



STEAMSHIP MUTUAL

Sea Venture



Issue 25

In this issue

- 06 OW Bunkers – A Global Perspective
- 17 Tianjin – Shipping Issues
- 49 Iran Sanctions: Is the End in Sight?
- 53 SK Shipping Naming Ceremony
- 54 War Risk and K&R Cover

Introduction



Malcolm Shelmerdine
Director
malcolm.shelmerdine@simsl.com

Welcome to the 25th issue of Sea Venture.

This is the time of year that the P&I industry attracts most publicity and attention as preparations for 20 February renewal gather pace. The Club experienced a remarkably good period in the last financial year when underwriting and financial results exceeded expectations. Furthermore, the Board recently agreed that no general increase in premiums for either P&I or FD&D is required for 2016/17. This is the second year in succession that a general increase has not been sought, good news for the Members and a reflection of the support the Club seeks to provide. However, market conditions and the risk of an increased incidence of claims – both in terms of numbers and cost – continue to provide challenges for the industry.

So far as claims perhaps the most topical issue in recent months has been the continued fallout from the collapse of OW Bunker A/S and its subsidiaries. Unlike Charterer defaults where an innocent Owner is at risk of having to pay the Charterer's debt, OW has brought a new dimension to these types of claims with both Owners and Charterers, neither of whom are at fault, exposed to paying twice for the same supply. The Club has been able to provide FD&D support to a number of Members that have faced this risk and these issues, and recent decisions in England, New York, and Singapore are discussed in an article by Emily McCulloch, an Associate in the Club's Americas syndicate at page 6 of this edition of Sea Venture.

Also included in this publication are articles commenting on the Tianjin explosion both from an English and Chinese law perspective, and following on from the discussion on maritime and statutory liens in England in Sea Venture 24, maritime liens in both China and South Africa. In addition, and as an aside from the usual articles discussing recent legal decisions and loss prevention initiatives, there is an interesting article by Patrick Britton, also an Associate in the Club's Americas syndicate, discussing what has happened to the RMS "Titanic" since the discovery of the wreck on the 1 September 1985, and an article by Sarah Nowak, an Associate in the European syndicate, discussing an environmental success off California.

The Managers are grateful to all those that have contributed articles to the Steamship Mutual website since the last issue of Sea Venture, but in particular to the editorial team.

16 November 2015

Editorial Team

Piers Barclay, Paul Brewer, Patrick Britton, Heloise Clifford, Beth Larkman, Sarah Nowak, Carole O'Brien, Malcolm Shelmerdine, Danielle Southey.

Electronic Versions

Sea Venture is available in electronic format. If you would like to read previous editions of Sea Venture or to review any other Steamship Mutual publications or articles, please visit: www.steamshipmutual.com/publications

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 address them to seaventure@simsl.com

Contact

For further information, please contact:
Steamship Insurance Management Services Limited
Aquatical House
39 Bell Lane
London E1 7LU
☎ +44 (0)20 7247 5490 and
+44 (0)20 7895 8490
🌐 www.steamshipmutual.com



04
Rock and a
Hard Place



08
Voyage Charters
- Damages for
Delay and
Positional Loss



30
Norovirus is
Not Caused
by the Ship



35
Electronic
Release of Cargo



46
Dubai Court
Issues Landmark
Judgment

Contents

Features

- 04 Rock and a Hard Place
- 06 OW Bunkers – A Global Perspective
- 08 Voyage Charters – Damages for Delay and Positional Loss
- 10 RMS "Titanic" Rest in Peace or Wrest a Piece
- 13 Liability for Freight and Demurrage under a Bill of Lading
- 15 Financial Consequences of Failure to Collect Cargo
- 17 Tianjin – Shipping Issues
- 19 Change in California Shipping Lanes to reduce Whale Strikes
- 21 Tanker Troubles in Nigeria
- 23 The Sea Mirror – Risk, Responsibility, and Stevedore Cargo Damage
- 25 Emission Control Areas and Low Sulphur Fuel
- 27 Maritime Liens in South Africa
- 30 Norovirus is Not Caused by the Ship
- 31 Tianjin Explosion – the Chinese Law Position
- 35 Electronic Release of Cargo
- 37 Important New Ruling Regarding Criminal Liability for Oil Spills
- 39 The New Turkish Salvage Contract
- 40 Carriage of Bauxite
- 42 Sampling of Bulk Liquid Cargoes
- 44 Maritime Lien under the Law of P. R. China
- 46 Dubai Court Issues Landmark Judgment
- 49 Iran Sanctions: Is the End in Sight?

Steamship Mutual News

- 52 New Loss Prevention DVD – 'Fit for Life'
- 53 SK Shipping Naming Ceremony
- 53 "Run the River" Race
- 54 War Risk and K&R Cover
- 54 Shipping in Liverpool – Steamship Mutual attends Taylor Marine's Ship Familiarisation Course
- 55 Overview of the 2015 Members Training Course

Features

Rock and a Hard Place



Sean O'Sullivan QC
4 Pump Court

This article discusses the relevance of negligence by the Master in safe berth / port and dangerous cargo cases. It is often said that the captain bears ultimate responsibility for the safety of his ship. But how does this proposition fit with the scheme of most charterparties, in which legal responsibility for the safety of the berth, or the cargo, is allocated to the charterer?

Introduction

The factual / expert issue about whether the Master was negligent can end up dominating proceedings, and arguments on this issue tend to take on an importance which outstrips its true role in the case.

This article will explore the different ways in which allegations of negligence against the Master fall to be characterised, and the issues of causation which can arise as a result, in the two different (but related) contexts of safe berth / port claims, and dangerous cargo cases, under English law.

Unsafe ports / berths

The classic definition of a 'safe port' is that given by Lord Justice Sellers in *The Eastern City* [1958] 2 Lloyd's Rep 127, at 131:

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

The Ocean Victory [2015] EWCA Civ 16 confirmed that this is the correct test to apply.

Since an unsafe port or berth is one where the vessel will be "exposed to danger which cannot be avoided by good navigation and seamanship", it is commonplace for respondent charterers to argue that the cause of a particular incident was the lack of good navigation and seamanship by the Master. If the explanation for the cause of the incident is the Master's negligent navigation then – so the argument runs – it cannot have been caused by the alleged unsafety of the port or berth.

In practice, that will be often be true. But, as a matter of analysis, the question of whether or not a particular port

or berth was safe, and the question of whether or not the Master was negligent, are distinct from one another. This issue was considered in *The Mary Lou* [1981] 2 Lloyd's Rep 272.

In addition to the straightforward cases in which the cause of an incident is the unsafety of the port or berth, or the negligent navigation of the Master, the learned Judge identified two further possibilities: first, where neither unsafety nor poor navigation was the cause, and secondly where there was both unsafety and poor navigation.

The first of these possibilities is illustrated by those authorities that deal with 'abnormal occurrences' – most recently, *The Ocean Victory*. The authorities make clear that, where damage results from an 'abnormal occurrence' unrelated to the prevailing characteristics of the port or berth, there is no breach of the safe port/berth warranty. Examples include the mishandling of other vessels or freak weather events. In such circumstances, it will not assist Owners to establish that the Master navigated the vessel with reasonable skill and care.

The second possibility is where there is both unsafety and negligent navigation. In practice, of course, if the tribunal has formed the view that the port or berth was unsafe, it can be an uphill struggle for Charterers to establish that the Master was negligent. As a rule, arbitration tribunals have great sympathy for Masters who are caught on the 'horns of a dilemma' or make a decision in the 'agony of the moment'. To establish negligence it is not enough to establish an error or mistake by the Master: it must be shown that no reasonably competent Master would have acted in the way that he did in those circumstances. But suppose that Charterers can prove negligence by the Master; what then?

This point arose squarely from the decision in *The Polyglory* [1977] 2 Lloyd's Rep 353. The vessel's starboard anchor had dragged and damaged an underwater pipeline and Owners were seeking to recover from Charterers their agreed liability to the Owners of the pipeline. Charterers' case was that the cause of the damage was the negligence of the Master and/or the crew and/or the pilot, and the arbitrator agreed that there was "bad seamanship" amounting to "negligence on the part of the pilot" in failing to engage the engines with sufficient power to avoid the casualty. The arbitrator nonetheless held that the unsafety of the port was the effective cause of the casualty. That finding was upheld by the Judge.

One needs to distinguish between allegations of negligence which are really alternatives to a finding that the port was unsafe (e.g. the buoy did not properly mark the obstacle versus the Master manoeuvred too close to the buoy) and those which are not. In one case in which the author was involved, it was alleged that the Master should have realised earlier that the berth to which the vessel had been sent was unsafe. To succeed with such

an allegation, it would have been necessary for Charterers to establish that the effective cause of the loss was the Master's negligence in failing to identify the danger and that this obliterated the causative effect of the original breach.

That represents a very high hurdle to clear. Indeed, it may be that nothing far short of the Master deliberately or recklessly running a risk would suffice.

Dangerous cargoes

In the context of a claim arising out of a dangerous cargo, the usual position is that Owners will be in the

made under Article IV.6 of the Hague or Hague-Visby Rules. However, even a notice of this kind may not afford a defence to a claim based on the express terms of the charterparty or contract of carriage.

What then, about constructive knowledge; knowledge that the Master ought to have (for example, by reference to circulars published by P&I clubs etc. as to the dangers of particular types of cargo)? Here, some care needs to be taken, because it will depend on the nature of the claim advanced by Owners as to whether that constructive knowledge operates as a defence to liability, or whether it might find an argument that the 'chain of causation' was broken. As to this:

- Where the claim is made under the common law implied duty not to ship dangerous goods without prior notice, the fact that the goods are such that the Master might "on inspection be reasonably expected to know to be of a dangerous nature" will usually operate as a defence to the claim.
- Where the claim is made under an express contractual obligation not to load dangerous cargoes, this constructive knowledge will not operate as a defence to the claim. It may be argued that the Master's negligence broke the 'chain of causation' such that negligence, and not the loading of the dangerous cargo itself, was the effective cause of the loss. As discussed above, the negligence would need to be such as to 'obliterate' the causative potency of the original breach.
- Where the claim is made under Article IV.6 of the Hague or Hague-Visby Rules, authorities suggest that the constructive knowledge of the Master will operate as a defence.

There is thus an important distinction to be drawn between a claim on the basis of the breach of an express term and a claim pursuant to the common law implied duty or under Article IV.6. That is perhaps unsurprising. In the former case, the parties have agreed that Charterers are going to take the risk of the cargo which is shipped proving unsafe. Having done so, if there is a breach, it is going to be very difficult for Charterers to escape liability by blaming the Master for negligently failing to save them from the consequences. By contrast, the implied obligation imposed by common law, and (probably) the Hague and Hague-Visby Rules, strikes a balance in the absence of express agreement.

In the case of an express term, the Charterer has promised not to ship a dangerous cargo, just as he has promised in the "unsafe port" case not to send the vessel to a dangerous port. In neither case are the parties envisaging that Charterers will deliberately send the ship to an unsafe port or tender an unsafe cargo. It is not necessary to show that the Charterer was negligent or should have been aware of the danger. The promise is concerned with risk allocation, not moral culpability.



position of the Claimant, and Charterers or shippers (together referred to here as 'Cargo Interests') in the position of the respondent. In those circumstances, the Cargo Interests sometimes advance the argument that, if the cargo was unsafe, the Master was at fault in loading it when he knew or ought to have known of the danger, and that they should not be liable for any loss or damage resulting therefrom.

It is important to distinguish cases of alleged negligence from those where the Cargo Interests have actually given notice to the Master and he has proceeded to load the cargo regardless. Such notice will discharge the Cargo Interests' obligation under their common law implied duty not to ship dangerous goods without prior notice and operate as a defence to any claim

Unusually, the situation may arise where the loading of a dangerous cargo gives rise to a claim by the Cargo Interests. A recent example in which the author was instructed involved a bulk cargo which was found part way through loading to be too wet to be safely carried by the vessel. It had to be dried out in the holds, causing significant delay and expense. Charterers complained that the Master should have realised that the cargo was too wet before any was loaded and advanced a claim against Owners for the costs incurred as a result. Could such a claim ever succeed?

In that case, the charterparty contained the usual express exclusion of dangerous cargoes and it followed that tender of the cargo in question for loading involved a breach by Charterers. Accordingly, it seemed that the claim would fail for circuitry unless it could be proved that the Master's negligence was so causatively potent as to negate the effect of the prior breach; in other words, unless it broke the chain of causation. As before, this must mean something more remarkable than a mere error of judgment. Hypothetical examples discussed included accepting a cargo of ticking bombs or fizzing sticks of dynamite (in the manner of Wiley Coyote being outwitted by the Road Runner). Whether failing to spot a wet cargo was ever likely to suffice was perhaps doubtful, but the claim settled, so that question was not definitively answered.

Absent such an express term, the situation might be different. There might, in principle, be scope for a claim (by Charterers) against Owners for negligence by the Master in the performance of Charterers' orders. Depending on the facts, it might also be possible to allege breach of terms concerning compliance with ISM, or to allege unseaworthiness.

Conclusion

What all of this perhaps illustrates is that, in shipping cases, where a loss ultimately falls is more often a matter of contractual risk allocation than a question of moral fault. The negligent Master may be morally culpable in the event of an accident which he could have prevented. He and his shipowner may face civil or even criminal action if third parties are harmed or their property damaged. By contrast, Charterers may have been another innocent victim of these events, unaware that the port was unsafe or the cargo dangerous. Nevertheless, as between Owners and Charterers, it is suggested that it will usually take something more than mere negligence to enable the latter to escape from the consequences of his breach, let alone to pass those consequences to Owners.

What is certain is that determining whether the Master was negligent may be only one aspect of the dispute and should not be permitted to dominate the whole arbitration, as sometimes begins to happen in practice. ■

OW Bunkers – A Global Perspective



Emily McCulloch
Syndicate Associate
emily.mcculloch@simsl.com

The complicated question **Who to pay** - the **OW Bunker Dilemma** was discussed in an article in July 2015 (www.steamshipmutual.com/publications/Articles/theowbunkerdilemma0715.htm). As a consequence of the collapse of OW in early November 2014 there have been far reaching effects on Owners and Charterers who, having stemmed bunkers prior to the collapse, have faced competing claims from OW Bunkers entities, ING (the bank who say OW Bunkers assigned their rights to them) and third-party bunker suppliers (suppliers) who say they are entitled to payment.

This has forced different courts to address a variety of claims, arrests and legal proceedings, and whilst there have been decisions in other jurisdictions perhaps the most notable are summarised below:

New York

In July 2015, some 20+ Owners and Charterers filed an interpleader lawsuit in New York's US Federal Court requesting that a judge decide who should receive payment for outstanding bunker invoices. At that time District Judge Valerie Caproni affirmed the interpleader actions on the basis that claims against the vessel (*in rem*) and contractual claims (*in personam*) were competing claims, being founded on the same underlying obligation to pay for bunkers. In addition to confirming jurisdiction, the court exercised statutory authority to prevent the suppliers from instigating proceedings elsewhere and prohibited vessel arrests.

This month it has been reported that US suppliers NuStar Energy Services and US Oil Trading have lodged an appeal and are requesting that the District Judge overturn the orders handed down in July which protect those vessels subject to the interpleader actions. It is understood they are challenging the jurisdiction of the court over vessels that are not in the Southern District of New York and do not routinely trade there.

It is unclear at this stage whether the appeal is likely to succeed, although US law is generally seen to favour bunker supplier in allowing a maritime lien over vessels for unpaid bunkers – even where no contract is signed by the Owner/Charterer. If the order preventing arrests is overturned, there could be an increase in arrests outside the US for those Owners/Charterers subject

“This decision has been met with surprise by many in the shipping industry as it is likely to impact the nature and application of bunker supply contracts going forward.”



to interpleader that have hitherto had the protection of the court's prohibition on vessel arrests.

Singapore

Similar to the US, 13 Owners and Charterers filed interpleader actions in Singapore in respect of bunkers stemmed from OW Bunker's subsidiary Dynamic Oil Trading. In contrast, in April 2015, the court determined that the suppliers' *in rem* claims did not compete with that of ING's contractual and thus *in personam* claims. The interpleader actions were therefore dismissed on the grounds the claims were of a different nature and did not concern the same debt. By definition an interpleader action can only succeed if by awarding entitlement to funds to one party, the rights of the other party to claim are extinguished.

Although it was held the parties were not entitled to interplead in Singapore, Owners/Charterers can take comfort in the fact that the court confirmed the suppliers had no legal right to payment. The suppliers had relied on a number of grounds to assert they should be entitled to the proceeds of sale of the bunkers, including arguments of fiduciary

agent/bailee, conversion, collateral contract, unjust enrichment and maritime lien. The court held that none of these competing claims asserted by the suppliers gave them any better rights than existed under their contract with OW Bunkers to be paid the price of the bunkers and, more importantly, none were claims directed against the bunker purchasers i.e. the Owners/Charterers. The only exception was the right to exercise a maritime lien in respect of owned vessels, but this is not permitted in Singapore, and there was no evidence before the court that any of the suppliers intended to or had a basis to assert a claim in jurisdictions which recognise a maritime lien for unpaid bunkers.

London

The most significant OW Bunkers case to be addressed by the English courts is that of the *Res Cogitans* (formally (1) *PST Energy 7 Shipping LLC* and (2) *Product Shipping and Trading S.A. v (1) OW Bunker Malta Limited* and (2) *ING Bank N.V.*).

In summary, the vessel Owners were faced with claims from OW Bunkers/ING and suppliers for payment of bunkers stemmed. In London arbitration,

Owners challenged the right of OW Bunkers/ING to obtain payment as (1) the supply contract was subject to the English Sale of Goods Act 1979 (SOGA) and (2), title to the bunkers could not have passed under the sale contract because OW Bunkers had themselves not acquired property in the goods from their supplier. As such, OW Bunkers could not pass property in the bunkers to Owners and, under SOGA, could not maintain a claim for the price of the bunkers. The tribunal dismissed Owners' claim on the grounds that the SOGA did not apply (primarily due to the use of a retention of title clause in the third-party bunker supply contract) and the claim by OW Bunkers/ING should be treated as a simple unpaid debt.

Owners appealed to the English High Court. In July 2015, the court upheld the tribunal's decision and confirmed that the SOGA does not apply to such bunker supply contracts. It was not therefore necessary for property to pass in the bunkers for Owners to be compelled to pay. The court based their decision on not only the retention of title clause, but also the fact the bunkers once purchased would likely be consumed imminently. Essentially, the supplier gave the Owners permission to consume the bunkers which in practice reflects more of a licence to use the bunkers, rather than the sale and purchase of goods.

Owners appealed the court's decision on transfer of title and their obligation to pay OW Bunkers/ING. On 22 October 2015 the Owners' appeal was dismissed. The Judges upheld the reasoning of the tribunal, and the High Court, and reiterated that the delivery of bunkers with a licence to consume them is a contract that can be described commercially as a contract for the sale of goods - but that does not mean the SOGA applies. Once the bunkers were delivered, the Owners incurred an obligation to pay and were not released from that obligation by the fact that OW Bunkers did not transfer title before they were consumed.

This decision has been met with surprise by many in the shipping industry as it is likely to impact the nature and application of bunker supply contracts going forward. Furthermore, Owners and Charterers (particularly those Charterers owning vessels) may now face increased pressure from OW Bunkers/ING to settle outstanding invoices with threats, if not actual arrests of vessels based on the weight of this decision under English law. However, it is important to note that no suppliers were involved in these proceedings (although it is understood limited submissions were put forward to the Court of Appeal) and payment by Owners to OW Bunkers/ING will not necessarily preclude such suppliers from seeking to enforce their right to payment in other jurisdictions. This may not be the end of this issue since it is understood leave to appeal has been sought by Owners. ■

Voyage Charters – Damages for Delay and Positional Loss



Jeff Cox
Syndicate Associate
jeff.cox@sims.com

The recent High Court case of *Louis Dreyfus Commodities Suisse SA v MT Maritime Management BV*, (*The MTM Hong Kong*) has considered the principles applicable to a claim for damages following repudiation of a voyage charterparty.

Background of the case

The vessel, an oil/chemical tanker, was chartered to load a vegoil cargo in South America with discharge to be in the Gibraltar/Rotterdam range. Under its preceding fixture, the vessel had been at Boma, upriver on the River Congo where it suffered a grounding. Delays then followed and correspondence was exchanged between the parties culminating in Owners accepting Charterers' messages as a repudiatory breach and bringing the charter to an end. Given the vessel was steaming offshore from West Africa at that stage, Owners decided to continue to proceed towards South America to seek their next fixture. It was accepted that rates there were lower than in the North Atlantic trade, but the intention was to take advantage of a shorter ballast leg to South America and then fix business for a voyage into that more profitable North Atlantic region.

The Owner claimed damages for Charterers' repudiatory breach and started arbitration in London.

The Arbitral Award

The arbitrators found as a matter of fact (i) that after arriving in the Uruguayan port of Punta del Este on 2 February 2011 the vessel had to wait until the 24 February 2011 before the anticipated North Atlantic fixture for a voyage to Rotterdam materialised; (ii) the mitigation fixture was completed on 12 April 2011 whereas the contract voyage would have taken 43.6 days if performed, completing on 17 March 2011 and the vessel would then have performed two short but lucrative voyages from the Baltic to the United States, followed by a voyage back to Europe; and (iii) if the contract voyage plus those two voyages had been performed, the vessel would have arrived back in Europe at approximately the same time as completion under the mitigation fixture, namely on or about 12 April 2011.

In the arbitration it was conceded in argument that Owners had behaved reasonably in their mitigation strategy. The arbitrators held the charterparty was repudiated by the Charterers, who were therefore

liable for damages, which they calculated until the end of the substitute charter at just over US\$1.2 million.

Appeal to the High Court

The tribunal's award was appealed by Charterers and the question of law posed was:

"If a voyage charter is repudiated by charterers in circumstances where the substitute employment begins after the contract voyage would have begun, and ends after the contract voyage would have ended, should damages be assessed by reference to the vessel's (actual and hypothetical) earnings up to the end of the contract voyage, or such earnings up to the end of the substitute employment?"

Mr Justice Males dismissed the appeal on the basis that if the contract voyage had been performed as intended, this would have enabled Owners to earn the freight payable and also would have positioned the vessel in Europe without a delay period, enabling the vessel to take advantage of the higher rates in the North Atlantic market. The consequent delay in arriving in Europe had been caused by the breach and by extension, the positional element was considered as a separate but recoverable head of damages from the loss of profits on the lost charter.

The compensatory principle is fundamental to the analysis of such a claim and broadly, this states that *"where a party suffers loss arising from a breach, they are to be placed in the same financial position as if the contract had been performed."* The question in this case was whether compensation should be awarded for loss of the follow on fixtures or only for the period up to when the contract voyage would have come to an end i.e. 17 March.

In the case of *Smith v M'Guire* (1858) 3 H&N 554 it was decided that the starting point for arriving at a shipowner's loss was *"the amount of freight which the ship would have earned if the charter-party had been performed"* and to then deduct *"the expenses which*

have been incurred in earning it" whilst taking into account *"what the ship earned (if anything) during the period which would have been occupied in performing the voyage"*. By so limiting damages to the end date of the original charter period and applying solely that measure to the facts of the case, the result would have been an award of damages at the considerably lower level of just under US\$480,000. However, in *Smith v M'Guire* losses extending beyond the end of the contract voyage were not claimed and, therefore, the case did not deal with profits that would have been earned after the date on which the contract voyage, if it had been performed, would have come to an end.

This issue was considered in the 2010 *Elbrus* (www.steamshipmutual.com/publications/Articles/Elbrus0210.html) case in relation to a trip time charter in which, when assessing damages for Charterers' wrongful termination of the charterparty, it was held Owners had to give credit for a benefit obtained after the date when the charterparty would have come to an end but for Charterers' early termination. In the same way there is no rule of law to prevent a claim for damages for losses arising after the end of a contractual charter period.

This issue can also be analysed in terms of foreseeability and assumption of risk, but it can readily be appreciated that it is difficult to formulate a workable rule barring Charterers' assumption of responsibility for loss of profit on employment occurring after the repudiated fixture, or indeed why such losses should not, at least in principle and subject to remoteness

"Following this case Charterers may have to consider their liability for consequences of terminating/repudiating a voyage charter or trip time charter that go beyond their intended contract period."



be recoverable. Loss that is in the reasonable contemplation of the parties at the time when a contract is agreed should normally be recoverable¹.

Where damages are to be based over a longer timescale, this has to be balanced against the need to avoid complex, hypothetical calculations, perhaps even as submitted by Charterers' counsel and in previous cases, extending 'to the end of the vessel's working life'. However, such concerns did not arise on the facts of this case which enabled the arbitrators to have made their findings with 'some degree of certainty'.

Summary

The Judge in this matter was careful to make clear that an Owners' claim for loss of employment relating to the period after the date when the contract voyage would have concluded will not always automatically succeed. As here, the reasonableness of Owners' acts in mitigation and that the losses claimed fall within the reasonable contemplation of parties are important factors. The extent to which losses are predictable and can be calculated with a degree of confidence and certainty are also relevant.

Whilst previous case law had tended to calculate damages to the end of the contract voyage, there was no error of law in the original award. The guiding principle remains the compensatory principle and the key decision continues to be that of the House of Lords in *The Golden Victory* (www.steamshipmutual.com/publications/Articles/GoldenStrait0507.html) where the prima facie position is that damages are assessed at the point and date of breach, and that events which follow can be taken into account as required by justice in each case.

Following this case Charterers may have to consider their liability for consequences of terminating/repudiating a voyage charter or trip time charter that go beyond their intended contract period, but can take some comfort that such liability will not result in complex endless calculations.

Whilst this may be seen as increasing the scope of damages in terms of both time and the vessel's position at the expense of a degree of legal certainty, the case makes it clear that this would only apply where calculations can be made with reasonable predictability and that the rules on remoteness of loss still need to be applied. ■

¹ The *Achilleas* (www.steamshipmutual.com/publications/Articles/AchilleasHL0908.html) and (www.steamshipmutual.com/publications/Articles/Sylvia0810.html)

RMS "Titanic" Rest in Peace or Wrest a Piece



Patrick Britton
Syndicate Associate
patrick.britton@simsl.com

The first of September 2015 was the thirtieth anniversary of the discovery of the wreck of RMS "Titanic" by a joint American-French expedition, led by Dr Robert Ballard of Woods Hole Oceanographic Institution (WHOI) in Massachusetts, and Jean-Louis Michel of the French National Institute of Oceanography (IFREMER). This article discusses the operation that discovered RMS "Titanic" and what has happened to the vessel since that time.

RMS "Titanic" had last been seen sliding under the black waters of the icy North Atlantic at 02:20 on 15 April 1912, 380 miles southeast of Newfoundland. She would not be seen again for 73 years, 4 months and 17 days. Although a few survivors reported seeing the ship break in half, the prevailing view was that her hull sank in one piece, and the idea of locating and raising the wreck never went away.¹ However, the technology to explore the deep ocean would not be available until the early 1980s, by which time explorers had access to unmanned vehicles equipped with sonar imaging systems and video cameras, towed above the ocean floor using long fibre-optic cable.

When planning their joint expedition in 1985, Ballard and Michel suspected the position given in "Titanic's" distress call calculated by her Fourth Officer, Joseph Boxhall, who survived the disaster, was wrong. Boxhall had accurately calculated the latitude from stellar observations, but he had overestimated the ship's speed when calculating the longitude. He thought "Titanic" had been steaming west at 22.5 knots, but the easterly Gulf Stream would have slowed her progress and her speed was probably below 21 knots.² Before she sank, "Titanic" was also pushed southwest by the Labrador Current, which is where RMS "Carpathia" found "Titanic's" lifeboats.

The expedition's search area was 100 square miles. After six weeks of searching using sonar, the expedition had covered 80% of the search area without finding any sign of "Titanic". Running out of time, Ballard decided to search for the ship's debris field instead of "Titanic" herself. While heavy debris would not have travelled far, light debris would have drifted in the currents, forming a pattern resembling a comet and its tail. If they could find the debris field, they could follow it



Image: "Iceberg Right Ahead!" reproduced with kind permission of maritime artist Simon Fisher

like an arrow to its source. Ballard also decided to switch from using sonar to using video cameras.

After days of staring at images of blank, brown ocean bottom, at 12:48 on 1 September 1985, metallic objects began to stream across their screens. Confirmation that the wreckage belonged to "Titanic" came shortly afterwards when a boiler came into view. The pattern of rivets and fire doors matched photographs of the boilers in Harland and Wolff's workshop. Having found the graveyard of not only a great ship, but also the 1,500 people who lost their lives when "Titanic" foundered, the expedition crew held a short memorial service and raised Harland and Wolff's flag.

Ballard and Michel discovered "Titanic's" hull about 13.5 miles east-southeast of her distress call position. They found it upright but broken in two with gaping holes where funnels had once stood. As the bow section had flooded slowly, it was pressure-compensated and sank virtually intact, gliding to the bottom. The impact, while enough to bury the bow in 60 feet of silt, did not ruin its appearance. In Ballard's words "it has magic and majesty". The stern section was found 1,970 feet away. Unlike the bow, it had not completely flooded, and as it plunged straight down, the incoming water forced out the remaining air, causing massive damage. Upon impact with the bottom, the decks collapsed

down on each other causing the hull to literally blow apart. After 73 years nature had also taken its toll. An army of molluscs and worms had consumed the ship's decks and woodwork, and "Titanic's" steel was found to be covered in bacteria formations called 'rusticles' which feed upon the ship's iron.

When the expedition returned home to face the world's media, Ballard remarked "*The "Titanic" lies in 13,000 feet of water on a gently sloping alpinelike countryside overlooking a small canyon below. Its bow faces north and the ship sits upright on the bottom. There is no light at this depth and little life can be found. It is a quiet and peaceful and fitting place for the remains of this greatest of sea tragedies to rest. May it forever remain that way and may God bless these found souls.*" WHOI intentionally did not publicise the precise location of the wreck in order to discourage visitors.

Ballard returned to "Titanic" on another WHOI expedition in 1986 to film and photograph the wreck. No artefacts were removed and when they discovered that the expedition's ROV had accidentally snared a piece of "Titanic's" cable, they threw it back. The US Congress passed the RMS "Titanic" Maritime Memorial Act of 1986 to encourage international negotiations to designate the wreck as an international memorial and to develop and implement guidelines

for her exploration. Pending an international agreement it urged that “no person should physically alter, disturb or salvage RMS “Titanic”.

However, the wreck lies in international waters, and in 1987 IFREMER financed its own return to “Titanic” with the help of an American enterprise called Titanic Ventures, which aimed to recoup its investment in the dives by recovering “Titanic” artefacts, and which evolved into a company called RMS Titanic Inc. The 1987 expedition took 1,800 objects from the debris field and the ship herself, and led to RMS Titanic Inc establishing a claim to be sole salvor-in-possession. Dozens of dives throughout the 1990s in French and Russian submersibles brought the number of recovered artefacts up to 5,500. The artefacts were displayed to an eager public in travelling exhibitions. Documentary and film-makers also frequented in the 1990s.

Scientists, historians and museum curators tend to agree that there is little purpose in recovering “Titanic’s” artefacts, because there is nothing to be learned about the Edwardian era from the personal items or from the ship’s fittings. The small number of survivors still living objected to the recovery of artefacts, as did Ballard who called it “robbing the old lady of her jewels in her grave”³. In his view, leaving the artefacts in their context both respects the sanctity of the site and tells the “Titanic’s” story. For example, in 1986 he saw the ship’s crow’s nest still attached to the fallen foremast and the bell which the lookouts rang when they spotted the iceberg. Salvors have since removed the bell, the mast light and the lookout’s telephone, knocking the crow’s nest off the mast in the process.

Others believe the recovery of artefacts is justified in order to preserve them for future generations, though items made of porcelain or glass, and leather treated with tannic acid are likely to survive on the ocean floor.

Photographs from later expeditions show how the hull has deteriorated dramatically since 1985, with the collapse of the walls and roofs of many of the boat deck structures. The major damage is done by the ‘rusticles’, which suck several hundred pounds of iron from the ship each day, but it is possible that repeated landing and manoeuvring of submersibles has accelerated the destruction. “Titanic’s” decks also show signs of visitors including artificial flowers, plastic sampling bags, lead weights and empty drink bottles, apparently tossed overboard from passing ships. In 2001 a New York couple were married on “Titanic” in a Russian submersible, and more recently a Californian company called Bluefish Group has organised dives to the wreck, at a cost of US\$60,000 per ticket, in collaboration with the Russians.

Ballard has advocated spraying the “Titanic’s” hull with anti-fouling paint in order to slow the decay. He is also in favour of using ‘telepresence’ to create a “wondrous underwater museum to be appreciated without being violated”, with

lights, cameras and other equipment installed to send images of the boat deck, grand staircase and other features around the world.

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, which entered into force on 20 January 2009, applies to all traces of human existence which have been underwater for at least 100 years, and “Titanic” came within its remit on 15 April 2012. However, the Convention has not been ratified by the majority of the states with the technology to explore the deep ocean. The threats to underwater cultural heritage that motivated the Convention will intensify as technology advances and wrecks of historical importance become accessible by anyone with the resources to call upon such technology, whether they are motivated by scientific study or by commercial gain. ■

¹ The producer of the 1980 film *Raise the “Titanic”*, Lew Grade, remarked “it would have been cheaper to lower the Atlantic”.

² “Titanic” was not trying to win the Blue Riband for the fastest North Atlantic crossing. She could never have achieved this as her designed service speed was 21.5 knots. The Cunard liner RMS “Mauretania” had a guaranteed service speed of 24 knots, with a maximum recorded speed of 28 knots.

³ Ballard also labelled the two main camps arguing about “Titanic’s” future as the “Rest in Peace” and “Wrest a Piece” contingents in the book he co-authored with Michael Sweeney: *Return to “Titanic”* (National Geographic Books, 2004).

‘Fit for Life’
New Loss Prevention DVD

This DVD focuses upon the importance of seafarers being fit for seagoing employment, and the actions they can take to improve their health and well-being.



Copies of ‘Fit for Life’ can be obtained free of charge upon request from the Club’s website
www.steamshipmutual.com/publications/order-form-request-a-copy.html

For further information see page 52

Liability for Freight and Demurrage under a Bill of Lading



David High
Syndicate Associate
david.high@simsl.com

In this arbitration the Claimant was the Head Charterer who, unsuccessfully, argued it was the contractual carrier under the contract of carriage.

The Facts

The Claimant chartered the vessel from the registered Owners on voyage charter terms and in turn sub-chartered the vessel, again on voyage charter terms. The vessel was fixed to carry a bulk cargo of wheat. The underlying sale contract was on FOB terms. The buyer under the sale contract and the sub-Charterer were affiliated companies.

Upon loading the cargo, bills of lading were issued on the Congenbill form and were signed by the Master. The bills specified that freight was payable as per the sub-charterparty. The terms of the sub-charterparty, including the law and jurisdiction clause, were expressly incorporated into the contract of carriage.

The cargo was loaded by 24 May. However the vessel’s sailing was delayed at the request of the shipper. It subsequently transpired that the sale contract had been repudiated by the buyer. The shipper, reportedly on behalf of the buyer, entered into negotiation with the Head Charterer to try to break the impasse and to get the ship moving, but the negotiations were inconclusive. In the event, the shipper obtained a court order to discharge the cargo at the load port. Meanwhile the vessel sat waiting at the roads for about six months.

For reasons that are not explained in the case report (although perhaps indicating the sale contract was not the only contract that had turned sour) the Head Charterers commenced arbitration against the shipper rather than the sub-Charterer and sought damages of around US\$2 million. The Head Charterer asserted it was the carrier under the contract of carriage, pursuant to which, the shipper was liable to them for either freight and demurrage, or detention damages and expenses.

The issues to be decided by the tribunal

The main issues that fell to be decided by the tribunal were:

- Who were the parties to the contract of carriage?

- Was the shipper estopped from denying that the Head Charterer was the contractual carrier?
- Was there an implied contract between the shipper and the Head Charterer?
- Was the relationship between the shipper and the Head Charterer subject to the sub-charter’s dispute resolution clause?

The tribunal’s decision

In the normal course, under a sale contract on FOB terms title for the goods will pass to the buyer upon the completion of loading, which in turn will mean, upon loading, the rights and obligations of the seller as shipper under the contract of carriage will also pass to the buyer. On the facts of this case however the tribunal was willing to accept that, contrary to the normal position, here, the shipper did retain rights and obligations under the contract of carriage after the completion of loading.

In reaching this decision the tribunal seems to have been swayed by the fact that the shipper was able to both lien the cargo and then obtain a court order for its discharge. It was considered that both of these steps were inconsistent with the shipper no longer being a party to the contract of carriage. The tribunal also considered that, as the bills had not been endorsed (or even issued) to the buyer, and the buyer had repudiated the sale contract, these facts also weighed in favour of the shipper still having obligations under the contract of carriage. But to whom were these obligations owed?

The resounding answer was: not to the Head Charterer.

The tribunal referred to the House of Lords’ guidance in *The Starsin* [2003] 1 Lloyd’s Rep 571 that the first place to look to ascertain the identity of the carrier was the face of the bill. Here the bill was signed by the Master, thus raising the presumption that the Head Owner was the carrier. There was nothing else on the face of the bill, or in the conditions of carriage, or in the incorporated sub-charterparty terms to displace this presumption. The Head Owners were therefore the carrier.

The tribunal then turned to Head Charterers’ estoppel argument. Finding no grounds to support this argument, it was held that the essential elements to found an estoppel were missing as:

- There was no pre-existing legal relationship between the parties.
- The shipper’s actions before and during loading were consistent with the actions of a FOB seller in ensuring the cargo was properly loaded. There was no evidence presented to the



“In the normal course, under a sale contract on FOB terms title for the goods will pass to the buyer upon the completion of loading, which in turn will mean, upon loading, the rights and obligations of the seller as shipper under the contract of carriage will also pass to the buyer.”

Financial Consequences of Failure to Collect Cargo



Heloise Clifford
Syndicate Associate
heloise.clifford@simsi.com

Summary

In the recent case of *Sang Stone Hamoon Jonoub Co Ltd v Baoyue Shipping Co Ltd ('Bao Yue')* [2015] EWHC 2288 (Comm), the defendant shipowner successfully defended a claim that it had committed the tort of conversion by storing cargo that had not been collected on discharge on terms that created a lien for the storage costs. This case provides helpful guidance on what a shipowner's rights are when the bill of lading is not presented on discharge.

Facts

A cargo of iron ore was carried from Bandar Abbas, Iran to Tianjin, China by the defendant shipowner in February/March 2012. The bill of lading issued was negotiable; it had no named consignee and was "to order". The Claimant was the named shipper. As a result of a dispute

between the shipper and the buyer of the cargo, a bill of lading was not available to be presented at the discharge port for delivery of the cargo.

The shipowner discharged the cargo and made arrangements for it to be stored in a bonded warehouse in Tianjin. The terms of this storage contract provided that the warehouse operator was entitled to refuse to release the cargo and to liquidate or otherwise dispose of such goods and to offset any proceeds against any overdue storage charges.

Three and a half years later the cargo was still in storage and cargo interests had taken no steps to collect it. As a result of the lengthy period of storage, the storage charges had accrued to an amount that exceeded the value of the cargo.

The warehouse owner refused to release the cargo until the accrued storage charges had been paid.

The Dispute

The shipper did not dispute the fact that the shipowner had been entitled to discharge the cargo into storage. However, it brought a claim in the tort of conversion. This claim was made on the following basis:

- The shipowner allowed a lien over the cargo for storage charges to be created in favour of the warehouse owner without express or implied authority.

tribunal which would amount to a representation by the seller that it intended (or represented) any other contractual relationship to prevail.

- Head Charterers could not identify any act or omission they took in reliance of the shipper's representations that was to their detriment.
- In any event - rendering the previous reasons superfluous - estoppel can only be used as a defence to a claim and cannot be used to bring a claim (per Denning LJ, estoppel could not be used as a "sword").

A US case was also considered by the tribunal (non-English law cases can be persuasive, but not binding, in English litigation / arbitration). Head Charterers alleged that the shippers had embraced favourable parts of the sub-charterparty and so were now estopped from denying the non-favourable parts including the obligation to pay freight. A US first instance court had snappily referred to such cherry-picking as the "knowing exploitation theory of equitable estoppel". The tribunal reiterated the evidence available to it did not support any such knowing exploitation had taken place by the shipper, whom it considered had acted consistently as only a FOB seller.

The shipper therefore did not owe the Head Charterer duties under the bills of lading or the sub-charter. This

left Head Charterers' only fall-back, an argument that there was an implied contract between themselves and the shipper. It was noted by the tribunal that in certain circumstances an implied contract could arise in respect of a bill of lading. The tribunal was not however prepared to accept that the evidence before it established there was any such implied contract between the shipper and the Head Charterer.

The tribunal then proceeded to deliver the *coup de grace*. Even if there was an implied contract between the shipper and the Head Charterer, there was no authority that provided such an implied contract would include an arbitration clause. The result was there was no arbitration agreement between the parties, the arbitration had not been properly commenced and consequently, with the exception of the tribunal's decision that it did not have jurisdiction, the rest of the proceedings were a nullity.

The missing piece in this story is the sub-Charterers. If they had been on the scene and, were fixed on standard voyage charter terms the Head Charterers should not have been left 'holding the baby'. The reason for this, and the lesson one could learn from it, are unfortunately hidden behind the anonymity that comes with London arbitration. ■

Providing Dedicated Yacht Liability Cover

Steamship Mutual provides a dedicated Yacht Liability Cover which answers the specific needs of Yacht Owners. As well as protecting the Yacht Owner against liabilities towards third parties, the cover allows the Owner to fulfil their obligation to provide financial security for repatriation expenses and unpaid wages in accordance with the MLC. The cover can be extended to include Legal Expenses, Accident and Illness, Hull War and Kidnap and Ransom covers.

Steamship Mutual has a dedicated Yacht Team of experienced underwriters and claims handlers.



Yachts@simsi.com
+44 (0)20 7650 6646
www.steamshipmutual.com/underwriting/yacht-facility.htm





“... the court found no failure by the shipowner, again it was noted that it was open to the shipper to present the bill of lading for delivery but instead it had chosen to leave the cargo in storage.”

- The shipowner’s agent had denied the bill of lading holder access to the cargo by various alleged statements it had made.

In order to succeed in such a claim, the shipper was required to prove that the shipowner had deliberately acted in a manner that was inconsistent with the bill of lading holder’s ownership rights of the cargo without consent.

The Decision

In principle, creating a lien without the cargo owner’s authority may amount to conversion. However, in this case the bill of lading incorporated a term permitting the discharge and storage of the cargo. Therefore, the shipowner had express authority to discharge the cargo and was entitled to make arrangements for storage in a warehouse. The costs of this storage could be reclaimed from cargo interests. The court went on to say that it was not unreasonable for this to be done on terms conferring a lien over the goods for storage charges; this was the obvious commercial reality.

It was also held that the bill of lading holder had never been denied access to his goods. It had always been open to cargo interests to present the bill of lading and pay the accrued charges in order to obtain delivery of the cargo.

A further argument was made by the shipper that the shipowner had failed to mitigate its loss by selling the cargo. However, the court found no failure by the shipowner, again it was noted that it was open to the shipper to present the bill of lading for delivery but instead it had chosen to leave the cargo in storage. Further, the cargo could not have been sold as the shipowner did not have the bill of lading so could not have completed the customs formalities to sell the cargo.

The shipowner was successful in obtaining an order that he was entitled to delivery of the original bill of lading to enable him to sell the cargo and pay the storage charges.

Comment

This case provides some guidance on the steps that a shipowner can take when cargo interests fail to collect their cargo on discharge. The bill of lading terms should always be checked to see what the shipowner is entitled to do and whether there are any restrictions. It is recommended that cargo interests are advised of the steps that are being taken in order to demonstrate that steps are not being taken on a unilateral basis. If Members have any questions or concerns about a failure to collect cargo, they should contact the Managers. ■

Tianjin – Shipping Issues



Shortly after 11pm (local time) on 12 August 2015 firefighters arrived at Tianjin Port because a fire had been reported to have broken out in some containers.¹ At about 11.30pm there was the first of two massive explosions, which caused significant loss of life and major property damage. What exactly happened and how the port has been affected remains at the time of writing unclear.

The blasts on the evening of 12 August apparently took place in a warehouse owned by Tianjin Dongjiang Port Rui Hai International Logistics Co. Ltd.²

The warehouse is said to have contained calcium carbide, potassium nitrate and ammonium nitrate. There have been unconfirmed reports that the warehouse contained 700 tonnes of sodium cyanide, stored in wooden boxes or iron barrels. Calcium carbide, when mixed with water, produces acetylene gas, which is flammable. A chemical safety expert has suggested that an acetylene explosion could have detonated the ammonium nitrate.³

Questions have been asked about whether such a large amount of sodium cyanide should have been stored in one place; and whether safe practices were followed in relation to how it was stored. Questions have also been raised over whether firefighters, who reportedly sprayed water on the initial fire before the blasts, followed the right protocol.⁴

There were reports of further fires and explosions on 15 August 2015.⁵

The extent of disruption to port activities remains unclear. Shipping lanes were initially closed. However, the warehouse was located outside the port area so damage to berths and internal port infrastructure is said to have been limited.⁶ On 17 August 2015 there were reports that some port operations were returning to normal.⁷ Oil terminals were reportedly closed due to safety concerns but seem, as at 17 August, to be reopening. There appear to be ongoing restrictions for vessels carrying dangerous goods and bunker oil. In light of the extent of the damage to the infrastructure supporting the port, for example roads and storage areas, the full impact of the disaster may not be seen for some time.⁸

Laytime/demurrage issues

Where time is spent awaiting loading/discharge due to the Tianjin explosions, Members will need

to consider the specific terms of charterparties to work out the financial consequences and whether these are for Owners’ or Charterers’ account.

As a matter of general principle, where a vessel is delayed from loading or discharging by the explosions, or by congestion following the explosions, Charterers are likely to have to pay demurrage under voyage charters, so long as the vessel is otherwise in all respects ready to commence operations. Owners will wish to ensure that they comply, insofar as possible, with all formal preconditions to time starting to run.

It is however quite common for voyage charters to provide that demurrage is payable at reduced levels, commonly one half, where demurrage arises out of or is incurred by reason of fire or explosion: see, for example, clause 15(2) of the Shellvoy 6 and clause 8 of the Asbatankvoy forms. Under such provisions, it seems likely that Charterers will be able to rely on such provisions to reduce demurrage payable. There may however be scope for arguments of fact about whether time has in fact been lost as a result of the explosions, or whether it was in fact lost as a result of precautions taken by port authorities in the aftermath of the explosions and/or by port congestion. Members should take care to retain evidence as to the cause of the delays experienced, for example any advice received from agents on the reasons for the waiting time.

Further, there is said to be a rule that “*once on demurrage always on demurrage*”. That means that if a vessel was already on demurrage awaiting loading/discharge at Tianjin, the fact that the delays were exacerbated by the explosions may not mean that demurrage ceases to run or reduces to one half. The rationale for this rule is that had the Charterer performed its obligation to load/discharge within the laydays, the vessel would never have been on demurrage. Whether this principle applies to the wording of a particular exceptions clause needs to be considered with care.

Members should, as always, be alert to the need to document all relevant delays by notices of protest and statements of fact; and to the need to comply strictly with any notice provisions relating to when demurrage claims should be submitted, and what documents or evidence must be submitted to support those claims.

In relation to time charters, it is difficult to see how the explosions could have caused a vessel to go off-hire on standard charterparty wordings. Accordingly, Charterers are likely to be obliged to carry on paying hire for the period of any delays.

Safe port issues

The courts have said that “*a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without,*

“As a matter of general principle, where a vessel is delayed from loading or discharging by the explosions, or by congestion following the explosions, Charterers are likely to have to pay demurrage...”

in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship...”.⁹ On the facts summarised above showing that instructions to load/discharge at Tianjin amount to a breach of Charterers’ obligations to nominate a safe port will not be straightforward. The obligation to nominate a safe port is a prospective one. That means that the issue of whether the port is safe is to be judged at the time the instructions were given.

To start with, it is unclear that the port is or has been unsafe. It has been reported that the relevant explosions did not seriously damage the port. There do not seem to have been significant reports of hazards at the port, such as gas, fires, or submerged objects propelled into the water by the explosion, although there have been reports that military chemical experts are testing the area.¹⁰

If under the particular charterparty the obligation to give instructions to proceed to a safe port is an absolute one, then it may be possible to argue that the storage of large amounts of sodium cyanide in the warehouse rendered the port unsafe. That will require further consideration of the facts if and when they become known. Even if that can be proven, however, Charterers may be able to argue that the explosions amounted to an unexpected and abnormal event, which is not inconsistent with a port being generally safe.¹¹

However where, as in (for example) the Shelltime 4 form, the obligation to nominate a safe port is limited to the exercise of due diligence, on the facts as they presently appear it will be difficult to suggest that Charterers should have identified that the explosions were likely to occur.

It may also be difficult to show that the port was unsafe at the relevant time. Where a port was safe when nominated but becomes unsafe after the initial orders were given but prior to arrival, Charterers are generally obliged to cancel the original order and to issue fresh orders for a safe port. If they fail to do so, then it is generally thought that Owners may refuse to comply with the original order. However, that still raises the issue of whether or not the port has in fact been rendered unsafe by the explosions.

Finally, if explosions did render the port unsafe, then the port will probably be unsafe only on a temporary basis. The courts have held in the context of voyage charters that temporary factors making a port unsafe only amount to a breach of contract where there is inordinate delay so as to frustrate the adventure. The question of what amounts to “inordinate” delay is notoriously fact specific, but save in the case of perishable goods, if it is right that the port has now or is shortly to be reopened, it seems unlikely that any delay will be inordinate.

Frustration and force majeure

A voyage charter is only likely to be frustrated by delay where the delay is ‘inordinate’. As mentioned

above, unless the contract of carriage is for perishable goods when special considerations may arise, it is unlikely that such a contract could be said to have been frustrated by the delays that are likely in the event that the port quickly returns to full use.

Whether any force majeure provisions apply will need to be considered on a case by case basis as the wordings which apply can vary significantly.

Exceptions under the Hague-Visby Rules

It seems unlikely that cargo will have been damaged whilst onboard vessels by reason of the explosions, although there has undoubtedly been significant property damage onshore. If such damage has occurred, and insofar as the contract of carriage is governed by the Hague-Visby Rules, then Owners’ liability for loss of or damage to goods may be excluded by Article IV rule 2(b) or (q).¹²

Exception (b), referring to loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier, is generally thought to extend to explosions resulting from combustion. Exception (q) is the general exception for loss or damage arising or resulting from any other cause arising without the actual fault or privity of the carrier, so even if the explosions fall outside the ‘fire’ exception, they should be caught by this exception.

Other issues

Other issues are likely to arise, for example in relation to fixtures lost by reason of delays, disputes on specifically negotiated slot charters and in relation to container losses. They will all require careful investigation by reference to the terms of the specific contract of carriage. As always, before taking steps which may have significant consequences, legal advice should be obtained. ■

¹ www.news.xinhuanet.com/english/2015-08/13/c_134513116.htm

² www.news.xinhuanet.com/english/2015-08/13/c_134510491.htm

³ www.bbc.co.uk/news/world-asia-china-33923478

⁴ www.bbc.co.uk/news/world-asia-china-33923478

⁵ www.theguardian.com/world/2015/aug/15/tianjin-blasts-police-order-mass-evacuations-amid-further-explosions

⁶ www.tradewindsnews.com/casualties/366760/tianjin-re-opens

⁷ www.news.xinhuanet.com/english/2015-08/17/c_134525348.htm

www.reuters.com/article/2015/08/17/china-blast-port-idUSL5N10501Z20150817

⁸ www.tradewindsnews.com/casualties/366760/tianjin-re-opens

⁹ *Leeds Shipping v Société Française Bunge (The Eastern City)* [1958] 2 Lloyd’s Rep 127, 131. Danger to the crew can also probably render a port unsafe.

¹⁰ www.bbc.co.uk/news/world-asia-china-33924501

¹¹ *The Evia* (No. 2) [1982] 2 Lloyd’s Rep 307.

¹² The resolution of such issues may of course depend on the jurisdiction in which any claim is commenced.

Change in California Shipping Lanes to reduce Whale Strikes



Sarah Nowak
Syndicate Associate
sarah.nowak@simsl.com

An excellent example of how industry and regulatory bodies can work with environmental activists to provide good results for the benefit of all.

Background

Blue, humpback, and fin whales are endangered species and are protected by the Endangered Species Act, the Marine Mammal Protection Act, and the National Marine Sanctuaries Act and every year, about 200 blue whales go to the Santa Barbara Channel and spend four to six months feeding on krill, which commonly congregate beneath shipping lanes.

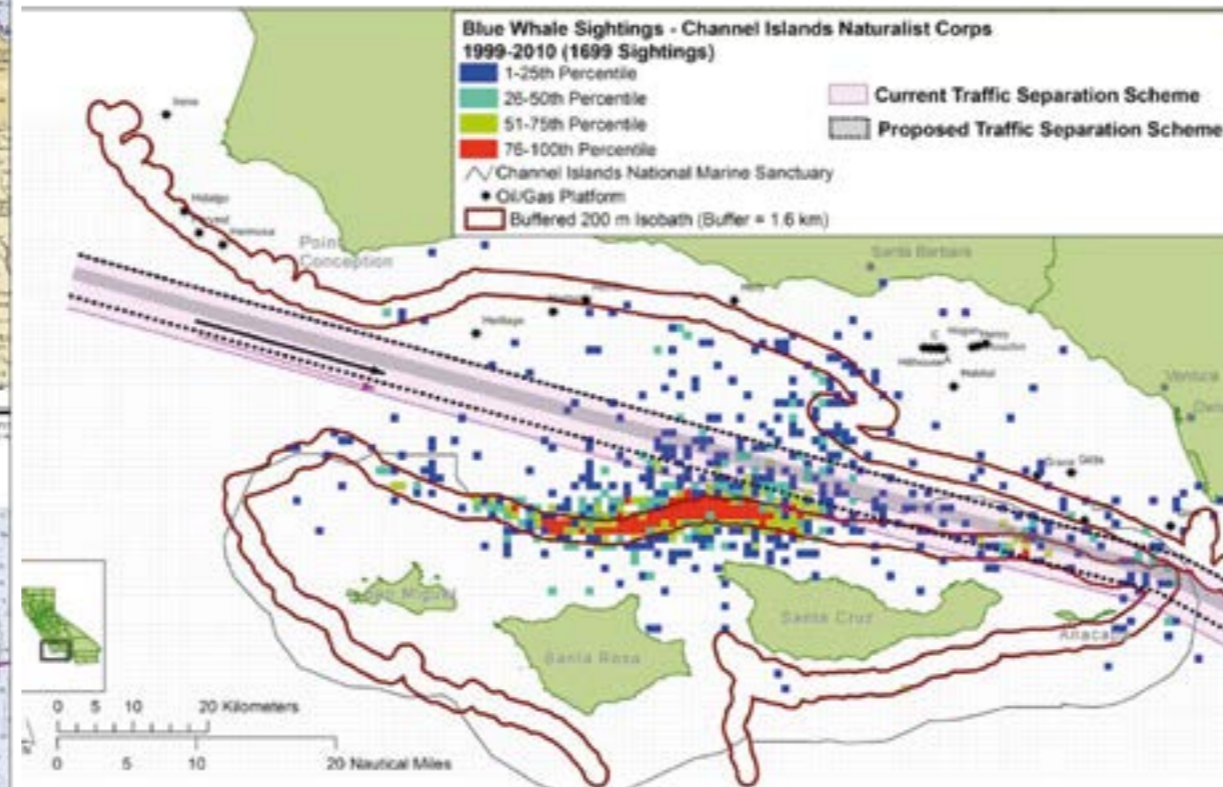
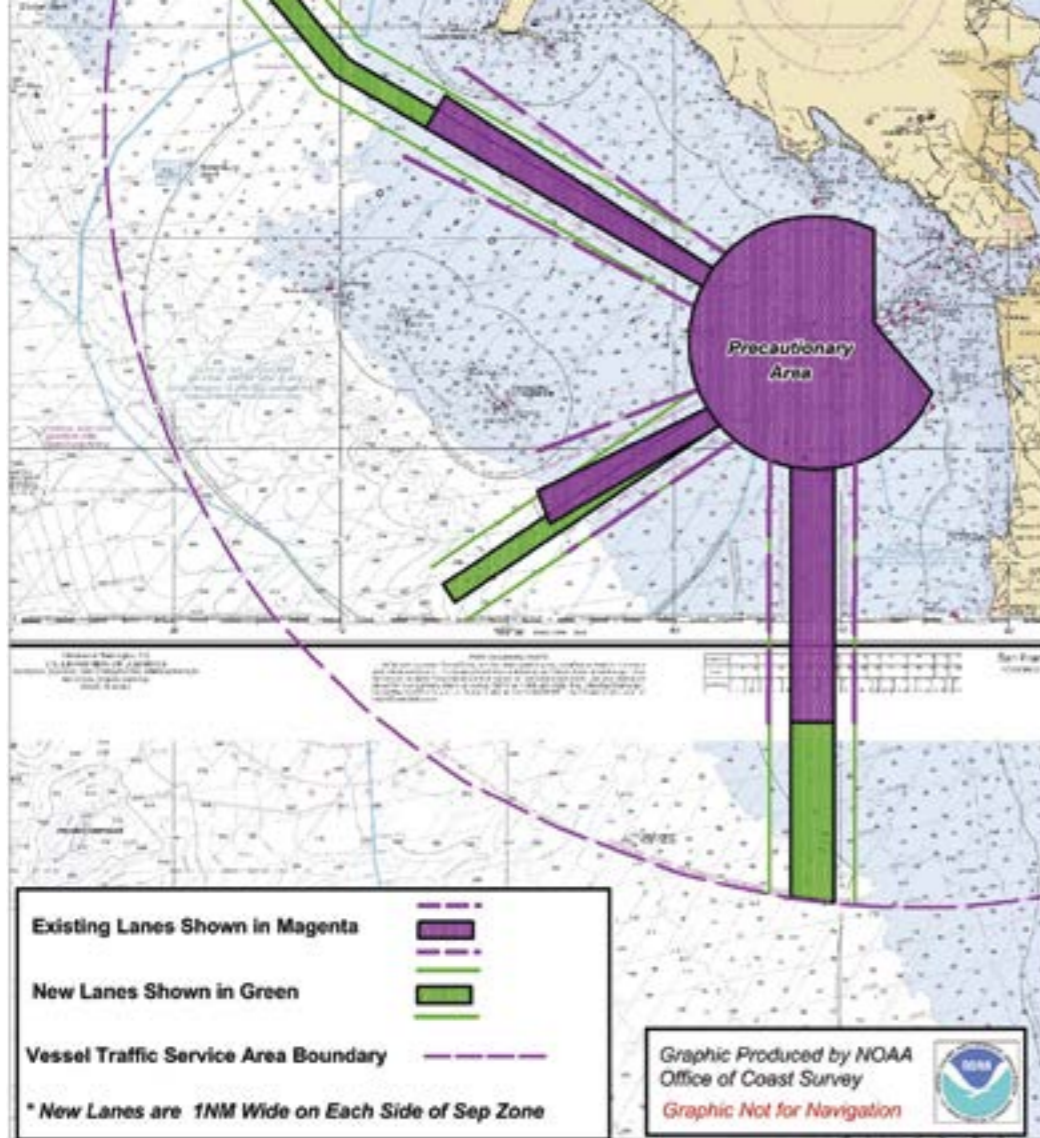
In addition to pollution and hunting, for decades one of the biggest dangers to blue whales has been ship strikes. These slow moving whales are historically vulnerable to ship strikes as their feeding and migration areas overlapped with shipping lanes. In 2007, four blue whales were killed by ship strikes in the Santa Barbara Channel alone. In 2010, two blue whales, one humpback whale, and two fin whales were killed in the San Francisco area and along the north-central California coast. It is also worth noting that the actual number of ship strikes in any given year is likely much greater, given that many ship strikes go undetected because the whales sink or drift out of sight.

The plight of the blue whale has brought industry into collaboration with scientists and the regulators to solve the problem of possible extinction of these mammals. A 15 year project to tag and track the movements of blue whales highlighted their migration and feeding patterns. This project assisted in the redrawing of the shipping lanes to assist in the protection of the blue whales and other species.

Implementation

In November 2012, the International Maritime Organization (IMO), which governs shipping worldwide, adopted proposals to adjust shipping lanes along the Californian coast with the goal of protecting endangered whale species from ship strikes. The adjustments were adopted after substantial research was conducted by the United States National

Images sourced by: NOAA



Oceanic & Atmospheric Administration (NOAA). Additionally, the United States Coast Guard (USCG) and the NOAA worked for two years to fine-tune the proposed traffic modification.

The IMO shifted lanes on the approaches to San Francisco Bay, Santa Barbara Channel (which runs from San Francisco to Long Beach/Los Angeles) and the ports of Long Beach & Los Angeles. Ships which pass through these areas come close to the Cordell Bank, the Gulf of Farallones and the Channel Islands, all of which are sanctuaries. It is hoped that narrowing the existing lanes and adjusting the busy lanes off the California coast that cross the three national sanctuaries would have a positive effect in reducing the number of whale strikes off the West Coast, where the estimated population of blue whales is 2,500.

The adjustments to shipping lanes were voluntarily implemented shortly thereafter by many operators in the San Francisco Bay, the Santa Barbara Channel, and the Ports of Los Angeles and Long Beach.

It was also recommended that speed reductions be put in place: this had two benefits. First emissions are substantially lower (some estimates suggest 50% lower) when a ship is operating at 12 knots or less rather than the standard cruising speed of 14-18 knots. Secondly, since whales are rather slow to react, the reduced speed gives

them the opportunity to identify the danger of an oncoming vessel and take evasive action.

Close co-operation

A phone app was also developed for iPhone and iPad devices for use by crew members on deck watch, which in effect makes them whale spotters. This aids officials reporting the presence of whales to others vessels transiting those areas. Educational posters distributed to the shipping industry have also helped crews acting as spotters. Advisory zone charts and notices to mariners have been developed as well so that ships could be advised of sightings. Using vessels as whale sighting platforms is an exceptionally efficient and effective way to assist in the efforts to protect the environment and in particular, the whales.

"The collaboration between NOAA and the Coast Guard in reviewing and modifying these vessel traffic separation schemes demonstrates the strong working relationship between the two agencies. The modifications to traffic lanes balance the safe and efficient flow of commerce within and between our nation's ports, with NOAA's goal of reducing whale strikes from vessels." (Rear Admiral Karl Schultz, 11th Coast Guard District Commander).

A win-win situation

NOAA has described the adjustments as a "win-win" in the sense that modification of shipping lanes to

protect whales illustrates a real-world balance between commercial considerations and environmental concerns.

According to Sean Hastings, the Resource Protection Coordinator of NOAA, there have not been any additional updates to shipping lanes since the adoption of the lane adjustments in 2012, and while data is still being gathered to determine the efficacy of the measures, NOAA hopes to soon confirm a substantial decrease in the number of whale strikes. Furthermore, Mr. Hastings stated that a review of shipping traffic logs noted a "very high compliance with south bound ships using the new approach to the ports." Although the lane adjustments are voluntary, it appears as though most vessel operators are buying in.

Furthermore, the IMO also believes the lane adjustments will increase vessel safety. According to the IMO, the lane extensions will keep commercial vessels on a dedicated route through prime fishing grounds, which will reduce the interaction between fishing vessels and commercial ships.

Proponents of the adjustment are hopeful that the data will confirm a substantial decrease in the number of ship strikes and the risk of future strikes.

Additional information can be found online at www.sanctuaries.noaa.gov.

We are grateful to James Marissen of Keesal, Young & Logan and Robert G Hanson of Lamorte Burns & Co., Inc. for their contribution to this article. ■

Tanker Troubles in Nigeria



Beth Larkman
Syndicate Associate
beth.larkman@simsl.com

There has been substantial discussion in the press recently in relation to the difficulties facing commercial parties trying to load oil cargoes in Nigeria.

Problems started in July 2015 with the Nigerian National Petroleum Corporation (NNPC) banning 113 tankers from loading cargo in Nigeria. It appears that this ban was subsequently lifted (although it is not entirely clear whether the ban has been fully lifted); at that time NNPC issued a letter on 8 September 2015 which stated that the President approved the consideration of all incoming vessels into Nigerian territorial waters "subject to receipt of Letter of Comfort from all Terminal Operators and off-takers of Nigerian Oil and Gas as guarantee that nominated vessels are free and will not be utilized for any illegal activity whatsoever".

The 8 September letter attached the pro forma for the Letter of Comfort which would be accepted – which included amongst other things an undertaking and guarantee "to indemnify NNPC or the Federal Government of Nigeria, against all consequences and/or liabilities of any kind whatsoever directly or indirectly arising from or relating to the deployment of the Vessel for activities extraneous to the contract and shall immediately upon demand without NNPC or the Federal Government having to substantiate the demand, reimburse or effect all payment necessitated by such illegal activity by the Vessel."

Clearly this is an extremely broad indemnity – indeed it is not clear what definition would be given to the words "activities extraneous to the contract" and whether it could even cover circumstances where pirates come on board despite all efforts made by the Owner, vessel and crew.

Following the issuance of the 8 September letter, there was confusion in the market as to which parties should be issuing the Letters of Comfort and what form any Letter of Comfort should take, given the onerous nature of the NNPC Letter of Comfort. Indeed, this impacted on fixtures and there was an increase in rates with some Owners refusing to trade to Nigeria and lift cargo there.

Intertanko, on behalf of Tanker Owners, had been seeking to engage with NNPC and had been advising their Owner Members that no Letter of Comfort should be given by Tanker Owners to NNPC, as they are not "terminal operators" or

“off-takers”. Indeed, Intertanko stated that they are aware of tankers sailing in and out of Nigeria without provision of a Letter of Comfort.

As at 2 October, Intertanko had not been able to establish a dialogue with NNPC. However, Intertanko did report that NNPC had written again to Terminal Operators on 5 October stating that *“In view of the reservations on the content of the Template of the Letter of Comfort earlier circulated, we have reviewed and have amended it to ensure suitability and acceptability to all parties.”* The Letter of Comfort now provides that the vessel *“shall not be involved in any oil theft activity whilst in Nigerian territorial waters”* and is to be provided by *“off-takers, or Vessel Owners or terminal Operators for each lifting”*.

Intertanko’s advice to Tanker Owners remains not to provide the Letter of Comfort and, as the Letter appears to give options as to who may issue it, the Letter may still be issued by Terminal Operators or Off-Takers and there is no confirmation from NNPC that they require anything to be provided by Owners. Indeed, Intertanko continue to note vessels sailing in and out of Nigeria without provision of a Letter of Comfort.

It is of course a commercial decision and subject to individual negotiations between Owners and Charterers as to whether Owners do then provide a Letter of Comfort. Intertanko have prepared an Intertanko Nigeria Trade Clause as well as a “model letter” which provides only that Owners confirm that the vessel

will not knowingly engage in any illegal activities and will strictly follow any legal instruction issued in accordance with the terms of the Charter Party.

Whether or not a Charterer can prevail upon an Owner to issue a Letter of Comfort will therefore depend on the terms and facts of each individual situation. Under a time charter, for example, it is probably not a lawful employment order to require the Owner to issue a Letter of Comfort containing terms which are more onerous than those of the charterparty (as per the Letter of Comfort requested by NNPC), although it may be lawful if the Letter does nothing more than contain a statement of what is already arguably an implied obligation on the Vessel not to engage in illegal activity.

As with any loading, Members should maintain best practices and be careful to obtain bill of lading figures which are as accurate as possible and provide outturn figures and other documents if requested by NNPC (or other local governmental entities). If previously subject to the ban, such Owners should be very cautious.

There are other issues to be considered, including in relation to Nigerian local law. Since the issues surrounding these Letters of Comfort are still evolving any Members looking to trade to Nigeria should obtain advice on these issues and Tanker Owner Members should consult Intertanko’s website for the most up to date information on this developing issue. ■

The Sea Mirror – Risk, Responsibility, and Stevedore Cargo Damage

Lax & Co

Stuart Dench
Lax & Co LLP

This English High Court decision¹ considered the interpretation of clause 5 of the Synacomex 90 form in proceedings commenced by the Claimant cargo interests (the ‘Cargo Interests’) of a consignment of bagged rice discharged at Abidjan in the Ivory Coast against the defendant carrier (the ‘Carrier’) under the bill of lading contract.

The Carrier faced numerous cargo claims in English High Court proceedings in relation to a series of shipments of bagged rice to ports in West Africa where liability for stevedore damage to bags on outturn was in issue.

In *The Sea Mirror* action Mr Justice Flaux was required to rule upon a preliminary issue agreed upon by the parties at a Case Management Conference whether as a matter of construction of the contract of carriage the Carrier was liable for loss caused by bags being torn/cut by stevedores during loading and discharge.

It was common ground between the parties that the bill of lading incorporated the Hague Rules by a General Clause Paramount as well as the terms of a voyage charter entered into on the Synacomex 90 form, clause 5 of which provided as follows:

“5 Cargo shall be loaded, trimmed and/or stowed at the expenses and risk of Shippers/Charterers at the average rate of 1,500 metric tons per weather working day...”

Cargo shall be discharged at the expenses and risk of Receivers/Charterers at the average rate of 1,500 metric tons per weather working day....

Stowage shall be under Master’s direction and responsibility”

It was further common ground that both at common law and under Article III Rule 2 of the Hague Rules that the parties could agree that the Carrier would not be responsible for cargo operations.

The Carrier’s position was that clause 5 transferred responsibility for loading and discharging the cargo from the Carrier to the Cargo Interests and that the Carrier had no liability for bags that were torn/cut during loading and discharging. The Carrier accepted however that the effect of the words *“stowage shall*

be under Master’s direction and responsibility” was to transfer responsibility for stowage back to themselves. The Cargo Interests in contrast contended that clause 5 was not sufficiently clear to divest the Carrier of his responsibility under Article III Rule 2 of the Hague Rules to properly and carefully load and discharge the cargo.

At the hearing before Mr Justice Flaux, both parties made reference to the Court of Appeal decision in *The Jordan II* [2003] 2 LR 87 in which Tuckey LJ stated:

“I have already referred to the position at common law and the need for clear words if the contract is to transfer the obligation to load, stow and discharge from owners to charterers. There are three facets of the cargo operation which have to be considered. Who is to pay for it; who is to carry it out; and who is liable for it not being done properly and carefully? The judge decided and I agree that there is no presumption that each of these responsibilities should fall on the same party. In other words, if the charterer has agreed to pay for the cargo operation, there is no presumption that he has also agreed to carry it out or be liable if it is done badly”.

The Cargo Interests contended that in order to impose liability upon the Charterers/Cargo Interests for the loading/discharging operation the provision needed to state that they were to *perform* the operations in question. *“Risk”* the Cargo Interests contended was not to be equated with responsibility for the performance of cargo operations. The meaning of *“at the risk of”* was they contended simply that the Cargo Interests were to bear loss caused by damage occurring fortuitously (i.e. without fault) during the cargo operation, alternatively it meant that the risk of delay in the cargo operations was with Cargo Interests.

The Carrier’s position in contrast was that *“at the expense and risk of”* were clear words allocating responsibility for the performance of loading/discharging onto Charterers/Cargo Interests. The Carrier further submitted that if the Cargo Interests’ construction was right then the provision that *“stowage shall be under Master’s direction and responsibility”* was otiose. *“Risk”* the Carrier submitted had been associated by the courts in a number of cases with *“responsibility”* for the performance of the relevant function and the Cargo Interests’ construction of *“risk”* did not accord with the ordinary meaning of the word nor did it make any commercial sense in the context of the charter.

In a detailed judgment Mr Justice Flaux having considered the various authorities found in favour of the Carrier. Mr Justice Flaux accepted the Carrier’s submission that just because the Cargo Interests were able to put forward alternative

“Whether or not a Charterer can prevail upon an Owner to issue a Letter of Comfort will therefore depend on the terms and facts of each individual situation.”



“Mr Justice Flaux accepted the Carrier’s submission that just because the Cargo Interests were able to put forward alternative constructions ... did not mean that the Carrier’s construction was incapable of achieving the necessary degree of clarity...”



constructions of clause 5 this did not mean that the Carrier’s construction was incapable of achieving the necessary degree of clarity to transfer responsibility for the cargo operations to the Cargo Interests.

As regards the Cargo Interests’ proposed constructions of “at charterers’ risk”, Mr Justice Flaux considered that neither stood up to scrutiny. Mr Justice Flaux held that in relation to Cargo Interests’ primary construction of risk as referring only to accidental loss, this submission had previously been considered and dismissed by Evans J in *The Alexandros P* [1986] 1 LR 421 and was not persuasive. As regards Cargo Interests’ secondary construction, that risk concerned the responsibility for delay, Mr Justice Flaux found that this was even less promising as delay was dealt with by the laytime and demurrage provisions of the charter. Mr Justice Flaux accordingly concluded that:

“...I am firmly of the view that the effect of the first sentence of clause 5 of the charterparty incorporated in the bills of lading is to impose responsibility on the charterers/cargo interests for bad loading and discharge of the cargo. It follows that, to the extent that it is established that damage to the bags of rice was caused by bad loading and/or discharge (as opposed to bad stowage) that damage

is the responsibility of the cargo interests who cannot recover in respect of such damage from the carrier”.

This common-sense judgment is to be welcomed for providing clarification to a poorly drafted but much used charterparty clause. Damage to cargoes of bagged foodstuff due to stevedore mishandling at discharge ports is unfortunately a common encountered risk which carriers and their P&I insurers face. Care should always be taken to ensure that clauses are clearly drafted to ensure that responsibility for such losses are transferred from the Carrier to Charterers/Cargo Interests.

Stuart Dench of Lax & Co LLP, was instructed by the successful Carrier and Steamship Mutual in *The Sea Mirror*.

The Jordan II was also a Steamship Mutual case and was decided by the House of Lords.

www.steamshipmutual.com/publications/Articles/Articles/Jordan1204.asp ■

¹ *Societe de Distribution de Toutes Merchandises en Cote D'Ivoire trading as "SDTM-CI" v Continental Lines N.V. and another (The Sea Mirror)* [2015] EWHC 1747.

Emission Control Areas and Low Sulphur Fuel



Bill Kirrane
Syndicate Manager
bill.kirrane@simsi.com

Enquiries in relation to the requirements for the consumption of low sulphur fuels in Emission Control Areas (ECA) are not uncommon. Many of the enquiries received by the Club have concerned disputes, or potential disputes under time charterparties.

Under MARPOL Annex VI the International Maritime Organisation (IMO) can establish ECAs where vessels have to comply with mandatory measures for the control and reduction of nitrogen oxides (NOx) and sulphur oxides (SOx). There are currently four ECAs, comprising the Baltic Sea, the North Sea, North America and the United States Caribbean Sea areas¹. From 1 January 2015, vessels have been required to consume fuel with less than 0.1% sulphur content while operating in these ECAs (unless the vessel is fitted with equipment such as scrubbers to reduce the sulphur in exhaust fumes, or is operating on alternative fuel such as LNG, or has a dispensation conferred by Reg. 14.4.4).

www.steamshipmutual.com/publications/Articles/SECAreminder171114.htm

Most vessels can consume low sulphur fuels, or can be adapted to consume such fuel relatively cheaply, so there have not been many disputes involving significant costs for conversion or adaption of ships, as happened in the case of the “*Ellie*”/“*Frixos*” which reached the House of Lords. In that case, when new MARPOL regulations effective from 2005 required that oil tankers be double-hulled, and when both vessels were in long time charters which required that they be in every way fit to carry oil, and which required Owners to maintain the vessels in that condition, it was held that the Owners had to adapt the ships, at a cost of about US\$600,000 per vessel, to comply with the charterparty requirement.

www.steamshipmutual.com/publications/Articles/GoldenFleeceHL0109.html

Before the lower 0.1% sulphur content requirement came into effect at the start of 2015, there were concerns that there would not be sufficient low sulphur fuel available at bunkering ports in or near to ECAs. However these concerns proved to be unfounded, and low sulphur fuels have been readily available in these areas, but at a higher cost than the

higher sulphur fuels. While a shipowner is obliged to comply with the MARPOL regulations, it is the time charterer who pays for the fuel consumed, and a time charterer will usually want the ship to perform as efficiently and economically as possible, by consuming the more expensive low sulphur fuel only when the ship is required to do this, within the ECAs.

MARPOL requires vessels to be in compliance at all times when sailing in the ECA, therefore a vessel needs to have compliant low sulphur fuel onboard, and to have changed over to low sulphur fuel in sufficient time to ensure that compliant fuel is being consumed before the vessel enters the ECA. If a Charterer gives an order to sail to an ECA, then the Charterer will need to ensure the ship has enough low sulphur fuel onboard to use while in the ECA, or will need to supply low sulphur fuel before the vessel reaches the ECA. Any Charterer’s orders to sail into or through an ECA on high sulphur fuel are probably unlawful since that order would require an Owner to break international and national regulations, and an Owner would be entitled to call on the Charterer to provide fresh orders which, dependent on what quantities of low sulphur fuel were onboard, might require the vessel to divert to stem low sulphur fuel before the ECA.

Even if a vessel is not calling at any port in an ECA, the vessel must still comply with its requirements when passing through an ECA: for example a ship sailing from Brazil to a port in northern Norway, north of the ECA limit, would either need to be consuming low sulphur fuel while passing through any part of the North Sea ECA, or would have to take care to navigate outside of the outer limits of the ECA if consuming high sulphur fuel.

While the time charterer is obliged to provide compliant fuel, the care and management of fuel onboard remains the responsibility of the Owner. In one case a port state control inspector took a sample of fuel from the vessel’s engine room, at a point immediately before the fuel entered the ship’s engine. The sample was found to contain more than 0.1% sulphur. In contrast the bunker delivery note for the fuel, supplied by time charterers, indicated that the fuel had less than 0.1% sulphur content. Further investigation and analysis of samples taken at the time of bunkering confirmed the fuel had less than 0.1% sulphur content when supplied to the vessel. However, the fuel had been stored in a tank on board that had previously contained higher sulphur fuel, and residues of the higher sulphur fuel had increased the sulphur content above the 0.1% limit. Whilst Owners faced a fine for breach of MARPOL, and the additional cost of obtaining compliant fuel to sail out of the port and out of the ECA, they had no claim against the time charterers, who had supplied compliant fuel.

Many vessels, whether or not operating under time charter, are expected to change over from low sulphur fuel to cheaper high-sulphur fuel and back to low sulphur fuels on a regular basis as they leave

or enter ECAs. Whilst the vessel ought to be able to do this, the vessel's engine might need different lubricating oils, to be compatible with the different fuels and advice should be sought from the engine manufacturer. Most time charters require Charterers to provide and pay for fuel, but the provision of lub oil usually remains the Owner's responsibility.

The vessel's crew can face other technical challenges in changing between different fuels, with different temperatures, viscosities, or other incompatibility between fuels. Again, under a charterparty that describes the vessel as capable of worldwide trading, or trading to or through an ECA, absent a clause to the contrary, the risks of operating the vessel on different fuels rests with the Owners.

www.steamshipmutual.com/downloads/Risk-Alerts/RA44ECA_ULSFuelOilChangeoverProceduresDec14.pdf

Many vessels trading under the new regime were built before it was necessary to have both low sulphur and high sulphur fuel onboard and, therefore, have been adapted to trade under the new requirements by having some of their fuel tanks dedicated to low sulphur fuel. This might reduce the range of the vessel, with the effect that the time charterer

has to arrange more bunker stems. For example, if a vessel originally had four 500t capacity fuel oil tanks, and one such tank is now dedicated to low sulphur fuel, then the vessel might be limited to carrying a maximum of 1,500t of high-sulphur fuel. As such Owners should be careful to ensure the vessels' tank capacities are carefully described in the charterparty to avoid disputes.

It is probably uneconomic to change storage tanks from low sulphur to high sulphur oil on a regular basis if the vessel is frequently employed in trades through or in and out of ECAs (with the corresponding risk of contaminating low sulphur fuel discussed above). However, the Club is aware of cases where Owners and Charterers have agreed to apportion the risk and cost of converting a "dedicated" tank from one grade to the other, when the vessel's employment has been changed to trades encompassing regular transit of ECAs to trades where there are no requirements for low sulphur fuel.

Most timecharters include a clause which states the quantities and, agrees the prices of both high and low sulphur fuels for bunkers on delivery into the charter, and on redelivery. It is not unusual for charterparties to require that the vessel to be redelivered with approximately the same quantities onboard as on

delivery. Whilst low sulphur fuel is widely available in ports in or near ECAs, it can be difficult to source in other parts of the world, such as China and in the Indian Ocean, where there is no significant market for low sulphur fuel. A Charterer redelivering a vessel in these areas might not be able to supply bunkers such that the ship redelivers with the same quantities of low sulphur fuel as on delivery. In these circumstances Owners cannot refuse redelivery but would have a claim for damages under the charterparty which, dependent on the actual wording of the relevant clause(s) in the charterparty, should be resolved by an adjustment of the final hire statement to take into account the actual bunkers onboard and prices. The vessel is unlikely to have an immediate need for low sulphur fuel in those areas, but Owners should be careful to describe accurately the bunkers onboard on delivery into the next timecharter so the next Charterer is aware that low sulphur fuel will need to be supplied before ordering the vessel to an ECA. ■

¹ MARPOL Annex VI Reg. 13 deals with NOx and specifies (in Reg. 13.6) three ECA. Reg. 14 deals with SOx and particulate matter and specifies (in Reg. 14.3) four ECA but also allows for "any other sea area, including any port area, designated by the Organization in accordance with the criteria and procedures set forth in appendix III to this Annex."

Maritime Liens in South Africa

BG Bowman Gilfillan
Jeremy Prain
Bowman Gilfillan

The features of maritime versus statutory liens in England and Wales were discussed in an article published in the last issue of Sea Venture www.steamshipmutual.com/Downloads/Sea-Venture/SeaVenture24i.pdf. In keeping with the topic of maritime liens, this article takes a look at the position in South Africa, which remains an important jurisdiction for the arrest of ships and the enforcement of maritime claims.

The maritime lien

South African admiralty law has its origins in English law and it is therefore relevant to have regard to an early definition of the maritime lien from the case of *Harmer v Bell (The Bold Buccleugh) (1852)*:

"A claim or privilege upon a thing to be carried into effect by legal process...this claim or privilege travels with the thing, into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached."

From this definition it is possible to determine the characteristics of the maritime lien, namely that is a claim enforced by legal proceedings in the form of the action *in rem* which travels with the property, that being the vessel, irrespective of whether the holder of the maritime lien remains in possession of the vessel or not and irrespective of changes in ownership of the vessel.

The maritime lien can be distinguished from other maritime claims recognised in South Africa in that the lien attaches to the vessel from the point of the incident giving rise to the lien and remains valid until it has been discharged. Prof. John Hare, a leading writer on the topic, explains that a maritime lien may be discharged by payment or waiver of the debt, by an exclusion clause such as a Himalaya Clause in a contract, physical loss of the asset, capture in times of war, laches (being an unreasonable delay in asserting a right resulting in harm to the defendant) or upon judicial sale by a competent court. The holder of the maritime lien does not have to remain in possession of the vessel in order for the maritime lien to be valid. The lien is inchoate or, put differently, remains unperfected until legal proceedings are commenced to enforce it.

"MARPOL requires vessels to be in compliance at all times when sailing in the ECA, therefore a vessel needs to have compliant low sulphur fuel onboard, and to have changed over to low sulphur fuel in sufficient time to ensure that compliant fuel is being consumed before the vessel enters the ECA."



In the case of other maritime claims which do not constitute a maritime lien, the party asserting the claim is required to show that the Owner of the property to be arrested is, at the time of the arrest, personally liable for the claim (described in South African law as *in personam* liability).

Whilst there are no specified time limits for the enforcement of maritime liens as a distinct category, the ordinary position in South Africa is that all civil claims in contract or delict (tort) prescribe within a period of three years from the date that the debt fell due. An exception arises in the case of collision claims under section 344 of the Merchant Shipping Act which limits the time period to two years.

Section 344 states, amongst other things, that the period of prescription shall be two years in respect of legal proceedings to enforce any claim or lien against a ship or its Owners in respect of any damage to or loss of another ship, caused by the fault of the former ship and shall begin to run on the date when the damage or loss or injury was caused.

These concepts were carried over into South African common law and, later, the Admiralty Jurisdiction Regulation Act, 1983, created a specific procedural framework for the recognition and enforcement of the maritime lien. For example:

- A maritime lien is stipulated to be a maritime claim;
- The arrest of a ship *in rem* may be commenced in South Africa if the Claimant has a maritime lien over the property, without the need to show personal liability on the part of the Owner; and
- Certain maritime liens, such as salvage and crew wage claims, enjoy a preference over a number of other categories of claims, for example ship mortgage claims and claims for the supply of goods or rendering of services to a ship, in terms of the ranking of claims against a fund constituted by the judicial sale of property in the jurisdiction.

In keeping with our common law roots and the historic influence of English maritime law, the heads of maritime claims recognised as maritime liens in the South African admiralty jurisdiction are limited to the following:

- i. Damage done by a ship;
- ii. Salvage;
- iii. Seaman's wages;
- iv. Bottomry;
- v. Respondentia; and
- vi. Master's Wages and Disbursements.

The maritime lien and the associated ship arrest

The concept of the 'associated ship' arrest sets South Africa apart from most other admiralty jurisdictions by permitting Claimants to arrest ships which are owned or controlled, directly or indirectly, by the same person or entity. The concept goes beyond the traditional sister ship arrest in that it allows a Claimant to pierce (or look through) the one-ship owning entities of both the ship concerned and the target ship in order to determine a single repository of power.

Against this background, the maritime lien can be used to good effect in conjunction with the associated ship arrest. Let's take, for example, a situation in which ship A collides with ship B, resulting in a total loss of ship B. Assuming that ship B is no longer available as a target of arrest in order to prosecute or, at least, to obtain security for a damages claim arising from the collision, the Owner of ship A can assert its maritime lien by arresting an associated ship which, at the time of arrest, is owned or controlled by the same person who owned or controlled ship B when the claim arose.

The maritime lien and the security arrest

Maritime liens can also be utilised in conjunction with a South African procedure known as the 'security arrest' which allows a Claimant to arrest property for the specific purpose of obtaining security for a claim, notably for foreign court or arbitration proceedings.

In this regard, let's take a situation in which a Claimant in seeking to enforce a salvage claim in legal proceedings in England and requires security for the claim. If the offending vessel is found in South Africa, it would be susceptible to arrest even if ownership of the vessel has changed hands in the intervening period. It may do so because, in principle, the Claimant need only show that it would be able to assert a lien over the vessel in support of an arrest *in rem*, but for the foreign proceedings.

Foreign maritime liens enforced in South Africa

There have been attempts in the past by creditors to elevate foreign maritime liens to the same status as those recognised in terms of South African common

law by arguing that the provisions of the Admiralty Jurisdiction Regulation Act are sufficiently broad to incorporate all categories of liens, be they local or foreign.

The debate was put to rest following the 1987 Cape High Court decision in the *Andrico Unity* where it was held that – in application of English law – a foreign maritime lien not falling into any one of the lien categories recognised by the domestic rules of English law cannot be accorded the status of a maritime lien in an English Court and, for this reason, the same rationale must be applied to South African courts exercising admiralty jurisdiction.

That said, if the subject matter of an unrecognised foreign lien claim falls within the broad definition of maritime claim in South Africa (for example, a necessaries claim), it may still be enforced by way of an action *in rem*, but it will not enjoy the status of a maritime lien. ■



“The maritime lien can be distinguished from other maritime claims recognised in South Africa in that the lien attaches to the vessel from the point of the incident giving rise to the lien and remains valid until it has been discharged.”

Tianjin Explosion – the Chinese Law Position

 **Zuoming Liu**
Hai Tong & Partners

By way of a follow up to the recent article on the shipping issues arising out of the Tianjin Explosions (www.steamshipmutual.com/publications/Articles/tianjinexplosionchineselaw.htm) this article discusses the Chinese law implications as a result of this incident.

As reported by various media around the world, the mass explosion accident in Tianjin has caused property damage and personal death/injury unprecedented in Chinese ports. While the cause of the accident is being investigated, it is envisaged that claims of different types will gradually emerge. As one of the most important ports in China, many ships call at and depart from Tianjin and a huge volume of cargo is handled at the port. In addition to mass damage and loss to other property, such as cars and nearby residential apartments, the shipping industry will also suffer huge losses. As such, it is sensible to make early preparations to respond to potential claims or put forward recourse claims.

Latest news regarding this accident*

- On 13 August 2015, the Tianjin Municipal Transportation Commission published a notice ordering all related departments to cease dangerous cargo export operations. In terms of import operation for bulk liquid terminals, operations from 0900-1800 hours were prohibited.
- On 15 August, all terminals in Tianjin port, with the exception of Huisheng Terminal, resumed normal operations, but time will be needed to resume operations at normal speed.
- On 16 August, oil spill response vessels were ordered by the Maritime Safety Administration to conduct emergency pollution responses.
- On 18 August, about 10 key persons from the Ruihai depot/warehouse were arrested by the Police.

Possible Claims

In terms of carriers, foreseeable claims or recourse claims may include:

- a. Claims by cargo interests against carriers for cargo damage;
- b. Claims by container owners against carriers for container damage;



“This is an extremely important decision for the cruise industry because it formally recognises that Norovirus is not caused by the ship and even with best practices employed outbreaks will still occur.”

Norovirus is Not Caused by the Ship



Paul Brewer
 Syndicate Manager Claims
 paul.brewer@simsi.com

In a recent first instance decision *Nolan v TUI Ltd* (2015), the London County Court has held that an outbreak of Norovirus is not considered to be a defect in the ship and the carrier is not negligent if the response to the outbreak was prompt and effective.

This outbreak of gastroenteritis occurred on board the “Thomson Spirit” in 2009 and affected over 211 of the 1,700 guests who were on-board at the time, resulting in claims for damages and loss of enjoyment being pursued.

The Claimants initially alleged the outbreak was caused by a bacterial infection which was as a result of contaminated food, drink and bad hygiene. The lab reports isolated Norovirus which is a viral infection, transmitted by various methods, including person to person or from contaminated surfaces but not generally from food or drink. The Claimants amended their claim to argue there were two

infections, Norovirus and Campylobacter, and that most passengers had been infected with both.

The judge heard evidence from expert witnesses and concluded that the illness was Norovirus and that the allegations of Campylobacter were not credible. The court concluded that the infection was most likely carried on to the ship by a guest, with one person having reported symptoms only a few hours after boarding; the incubation period for norovirus is usually 24 to 48 hours but cases can occur within 10 or 72 hours.

So having established this was a Norovirus outbreak, and not a foodborne bacterial infection, the principal issues were whether the vessel Owner had an adequate outbreak response plan in place and, if so, whether it was implemented correctly. On the facts of the case, the court concluded that the on-board systems and response plan were properly implemented and there was no “fault or neglect” (as required by the Athens Convention 1974) by the Owner or Charterer.

It had also been alleged by the Claimants that an outbreak of the virus on the previous voyage constituted notice of a defect in the ship which should have been relayed to guests prior to boarding. The court rejected their contentions that illnesses during the previous cruise had affected the subsequent cruise and concluded that the small number of illnesses on the previous cruise (18 cases) had been effectively controlled.

The court also rejected as a matter of law the Claimants’ contention that there is a ‘duty to warn’, holding that the Athens Convention was the applicable framework and that, in line with the Supreme Court case of *Sidhu v British Airways*, 1997 AC p 430 (which concerned carriage by air), the fault or neglect must occur during the carriage by sea. The court also rejected the argument that if the ship had been contaminated from the previous cruise (which it was not) that this could be a ‘defect in the ship’ in accordance with article 3.3 which transferred the burden of proof onto the Defendants. The court held that this article is limited very much to navigational and marine perils and not hotel services on a ship.

This is an extremely important decision for the cruise industry because it formally recognises that Norovirus is not caused by the ship and even with best practices employed outbreaks will still occur. The decision highlights the importance of having a suitable outbreak response plan in place and in making sure that the crew are adept at putting the plan into action.

We are grateful to Maria Pittordis of Hill Dickinson for her contribution to this article ■

- c. Claim by carriers for their own containers damaged in the incident;
- d. Carriers' economic losses, such as loss of profit due to the prohibition on movements of dangerous cargo to and from Tianjin Port and having to discharge dangerous goods at nearby ports;
- e. Loss of life, personal injury and associated recourse claims regarding carriers' employees.

In summary, carriers' involvement in this matter will include defending claims, or making claims or recourse claims. A carrier's major concern will be how to deal with a proliferation of cargo claims in the near future. In this respect, some carriers have already issued notice to customers invoking force majeure clauses. In general, before the facts of the accident are fully investigated and the cause of the accident is known, it is commercially sensible to issue such a 'without prejudice' notice to customers. In addition to possible force majeure defences, other defences available to carriers may include 'period of responsibility', fire exemption, 'other cause not involving fault of carrier or its agent/employee', and limitation of liability.

Carriers' period of responsibility for cargo

According to Article 46 of the Chinese Maritime Code, the responsibility of the carrier with regard to goods carried in containers covers the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge. The responsibility of the carrier with respect to non-containerised goods covers the period during which the carrier is in charge of the goods, starting from the time of loading of the goods onto the ship until the time the goods are discharged therefrom.

Generally, in terms of container cargo, the dividing line for responsibility of carrier versus cargo interests is the issuing of the Equipment Interchange Receipt (EIR), which will record the time and date the container is delivered by shipper to carrier, or by carrier to consignee. Such information may also be stored in online tracking systems.

For inbound containers, normally there is little dispute over the period of responsibility as this ends when consignees take delivery of containers from the depots. However, for outbound containers, disputes may arise as to when the carrier's period of responsibility starts because it is often the case that shippers and the depots enter directly into a contract. As far as the ocean carrier is concerned, the period of responsibility should not commence before the depot shifts the container to the terminal's

container yard. Nevertheless, it can be envisaged that the shipper might raise a claim against both the depot and the ocean carrier, in which case the ocean carrier may raise, inter alia, a defence that their period of responsibility had not yet commenced.

Force Majeure

As defined by the General Principles of Civil Law of the PRC (Article 153), force majeure is an objective phenomenon unforeseeable, unavoidable, and insurmountable. Basically, force majeure usually refers to a natural disaster and even in terms of a natural disaster, the courts will take a very strict view in examining whether the event is unforeseeable, unavoidable, and insurmountable. In terms of an accident caused by human error, we opine it may be difficult to rely on the general force majeure defence.

Under the PRC Tort Liability Law, where damage is caused by a third party's fault, that third party shall be liable. The same law also provides where damage is caused by force majeure, the defendant shall not be liable unless otherwise provided by the law. By logical deduction from these two provisions, an event caused by a third party's fault is not covered by force majeure although the consequences are the same; i.e. the defendant shall not be liable under either circumstance. However, the liability of a carrier under a contract is different from that that under a tort. Under PRC Contract Law, a carrier can only be exonerated from liability when the damage is caused by force majeure, the fault of shipper/consignee or inherent vice of the cargo (as maritime law is a special law, under carriage

"While the depot is unlikely to be able to invoke the force majeure defence, the PRC Contract Law provides warehouses are to be liable only when the goods are improperly kept."



of goods by sea the PRC Maritime Code shall apply in the first instance and prevail over the Contract Law if there is any difference between the two). It is clear that liability for damage caused by a third party's fault is not exempted under the Contract Law.

Another issue to be considered is that, if the statutory force majeure defence is not available, how is a contractual force majeure clause to be applied? In this case, we note some carriers' bill of lading clauses provide that "...force majeure should include, but not limited to...casualties, lockouts, fire, transportation disasters,...". Basically, such a contractual force majeure clause, although using the legal term 'force majeure', may not be viewed as force majeure and may be viewed instead as an exemption clause.

In accordance with Article 39 of the PRC Contract Law, in terms of standard clauses the party that proposes the standard clauses shall consider the rights and obligations between the parties in accordance with the principle of fairness, and shall, in a reasonable manner, call the other party's attention to any exemption and restrictive clauses regarding its liability, and give explanations of such clauses at the request of the other party. In judicial practice, Chinese courts will also take a strict view towards exemption clauses. Nevertheless, carriers can also try to put forward this defence to customers or before a court.

Fire exemption

Article 51(2) of the PRC Maritime Code, provides that the carrier is not liable for loss or damage caused by fire, unless the fire is caused by the actual fault of the carrier. It is disputable whether a carrier can invoke the defence where the fire incident happened on land (and not during sea transit), but in judicial practice some courts have decided that carriers can be exempt from liability for cargo damage caused by fire which occurred in storage yards.

"Other cause not involving fault of carrier or its agent/employee"

Article 51(12) of the Maritime Code is a 'saving clause' (or 'miscellaneous clause') providing that the carrier is not liable for 'Any other cause not involving fault of carrier or its agent/employee.' In this case, it makes sense that where goods have been warehoused in duly licensed depots, there should be no element of blame on the carrier regarding cargo damage which occurs in the depot. As such, carriers may also consider using this 'saving clause' as a last line of defence.

Carriers' claims and recourse claims

Carriers are entitled to bring claims against Ruihai. Carriers storing containers in Ruihai depot may file claims in contract, whereas carriers storing containers in nearby depots will only be able to file claims against Ruihai in tort. Although Ruihai's registered capital amounts to RMB100 million, this is unlikely to be sufficient to fully compensate all victims for this incident. In addition, according to news media, Ruihai may not have had terminal liability insurance cover in place.

Carriers may bring claims against the depots where they stored their containers on the basis of contract. We understand many containers stored in depots adjacent to the Ruihai depot sustained extensive damage. As mentioned above, while the depot is unlikely to be able to invoke the force majeure defence, the PRC Contract Law provides warehouses are to be liable only when the goods are improperly kept.

Carriers may file claims against shippers or freight forwarders who use carriers' containers. To our knowledge, carriers often retain local shipping agents, such as Penavico, as general agents for booking and

controlling containers. The local shipping agent will have a Container Usage Agreement with freight forwarders or shippers regarding the use of containers. Under the terms of such a Container Usage Agreement, the shipper or forwarder has the obligation to return the containers to the carrier, and if the container cannot be returned the shipper or forwarder should be liable for compensation. The shipper or forwarder may argue that it is the explosion which caused the loss of the containers, but as analysed above it may not be possible for the shipper or freight forwarder successfully to invoke the force majeure defence.

A carrier may also sue the government, based on Article 121 of the General Principles of Civil Law of the PRC and other relevant law which says that *"if a State organ or its personnel, while executing its duties, infringes upon the lawful rights and interests of a citizen or legal person and causes damages, it shall bear civil liability."* Reports released by some news media so far indicate that the Tianjin Municipal Government may have been at fault in its examination and approval of Ruihai for the storage of dangerous goods. However, to whom and to what extent the Tianjin Municipal Government may be liable depends largely on the final investigations of the Central Government.

Limitation of liability

Regarding limitation of liability, as per Article 56 of the PRC Maritime Code the carrier can cap its liability for cargo claims to SDR666.67 per package or SDR2 per kilo (whichever is higher), unless the value of the cargo has been declared and recorded in the B/L, or if the carrier and shipper have agreed for a higher limitation amount. In this case, carriers may be able to take advantage of package / weight limitation, especially where the cargo is machinery equipment. However, there may be problems claiming limitation where the loss or damage has occurred on land, instead of during a sea transit.

As always, before taking steps which may have significant consequences in any legal proceedings in China, or elsewhere, legal advice on the particular facts of the claim should be obtained.

***Please note this article is based on information available at the time of writing. ■**

Electronic Release of Cargo



Avnish Jani
Syndicate Executive
avnish.jani@simsi.com

A recent decision in the High Court case of *Glencore International AG v MSC Mediterranean Shipping Co SA and Another*, has considered issues relating to carriers' responsibility for loss of containers. In particular, the case discussed whether delivery of cargo under an Electronic Release System (ERS) complied with the Carrier's obligation to deliver the cargo under a bill of lading (B/L) and if this was a breach of contract.

Background of the case

Claimants, Glencore, contracted with the defendant carrier, MSC, to ship three containers of cobalt briquettes from Fremantle, Australia to Antwerp, Belgium. The cargo had been shipped under a negotiable B/L issued by MSC, which named Glencore as the Shipper and Steinweg (Glencore's local agents) as "Notify Parties" with the consignee box completed as "To order".

The negotiable B/L contained the following express clause:

"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 cargo was handled under an ERS implemented for use on containerised cargo on its arrival into the MSC Terminal at Antwerp. Under the ERS, carriers provided computer generated import PIN codes in exchange for the original B/L which the holders of the B/L presented to the terminal to take delivery of cargo. This ERS was not mandatory at Antwerp and was an alternative method adopted by MSC. Steinweg were entrusted with taking delivery of the cargo for Glencore and were familiar with the operation of the ERS as Glencore had previously shipped cargo to Antwerp successfully with MSC as carrier.

On this occasion, although MSC had issued Steinweg with an import PIN code for each of the containers, Steinweg's hauliers were informed that two of the three containers had already been collected. It is unclear exactly what happened to the two missing containers and the cargo within.

Glencore claimed damages from MSC for breach of contract with respect to the two

missing containers submitting that only one of the containers had been delivered.

The parties arguments

Glencore argued that they did not know that MSC used the ERS and that MSC should have delivered the cargo only on presentation of the B/L or a delivery order given in exchange for it as per the express clause contained in the B/L.

MSC contended that they had (i) handled the cargo in accordance with the express terms of the B/L as the import PIN codes constituted a "Delivery Order" within the meaning of the B/L, and (ii) that an implied term permitted the use of the ERS to give business efficacy to the B/L. MSC further contended that they had (iii) acted in accordance with an agreement varying the B/L's original terms.

Decision of the High Court

After consideration of MSC's arguments, Mr Justice Andrew Smith held that Glencore had established its claim for breach of contract. Each of MSC's arguments were examined in reaching this conclusion:

- i. Did the import PIN code constitute a "delivery order" within the meaning of the B/L?

In analysing this question, Mr Justice Andrew Smith noted that the term "delivery order" is used to describe documents of different kinds and as such should be interpreted in its context within the B/L. In this respect, he inferred that the parties must be taken to be referring to a "ships delivery order", a commonly used expression defined in s.1(4) of the 1992 Carriage of Goods by Sea Act. An essential feature of such a delivery order is the carrier's undertaking to deliver the goods to the person identified to take delivery under the document.

Mr Justice Andrew Smith held that the import PIN codes were not "Delivery Orders" as required under the B/L. He considered it improbable that the holder of a B/L would surrender its rights against a carrier without receiving either the goods themselves or the benefit of a substitute undertaking from the carrier. He decided that the import PIN codes themselves could not be held as providing any undertaking to the holder of the B/L.

- ii. Did an implied term permit the use of ERS to give business efficacy to the contract?

MSC argued that the previous course of dealing effectively permitted the use of the ERS as an implied term of the B/L, to effectively say that, "upon surrender of the bill of lading by the lawful holder, a carrier or its agent may provide an import pin code..." as well as to give business efficacy to the B/L.

“The issues presented by this case are unusual and largely dependent on the facts of the scenario. However, this case demonstrates both the commercial and legal risks presented to a carrier when such systems are used ...”



Important New Ruling Regarding Criminal Liability for Oil Spills



John Cox & Erin Weesner-McKinley
Keesal, Young & Logan

A shipowner whose vessel spills oil in the United States may no longer face strict criminal liability when the spilled oil kills migratory birds. The United States Court of Appeals for the Fifth Circuit recently ruled that the Migratory Bird Treaty Act of 1918 (MBTA) does not impose strict criminal liability for accidentally or indirectly killing migratory birds, *United States of America v Citgo Petroleum Corp.* In the past, prosecutors have brought misdemeanor strict liability criminal charges under the MBTA against vessel owners and operators, when discharges from their vessels killed sea birds. The statutory fines for misdemeanor violations of the MBTA are limited. However, penalties can also include vessel forfeiture or fines under the Alternative Fines Act, 18 United States Code § 3571(d), of up to twice the gross gain or loss resulting from the criminal conduct.

Before the recent Fifth Circuit decision, Courts were evenly split over whether the MBTA applied to accidental or incidental taking of such birds. The Fifth Circuit’s decision aligns it with similar decisions from the Eighth and Ninth Circuit Courts of Appeal, and means that the majority of the five Circuits that have decided this issue have held that an accidental ‘taking’ or ‘killing’ of a migratory bird does not run afoul of the MBTA. Given the split in the Circuit Courts of Appeal, it is possible that this case will be appealed to the United States Supreme Court. A decision by the Supreme Court on the propriety of bringing strict liability criminal charges based on accidents could potentially change the way criminal prosecutions are conducted following oil spills in the United States.

Accidental killing of migratory birds

In *United States of America v Citgo Petroleum Corp., CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P.* (collectively “CITGO”) were alleged to have committed multiple violations of the MBTA when a surprise inspection of CITGO’s Corpus Christi refinery revealed 130,000 barrels of oil floating atop two uncovered equalization tanks. Because the government suspected birds had died in the uncovered tanks, CITGO was accused of ‘taking’ migratory birds in violation of the MBTA (16 U.S.C. §703.) The district court found CITGO guilty of three out of five counts for ‘taking’ migratory birds and sentenced CITGO to US\$15,000 for each MBTA violation. CITGO appealed the decision and the Fifth Circuit Court of Appeals reversed the district court’s decision.

Mr Justice Andrew Smith concluded that such an implied term was contradictory to the express terms in the B/L which stated the goods or a delivery order were to be provided in exchange for the B/L. He referred to Lord Hoffman’s comments in *Johnson v Unisys Ltd* [2001] UKHL 13 at para 35, “...any terms which the courts imply into a contract must be consistent with the express terms. Implied terms may supplement the express terms but cannot contradict them”. As the parties had specifically relaxed the carrier’s prima facie obligation to deliver against an original B/L by allowing the carrier to deliver the cargo against a delivery order, it was difficult to conclude that the parties intended to go further by allowing delivery against an import PIN code.

Furthermore, the evidence showed that the ERS was not exclusively used at Antwerp and it was not mandatory. Therefore, it was difficult to conclude that business requirements dictated the use of the ERS.

Mr Justice Andrew Smith commented further that to allow the implication of such a term would imply that by providing an import PIN code, MSC did indeed fulfil their obligations in delivering the cargo and discharging their liabilities. This could not be correct as receipt of an import PIN code did not constitute delivery but only a “right of delivery”.

iii. Did MSC act in accordance with an agreement varying the B/L’s original terms?

MSC submitted that the express term in the B/L was varied by Steinweg’s agreement in correspondence in January 2011.

Mr Justice Andrew Smith accepted that Glencore’s local agents, Steinweg, were left to liaise with the carrier to handle the cargo following discharge subject to Glencore’s further instructions. Glencore were not involved or concerned with how Steinweg conducted these operations.

Having considered this, Mr Justice Andrew Smith was not satisfied on the evidence that Glencore gave Steinweg actual authority to enter into any agreements and consequently accept any variation of the original terms on Glencore’s behalf or that Glencore held Steinweg out as having such authority to do so. Notwithstanding the above, it was also noted that the correspondence referred to pre-dated the issuance of the B/L which the claim was brought under.

Comment

This case reinforces the fundamental obligation of a carrier to deliver goods in accordance with

the terms of the contract of carriage unless it can clearly be shown that there is a valid agreement in place to the contrary. To fulfil its obligations, the carrier must either deliver the cargo to the holder of the B/L or provide a valid delivery order containing an undertaking as to delivery.

This case is specifically noteworthy as MSC as a carrier did not seek to do anything out of the ordinary and had previously used the ERS with cargo shipped by Glencore. There were obvious commercial advantages to adopting the ERS, which although not mandatory was considered more efficient than the traditional process.

The issues presented by this case are unusual and largely dependent on the facts of the scenario. However, this case demonstrates both the commercial and legal risks presented to a carrier when such systems are used and cargo is not delivered strictly in accordance with the terms of a contract of carriage.

Given the decision in this case, if carriers wish to use alternative delivery systems they should consider obtaining legal advice on their obligations and incorporating clear and express clauses in their B/L to reflect this. ■

The split in authority in interpreting the MBTA

There is a split in authority regarding the interpretation of the MBTA. The Eighth and Ninth Circuits have held that a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds. The Second and Tenth Circuits interpret the MBTA more broadly and hold that because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds. The Fifth Circuit declined to adopt this broad reading of the MBTA and instead joined the Eighth and Ninth Circuits in its interpretation of the statute.

A three judge panel of the Fifth Circuit decided to interpret the MBTA more narrowly based on the MBTA's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act. Importantly the Fifth Circuit reasoned that the MBTA's text provides no basis, explicitly or implicitly, for criminalising migratory bird deaths because they resulted from violations of other state or federal laws. The Fifth Circuit fundamentally disagreed that because misdemeanor MBTA violations are strict liability crimes, a 'take' includes acts (or omissions) that indirectly or accidentally kill migratory birds.

Lastly, the Fifth Circuit addressed the absurd scope of liability that a broad interpretation of the MBTA creates. The Fifth Circuit reasoned that if the MBTA prohibits all acts or omissions that 'directly' kill birds where bird deaths are 'foreseeable', then all Owners of big windows, communications towers, wind turbines, solar energy farms, cars, cats and even church steeples may be found guilty of violating the MBTA.

The United States may petition the entire Fifth Circuit to review the panel decision, or it may ask the United States Supreme Court to review the issue. If the Supreme Court accepts the appeal, its decision may have implications beyond the MBTA, which is not the only statute used by prosecutors to charge shipowners and operators criminally following an oil spill. Prosecutor routines bring strict liability misdemeanour charges under the federal Refuse Act, and bring charges for negligently discharging oil under the federal Clean Water Act. A broad decision by the Supreme Court could potentially strengthen or weaken the prosecutors' hands in future cases. ■

"... Migratory Bird Treaty Act of 1918 (MBTA) does not impose strict criminal liability for accidentally or indirectly killing migratory birds ..."



The New Turkish Salvage Contract

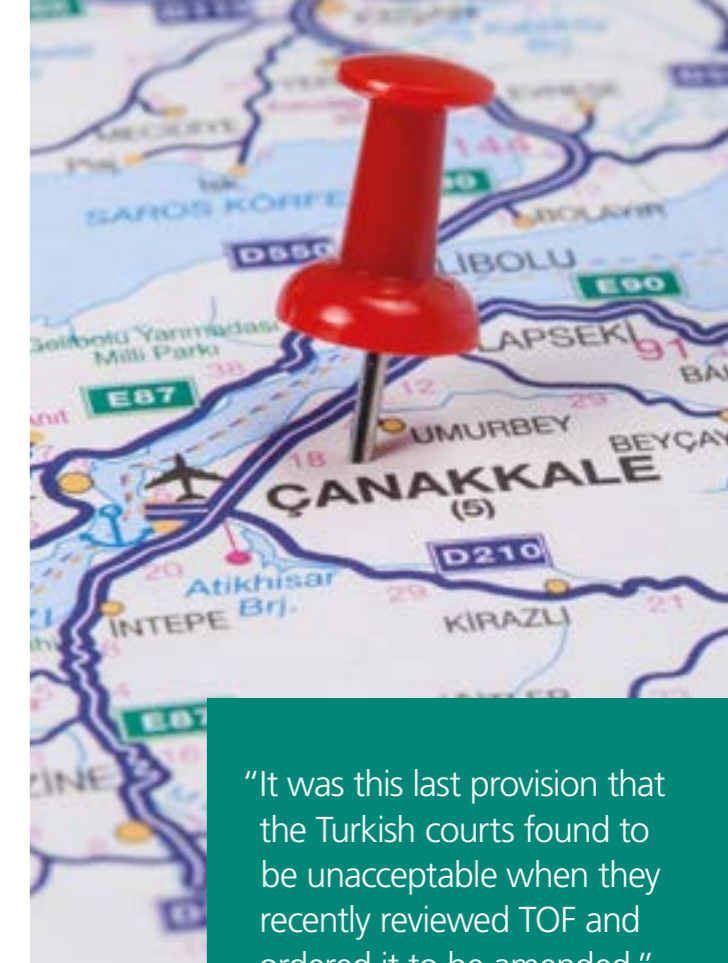
INCE & CO | INTERNATIONAL LAW FIRM
Victor Fenwick
 Ince & Co

As many know well, the Directorate General of Coastal Safety (DGCS) are responsible for the provision of salvage services in the Turkish Straits. The Turkish Straits extend from roughly, the Straits of Çanakkale in the West, through the Sea of Marmara to the Istanbul Straits in the East. This is a zone of significant shipping activity with approximately 50,000 ships a year transiting the Istanbul Straits alone.

The DGCS have monopoly rights on the provision of salvage services in this region. This means that no other salvor will be able to work in this region without the permission of the DGCS. They operate their own tugs and usually work independently.

Traditionally, the DGCS asked the ship to sign a Turkish salvage contract to formalise the salvage claim. Their preferred contract, until this year, was the Turkish Open Form (TOF) which was similar in some respects to the Lloyd's Open Form (LOF) – the world's most widely used salvage contract. In the absence of an agreement between the parties as to the size of the salvors' reward, the matter is referred to Turkish arbitrators for a decision. However, TOF contained three other clauses which do not appear in LOF, which made it unattractive to shipowners. These clauses were as follows:

1. A clause which obliged the shipowners to provide security on behalf of all salvaged property, rather than just the shipowners' property. In other words, shipowners had to post security on behalf of cargo and bunkers even if they didn't belong to them.
2. If a settlement could not be reached with the salvors, and the matter proceeded to arbitration, then the arbitrators fees would be based on the level of the award. In other words, the higher the award, the higher the arbitrators fees – not a very re-assuring prospect for shipowners!
3. The TOF granted an exclusive right to the salvors to commence arbitration. Shipowners, although a party to the contract, did not have that option. Salvors were able to use this clause as a pressure point on shipowners to settle cases when shipowners had, as per point 1 above, put up security to the salvors on behalf of all the salvaged property. This was always in the form of a bank guarantee from a Turkish bank which incurred fees for the shipowners in both setting it up and maintaining it. The fact that the shipowners could



"It was this last provision that the Turkish courts found to be unacceptable when they recently reviewed TOF and ordered it to be amended."

do nothing to minimise their accruing losses under the bank guarantee by starting an arbitration (in an attempt to bring the process to an end) meant that the salvors were in a strong negotiating position, and were able to pressurise shipowners into agreeing unfavourable settlements.

It was this last provision that the Turkish courts found to be unacceptable when they recently reviewed TOF and ordered it to be amended. This in turn, led to the demise of TOF and the birth of its replacement, Turks 2015 (the son of TOF). Unfortunately the other two unfavourable clauses survived the review. The provision requiring shipowners to provide security on behalf of all salvaged property and the provision which awards the arbitrator fees based on the size of the award, are alive and well in Turks 2015; making this new Turkish salvage contract only marginally more user friendly for shipowners than its predecessor.

In closing, it is sometimes possible, depending on the factual circumstances of the case, to avoid agreeing the Turks 2015 form with the DGCS at the time the services are provided. In an emergency for example, it is our experience that services will be provided and after they have been rendered, the DGCS will try and put pressure on the shipowners to agree Turks 2015. If possible, this should be resisted, as this will leave the salvors to pursue their salvage claim through the Turkish courts against the backdrop of the Turkish commercial code rather than by contract through arbitration. The commercial code incorporates the 1989 Salvage Convention and importantly, does not include a provision which requires the shipowners to put up security on behalf of all the salvaged property. ■

Carriage of Bauxite



Bill Kirrane
Syndicate Manager
bill.kirrane@simsl.com

On 18 August, 2015 The Bahamas Maritime Authority published its report into the sinking of the "Bulk Jupiter" in January 2015, with the loss of 18 lives, and on the 20 October 2015 the IMO issued a circular letter warning of the dangers of the carriage of bauxite.

www.bahamasmaritime.com/downloads/Reports%20-%202001%20to%20date/Bulk%20Jupiter%20Final%20Report%20-%20August%202015.pdf

www.edocs.imo.org/Final%20Documents/English/CCC.1-CIRC.2%20%28E%29.docx

Bauxite was traditionally considered to be a "safe" cargo for bulk carriers. The only entry for bauxite in the International Maritime Solid Bulk Cargoes Code (IMSBC code) lists it as a "Group C" cargo which is not liable to liquefy ("Group A") or to possess chemical hazards ("Group B"). However this "Group C" classification applies to bauxite which meets certain parameters for particle size (70% to 90% lumps: 2.5 mm to 500 mm / 10% to 30% powder) and moisture content (0% to 10%). If the bauxite cargo comprises a finer material, or if it has more moisture, then it should not automatically be considered as a "safe" "Group C" cargo.

The "Bulk Jupiter" was fixed to load a cargo of 46,000 tonnes of bauxite at Kuantan, Malaysia for China. After arrival at Kuantan on 16 December 2014, the Master was given a certificate issued by the shippers on 11 December, stating that the cargo was a Group "C" cargo, with particle size (70% to 90% lumps: 2.5 mm to 500 mm / 10% to 30% powder) and moisture content (0% to 10%), matching the IMSBC parameters.

There had been heavy rainfall at Kuantan during the five days between the date on the certificate and the commencement of loading. It is understood that the cargo for BULK JUPITER was stockpiled in the open, exposed to the weather. There was further rainfall while the ship was in port, with loading operations being suspended for various periods because of rain.

The subsequent investigation found that the exporters of the cargo had instructed an independent surveyor to attend, who took samples of the cargo at approximate intervals representing each 5,000 tonnes loaded. These were analysed later, and each sample

was found to comprise more than 20% water. It seems that the Master was not aware of this operation, and that no information about it was passed to him.

The "Bulk Jupiter" completed loading on 30 December 2014, and sailed that evening. She sank on the morning of 2 January 2015, with the loss of 18 of her 19 crew.

The sole survivor was the ship's cook, who had started his daily work in the galley at 06:00. The ship was rolling in typical monsoon weather conditions in the South China Seas. He had returned to his cabin when, at about 06:40, he heard the ship's general alarm signal, followed by the Master's voice instructing all hands to the bridge. He started to make his way to the bridge, but met other crewmen who told him that they were to proceed to the port lifeboat. He went back to his cabin quickly for his life-jacket and immersion suit.

The ship blacked-out as he left his cabin, and took a list to starboard, that the cook estimates was about 45

degrees. Because of the list, he could not open the external door from the accommodation to the port side lifeboat deck, so he went back up the internal staircase, where he met the ship's Master, coming down. They both exited the accommodation onto a small platform at the starboard aft side of "C" deck, jumped into the sea and swam some distance away from the ship. The cook reports that he looked back to see his ship almost totally submerged, but he did not see any of the other crewmen.

At about 07:00 the "Bulk Jupiter's" EPIRB automatically broadcasted a distress message, and ships in the vicinity started a search. A containership spotted a ship's lifeboat and life raft, but both were empty. At about 14:00 the same ship spotted two persons in the water: the cook was taken onboard a tug soon after, together with the body of the Master, who had died in the water. The Chief Officer's body was later recovered, but none of the other crew was found.

The IMO have issued a circular, recommending that if the Master has doubts as to whether a bauxite

cargo presented for loading does comply with the parameters for moisture or particle size of a "Group C" cargo then the Master should stop loading, and have the shipper verify the properties of the cargo.

A Master should consider the possibility that a bulk cargo might have a higher moisture content than certified when there has been rainfall at the port in the period before and during loading of cargo, and if the cargo has been exposed to the weather. Apart from the influence of weather, it is reported that some bauxite cargoes are processed before loading, by washing, or crushing to break down large particles, which might affect the moisture content and particle size of cargo actually loaded.

As set out in its October circular the IMO is taking action to investigate the hazards and risks associated with the carriage of bauxite as well as any necessary amendments to the IMSBC Code dependent on the results of its investigations.

The Master and ship's staff should be vigilant in checking the condition of cargo before and throughout the loading operation, onboard ship, and ashore at cargo stockpiles, if this is possible. Where cargo is brought to the ship in barges, then cargo in all barges, and not just the first one presented for loading, should be carefully checked. The "can test", described in the IMSBC code, should always be used by the Master to give an early indication of any problem and, if there is reason to doubt the cargo being loaded is consistent with the shipper's declaration it may be appropriate to stop loading but, in these circumstances, the vessel's master should in any event request the shipper to verify the properties of the cargo and seek advice from the Club and its local correspondents. ■



"As set out in its October circular the IMO is taking action to investigate the hazards and risks associated with the carriage of bauxite as well as any necessary amendments to the IMSBC Code..."

Sampling of Bulk Liquid Cargoes



David Jones
CWA International Limited

Introduction

Sampling is a vitally important factor in the custody transfer of bulk liquid cargoes. Acquisition and subsequent care and retention of representative samples can provide an important means of rebutting unfounded allegations of cargo contamination. This applies equally to chemical, petrochemical, petroleum product and crude oil shipments.

Cargo surveyors attending the loading or discharge of any given cargo are often working on behalf of shippers or consignees (or both, on a joint basis) and are not obliged to provide samples to the ship, albeit that it is common practice to place samples in the custody of the master at the loadport for delivery to the disport receivers. However, these samples are not the property of the ship and only on rare occasions are official-sealed custody transfer samples provided. Whether samples are provided by the cargo interests to the ship or not, it is recommended that the vessel's crew draw samples for the ship's protection.

Retention and sealing

Due to the inability of the ship's officers to undertake analysis of samples, only the most obvious contamination problems will be apparent at the outset, such as:

- i. change in colour
- ii. the presence of water (if water is not soluble in the cargo)
- iii. foreign particulate matter
- iv. odour taint¹

Samples taken at the initial stages of cargo operations showing such obvious cargo quality deviations should give cause to halt cargo operations in order to carry out further investigations² and to note protest.

All samples drawn should be sealed, labelled, retained and recorded. Wherever possible, samples drawn by ship's crew should be clearly labelled with the following:

Ship's Name

Operational Status i.e. before loading, after loading, before discharge.

Product

Sample Source i.e. tank number, manifold number.

Sample Type i.e. top, middle, bottom, dead bottom, running, composite

Identity of Sampler i.e. surveyor, crew member.
Date and Time

Location i.e. port, berth, anchorage. Seal Number

Seals are customarily applied to samples taken by an independent surveyor in order to preserve sample provenance in the event of dispute. Nowadays, seals are widely available and relatively inexpensive and it is increasingly common for ships to be equipped with their own seals. Alternatively, some owners use self-sealing tamper-evident bottle closures which may not be individually numbered but, nonetheless, preserve sample provenance.

Marked samples should be retained in a dedicated locker, ideally for at least 12 months. Space considerations may make this impractical in which case the samples should be retained for as long as possible. However, where the cargo is known or expected to be the subject of dispute, samples should be retained for at least 12 months in any event. Samples should not be exposed to extremes of temperature and should be kept in darkness. When no longer required, disposal should be by appropriate means; many owners use the services of local cargo surveyors who invariably have disposal methods already in place.

Sample bottles

Sample bottles vary in size and in the materials from which they are made. Glass and plastic bottles can be dark or clear. Most samples can generally be stored in clear glass bottles. Light sensitive samples, however, should be stored in brown bottles³. Certain samples, such as Caustic Soda or Potash require plastic containers. Petroleum product/crude oil samples are often retained in lacquer-lined tinsplate containers. These types of containers are, in general, unsuitable for retention of chemical cargo samples. Where possible, a range of containers should be available.

Sample bottle closures vary in the chemical resistance of the sealing insert. Waxed cardboard disc type should only be used for petroleum products/crude oils. Aluminium foil faced cardboard discs are unsuitable for acid or alkaline samples. Preferred inserts are polypropylene or PTFE.

Sample bottle size may be determined, to some extent, by storage capacity, balanced against the need to retain sufficient sample volume to allow analysis in the event of a dispute arising. Generally, 500ml is a realistic compromise.

Where to take samples

During the custody transfer of a bulk liquid cargo, the principal sampling points where cargo quality can be adequately monitored are: -

- i. Loadport Shore tank(s)

- ii. Shoreline Sample following any 'packing' or flushing operation
- iii. Vessel's manifold at commencement of loading and spot checks during loading
- iv. Vessel's cargo tanks first foots
- v. Vessel's cargo tanks post loading
- vi. Vessel's cargo tanks pre-discharge
- vii. Vessel's manifold at commencement of discharge
- viii. Disport Shore Tank(s) pre and post discharge

Ideally, all of these samples should be taken on each cargo carrying voyage, but in any event, onboard ship samples (iii) to (vii) should always be taken by the crew for protection of the owner's interests. Further samples might be considered, such as (iii), following change-over of shoretanks at a mid-loading stage.

Method of drawing samples

Samples should be drawn in compliance with industry practice as set out in publications such as those issued by ASTM, API, BS, ISO or EI (see references below). In general, a 'running' sample taken by use of a bottle and sample cage is the preferred method of obtaining a representative sample in a homogeneous bulk cargo. Where the cargo may not be homogenous, careful zone sampling is required to produce a representative composite sample. The properties of some chemical cargoes require that special sampling procedures are adopted such as excluding air, using specialist sample valves or indeed 'closed' sampling methods due to the toxicity or flammability of the cargo. Here, the sampling procedure is prescribed by the specialist equipment in use but general guidelines have recently been drafted by the EI and API. Appropriate safety procedures must be observed and the sampler protected from exposure to the cargo during sampling.

Conclusion

It is unquestionably the case that a vessel's adherence to the above sampling procedure can provide the necessary evidence to rebut cargo quality claims in circumstances where unfounded

allegations are made against shipowners. A rigorous sampling system should form an essential part of a vessel's ISM Operational Procedures.

References

ASTM D 4057 -

- Standard Practice for Manual Sampling of Petroleum and Petroleum Products.

ASTM E 300 -

- Standard Practice for Sampling Industrial Chemicals.

BS 3195 -

- Methods for Sampling Petroleum Products.

BS 5309 -

- Methods for Sampling Chemical Products.

IP-

- Petroleum Measurements Manual Part IV Sampling - Section I Manual Methods.

API -

- Manual of Petroleum Measurement Standards Ch 8, Standard Methods of Sampling Petroleum and Petroleum Products.

- ISO 5555 - Animal and Vegetable Fats and Oils - Sampling.

- EI HM52 - Measurement and sampling of cargoes on board tank vessels using closed and restricted equipment. ■

¹ Safety: Odour is not an issue on all cargoes. Toxic and highly odiferous cargoes should not be tested for odour.

² A P&I surveyor should be summoned.

³ Brown bottles impede inspection of the sample for colour/water/particulates. It is suggested that clear glass bottles are used initially and, after inspection, the sample transferred to a dark brown bottle for storage.

Maritime Lien under the Law of P. R. China

 Wang Hongyu
Wang Jing & Co

In the previous issue of Sea Venture, there was an overview of the types of maritime and statutory liens which arise in England and Wales. This article discusses the position in China and particular issues to be aware of in this jurisdiction when enforcing maritime claims.

Definition and classification of maritime liens

There is no general action *in rem* under Chinese law. In order to arrest a ship regardless of its ownership, the claim against the ship needs to give rise to a maritime lien. Otherwise, if the claim is an ordinary maritime claim, the ship may only be arrested if it is the property of the person liable *in personam*. Maritime liens are provided for together with ship mortgage and possessory liens under the Chinese Maritime Code ('CMC'). The definition of a maritime lien under the CMC is that it is "the right of the claimant to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim." When it comes to the priority rule, a maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over a ship mortgage.

According to Article 22 of CMC, the following five categories of claims give rise to maritime liens:

- (a) claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement;
- (b) claims in respect of loss of life or personal injury occurred in the operation of the ship;
- (c) claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
- (d) claims for salvage payment;
- (e) claims for loss of or damage to property resulting from tortious acts in the course of the operation of the ship. (It should be noted that if a ship carrying more than 2,000 tons of oil in bulk as cargo has valid oil liability insurance coverage or other financial security, those claims for oil pollution damage caused by the carrying ship are not attached with maritime liens even if it falls under category (e).)

Priority rules of maritime liens

Maritime liens have a unique set of priority rules that are used when comparing one lien to another. In this regard, where there is more than one maritime lien attaching to a ship, the CMC provides that the maritime liens in different categories shall be enforced in the order from (a) to (e) as listed above. However, if salvage takes place after the incident giving rise to maritime liens in category (a) to (c), payment of the salvage claim will take priority over category (a). This is because if the ship is not salvaged, enforcing maritime liens in category (a) to (c) would be impossible.

Accordingly, where there is more than one salvage claim, the salvage which takes place later in time will take priority in the payment order. However, maritime liens within the same category of (a), (b), (c) and (e) will take the same sequence. Where there is more than one maritime lien falling into the same category (except for category (d) as mentioned above) and the value of those claims exceed the proceeds of sale, the claims falling into the same category of maritime lien will be compensated pro rata.

Discharge and distinction of maritime liens

A maritime lien attaches to a ship from the time of the incident and continues to be binding until it is discharged. A maritime lien can be discharged in the following circumstances:

- When payment of the claim has been made;
- In the case of transferring the ownership of a ship, failing to enforce the maritime lien within the 60-day period of a public notice issued by a court at the request of the purchaser.
- Chapter 11 of the Maritime Special Procedures Law of the PRC (MSPL) deals with procedures on public notice for enforcement of maritime liens. According to Article 120 of the MSPL, a purchaser has the option to choose whether or not to apply to court for publication of the ship transfer. If the purchaser applies for publicity, upon elapse of the 60-day period, the maritime court shall, upon application by the purchaser, make a judgment to declare that no maritime liens are attached to the transferred ship. Otherwise, maritime liens shall survive the transfer/sale of a ship.
- A maritime lien has not been enforced within one year since the existence of such maritime lien arising.
- The one-year period is applied only to maritime liens and does not affect the usual time bars applicable to maritime claims. Furthermore, the one-year period is not subject to interruption. For example, the time bar for claims arising from ship collisions is two years under CMC. If the

Claimant fails to enforce the maritime lien by way of arresting the ship within the one-year period, the maritime lien shall be discharged, however, the underlying maritime claim is still protected by the two-year limitation period.

- The ship in question has been the subject of a forced sale by the court.
- In this regard, the court will put up a notice on the forced sale and maritime liens are required to be registered to court within 60-days starting from the day when the first notice on forced sale is published by the court.
- The ship has been lost / destroyed.

Enforcement of maritime liens

Maritime liens are enforced by making an application for a ship arrest to the Chinese maritime court located at the place where the subject ship is berthed (Article 28 of the CMC). Upon expiration

of the 30-day period of arrest, if the respondent fails to provide security, the Claimant may initiate a lawsuit or arbitration (Article 29 of the Chinese Maritime Special Procedures Law) and then apply to the maritime court for auction of the ship.

The Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Arrest and Auction of Ships ('Provisions') came into force on 1 March 2015. The Provisions include rules which pave the way for enforcement of maritime liens, these are summarised below:

- Claimants can enforce maritime liens against a ship that is already under the court's order of restraint on sale (see Article 1). Article 1 of the Provisions allows taking measures other than ship arrest for the purpose of securing a maritime claim, such as restraint on sale of a ship or mortgage.
- Claimants can enforce maritime liens against a ship that is already arrested by a different Claimant

"Maritime liens are enforced by making an application for a ship arrest to the Chinese maritime court located at the place where the subject ship is berthed (Article 28 of the CMC)."



(see Article 2). After a ship is under arrest, the Claimant has chosen not to apply for a judicial sale but is instead negotiating security with the shipowner in exchange for release of the ship, other Claimants of maritime liens can still apply for arrest of the ship in order to enforce their own maritime liens.

- Claimants can enforce maritime liens against a bareboat chartered ship in order to satisfy their claim against the bareboat charterer (see Article 3). Before the implementation of the Provisions, the MSPL provides for arresting a bareboat chartered ship for claims against the bareboat charterer. However, it is still controversial as to whether the bareboat chartered ship could be the subject of forced sale in order to satisfy a claim against its bareboat charterer.
- When distributing the proceeds of judicial auction of a ship, maritime liens have priority to possessory liens and mortgages (see Article 22).

Maritime lien and limitation fund for maritime claims

For those claims which give rise to a maritime lien and also are subject to maritime liability limitation, once a limitation fund has been established, the Claimant would no longer be able to enforce its maritime lien. This means that once a limitation fund is established, maritime liens lose the privilege of priority and will be paid out according to the sequence as provided for under the limitation fund.

In the judgment rendered by Ningbo Maritime Court (NMC, case No: (2011) Yong Hai Fa Wen Quan Zi No1), M/V "269" collided with M/V "168" causing M/V "269" to sink. The inter-ship liability ruled by NMC was 50:50. Following the accident, M/V "168" established a maritime liability limitation fund. Owners of cargo on board M/V "269" initiated claims against M/V "168" for cargo losses and requested NMC to confirm that their claims were attached with maritime liens. The NMC ruled that the cargo claim should be paid through the maritime limitation fund as the maritime liens which attached to such claims were discharged.

For completeness, claims in category (a), (c) and (d) are not subject to maritime liability limitation. Therefore, for these claims, establishment of a limitation fund would not prejudice the Claimant's right to enforce maritime liens against the concerned ship. ■

¹ See Article 30 of the CMC: "The provisions of this Section shall not affect the implementation of the limitation of liability for maritime claims provided for in Chapter XI of this Code." Where enforcing a maritime lien conflicts with a maritime liability limitation fund, we are of the view that enforcement of maritime lien should give way to maritime limitation fund.

Dubai Court Issues Landmark Judgment



Yaman Al Hawamdeh & Anas Al Tarawneh
Holman Fenwick Willian

In a recent landmark judgment the Dubai Court of Appeal ordered the recognition and enforcement of a London arbitration award in the UAE. This judgment is of particular significance as it confirms that UAE courts should consider the validity of the underlying arbitration clause in the context of the New York Convention and the foreign law governing the contract. The judgment is also the first of its kind ordering the recognition and enforcement of a foreign arbitral award made on the basis of an unsigned charterparty.

Historical background

In 2006, the UAE ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) without reservations. In principle, therefore, the UAE courts should recognise foreign arbitral awards that satisfy the conditions set out under the New York Convention as binding and enforceable.

Before the UAE ratified the New York Convention, enforcement of foreign arbitral awards was dealt with in the same manner as foreign courts' judgments under the UAE Civil Procedures Law (CPL). This allowed the UAE courts to set aside foreign arbitral awards on various grounds set out under the CPL. These grounds mostly related to the lack of reciprocity between the UAE and the country where the award was made.

As a result, the UAE courts inherited a considerable number of negative precedents in relation to the enforcement of foreign arbitral awards. These precedents suggested that foreign arbitral awards may not be enforced in the UAE.

Since the New York Convention has come into force, it has taken several years for the first case to proceed through the UAE courts system. In 2010, the Fujairah Court of First Instance ordered enforcement of a foreign award in the UAE under the New York Convention. This was a default judgment and many grounds which were traditionally used to challenge the recognition and enforcement of foreign arbitral awards were not raised.

The UAE courts have recently delivered a few judgments which adopted a more flexible and arbitration friendly stand with regards to the enforcement of foreign arbitral awards. However, in a more recent striking development, the Dubai Court of Cassation declined the recognition and



enforcement of a foreign arbitral award on the basis that it lacked jurisdiction under the CPL to consider the underlying dispute. This was despite the fact that many legal experts considered the presence of assets in the UAE, against which enforcement was sought should be sufficient under the New York Convention to give local courts jurisdiction. This approach creates uncertainty as to whether the UAE courts would apply the conditions set out under the CPL rather than those laid down under the New York Convention.

Brief background of the case

A Hong Kong based shipping company (the Claimant), in its capacity as the disponent owner of a vessel, entered into a time charterparty with a Dubai based company (the Defendant). Under the charterparty, the Defendant hired the vessel for a period of between 59 to 62 months. The charterparty contained an arbitration clause which provided for adhoc arbitration in London, and was governed by English law. The Claimant and the Defendant negotiated and fixed the terms of the charterparty by email exchanges, although

"This judgment is of particular significance as it confirms that UAE courts should consider the validity of the underlying arbitration clause in the context of the New York Convention and the foreign law governing the contract.

The judgment is also the first of its kind ordering the recognition and enforcement of a foreign arbitral award made on the basis of an unsigned charterparty."

as often occurs in the business the parties never actually signed a physical copy of the charterparty or the arbitration clause (English law pragmatically allows for a binding contract to be formed by exchange of electronic email transmissions alone).

A dispute arose between the parties and subsequently, the Claimant commenced arbitration proceedings in London. The arbitral tribunal handed down three arbitration awards between 2011 and 2013, all in favour of the Claimant. The Claimant was represented in the arbitration by HFW's Shanghai team, including Partner Julian Davies and Senior Associate Trevor Fox.

In January 2014, the Claimant brought proceedings before the Dubai Court of First Instance, requesting the court to recognise and enforce one of the three awards pursuant to the New York Convention. The proceedings were fully defended by the Dubai based Defendant. The Claimant was represented in Dubai by HFW Partner Yaman Al Hawamdeh and Associate Anas Al Tarawneh.

Dubai Court of First Instance and Court of Appeal judgments

In March 2014, the Dubai Court of First Instance rejected the application to recognise and enforce the London arbitral award. The court concluded that no valid arbitration agreement was concluded between the parties, on the basis that:

1. The emails exchanged by the parties suggested that a charterparty was to be drafted and signed by the parties.
2. The supporting documents submitted by the Claimant did not include any evidence confirming that the charterparty was signed by the parties.

Previously, irrespective of the position under the New York Convention and the governing law of the contract, this type of defence could gain traction under the CPL, which sets out the grounds for invalidating local arbitral awards, and therefore there was some precedent for the decision.

The Court of First Instance did indeed rely on the CPL, and made its ruling without reference to the New York Convention. This is despite the fact that the underlying charterparty was subject to English law (and therefore the validity of the arbitration clause should be considered in the context of English, not UAE law); and the recognition and enforcement of foreign arbitral awards should have been dependent on the New York Convention, not the CPL. The Claimant, therefore challenged the Court of First Instance judgment before the Dubai Court of Appeal.

In May 2015, the Dubai Court of Appeal handed down its judgment in which it overturned the Court of First Instance judgment, and

ordered the recognition and enforcement of the Claimant's London arbitration award. The court's judgment recognised that, as a matter of New York Convention and English law, the parties had agreed to arbitration in their email exchanges, and therefore the award should be recognised in accordance with the New York Convention. The judgment also confirmed that foreign arbitral awards should be recognised and enforced provided that such recognition and enforcement does not contradict UAE public policy, and provided also that the subject matter is capable of settlement by arbitration.

This judgment is of particular significance as it confirms that UAE courts should consider the validity of the underlying arbitration clause in the context of the New York Convention and the foreign law governing the contract. The judgment is also the first of its kind ordering the recognition and enforcement of a foreign arbitral award made on the basis of an unsigned charterparty.

Whilst the Court of Appeal judgment is currently under appeal, it nevertheless sets a very encouraging precedent in the UAE which supports the aim and the spirit of the New York Convention. ■

New Loss Prevention Posters

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



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

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

Iran Sanctions: Is the End in Sight?



Daniel Martin, Anthony Woolich,
and Elena Kumashova
Holman Fenwick Willian

Progress continues to be made in implementing the various parties' obligations pursuant to the Joint Comprehensive Plan of Action (JCPOA) with a view to the lifting of the majority of EU sanctions and US extra-territorial sanctions at some point in 2016.

Any businesses which are considering future opportunities in Iran need to be aware of the scope and timeframe of any sanctions relief, so that appropriate procedures can be adopted. It is therefore helpful and timely that the EU and US have recently issued legislation and waivers which give additional clarity about the precise extent of sanctions relief which will follow once Iran complies with its JCPOA commitments.

In parallel with these legislative measures in the EU and the US, the JCPOA has now been approved by Iran's Supreme Leader Ayatollah Ali Khamenei, with the result that Iran is now expected to begin performing its obligations under the JCPOA.

Introduction

On 18 October 2015 the EU and the US issued legislative documents, as the first stage towards implementing their respective sanctions relief commitments pursuant to the JCPOA.

The EU measures comprise two amending Regulations and an authorising Decision. On the US side, two documents were published - a set of contingent waivers and a memorandum from the President to the Secretaries of State, the Treasury, Commerce, and Energy.

Importantly, these changes do not have any immediate effect on the existing sanctions and will only come into effect on 'Implementation Day' namely once Iran has implemented its key nuclear-related commitments described in the JCPOA and this has been verified by the International Atomic Energy Agency (IAEA). The exact date of 'Implementation Day' is not yet known but is expected to occur sometime in the second half of 2016.

EU legislation

On 18 October 2015 the EU published a Decision¹ and two Regulations².

These documents set out in detail the EU Iran sanctions landscape which will apply after Implementation Day. In particular, on that date most of the sanctions in the current EU Decision³ will be

suspended and most of the sanctions in the current EU Regulation⁴ will be terminated or modified.

The asset freeze measures will stay in place, but the list of asset freeze targets will be substantially reduced. Only 29 individuals and 94 entities will remain on the list, in line with the EU's de-listing obligation under the JCPOA.

The position should be contrasted with the current EU Iran (Nuclear Proliferation) list, which contained 93 individuals and 467 entities on 23 October 2015, including the likes of NITC, IRISL and IOTC, all of which will be de-listed on Implementation Day.

The remaining asset freeze targets, including Tidewater Middle East, are due to be de-listed by the EU on Transition Day in 2023. It is worth highlighting that, notwithstanding the de-listing of some Iranian banks on Implementation Day, EU financial institutions will still be prohibited from supplying SWIFT services to Bank Saderat, Ansar Bank and Mehr Bank until Transition Day. In addition, notwithstanding the EU de-listing, certain entities will remain on the US Specially Designated Nationals (SDN) list at the relevant times, such that ongoing vigilance and due diligence will be required.

EU businesses will need to comply with the continuing asset freeze and the other restrictions which remain in place in the EU, as set out below. They will also need to comply with certain continuing US extra-territorial sanctions. Provided they do so, EU businesses will once again be able to engage in the following activities once Iran's performance of its obligations under the JCPOA has been certified by the IAEA:

- Transactions relating to the supply to Iran of key equipment and technologies for the Iranian oil and gas industries.
- Transactions relating to the supply to Iran of key naval equipment or technology.
- Transactions relating to the purchase, import or transport of crude oil, petroleum products, petrochemical products and natural gas of Iranian origin.
- Transactions relating to the supply to Iran or purchase from Iran of gold, precious metals and diamonds.
- Transactions relating to the supply to Iran of Iranian banknotes and minted coinage.
- Investment in the Iranian oil, gas and petrochemical industry.
- Transfers of funds to and from Iranian persons, entities or bodies without the need for prior notification or authorisation.

- Transactions with Iranian banks.
- Purchase or sale of Iranian public or public-guaranteed bonds.
- Provision of insurance and re-insurance to Iran, its government and public bodies, and Iranian companies.
- Provision of services to Iranian flagged vessels.
- Provisions of vessels for the transportation and storage of Iranian oil and petrochemical products.

The following restrictions will remain in place:

- A prior authorisation will be required for the supply of software designed specifically for use in Iran’s nuclear or military industries – restrictions in respect of software designed for use in gas, oil, navy, aircraft, financial and construction industries are lifted.
- A prior authorisation will be required for the supply to Iran of graphite, raw and semi-finished metals. The authorisation will not be granted if there are reasonable grounds to determine that the material will be used in connection with reprocessing or enrichment related, heavy water related, or

other nuclear related activities inconsistent with the JCPOA, Iran’s military or ballistic missile programme or for the direct or indirect benefit of the Iranian Revolutionary Guard Corps.

- Restrictions on the transportation of goods covered by the EU Common Military list, Missile Technology Control Regime List, the Nuclear Suppliers Group List, or other items that could contribute to reprocessing or enrichment-related or heavy water-related activities and prohibited supplies of graphite, raw and semi-finished metals.

For various nuclear-related materials, and ancillary services such as financing, transportation and brokering, the regulations create three different regimes which will apply depending on how a particular item is classified. If the item falls under the Missile Technology Control Regime List, supply and various related services will be prohibited. If the item falls under the Nuclear Suppliers Group List an authorisation will be required. If the item falls under “other items that could contribute to reprocessing- or enrichment-related or heavy water-related or other activities inconsistent with the JCPOA” list an authorisation will be required on a case-by-case basis.

The Decision and the Regulations also clarify, at least to some extent, the EU’s position in respect

of “grandfathering”, namely whether there will be an exemption for pre-existing contracts if sanctions are re-imposed due to Iran’s breach of its commitments under the JCPOA. It does now appear that there will be some exemptions for such contracts: all three documents note that in case of the re-introduction of the EU sanctions, the EU will provide “adequate protection” for the execution of contracts concluded in accordance with the JCPOA while sanctions relief was in force.

US waivers

On 18 October 2015 the Secretary of State issued a number of contingent waivers described below. These contingent waivers are expected to be further supplemented prior to Implementation Day by notices confirming the termination of a number of executive orders, issue of OFAC’s general licences for non-US persons owned or controlled by US persons and a number of SDN removals.

As expected, the contingent waivers deal mostly with the so-called US secondary sanctions – the sanctions applicable to non-US persons – and only to a limited extent with the primary sanctions.

In terms of the impact of the JCPOA on US primary sanctions, from Implementation Day US persons who obtain a licence from OFAC will be allowed to sell commercial passenger aircraft and spare parts and components for such aircraft, along with associated services to Iran. Provision by US persons of related underwriting services, insurance or reinsurance will also be allowed.

As a result of the 18 October 2015 contingent waivers, the penalties for breaching the following secondary sanctions applicable to non-US persons will be waived for activities which take place after Implementation Day:

- Restrictions on dealing with the energy, including natural gas, port, shipping, or shipbuilding sectors of Iran, including the National Iranian Oil Company, the National Iranian Tanker Company, and the Islamic Republic of Iran Shipping Lines.
- Restrictions on the direct or indirect sale, supply or transfer to or from Iran of precious metals, graphite, raw or semi-finished metals, save for graphite, raw or semi-finished metals which will be used in connection with the military or ballistic missile program of Iran or which have a potential nuclear end-use, unless approval has been received through the procurement channel set out in section 6 of Annex IV of the JCPOA.
- Restrictions on the provision of underwriting services, insurance and re-insurance, save where the transaction involves SDNs, or persons designated in connection with Iran’s support for terrorism and Iran’s proliferation of weapons of mass destruction.
- Restrictions on financial institutions which transact with, or facilitate a significant financial transaction on behalf of, the Government of Iran, certain Iranian financial institutions and any entity owned or controlled by them.
- Restrictions on the purchase of Iranian sovereign debt or the debt of any Iranian state controlled entity.

The presidential memorandum requires the Secretary of State, the Secretary of the Treasury, the Secretary of Commerce and the Secretary of Energy to “take all appropriate additional measures to ensure the prompt and effective implementation of the US commitments set forth in the JCPOA”.

Recommendation

Those businesses which are considering opportunities in Iran should carefully review the latest legislative measures from the EU and US to determine whether their intended activities will be permitted after Implementation Day.

They should consider carefully what ongoing due diligence will be required after Implementation Day, and also keep a close eye on developments, in order to be sure of when sanctions relief will commence. ■

“On 18 October 2015 the EU and the US issued legislative documents, as the first stage towards implementing their respective sanctions relief commitments pursuant to the JCPOA.”

¹ Council Decision (CFSP) 2015/1863 of 18 October 2015 amending Decision 2010/413/CFSP concerning restrictive measures against Iran.
² Council Regulation (EU) 2015/1861 of 18 October 2015 amending Regulation (EU) No. 267/2012 concerning restrictive measures against Iran; and Council Implementing Regulation (EU) 2015/1862 of 18 October 2015 implementing Regulation (EU) No. 267/2012 concerning restrictive measures against Iran.
³ Decision 2010/413/CFSP as amended.
⁴ Regulation (EU) No. 267/2012 as amended.



Steamship Mutual News

New Loss Prevention DVD – ‘Fit for Life’

The Club’s latest loss prevention DVD was formally launched at a premiere screening of the film at the Barbican Centre, central London on 22 September before an invited audience of a number of the Club’s Member, broker and professional contacts who are actively involved in raising awareness of crew health. Prior to that event, the film had been previewed during London International Shipping Week when the UK Minister for Shipping and Ports, Mr Robert Goodwill MP visited the Manager’s London office on 9 September.

This DVD, produced with funding from The Ship Safety Trust, is directed towards improving the health and fitness of seafarers for the ultimate benefit of those individuals, their families and their employers.

‘Fit for Life’ is a response to a persistently high exposure to crew illness claims. On investigation, many of those claims reveal the existence of medical conditions that ought to have been detected at the stage of the pre-employment medical examination (PEME). The film emphasises the vital importance of seafarers being fit for seagoing employment, particularly because there is no way of knowing when a particular medical condition might incapacitate an

individual, or where the ship might be at that time. Consequently, seafarers who are not fit represent a potential and serious risk not only to themselves, but also to their colleagues and others outside the vessel.

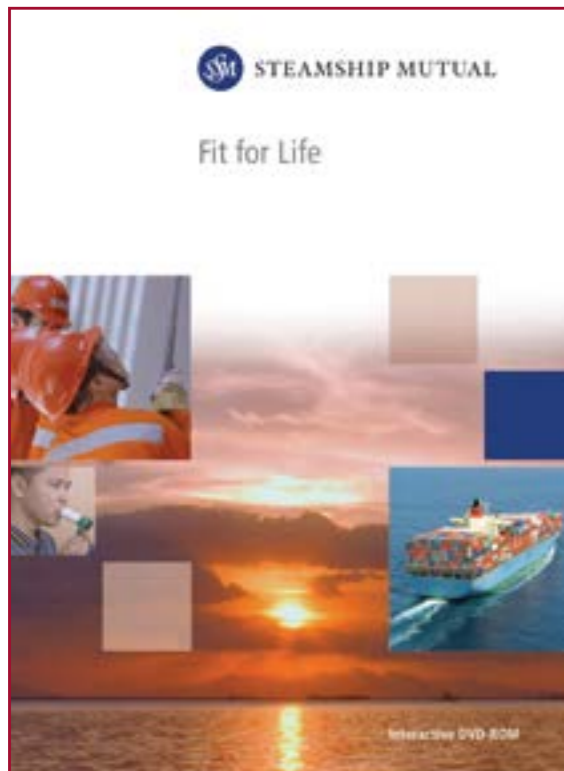
However, each serious crew illness claim that the Club encounters represents much more than just a financial cost to the Club and its Members. For the individual who is the victim of illness, the consequences can be tragic and devastating. In order to minimise these potential impacts upon individuals and their families, the Managers strongly believe that there are benefits to be derived from informing and educating seafarers about health and fitness, and the actions they can take to improve their well-being.

The DVD examines the most frequently encountered conditions that can result in unfitness – for example obesity, high blood pressure or hypertension, diabetes, and hepatitis. The principal doctors from some of the Club’s recommended PEME clinics explain each of these conditions and their causes. The inter-relationship between obesity, hypertension and diabetes, and the causal effect that lifestyle has on the chance of developing these conditions is emphasised. The point is made that all seafarers have the means to minimise the risk of developing these conditions through the lifestyle choices they can make associated with diet, exercise and giving up smoking.

The DVD also encourages seafarers to take a more positive view of the PEME process and to use that as a means by which the status of their health can be determined and monitored on successive examinations and thereby provide early warning of the onset of conditions that might ultimately threaten fitness for seagoing employment.

As with other of the Club’s loss prevention DVDs ‘Fit for Life’ also features useful reference material, such as exercise routines that can be followed without the need for equipment, links to relevant websites with a focus on crew health and well-being, and an interactive Body Mass Index (BMI) calculator and chart.

The DVD has been distributed to Members to be placed onboard their vessels, and any further copies that may be required will be supplied on request to the Loss Prevention Department (loss.prevention@simsl.com). ■



SK Shipping Naming Ceremony



On 30 July 2015, JS Kim (Director of Underwriting, Eastern Syndicate) was privileged to be a guest at the naming ceremony of the “K. Younghung”, one of the Club’s Korean Member’s, SK Shipping, vessel at Sungdong Shipyard in Tongyoung, Korea. This vessel is the first of a series of capesize bulk carriers on order for SK Shipping, all of which will be employed in the carriage of coal from Australia to Younghung, Korea under an 18 year Contract of Affeigment with the Korea South-East Power Co (KOSEP). It is anticipated that some 1.20m metric ton of bituminous coal will be carried by SK Shipping under the COA.

In the naming ceremony, CEO of SK Shipping, Sokhyon Paek, described his hopes for this vessel:

““K.Younghung” is the first ship tied up with KOSEP in performance of a long-term transport contract, and is assured of becoming a cornerstone for collaboration between two companies. SK Shipping’s safe and reliable shipping service is expected to greatly contribute to developing Korea’s power industries.”

We wish SK Shipping every prosperity with this venture. ■

“Run the River” Race

On 15 September 19 members of staff from all three syndicates, legal, accounts, and IT departments took part in the “Run The River” evening race, a 5km or, for those more confident in their fitness levels, a 10km loop starting and finishing in front of the Mayor of London’s office. There were some 3,100 runners participating in both races. Every member of Steamship Mutual’s team completed the courses with Rosie Davies and, yet again, Richard Harrison recording the fastest times at 54:03 minutes and 40:39 minutes for the 10km run, and Beth Larkman 25:50 and Graham Jones 23:14 leading the way in the 5km run.

The remaining members of the team were:

10km - Chris Durrant; Andy Bowman; Rebecca Robertson; Pablo Constela, Jose Calmon, Colin Williams; and Lyndy Souster.

5km - Hugo Jacquot; David Ragan; Sabeer Kandil; Heloise Clifford; Simon Peet; Elpida Kalathia; Jason D’Souza; Janet Meldon-McSweeney; and Brian Goldsmith. ■



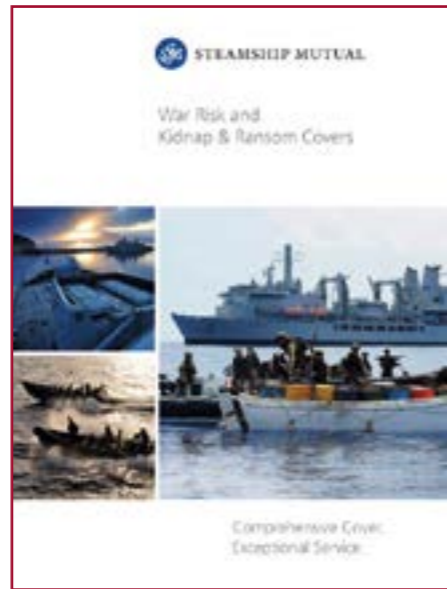
War Risk and K&R Cover

The Club can now provide cover for Hull War risks, full ground up P&I War risks and Kidnap and Ransom (K&R).

The objective is to offer these covers to Members on competitive terms and conditions, providing a serious alternative to Members' existing or expiring market covers. The Club is prepared to offer War and K&R cover on conditions which are at least as comprehensive as those presently in place for Members, structured in a way familiar to Owners and Brokers alike. Rating will be determined by the usual considerations including vessel characteristics, safety precautions and trading areas.

Premium for War and K&R has come down considerably over the past few years, and there are still savings to be made.

Members who place these covers with the Club, even if the Club only takes a line, are paying premiums which will of course be recognised as being part of their overall contributions to the Club when P&I renewals are negotiated.



Members' War and K&R brokers are encouraged to contact the Club's underwriting team to discuss further. ■ www.steamshipmutual.com/underwriting/warrisk.htm

Shipping in Liverpool – Steamship Mutual attends Taylor Marine's Ship Familiarisation Course

In early September three Steamship Mutual claims handlers travelled north to Liverpool to attend Taylor Marine's Ship Familiarisation Course.

Heloise Clifford, Marius Vittas and Danielle Southey, together with a number of brokers from Georg Duncker in Hamburg, swapped their usual office attire for hard hats, goggles and high visibility clothing to spend three days learning about the vessels which use and service Liverpool's ports.

At Mersey Docks the team tried a simulator for a new container loading crane which is soon to be delivered and also inspected the stacking of containers on board a vessel. They also got the chance to board a bulk carrier which was in the process of completing discharge where the crew gave them a tour of the bridge and showed them the cargo handling equipment on board.

The next day the team went on board a Ro-Ro vessel where they were shown the loading and lashing arrangements in addition to being given the chance to experience the noise of the engine room.

There was also a visit to the dry dock where they saw a Royal Fleet Auxiliary vessel undergoing an overhaul. The team were given a chance to carry out a close inspection of the paint job!

A real highlight was the chance to try the 360° ship handling simulator at Lairdside Maritime Centre. It was here that they were able to pilot vessels in and around the River Mersey and to see if they could avoid a casualty! ■



L-R Danielle Southey and Heloise Clifford



Overview of the 2015 Members Training Course

The Club's fourth Residential Training Course for Members took place in London and Southampton between 15th and 20 June. Twenty one delegates attended representing Members based in the United States, the United Kingdom, India, South Korea, the United Arab Emirates, the Philippines, Russia, Italy and Turkey.

As in previous years, delegates gathered in London on Monday 15 June and visited Steamship Insurance Management Services Limited's (SIMSL) office where they were welcomed by Gary Rynsard, SIMSL's CEO. Members also had the opportunity to meet and have lunch with other Directors and Syndicate claims and underwriting staff. The delegates were later transferred to the Grand Harbour Hotel in Southampton, the venue for the remainder of the course, where the programme included a morning on the bridges of the ship simulator facility at the Warsash Maritime Academy, followed by a workshop to determine the apportionment of liability for the collision the delegates had experienced in the simulator. This resulted in some lively discussion between the teams representing the two vessels involved.

There were equally lively discussions during the other workshop sessions held during the week which addressed handling a major casualty, discretionary claims under the Club's Rules, and a mock arbitration. Other topics covered during the week were Crew, Passenger and Personal Injury Claims, Pre-Employment Medical Examinations, Media Response in a Major Casualty, Oil Pollution and the Criminal Consequences of Pollution in the USA, Underwriting and the Club's Reinsurance arrangements, Cargo Liabilities, Loss Prevention and the Role of the Correspondent.

The course also included a number of social events during the week which included an evening cruise in the Port of Southampton, a guided tour of HMS Victory, and a visit to the Maritime Museum at Bucklers Hard.

Extremely positive feedback on the course has been received from delegates as can be seen from a representative sample of comments made on the delegates' appraisal forms:

"I totally enjoyed the course it was very productive. All topics were cleverly chosen and the time schedule was perfectly balanced. I was very pleased to attend the course. Thanking SSM for their exceptional hospitality."

"The quality of the course is 1st class and the presentations were excellent. I found it both enjoyable and enlightening."

"The course helped me to understand how P&I works and gave me the whole picture of the system. I will definitely recommend the course to other people in Korean Shipping market."

"Great variety of topics / speakers; very well organised."

"The course is very comprehensive and very appropriate to my daily dealings with the P&I Insurance and Claims."

"The course has been really interesting with the right compromise between education, tourism and fun. I look forward to being part of the next one." ■





STEAMSHIP MUTUAL



Steamship Insurance Management Services Limited
Aquatical House
39 Bell Lane
London
E1 7LU

Telephone:
+44 (0) 20 7247 5490 & +44 (0) 20 7895 8490

For further information please see our website
www.steamshipmutual.com

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

