USCG Form 2692;
5. Within four days, submit to CARB documents establishing the conditions necessitating the safety exemption. ■

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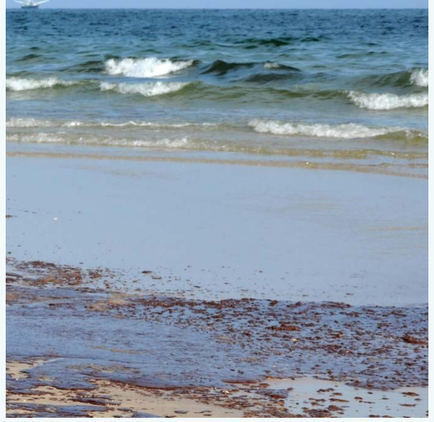

Contribution for Purely Economic Damages Available Under the Oil Pollution Act

In the event of an oil spill the USCG identifies a responsible party, usually the owner, and makes them responsible for the clean-up action. The US 5th Circuit has recently set out the basis for which a responsible party is able to recover contribution from a partially liable third party.

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The United States Court of Appeals for the Fifth Circuit holds in *In re Settoon* that the Oil Pollution Act grants a responsible party a right to contribution for the recovery of purely economic damages from a partially liable third party.

In *In re Settoon Towing, LLC*, 859 f.3D 340, 343 (5th Cir. 2017), the Fifth Circuit recently addressed the scope of the Oil Pollution Act ("OPA"), 33 U.S.C. §§2701-2762, et seq., and the rights and remedies available to a "responsible party." Before we tackle the Court's interpretation, let's set the scene. Imagine two scenarios:

(1) A tanker vessel allides with a bridge in the Houston ship channel while avoiding a collision with a negligently operated vessel. The bridge collapses, forcing a prolonged closure of the channel. Third-party carriers suffer significant delay damages but do not sustain any physical injury to their own property as a result of the bridge collapse and channel closure. These carriers seek to submit claims against the tanker that allided with the bridge.

(2) The same scenario, but the bridge does not collapse. Rather, the alliding tanker discharges oil into the channel. The channel is closed to control the recovery and cleanup process. As in the first scenario, the third-party carriers suffer significant delay damages as a result of the channel closure, but sustain no physical injury. These carries seek to submit these claims against the tanker that allided with the bridge.

Under the first scenario, the "hoary" rule of *Robins Dry Dock* will bar recovery of the carriers' delay damages – they did not suffer physical damage to a proprietary interest. Under the second scenario, however, the OPA will permit the carriers to make a claim for their purely economic losses. These differing results are commonly understood. The more narrow question facing the Fifth Circuit in *In re Settoon* focuses on what happens next.

In *In re Settoon*, the Fifth Circuit examined, continuing with the imaginary scenarios above, whether the alliding tanker, as the OPA-designated responsible party, can pursue the other negligent vessel for contribution proportionate with that vessel's comparative fault. As you can likely guess, absent the discharge of oil, the bright-line rule in *Robins Dry Dock* still carries the day. Although the OPA provides a specific provision addressing contribution, somewhat surprisingly, the Fifth Circuit and other maritime courts in the US have never addressed whether a responsible party may seek contribution from a joint tortfeasor for purely economic losses. *In re Settoon* answers that question in the affirmative.

The facts are straightforward and mirror the imaginary scenarios presented earlier. Two vessels were heading southbound on the Mississippi River. The M/V "HANNAH C. SETTOON", owned by Settoon Towing, LLC ("Settoon"), was towing two crude oil tank barges. The other, the M/V "LINDSAY ANN ERICKSON", owned by Marquette Transportation Company, LLC ("Marquette"), was towing twenty-one loaded grain barges. The "LINDSAY" began to stop just after it passed a bend in the river near Convent, Louisiana, in order to "top around" so that it could drop off three barges and head back upstream. The "HANNAH", which was traveling a few thousand feet behind the "LINDSAY", communicated with the "LINDSAY" to coordinate a "one whistle overtaking agreement."

The "HANNAH" was to pass the "LINDSAY" on her stern halfway between the "LINDSAY" and the west bank of the Mississippi River. The "LINDSAY" was to hold steady until the "HANNAH" passed before beginning her top around maneuver. Before the "HANNAH" completely passed, however, she radioed the "LINDSAY" and released her from the agreement. The "LINDSAY" reversed into the river and her stern collided with the portside bow of one of the crude-oil barges, causing seven hundred and fifty barrels of light crude oil to discharge into the river. A seventy-mile stretch of the river was closed for approximately forty-eight hours.

After the collision, the United States Coast Guard named Settoon the strictly liable "responsible party" under the OPA. In line with its responsibilities, Settoon managed the cleanup, remediation, and third-party claims for damages. Settoon then filed a Limitation of Liability proceeding pursuant to 46 U.S.C. §§30501-30512, *et seq*, in the United States District Court for the Eastern District of Louisiana. Marquette filed a claim in the limitation proceeding and Settoon brought a counterclaim against Marquette seeking contribution under the OPA and the general maritime law.

After a bench trial, the District Court apportioned fault to both parties: 65% to Marquette and 35% to Settoon. The District Court also held that because Marquette was a jointly liable tortfeasor, the OPA entitled Settoon to contribution for Marquette's share of Settoon's purely economic damages. Marquette filed a timely notice of appeal challenging the apportionment of fault and the district court's contribution holding. The principal issue on appeal was whether Settoon could receive contribution under the OPA for Marquette's share of fault for Settoon's payment of purely economic damages.

The OPA sets forth Congress's intent to streamline US federal law to provide for the quick and efficient cleanup of oil spills, disbursement of compensation to victims, and to internalize the costs of oil spills within the petroleum industry. As part of this statutory framework, the US Coast Guard first identifies the "responsible party." This party is "strictly liable" for cleanup costs and damages and is the party responsible for paying any claims for removal costs and damages that may arise under the OPA. *United States v Am. Commercial Lines, LLC, 759* F.3d 420, 422 n.2 (5th Cir. 2014). Claimants may recover economic losses absent damage to a proprietary interest from the responsible party, a bright-line exception to the long-standing American principle in maritime cases that purely economic losses are not recoverable unless the claimant can prove that it sustained damage to its own property. See *Robins Dry Dock & Repair Co. v Flint*, 275 U.S. 303, 307-309 (1927); *Louisiana ex rel Guste v M/V TESTBANK*, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc); 33 U.S.C. §2702(b)(2)(E). The only condition limiting recovery of purely economic losses under the OPA is that the loss must arise *"due to the injury, destruction, or loss of real property, personal property, or natural resources."* 33 U.S.C. §2702(b)(2)(E).

Litigation under the OPA generally works as follows: (1) the U.S. Coast Guard identifies and names a responsible party (typically the party owning or operating the source of the discharge); (2) a claimant presents its claim(s) to the responsible party; (3) if the responsible party rejects or refuses to settle

within 90 days, the OPA provides, among other things, the claimant a statutory cause of action against the responsible party for its damages; and (4) once the responsible party pays the claimant, it may seek partial or complete repayment from others by way of contribution (§2709) or subrogation (§2702(d)(1)(B) and §2715).

Because Settoon suffered or paid purely economic loss damages, it sought contribution from Marquette for those losses, arguing that Marquette's negligence contributed to the incident. Marquette argued that Settoon's contribution claim did not arise under the OPA and was instead based on the general maritime law, and therefore subject to the restrictions of the *Robins Dry Dock* rule barring the recovery of purely economic losses.

The threshold issue for the Fifth Circuit was whether the OPA creates a statutory right to contribution or whether it merely preserves contribution rights under the general maritime law. Secondarily, if contribution is available "*under the Act*," to determine the scope and whether the statutory grant allows a responsible party to recover purely economic losses from a joint tortfeasor. In answering these questions, the Fifth Circuit was tasked with first discerning the meaning of the statute.

Marquette argued that §2702(d)(1)(A) provides that a third party cannot be liable under the OPA unless it is found solely at fault. The Court quickly dismissed this argument, analyzing §2702(d)(1)(A) as a provision that substitutes a solely-liable party as the responsible party, providing a subrogation remedy to the originally-named responsible party. The Court further highlighted that §2709 deals with the concept of contribution "*from title through content*." *In re Settoon*, 859 F.3d at 348 (5th Cir. 2017). If the Court accepted Marquette's interpretation, §2709 would be eliminated entirely and restrict a responsible party to seek reimbursement only from a party that was later-designated solely at fault under §2702. Based on the plain language of §2709, the Fifth Circuit held that the OPA provides that both subrogation and contribution are available "under this Act." *Id.* at 347. But, because the OPA does not define the term "contribution," the scope of contribution required further analysis.

To determine the limits of the OPA's right to contribution, the Court looked to the OPA's standard of liability as adopted from §1321 of the Clean Water Act ("CWA"). See 33 U.S.C. §2701(17) (defining "liability" in the OPA as the standard set forth in the CWA); 33 U.S.C. §1321. The CWA provides that "*liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel … may have against any third party whose acts may in any way have caused or contributed to such discharge.*" 33 U.S.C. §1321(h). The Fifth Circuit previously held in a non-precedential opinion that the CWA does not create a right to contribution. See *Tetra Tech., Inc. v Kansas City S. Ry. Co.*, 122 F. App'x 99, 102 (5th Cir. 2005). Rather, the CWA merely preserves the right of contribution without serving as its source and that contribution rights are reserved to "other law." This is because the CWA does not have a separate section addressing contribution. Unlike the CWA, however, the OPA specifically addresses contribution. The language of Section 2709 is clear: the OPA creates a cause of action for contribution. The express terms of statute support this and to interpret §2709 any other way would make it entirely superfluous.

Next the Court examined what it means to be "*potentially liable,*" which is likewise undefined in the OPA. Returning to §2702, the section on which Marquette initially relied, the Court recognized that if a third party is found to be solely at fault, they can be substituted as the "*responsible party,*" and are therefore potentially liable. But, a party cannot be substituted under §2702 until a fact-finder confirms or rejects complete liability. Until that occurs, the potential exists that an entity who played some role in causing the discharge may be liable. The court found support for this interpretation in case law analyzing similar language in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601, et seq. Based on CERCLA case law, the Fifth Circuit held that until a party is cleared of liability, it is at least potentially liable. *See Elementis Chromium L.P. v Coastal States Petrol. Co.*, 450 F.3d 607, 612 (5th Cir. 2006); *OHM Remediation Servs. v Evans Cooperage Co.*, 116 F.3d 1574, 1582 (5th Cir. 1997).

Because the OPA expressly provides for the recovery of purely economic losses and creates a cause of action for contribution, the Fifth Circuit held that the most reasonable interpretation of the OPA is that a responsible party "*may recover from a jointly liable third party any damages it paid to claimants, including those arising out of purely economic losses.*"In *In re Settoon*, 859 F.3d at 352. Marquette was cast in judgment and was therefore liable to Settoon for contribution for its payment of purely economic losses.

Takeaways for Members, the Club, and Practitioners

The *In re Settoon* holding is important for Members and insurers involved in the movement or storage of cargoes presenting potential OPA liability. The Court's holding is a logical and equitable result. While the decision is not binding outside of the Fifth Circuit (Texas, Louisiana, and Mississippi), it is likely to find support among other circuits. With an increase in crude oil exports out of the US expected in coming years, it is important that any Member identified as a responsible party have counsel investigate any factors or parties potentially contributing to any discharge to potentially limit exposure via contribution under the OPA. ■

Article published on the Steamship Mutual website September 2017.

Force Majeure in the Aftermath of Hurricanes Harvey and Irma

Whether *force majeure* will excuse performance of contractual obligations will depend on the applicable law and particular contract terms.

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There is often an assumption that events such as the closing of the ports along the US Gulf Coast in advance, or in the aftermath, of Hurricanes will create a *force majeure* event that will automatically excuse all parties of their obligations of performance under a contract. The recent devastation caused by Hurricanes Harvey and Irma have once again given rise to questions surrounding continuing charterparty obligations if a *force majeure* event is declared.

For a detailed explanation of the concept of *force majeure* please see the Club's article – 'What is Force Majeure?' (https://www.steamshipmutual.com/publications/Articles/ForceMajeure0211.html). In summary, in some civil law systems *force majeure* can operate as a matter of law. If so, specific advice would need to be sought in that jurisdiction as to any rights that might arise. In contrast English law does not recognise a general free-standing concept of *force majeure*. For *force majeure* to be relevant there must be specific provision – in the form of a reference to *force majeure* or a clause defining events that are *force majeure* events and their effect on the contract if they arise – in the charterparty.

In the case of a specific clause making reference to *force majeure* the clause has to be carefully reviewed to determine whether the events arising fall within the definitions as set out in that clause. As with any exceptions clause the burden of proof under English law will be on the party seeking to rely on the *force majeure* clause to establish such an event has arisen, but that party will also have to show (i) its performance has been adversely affected by the event, and (ii) that both non-performance was beyond its control and there were no reasonable steps it could have taken to avoid either the event or its consequences.

In the absence of specific charterparty provisions a party has no right under English law to claim termination on the basis of *force majeure*. This applies even if there are valid *force majeure* declarations elsewhere within the contractual chain, for example a voyage charterer is able to terminate but absent provisions in the time charter the disponent owners will remain bound to their obligations to head owners[1]. English law does, however, recognise the separate concept of frustration. Frustration is the termination of a contract by operation of law due to unforeseen circumstances that either: (i) prevent achievement of its objectives; (ii) render its performance illegal; (iii) make it practically impossible to execute; and (iv) that arise without the fault of either party. The ability to rely on the doctrine of frustration will depend on the specific facts. Generally, in order to rely on the doctrine of frustration, a party would need to show that there was an unforeseeable change of circumstance which either makes the contractual obligation incapable of being performed or renders performance radically different from that which was undertaken. Frustration is not a doctrine that can be invoked lightly. Inconvenience, additional expense or temporary delay will not usually amount to frustrating events.

Although the aftermath of Hurricanes Harvey and Irma is causing delays and additional expenses to the shipping industry, it does not mean that it will automatically be impossible for a party to perform under any contracts affected by the disruptions. Whether there are rights to terminate or cancel contracts will depend on the specific facts and careful consideration of the charterparty terms. ■

Article published on the Steamship Mutual Website September 2017

[1] For a discussion on Force Majeure and causation see '*The Crudesky* – Chain of causation – Force Majeure or Not'? https://www.steamshipmutual.com/publications/Articles/ForceMajeure1113.htm

Yacht Claims and the Limitation of Liability for Maritime Claims Conventions

When damage or injury is caused by something falling outside the typical definition of a 'ship': should the LLMC still apply?

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The Limitation of Liability for Maritime Claims Convention (the "LLMC") provides specified limits of liability for two types of maritime claims: loss of life or injury, and property claims.

A shipowner can rely on the LLMC to limit liability unless *"it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such a loss, or recklessly and with knowledge that such loss would probably result"*[1].

The limits are perceived as virtually 'unbreakable', although a recent case has demonstrated that the courts can and do deny owners' rights to limit when appropriate [see 'The Atlantik Confidence – No Weakening of the Test to Deny Limitation' (https://www.steamshipmutual.com/publications/Articles/AtlantikConfidence1116.htm)].

Limitation can be used as a defence to a claim or a 'limitation fund' can be established in the court before a claim is brought.

Latest Limits

The limits provided by the LLMC are determined by the tonnage of the vessel and there can be large disparities between the quantum of a claim and the level of limitation.

The limits are reviewed periodically by the Legal Committee of the International Maritime Organization and adjusted as deemed necessary. The most recent adjustment, an increase, was agreed by the IMO in April 2012 and enacted in most contracting states in June 2015 [see '1996 LLMC Protocol – Limits of Liability Increased' (https://www.steamshipmutual.com/publications/Articles/LLMC96Inc0412.htm)]. Under English law, secondary legislation incorporating the increases came into effect on 30 November 2016.

Superyacht Claims: Lower Tonnage… Lower Limits

Despite the significant recent increase in the limits, the LLMC can still be important when handling superyacht claims where the tonnage (and, therefore, limitation) is typically much lower than commercial ships.

Under the latest amendments, liability for property damage claims for any vessel under 2,000 GT will be limited to SDR 1.51 million (about US$2.14 million as at September 2017). A large number of superyachts and most (if not all) of their toys, rigid inflatable boats ("RIB") and tenders, fall within this 2,000 GT limit. English law applies an even lower limit of SDR 500,000 (about US$709,000 as of September 2017) to property damage claims against vessels under 300 GT.

Yachts, Dinghies, Toys and Tenders

With super yacht water toys growing in popularity and variation, limitation is something that yacht owners might consider if a 'toy' (i.e. seabobs, hoverboards, semi-submersibles, tenders, jet skis and hovercrafts to name but a few) causes damage or worse, injury.

However, questions arise when damage or injury is caused by something falling outside the typical definition of a 'ship': should the LLMC still apply? Under English law, the LLMC only applies

> "… questions arise when damage or injury is caused by something falling outside the typical definition of a 'ship' …"

to 'seagoing ships'. A 'ship' is defined in the Merchant Shipping Act 1995 as *'any structure… launched and intended for use in navigation as a ship or part of a ship'* – the emphasis being on the purpose of the vessel as opposed to its physical characteristics. This definition of 'ship' has been tested in a number of English law cases.

In the case of *Steedman v Schofield*[2], a claimant suffered injury when his jet ski collided with a speedboat. The defendants argued the claim was time barred by a two year limit for claims in connection with a 'vessel' as set out in the Maritime Conventions Act 1911. The Court had to decide if the claimant's jet ski was 'used in navigation' and thus a 'vessel'.

The Court held that whilst it *"may be possible to navigate a jet ski…it is not a "vessel used in navigation.""* As the claim did not fall within the Maritime Conventions Act, the claimant had three years to bring a claim for personal injury. Sheen J contrasted the construction of a jet ski with that of a boat, which conveyed an idea of a concave structure that could be boarded. Sheen J thought that giving the term 'boat' its usual meaning, "*it did not encompass a jet ski*".

The case of *The Winnie Rig*[3] considered whether a private yacht used as a residential dwelling was a 'vessel used in navigation'. The fact that a vessel was capable of being used in navigation was sufficient to fall within the definition of ship, even if, at the time of the incident, it was not being used in that way.

The only Court of Appeal authority on what constitutes a vessel is the criminal appeal case of *R v Goodwin*[4]. A collision took place between two jet skis in Weymouth harbour and one rider was seriously injured. The defendant was accused of criminal offences under the Merchant Shipping Act. The defendant appealed on the grounds that the jet ski did not fall within the definition of 'ship'.

The Court again considered the meaning of "*use in navigation*" and decided that "*navigation*" should involve the "*planned or ordered movement from one place to another*". Crafts that were used

simply for fun and with no objective of going anywhere were not considered to be ships.

The most recent reported case to consider the definition of a ship was *The Sea Eagle*[5] . A passenger suffered a back injury during a trip around the Menai Straight when the eight metre RIB hit a wave. The defendant RIB owner argued the claim was time barred by the Athens Convention's two year limit because the injury took place on a vessel. If the Athens Convention did not apply, the three year personal injury time bar applied.

The Athens Convention defines "*ship*" as "*a seagoing vessel*" and so the RIB had to be both a "*ship/vessel*" and 'seagoing'. The Court reaffirmed the test for a vessel, being something 'capable of being used in navigation'. Jervis Jay QC gave the example of "HMS Victory" to demonstrate that, whilst no longer used in navigation, vessels can undoubtedly still satisfy the 'ship' test.

'Seagoing' was determined to be more than a vessel 'used in navigation' and the court held that it was "*necessary to consider the actual use to which the vessel in question is being put in the context of the claim being brought against her*".

Conclusion

The effect of limitation can be surprising. In a 1963 case, Cairns J held that "*The limitation of liability sometimes lead to arbitrary results*"[6]. In the appeal of the same case, Lord Denning went a step further, contending "*limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience*"[7]. Be that as it may, it can be a valuable tool if faced with a significant property damage or personal injury claim.

The facts of each case need to be carefully examined before seeking to rely on the limits of the LLMC, particularly if the claim involves a yacht, its tender or toys. Whilst tenders or toys might fall within the definition of 'vessel' if used for one purpose, less navigational roles might put them outside that definition and open owners up to a much larger exposure.

So if a claim arose on a tender used solely for pleasure purposes, might this bring about a different outcome than if that same tender were used to ferry crew or passengers to and from the shore? The answer, we think, is far from clear. ■

Article published on the Steamship Mutual Website September 2017

[1] The LLMC Convention Article 4
[2] *Steedman v Schofield and Others* [1992] 2 Lloyd's Rep. 163
[3] *The Winnie Rig* [1998] 2 Lloyd's Rep 675
[4] *R v Goodwin* [2005] EWCA Crim 3184
[5] *The Sea Eagle* [2012] 2 Lloyd's Rep 37
[6] *The Bramley Moore* [1963] 1 Lloyd's Rep. 304
[7] *The Bramley Moore* [1963] 2 Lloyd's Rep. 429

Qatari Restrictions – What Do These Mean for Shipping?

Sanctions or other trade restrictions will have an effect on trade and, therefore, on the performance of bill of lading and charterparty obligations.

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On 5 June 2017, Saudi Arabia, the UAE, Bahrain, Egypt, Yemen and Libya cut diplomatic ties with Qatar. The impact of these restrictions is evolving and Members are referred to the dedicated page on the Club's website (https://www.steamshipmutual.com/publications/Articles/Qatar_Sanction0617.htm) for information on the restrictions being applied by each country.

The current position is that Qatari flagged vessels and other vessels which have or are due to call in Qatar are prohibited from calling at certain ports in the states which have imposed restrictions. This is a major concern for the shipping industry and those which trade to this region.

In this article, the issues that may arise in consequence of the restrictions under both bills of lading and charterparties are discussed.

Change of Destination and Liberty to Deviate

Carriers who have contracted to carry cargo to or from Qatar, but are no longer able to do so due to the restrictions, are advised to carefully check the terms of the bill of lading or other contract of carriage issued.

The bill of lading terms may permit the cargo to be delivered to a destination other than that originally agreed e.g. Qatar. If so there ought not to be any Club cover implications but this will depend on the terms of the contract, including the applicable law and jurisdiction provisions applicable to the contract of carriage, and local legal advice may be necessary.

Similarly, and again subject to the contract terms and applicable law and jurisdiction provisions, a change to the port rotation which has been scheduled in order to comply with these restrictions, for example where a vessel is destined for a Qatari port but is calling at one of the affected ports prior to or following Qatar, may be possible. Many contracts of carriage include wide liberty clauses permitting deviations in such circumstances.

Even if there is no applicable liberty clause it may still be possible to deviate from the scheduled port rotation. Most contracts of carriage incorporate the Hague or Hague-Visby Rules. Article IV Rule 4 provides that a reasonable deviation shall not be deemed to be a breach of the Rules or the contract of carriage, and that the carrier is not liable for any loss or damage resulting. Subject to any other terms in the contract, if the Rules are incorporated, Members would be permitted to deviate in order to comply with the restrictions provided that the decision to do so is "reasonable". There is no clear authority on what would be "reasonable" and any deviation would be assessed on its own particular facts and circumstances.

Members are advised to always check with the Club prior to taking any decisions to deviate.

Where the circumstances allow, it may also be possible for the parties to reach an agreement that discharge will take place at an alternative place.

Transhipment

Difficulties may arise where a vessel is carrying cargoes to a number of different destinations, for example container line operators. In these circumstances, there may be the opportunity to tranship cargo, for example transferring containers onto a feeder carrier for onward carriage to Qatar, in order to ensure that the ocean carrier is able to comply with the restrictions. However, whether this will be possible in any particular port, and if so what terms might apply to Qatari bound cargo at any transhipment port, will require local advice.

Defence to Claims

As set out above, most contracts of carriage incorporate the Hague or Hague-Visby Rules. Article IV provides certain defences to cargo claims, including Article IV (g) *"Act or restraint of princes, rulers or people, or seizure under legal progress"*

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

Whilst always dependent on the applicable law and jurisdiction in which any claim is brought, these provisions may provide a defence to any cargo claim brought as a result of changes made to accommodate these restrictions.

Frustration and Force Majeure

Events which take place after entering into the contract, that are not the fault of the parties, may result in it being impossible to perform either the whole or part of a contract. Alternatively, if performance of a contract has become radically different from that which was contemplated it may be frustrated.

In circumstances where a vessel cannot get close to the nominated port, the charterparty may become frustrated. Whether a charterparty is frustrated is far from straightforward and will require a detailed factual analysis of the length and effect of the delay, for example the length of delay would need to be considered against the period of the charterparty and the extent of the permitted trading as against the areas affected by the restrictions. This analysis must be done at the time, and cannot be done with the benefit of hindsight.

However, it should be borne in mind that the fact that performance may become more expensive or more inconvenient is unlikely to be sufficient to frustrate a charterparty.

The extent and impact of the restrictions is also evolving and this may have a bearing on whether frustration can be established.

Frustration is an English law concept but most charterparties include force majeure clauses.

Force majeure is a generic term for events beyond the control of the parties to a contract which prevent, delay or hinder their ability to perform the contract. The term has no specific legal meaning and for it to have any effect, parties to a contract need to define those events which they agree constitute force majeure.

Many charterparties contain standard clauses or bespoke negotiated force majeure provisions. Whether such a clause will assist the parties will depend on the specific wording. In addition, precise notice provisions may apply in order to be able to rely on such clauses.

Legal advice should be sought before relying on frustration or a force majeure clause to bring a contract to an end.

Safe Port Warranties

Charterparties often contain warranties by charterers as to the safety of the port to which the vessel is ordered. It is well established that a port will not be safe if a vessel cannot reach it, use it and leave it without, in the absence of some abnormal occurrence, being exposed to a danger which could not have been avoided by good navigation and seamanship. Unsafety is not limited to physical dangers, but can also include exposure to political unsafety. Therefore, a port may be unsafe if there is a risk of seizure, or if the vessel may be detained or blacklisted.

Under a time charter, if an unsafe port has been nominated, owners may be entitled to refuse to comply with that order, prior to arrival of the vessel at the port. The position is slightly more complicated under a voyage charter and unless there is an express agreement with owners, charterers may not be permitted to nominate a substitute port.

Sanctions Clauses and Charterparty Orders

Charterparties often contain provisions which specifically address the parties' obligations where government actions prevent cargo from being shipped or delivered. Although these were originally prompted by the Iranian sanctions regime, they may be wide enough to cover these restrictions. For example, they may include wording such as "restrictions", "prohibitions", "sanctions" or "boycotts". It will also need to be considered whether the clauses also respond to the entities which have imposed these restrictions. Parties should carefully consider the wording of any sanctions clause, in the context of the charterparty as a whole, to establish whether they are wide enough to cover these current restrictions.

Members negotiating new fixtures should consider incorporating sanction clauses in their fixtures – for example, the BIMCO sanctions clauses.

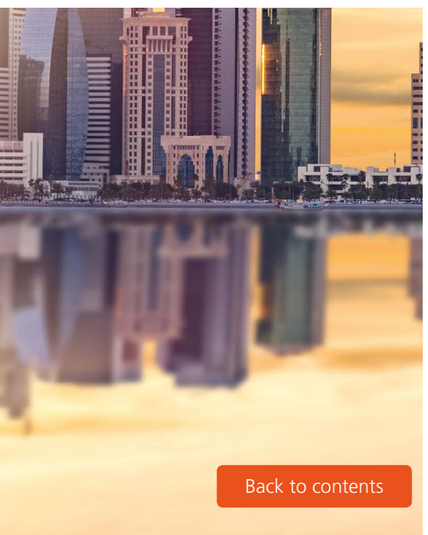
In addition to safe port questions and sanctions clauses, charterparty and bill of lading issues may arise if vessels are no longer able to perform charterer's orders as a result of the Qatari restrictions. If so, dependent on the relevant contract terms owners may be able to call for revised orders from their charterers.

Comment

It is difficult to predict how the Qatari restrictions will develop and evolve. However, it is clear that they will impact on the performance obligations in many shipping contracts. In order to determine what steps can be taken in order to avoid contravening the restrictions, the particular facts and terms of the contact will need to be carefully considered. Those entering charterparties may also wish to consider including specific wording which allocates the risk of additional delays or costs as a result of these restrictions. ■

Article published on the Steamship Mutual Website in June 2017

Further information can be found on the Steamship Mutual website on the Qatar page (https://www.steamshipmutual.com/publications/Articles/Qatar_Sanction0617.htm).



Back to contents

Back to contents

News

Edward Lee Retirement

The Board and Managers of the Club would like to express their gratitude to Edward Lee who, after 28 years of service to the Club, is retiring at the end of November. Edward was appointed the first Managing Director of the Club's Hong Kong office, which opened in 1989. Under his stewardship, the Club's presence in Hong Kong has gone from a liaison branch with a staff of just two to a full service office comprising a staff of 11.

Following graduation from the University of Hong Kong, Edward embarked on what would turn out to be a lifelong career in the shipping industry. He first worked on the shipowning side, most notably for Worldwide Shipping which subsequently evolved into the B&W Group, but then switched to broking and was at Jardine Insurance Brokers, now known as JLT, for 10 years where his talents caught the eye of the Club's managers.

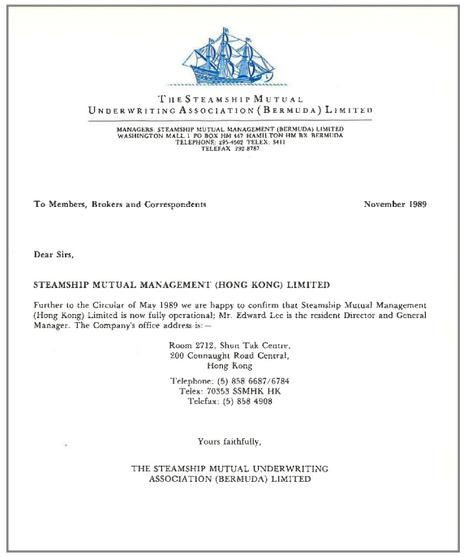
During his time at the Club, Edward has become a well-known and respected figure in Hong Kong shipping circles. Amongst other positions, he served as Chairman of the Marine Insurance Club for 7 years, and as a member of the Hong Kong Shipowners Association Executive Committee for 8 terms. He currently maintains a position on the Promotion and External Relations Committee of the Hong Kong Maritime and Port Board.

Outside of Hong Kong Edward is equally well known to the Club's Taiwanese and mainland Chinese business partners. He was instrumental in establishing and maintaining the close links that still exist today between the Club and China Shipowners Mutual Assurance Association, more widely referred in the industry as CPI.

The Executive Chairman of the Club's London representatives, Gary Rynsard, said: *"Successfully heading a local office requires special skills; you need to be close to the local members yet at the same time understand the needs of the Club as a whole. Edward met these demands with consummate professionalism. He has quite simply been one of the Club's outstanding servants, I hope he takes justifiable pride in his considerable achievements."*

A Cocktail Reception will be held at the Hong Kong Maritime Museum on 14 November to mark the occasion, following which Edward will be able to enjoy his retirement spending more time on the golf course and travelling. We wish him, and his wife Marina, all the very best for the future. ■

Edward and Marina Lee



THE STEAMSHIP MUTUAL
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To Members, Brokers and Correspondents — November 1989

Dear Sirs,

STEAMSHIP MUTUAL MANAGEMENT (HONG KONG) LIMITED

Further to the Circular of May 1989 we are happy to confirm that Steamship Mutual Management (Hong Kong) Limited is now fully operational; Mr. Edward Lee is the resident Director and General Manager. The Company's office address is: –

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Yours faithfully,

THE STEAMSHIP MUTUAL UNDERWRITING
ASSOCIATION (BERMUDA) LIMITED

Back row from left: Miguel Caballero, Edward Barnes, Felix McClure, Paul Brewer and Matthew Poole
Front row from left: Nicholas Jolly, Jack Beesley and Harry Newall

Marine Cup Challenge

With no International football to fill the summer calendars fans found themselves flocking to King's College Sports Ground in Dulwich for the annual Marine Challenge Cup. A strong turnout from the Marine sector saw 30 teams battle it out for industry bragging rights and the much coveted trophy.

Entering the tournament as one of the favourites meant that great things were expected in the early rounds from Steamship's young and dynamic squad. While many would have crumbled under the burden of such expectation Steamship clearly had the wind at their backs and were quick out of the blocks.

Several new faces were making their Marine Challenge Cup debuts; however back by popular demand and marshalling the squad was Steamship's legendary stalwart, Paul Brewer, believed to be entering his 15th Marine Challenge Cup! It had been feared that this crowd favourite's knees would no longer be able to cope with the firm summer terrain; but those fears were quickly put to rest as Paul began pulling the strings from deep.

Hill Dickinson and Spinnaker Global were both put to the sword in empathic fashion. Braces being scored by Felix McClure, and Jack Beesley, to settle any early nerves; with another individual effort from Master Beesley staking a strong claim for goal of the tournament. Whilst the opposition tried to batten down the hatches there seemed no resisting Steamship's relentless attack. With goals flying in at one end Matthew Poole was proving an impenetrable force between the sticks at the other and automatic qualification to the Cup competition was secured as group winners!

The Cup was not so plain sailing, with Steamship being caught napping from the kick-off to fall fatally a goal down against Skuld. An immediate bounce back against Thomas Miller, with an impressive second half hat-trick from inspirational Captain Edward Barnes, saw hopes of semi-final qualification increase. With only the co-hosts, Chaffe McCall, standing between Steamship and a date with destiny, Steamship rushed into a 3-1 lead, with imposing contributions from Miguel Caballero, Harry Newall and Nick Jolly. Unfortunately a combination of refereeing decisions and lapses in concentration allowed Chaffe McCall to cruelly equalise with the last kick of the game, leaving Steamship two goals short of a deserved semi-final berth. ■

“OOCL Hong Kong” arrival at Felixstowe 21 June 2017

Eastern Syndicate Executive Darren Heppel, from the Club’s Far East claims team, was at Felixstowe Point on Wednesday 21 June 2017 to witness the maiden call of the world’s largest container ship, the “OOCL Hong Kong”, to Felixstowe port.

At just under 400 metres long and fully laden, the “OOCL Hong Kong” made a truly impressive sight as she approached port. Led by a tug providing a water cannon escort in honour of her arrival, she cut smoothly through the water and was gracefully manoeuvred onto her berth with an agility that belies her great size.

The “OOCL Hong Kong” is the first vessel in the world to have a carrying capacity in excess of 21,000 containers and this milestone was recognised by Guinness World Records which has officially confirmed that the “OOCL Hong Kong” is the world’s biggest containership, having a carrying capacity of 21,413 teu.

It is noteworthy that this is the second time OOCL has set a Guinness World Records title. The previous record was set in April 2003 with the “OOCL SHENZHEN” being recorded as the largest containership (8,603 teu!) at that time.

At the time of writing, the “OOCL Hong Kong” has now been joined in service by her sister “OOCL JAPAN” which entered service on 11 September 2017. Both vessels are entered with the Club.

Steamship Mutual has enjoyed a long association with OOCL which has been a Club Member since 1973.

We are extremely pleased to hold the P&I entry for both vessels and take this opportunity to extend our very best wishes to their Masters and crew, and all at OOCL. ■

Members Training Course 2017

Steamship Mutual was proud to present its fifth Member Training Course in June 2017. Taking place every two years, Steamship's Member Training Course is designed to offer the Club's Members the opportunity to take part in practical training such as workshops, a mock arbitration and a collision simulation as well as providing an overview of current topical maritime issues.

In 2017, 24 delegates took part, from shipping companies based in Argentina, Brazil, Canada, Cyprus, Germany, Hong Kong, India, Iran, Korea, Monaco, Switzerland, UK, and USA.

Presentations are given by the Club's staff and also by leading experts from the legal and maritime industries.

The course began at Steamship's London office with an address by SIMSL's Executive Chairman Gary Rynsard followed by the first presentations on correspondents, crew claims and Pre Employment Medical Examinations. A buffet lunch gave delegates the opportunity to meet with the Club's Directors as well as claims and underwriting staff.

After lunch the delegates travelled to Southampton where the remainder of the week-long course took place. A collision simulation at the Warsash Maritime Academy was followed by an afternoon of collision related events. Talks by Club and legal speakers on collision liabilities and collision investigation led to a collision workshop allowing delegates to discuss and debate the issues presented during the day.

On subsequent days delegates took part in a major casualty workshop, Steamship's FDD department presented a mock FDD arbitration and a workshop led by Club Directors discussed the approach to discretionary cover for claims. In addition, talks were presented on cargo liabilities, oil pollution, underwriting, sanctions and loss prevention. A talk on cyber security threats to shipping was particularly topical following the recent release of the Club's DVD "Cyber Security: Smart, Safe Shipping".

https://www.steamshipmutual.com/loss-prevention/cybersecurity.htm

The social events are always popular with delegates and these included a cruise on the Solent, a historic "Titanic" themed walking tour of Southampton and a visit to Buckler's Hard.

The Member Training Course provides a valuable opportunity for Members to meet Steamship staff, industry experts and to take part in practical events designed to be of use to the Club's Members.

The Managers look forward to hosting the next course in 2019.

The feedback from the delegates was very positive:

"I came away with a better understanding of the issues covered by our Club and also enjoyed the occasion to share time with other Club members from around the world."

"The course was a fantastic learning experience and I am so glad that Steamship put this together."

"All the speakers were great and the content was very useful."

"We finally got to meet each other from Steamship and develop a bond, which is also very helpful in our business."

"It was a fantastic course and I am glad to have made it."

"The material was very helpful. Had my attention 100%."

"This is the first time I attended this course. It was intense and the content was very relevant and useful. I am grateful for the opportunity."

"I have personally benefitted enormously from your very varied and diverse course."

"Steamship has definitely succeeded in further strengthening the existing strong relationship with the Club through this event." ■

Chris Adams (third from right) with Steamship Mutual Staff Members and MTC attendees

IG Correspondent Conference 2017

Correspondents provide a vital service to the Club's members. Without their help it would not be possible to provide the level of service and support shipowner and charterer Members require. An article recently published on the Club's website discussing the issues created by stowaways aptly demostrates the importance of Correspondents to Steamship Mutual. The claim handlers at the Club are in contact with numerous correspondents worldwide on a daily basis.

The International Group's ("IG") Correspondents sub-committee arranges a conference for correspondents every 4 years and after conferences in Bristol, London and twice in Amsterdam, the event returned to London for its fifth conference from 24 – 26 September 2017.

Around 540 delegates travelled from 100 countries to attend the conference. Delegates were treated to a surprise at the opening cocktail reception when Steamship's Correspondent and Communications Manager Neil Gibbons on piano, and The London Club's correspondent manager Garry Stevens on saxophone, entertained the visitors with a musical performance.

The conference opened the next day and heard that the IGP&IQ examination is to be open to Club correspondents from October 2017. Sea Venture issue 22 reported that many Steamship staff already study for the P&I Qualification. The IG has worked to allow the extension of the qualification to correspondents by establishing an online examination procedure. Candidates will be able to study for this qualification from Autumn 2017.

The sessions in the Correspondent Conference mirrored the IGP&IQ modules, with presentations based around the shipping business; P&I insurance history, operation and practice; loss prevention and claims management; people risks; cargo risks; collision, FFO and pollution risks with a final session on towage, salvage and wreck removal.

"Around 540 delegates travelled from 100 countries to attend the conference."

Neil Gibbons

Steamship's head of European Syndicate and Loss Prevention, Chris Adams gave a presentation about cyber security, whilst Head of Claims Colin Williams was the moderator for the session dealing with collision, FFO and pollution risks.

Neil Gibbons was a member of a working group involved in re-writing the IG Guidelines for Correspondents. The working group revised the Guidelines and succeeded in producing a much shorter document than previous versions whilst still retaining the core information. Neil gave a presentation to the delegates about the new Guidelines. These Guideline are available on the Steamship website as well as the International Group website: www.igpandi.org

The conference took place at the Queen Elizabeth II Conference Centre in Westminster. Steamship was able to send 12 claim handlers over the two days to attend the presentations and meet with delegates. The International Maritime Organisation was the venue for the conference dinner where the delegates heard an address by the Secretary General Mr. Kitack Lim.

The feedback from delegates has been very positive with the conference providing a useful forum for meeting Club representatives and other correspondents as well as hearing about developments relevant to the work of clubs and correspondents.

Two days after the conference Steamship hosted a reception at the Club's London office for visiting correspondents which provided a good opportunity for the nearly 100 attendees to meet the Club's claim handers. ■

Steamship Wanderers Walk 24 Peaks in 24 Hours in Support of Seafarers UK

Over the weekend of 8-9 July, the Steamship Wanderers consisting of Harry Newall, Danielle Southey, Fern Rogers, Captain John Taylor and Miguel Caballero all embarked on the 24 Peaks Challenge in the Lake District for the SeafarersUK charity. The Challenge was a gruelling 24 Peaks in 24 hours covering the likes of Scafell Pike, Helvellyn, Broad Crag and Great Gable. This was described to us as the 'ultimate test of endurance' with a total ascent of over 13,000 feet.

Once we had ascended the first peak of Red Pike on the Saturday, the enormity of the challenge begun to be apparent. Ahead of us sprawled peak after peak basking in the glorious sunshine. This, however, was a sorry sight for those of us that had only managed to grab a few hours' sleep in the local youth hostel. Nonetheless, we marched on and eventually finished the first ten peaks on Saturday evening.

After a very quick turnaround at 4.00am the next morning and, notwithstanding the odd missed wake-up call and alarm, we were once more up and ready to go and all set for the remaining fourteen peaks. This time, however, thick cloud and strong winds greeted us as we summited the first peak of Red Screes, a clear sign that the final day would not be easy.

As we trudged on in the harsh conditions, our bodies were crying out for rest and recuperation from the previous day's exploits. Many energy bars, sweets and chocolates kept the Steamship spirits high, along with the determination to complete the challenge. As we reached the peak of Helvelyn during the early afternoon, the clouds broke and the remaining peaks sprawled out before us. We gathered ourselves and pushed on to the final peak of Grovebeck Fold, finishing the course with a highly respectable time of 24 hours and 41 minutes.

Feeling incredibly exhausted but satisfied, we made our way to the organiser's barbeque and prize-giving where we were pleased to win the 'Best Fundraiser' award. The following day we climbed back into the min-van and made our way back to London for a heroes return and the remainder of the week in the office.

The challenge was very tough but at the same time satisfying. We were incredibly glad to raise £6,932.94 for the Seafarers UK who do so much good work, and would like to encourage additional contributions, or entries for the next fundraising challenge.

The Steamship team's fundraising page is still open so please, if you haven't already done so, have a look here. https://www.justgiving.com/fundraising/steamshipwanderers

We would like to thank all those individuals, work colleagues, associates and business partners who have given generously to the SeafarersUK charity. ■

From left: Miguel Caballero, Harry Newall, Danielle Southey, Captain John Taylor, Fern Rogers and Vijay Rao

Back to contents

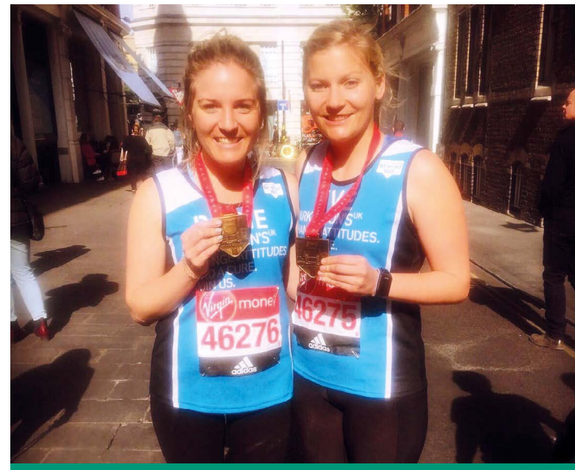
Marathon for Parkinsons

On Sunday 23 April 2017, Rosie Davies from the American Underwriting team completed the London Marathon in a time of 4:01:40. A record breaking 40,048 runners crossed the start line to complete the 26.2 mile journey from Blackheath to Westminster. Rosie finished with an overall place of 13,801.

This was the first marathon for Rosie and her sister who both raised money in aid of Parkinsons UK. The pair are delighted to have raised over £6,000 for the amazing charity that drives better care, treatments and quality of life for people suffering from Parkinsons.

Rosie's fellow Steamship colleagues have supported the worthy cause and contributed over £1,000 on 3 March 2017 for 'Dress down for Parkinsons UK'.

The fundraising page is still open online so please do visit the website should you wish to contribute. https://www.justgiving.com/fundraising/rosieandeverunthelondonmarathon ■



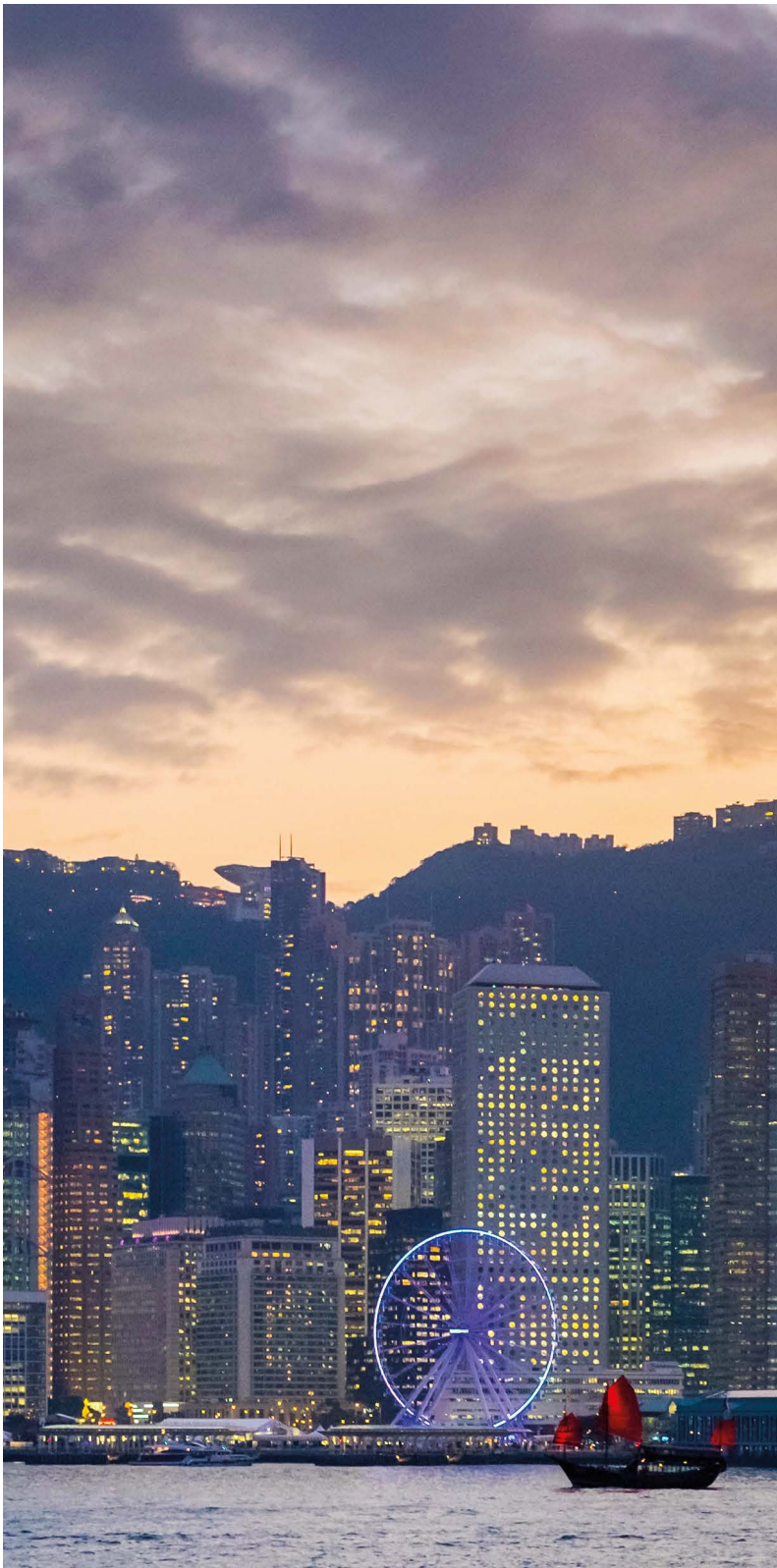
Rosie Davies, left

Patience Williams Retirement

In June the Club wished 'a happy retirement' to one of its longest serving members of staff, Patience Williams. In today's modern world, it is not often that you can say that "I worked for one company for 43 years!" but in this case this an accolade that Patience can certainly claim! Patience joined Steamship Mutual in 1974 as an accounts clerk, and throughout her time at the Club has led and been involved in many changes relating to the Clubs finance systems and procedures. She developed a large network of friends and colleagues – a direct result of her experience, knowledge and willingness to help people. This was demonstrated in the lead up to her retirement by the many messages of thanks and good luck received from across the world. Patience will be missed and we all wish her a long and happy retirement. ■

Patience Williams, centre, at her leaving party

Back to contents



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